AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Federal Register

2–11–08 Monday
Vol. 73 No. 28 Feb. 11, 2008

Pages 7657–8002

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.archives.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** *www.gpoaccess.gov/nara,* available through GPO Access, is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

For more information about GPO Access, contact the GPO Access User Support Team, call toll free 1-888-293-6498; DC area 202-512-1530; fax at 202-512-1262; or via e-mail at *gpoaccess@gpo.gov.* The Support Team is available between 7:00 a.m. and 9:00 p.m. Eastern Time, Monday–Friday, except official holidays.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 73 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Paper or fiche	**202–741–6005**
Assistance with Federal agency subscriptions	**202–741–6005**

FEDERAL REGISTER WORKSHOP

THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.

2. The relationship between the Federal Register and Code of Federal Regulations.

3. The important elements of typical Federal Register documents.

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

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

WHEN: Tuesday, March 18, 2008
9:00 a.m.–Noon

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

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

Contents

Federal Register

Vol. 73, No. 28

Monday, February 11, 2008

Agriculture Department
See Animal and Plant Health Inspection Service
See Forest Service
See Grain Inspection, Packers and Stockyards Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7695

Alcohol and Tobacco Tax and Trade Bureau
NOTICES
Standards of Identity and the Use of Semi-generic Designations and Retsina on Certain European Wines Imported into the United States, 7804–7805

Animal and Plant Health Inspection Service
PROPOSED RULES
South American Cactus Moth; Quarantine and Regulations, 7679–7686

Antitrust Division
NOTICES
National Cooperative Research Notifications:
International Electronics Manufacturing Initiative, 7762
Petroleum Environmental Research Forum, 7762–7763

Army Department
NOTICES
Meetings:
Board of Visitors, United States Military Academy (USMA), 7720–7721

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7746

Commerce Department
See International Trade Administration
See National Oceanic and Atmospheric Administration
NOTICES
Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements, 7696–7705

Defense Department
See Army Department
NOTICES
Meetings:
Missile Defense Advisory Committee, 7715–7716
Privacy Act; Systems of Records, 7716–7720

Drug Enforcement Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7763–7764

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7721–7722

Employment Standards Administration
See Wage and Hour Division
PROPOSED RULES
Family and Medical Leave Act of 1993, 7876–8001

Energy Department
See Energy Efficiency and Renewable Energy Office
See Energy Information Administration
See Federal Energy Regulatory Commission
NOTICES
Meetings:
Basic Energy Sciences Advisory Committee, 7722

Energy Efficiency and Renewable Energy Office
NOTICES
Meetings:
State Energy Advisory Board, 7722–7723

Energy Information Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7723

Environmental Protection Agency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7742–7743
Environmental Statements; Notice of Intent:
Coastal Nonpoint Pollution Control Programs; States and Territories—
Florida and South Carolina, 7714
Meetings:
Board of Scientific Counselors, Global Change Research Program Mid-Cycle Review, 7743–7744

Federal Aviation Administration
RULES
Airworthiness Directives:
Boeing Model 737-300, -400, and -500 Series Airplanes, 7666–7667
Bombardier Model CL 600 2B19 (Regional Jet Series 100 & 440) Airplanes, 7661–7663
Fokker Model F.27 Mark 050 Airplanes, 7663–7665
Saab Model SAAB SF340A and Model SAAB 340B Airplanes, 7659–7661
Saab Model SAAB SF340A and SAAB 340B Airplanes, 7657–7659
Class E Airspace:
Black River Falls, WI, 7668–7670
Lexington, OK, 7667–7668
PROPOSED RULES
Airworthiness Directives:
Boeing Model 767-200, -300, and -400ER Series Airplanes, 7690–7692

Federal Communications Commission
RULES
Radio Broadcasting Services; Various States, 7671–7674
PROPOSED RULES
Radio Broadcasting Services; Toquerville, UT, 7694
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7744–7745

Federal Energy Regulatory Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7723–7726
Application Accepted for Filing and Soliciting Motions to Intevene, Protests, and Comments:
Arkansas River Hydro 3, LLC, 7728–7729
Clementine Dam Hydro, LLC, 7729–7730
Goodwin Hydro, LLC, 7727–7728
Imperial Hydro, LLC, 7730–7731
Morgantown Hydro, LLC, 7726–7727
NT Hydro, 7731–7732
Putnam Green Power, LLC, 7732–7734
Application for Non-Project Use of Project Lands and Waters, etc.:
Progress Energy Carolinas, Inc, 7734–7735
Combined Notice of Filings, 7735–7739
Filing:
Integrys Energy Group, 7739
Issuance of Order:
Argo Navis Fundamental Power Fund, L.P, 7739
Lehigh Capital, LLC, 7739–7740
Nexen Marketing U.S.A. Inc, 7740
Limited Scoping and Request for Comments on Environmental Issues:
Port Dolphin Energy LLC, 7740–7742

Federal Railroad Administration
NOTICES
Petition for Approval; Railroad Safety Program Plan, 7788
Petition for Waiver of Compliance, 7788–7789

Federal Register Office
NOTICES
Cumulative List of Public Laws:
110th Congress, First Session, 7810–7813

Federal Transit Administration
NOTICES
FTA Supplemental Fiscal Year 2008 Apportionments and Allocations and Program Information, etc., 7789–7803

Food and Drug Administration
PROPOSED RULES
Proposal to Permit the Use of Ultrafiltered Milk; Extension of Comment Period:
Cheeses and Related Cheese Products, 7692–7693
NOTICES
Draft Guidance for Industry:
Validation of Growth-Based Rapid Microbiological Methods for Sterility Testing of Cellular and Gene Therapy Products; Availability, 7746–7747
Hemoglobin Based Oxygen Carriers; Current Status and Future Directions; Public Workshop, 7747–7748

Foreign Assets Control Office
NOTICES
Additional Designations of Individuals Pursuant to Executive Order 13448, 7805–7806

Forest Service
NOTICES
Availability of Record of Decision for the Buckman Water Diversion Project Environmental Impact Statement, 7695–7696

Grain Inspection, Packers and Stockyards Administration
PROPOSED RULES
Weighing, Feed, and Swine Contractors, 7686–7690

Health and Human Services Department
See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health
NOTICES
Meetings:
Physical Activity Guidelines Advisory Committee, 7745–7746

Health Resources and Services Administration
NOTICES
Advisory Committee on Interdisciplinary, Community-Based Linkages; Notice of Request for Nominations, 7748–7749

Homeland Security Department
See U.S. Customs and Border Protection

Housing and Urban Development Department
NOTICES
Mortgage and Loan Insurance Programs Under the National Housing Act:
Debenture Interest Rates, 7754–7756
Notice of Funding Availability for the Fiscal Year 2007 Public Housing Neighborhood Networks Program; Technical Correction, 7756–7757

Indian Affairs Bureau
NOTICES
Land Acquisitions; Elk Valley Rancheria, California, 7758–7759

Interior Department
See Indian Affairs Bureau
See Land Management Bureau
See Minerals Management Service
See National Park Service
NOTICES
Human Capital, Performance and Partnerships National Invasive Species Council, 7757–7758

International Trade Administration
NOTICES
Amendment to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation, 7705–7708
Countervailing Duty Administrative Review; Polyethylene Terephthalate Film, Sheet, and Strip from India, 7708–7710
Postponement of Preliminary Determinations of Antidumping Duty Investigations:
Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China, Thailand, and the United Arab Emirates, 7710
Stainless Steel Sheet and Strip in Coils from Mexico:
Final Results of Antidumping Duty Administrative Review, 7710–7713

International Trade Commission
NOTICES
Fresh Tomatoes from Mexico, 7762

Justice Department
See Antitrust Division
See Drug Enforcement Administration

Labor Department
See Employment Standards Administration

See Wage and Hour Division
PROPOSED RULES
Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations; Extension of Time for Comments, 7693–7694
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7764

Land Management Bureau
NOTICES
Alaska Native Claims Selection, 7759
Availability of Record of Decision for the Buckman Water Diversion Project Environmental Impact Statement, 7695–7696

Minerals Management Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7759–7761

National Highway Traffic Safety Administration
NOTICES
Activities under the United Nations Economic Commission for Europe 1998 Global Agreement:
Glazing, 7803–7804

National Institutes of Health
NOTICES
Meetings:
National Cancer Institute, 7749
National Heart, Lung, and Blood Institute, 7749
National Institute of Allergy and Infectious Diseases, 7749–7752
National Institute of Dental and Craniofacial Research, 7750
National Institute of Environmental Health Sciences, 7752
National Institute of General Medical Sciences, 7750–7751

National Oceanic and Atmospheric Administration
RULES
Endangered and Threatened Species:
Final Threatened Listing Determination
Oregon Coast Evolutionarily Significant Unit of Coho Salmon, 7816–7873
Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic;
Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic;
Atlantic Group Spanish Mackerel Commercial Trip Limit in the Southern Zone; Change in Start Date, 7676–7678
Taking of marine mammals incidental to commercial fishing operations; Atlantic large whale take reduction plan, 7674–7676
NOTICES
Environmental Impact Statement; Southwest Fisheries Science Center, La Jolla, CA, 7713–7714
Environmental Statements; Notice of Intent:
Coastal Nonpoint Pollution Control Programs; States and Territories—
Florida and South Carolina, 7714
Marine Mammals, 7715

National Park Service
NOTICES
National Register of Historic Places; Pending Nominations and Related Actions, 7761–7762

Nuclear Regulatory Commission
PROPOSED RULES
Withdrawal of Petition for Rulemaking:
North Carolina Utilities Commission Public Staff, 7690
NOTICES
Request for a License to Export Radioactive Waste, 7764–7765
Request for a License to Import Radioactive Waste, 7765–7766
Withdrawal of Regulatory Guide, 7766–7767

Securities and Exchange Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7767–7768
Application:
Bear Stearns Asset Management, Inc., et al., 7768–7771
Barclays Global Fund Advisors, et al.; Application, 7771–7774
Meetings; Sunshine Act, 7774
Self-Regulatory Organizations; Proposed Rule Changes:
NYSE Arca, Inc., 7774–7776
WisdomTree Trust, et al.; Application, 7776–7781

Social Security Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7782–7783

State Department
RULES
Visas: Documentation of immigrants under the Immigration and Nationality Act, as Amended, 7670
NOTICES
Defense Trade Advisory Group; Notice of Membership, 7783–7784

Transportation Department
See Federal Aviation Administration
See Federal Railroad Administration
See Federal Transit Administration
See National Highway Traffic Safety Administration
NOTICES
Applications for Certificates of Public and Necessity and Foreign Air Carrier Permits, 7784
Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits, 7784–7785
Aviation Proceedings, Agreements Filed, 7785
National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays, 7785–7788

Treasury Department
See Alcohol and Tobacco Tax and Trade Bureau
See Foreign Assets Control Office
See United States Mint

U.S. Customs and Border Protection
NOTICES
Accreditation and Approval of Inspectorate America Corporation, as a Commercial Gauger and Laboratory, 7752
Issuance of Final Determination Concerning Military-Grade Flashlights and Replacement Part, 7752–7754

United States Mint
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 7806–7807

Wage and Hour Division
PROPOSED RULES
Family and Medical Leave Act of 1993, 7876–8001

Separate Parts In This Issue

Part II
Readers Aids, Office of the Federal Register, National Archives and Records Administration, 7810–7813

Part III
Commerce Department, National Oceanic and Atmospheric Administration, 7816–7873

Part IV
Labor Department, Employment Standards Administration; Labor Department, Wage and Hour Division, 7876–8001

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

7 CFR
Proposed Rules:
301 7679

9 CFR
Proposed Rules:
201 7686

10 CFR
Proposed Rules:
50 7690

14 CFR
39 (5 documents) ...7657, 7659, 7661, 7663, 7666
71 (2 documents) 7667, 7668
Proposed Rules:
39 7690

21 CFR
Proposed Rules:
133 7692

22 CFR
42 7670

29 CFR
Proposed Rules:
29 7693
825 7876

47 CFR
73 7671
Proposed Rules:
73 7694

50 CFR
223 7816
226 7816
229 7674
622 7676

Rules and Regulations

Federal Register

Vol. 73, No. 28

Monday, February 11, 2008

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0212; Directorate Identifier 2007–NM–237–AD; Amendment 39–15368; AD 2008–03–17]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB SF340A and SAAB 340B Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated 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:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA has published Special Federal Aviation Regulation 88 (SFAR88) in June 2001.

In their Letters referenced 04/00/02/07/01–L296 dated March 4th, 2002 and 04/00/02/07/03–L024, dated February 3rd, 2003, the JAA (Joint Aviation Authorities) recommended the application of a similar regulation to the National Aviation Authorities (NAA).

Under this regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3402 kg) or more, which have received their certification since January 1st, 1958, are required to conduct a design review against explosion risks.

The unsafe condition is the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective March 17, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of March 17, 2008.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on November 21, 2007 (72 FR 65480). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA has published Special Federal Aviation Regulation 88 (SFAR88) in June 2001.

In their Letters referenced 04/00/02/07/01–L296 dated March 4th, 2002 and 04/00/02/07/03–L024, dated February 3rd, 2003, the JAA (Joint Aviation Authorities) recommended the application of a similar regulation to the National Aviation Authorities (NAA).

Under this regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3402 kg) or more, which have received their certification since January 1st, 1958, are required to conduct a design review against explosion risks.

This Airworthiness Directive (AD), which renders mandatory the modification [3163] to separate wiring of Fuel Quantity Indication System [FQIS], is a consequence of the design review.

The unsafe condition is the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. Modification 3163 includes re-routing of existing wiring to the FQIS, installing new wires with shields to the FQIS, and operational and functional tests of the FQIS. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This 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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a **Note** within the AD.

Costs of Compliance

We estimate that this AD will affect about 218 products of U.S. registry. We also estimate that it will take about 50 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $1,500 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 parts. 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

this AD to the U.S. operators to be $1,199,000, or $5,500 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 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 this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is 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, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2008–03–17 SaaB Aircraft AB: Amendment 39–15368. Docket No. FAA–2007–0212; Directorate Identifier 2007–NM–237–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective March 17, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Saab Model SAAB SF340A and SAAB 340B airplanes, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA has published Special Federal Aviation Regulation 88 (SFAR88) in June 2001.

In their Letters referenced 04/00/02/07/01–L296 dated March 4th, 2002 and 04/00/02/07/03–L024, dated February 3rd, 2003, the JAA (Joint Aviation Authorities) recommended the application of a similar regulation to the National Aviation Authorities (NAA).

Under this regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3402 kg) or more, which have received their certification since January 1st, 1958, are required to conduct a design review against explosion risks.

This Airworthiness Directive (AD), which renders mandatory the modification [3163] to separate wiring of Fuel Quantity Indication System [FQIS], is a consequence of the design review.

The unsafe condition is the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. Modification 3163 includes re-routing of existing wiring to the FQIS, installing new wires with shields to the FQIS, and operational and functional test of the FQIS.

Actions and Compliance

(f) Within 72 months after the effective date of this AD, unless already done, do modification 3163 in accordance with the Accomplishment Instructions of Saab Service Bulletin 340–28–025, dated February 26, 2007.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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, 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 EASA Airworthiness Directive 2007–0169, dated June 15, 2007; and Saab Service Bulletin 340–28–025, dated February 26, 2007; for related information.

Material Incorporated by Reference

(i) You must use Saab Service Bulletin 340–28–025, dated February 26, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linkoäping, Sweden.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Renton, Washington, on January 30, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2357 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0298; Directorate Identifier 2007–NM–238–AD; Amendment 39–15369; AD 2008–03–18]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB SF340A and Model SAAB 340B Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated 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:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA has published Special Federal Aviation Regulation 88 (SFAR88) * * * [which] required * * * [conducting] a design review against explosion risks.

The unsafe condition is the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective March 17, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 17, 2008.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on December 10, 2007 (72 FR 69635). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA has published Special Federal Aviation Regulation 88 (SFAR88) in June 2001.

In their Letters referenced 04/00/02/07/01–L296 dated March 4, 2002 and 04/00/02/07/03–L024, dated February 3, 2003, the JAA recommended the application of a similar regulation to the National Aviation Authorities (NAA).

Under this regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3402 kg) or more, which have received their certification since January 1, 1958, are required to conduct a design review against explosion risks.

This Airworthiness Directive (AD), which renders mandatory the modification [2762] of improving the sealing of Fuel Access Doors, is a consequence of the design review.

The unsafe condition is the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. Modification 2762 includes removing the fuel tank access doors and the old type of clamp rings and gaskets, installing new, improved clamp rings and re-installing the fuel tank access doors, and doing related investigative and applicable corrective actions. Related investigative and applicable corrective actions include inspecting for corrosion of the wing skin panel, access door areas, and access doors; removing any corrosion found during the inspection; and replacing the access door protection plate with a new protection plate. Corrosion removal also includes inspecting the doubler flange and contacting Saab and doing repairs if the doubler flange thickness does not meet minimum specifications. Additional corrective actions include replacing conductive foil on the access door with an aluminum panel. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This 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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a **Note** within the AD.

Costs of Compliance

We estimate that this AD will affect about 168 products of U.S. registry. We also estimate that it will take about 20 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $417 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 parts. 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 this AD to the U.S. operators to be about $338,856, or about $2,017 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 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 this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is 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, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2008–03–18 SaaB Aircraft AB: Amendment 39–15369. Docket No. FAA–2007–0298; Directorate Identifier 2007–NM–238–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective March 17, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Saab Model SAAB SF340A and Model SAAB 340B airplanes, certificated in any category, serial numbers 004 through 401.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA has published Special Federal Aviation Regulation 88 (SFAR88) in June 2001.

In their Letters referenced 04/00/02/07/01–L296 dated March 4, 2002 and 04/00/02/07/03–L024, dated February 3, 2003, the JAA recommended the application of a similar regulation to the National Aviation Authorities (NAA).

Under this regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3402 kg) or more, which have received their certification since January 1, 1958, are required to conduct a design review against explosion risks.

This Airworthiness Directive (AD), which renders mandatory the modification [2762] of improving the sealing of Fuel Access Doors, is a consequence of the design review.

The unsafe condition is the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. Modification 2762 includes removing the fuel tank access doors and the old type of clamp rings and gaskets, installing new, improved clamp rings and re-installing the fuel tank access doors, and doing related investigative and applicable corrective actions. Related investigative and applicable corrective actions include inspecting for corrosion of the wing skin panel, access door areas, and access doors; removing any corrosion found during the inspection; and replacing the access door protection plate with a new protection plate. Corrosion removal also includes inspecting the doubler flange and contacting Saab and doing repairs if the doubler flange thickness does not meet minimum specifications. Additional corrective actions include replacing conductive foil on the access door with an aluminum panel.

Actions and Compliance

(f) Within 72 months after the effective date of this AD, unless already done, do the actions described in paragraphs (f)(1) and (f)(2) of this AD.

(1) Do Modification 2762 and all related investigative actions and applicable corrective actions, in accordance with the Accomplishment Instructions of Saab Service Bulletin 340–57–031, Revision 02, dated September 28, 2005. Do all applicable related investigative and corrective actions before further flight. Actions done before the effective date of this AD in accordance with the Accomplishment Instructions of Saab Service Bulletin 340–57–031, dated September 4, 1996; or Revision 01, dated June 28, 1999; are considered acceptable for compliance with the requirements of this paragraph.

(2) For airplanes identified in Saab Service Bulletin 340–57–010, dated March 28, 1989, do the additional corrective actions described in and in accordance with the Accomplishment Instructions of that service bulletin.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: The MCAI does not require doing the actions of Saab Service Bulletin 340–57–010, which is specified in Saab Service Bulletin 340–57–031, Revision 02, as the appropriate source of service information for doing additional corrective actions for certain airplanes to completely address the unsafe condition. This AD requires accomplishing the additional corrective actions described in Service Bulletin 340–57–010 for certain airplanes.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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, 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 EASA Airworthiness Directive 2007–0168, dated June 15, 2007; Saab Service Bulletin 340–57–031, Revision 02, dated September 28, 2005; and Saab Service Bulletin 340–57–010, dated March 28, 1989; for related information.

Material Incorporated by Reference

(i) You must use Saab Service Bulletin 340–57–031, Revision 02, dated September 28, 2005; and Saab Service Bulletin 340–57–010, dated March 28, 1989; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on January 31, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2344 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0262; Directorate Identifier 2007–NM–247–AD; Amendment 39–15370; AD 2008–03–19]

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: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated 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:

Bombardier Aerospace has completed a system safety review of the CL–600–2B19 aircraft fuel system * * *.

The assessment showed that sealant has not been applied to bolts on the collector fuel tanks or the transfer ejector fuel pumps. Lack of sealant on the above-noted locations, if not corrected, could result in arcing and potential ignition source inside the fuel tank during lightning strikes and consequent fuel tank explosion. * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective March 17, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 17, 2008.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

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:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on December 3, 2007 (72 FR 67870). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Bombardier Aerospace has completed a system safety review of the CL–600–2B19 aircraft fuel system against new fuel tank safety standards, introduced in Chapter 525 of the Airworthiness Manual through Notice of Proposed Amendment (NPA) 2002–043. The identified non-compliances were assessed using Transport Canada Policy Letter No. 525–001 to determine if mandatory corrective action is required.

The assessment showed that sealant has not been applied to bolts on the collector fuel tanks or the transfer ejector fuel pumps. Lack of sealant on the above-noted locations, if not corrected, could result in arcing and potential ignition source inside the fuel tank during lightning strikes and consequent fuel tank explosion. To correct the unsafe condition, this directive mandates the application of sealant to the bolts that attach various fittings on the collector fuel tanks, [an inspection for a fillet seal and if necessary application of fillet seal] to the edges of the transfer ejector pumps and [an inspection for sealant and if necessary application of sealant] to the bolts that attach the transfer ejector pump to the transfer ejector pump casing.

You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This 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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a **Note** within the AD.

Costs of Compliance

We estimate that this AD will affect about 626 products of U.S. registry. We also estimate that it will take about 31 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost a negligible amount 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 parts. 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 this AD to the U.S. operators to be $1,552,480, or $2,480 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 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 this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is 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, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2008–03–19 Bombardier, Inc. (Formerly Canadair): Amendment 39–15370. Docket No. FAA–2007–0262; Directorate Identifier 2007–NM–247–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective March 17, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 through 7067 and 7069 through 7924; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Bombardier Aerospace has completed a system safety review of the CL–600–2B19 aircraft fuel system against new fuel tank safety standards, introduced in Chapter 525 of the Airworthiness Manual through Notice of Proposed Amendment (NPA) 2002–043. The identified non-compliances were assessed using Transport Canada Policy Letter No. 525–001 to determine if mandatory corrective action is required.

The assessment showed that sealant has not been applied to bolts on the collector fuel tanks or the transfer ejector fuel pumps. Lack of sealant on the above-noted locations, if not corrected, could result in arcing and potential ignition source inside the fuel tank during lightning strikes and consequent fuel tank explosion. To correct the unsafe condition, this directive mandates the application of sealant to the bolts that attach various fittings on the collector fuel tanks, [an inspection for a fillet seal and if necessary application of fillet seal] to the edges of the transfer ejector pumps and [an inspection for sealant and if necessary application of sealant] to the bolts that attach the transfer ejector pump to the transfer ejector pump casing.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 5,000 flight hours after the effective date of this AD: For airplanes with serial numbers 7003 through 7067 and 7069 through 7797, apply sealant to bolts on the collector fuel tanks according to the Accomplishment Instructions of Bombardier Service Bulletin 601R–28–051, Revision A, dated March 30, 2005.

(2) Within 5,000 flight hours after the effective date of this AD: For airplanes with serial numbers 7003 through 7067 and 7069 through 7924, do a general visual inspection of the left and right transfer ejector pumps for the presence of a fillet seal on the edge of the pumps and sealant on the bolts, according to the Accomplishment Instructions of Bombardier Service Bulletin 601R–28–060, Revision A, dated March 30, 2005.

(3) If during the inspection required by paragraph (f)(2) of this AD any fillet seal is found missing from the edge of the transfer ejector pump or sealant is found missing from any of the bolts, prior to further flight, apply fillet seal and sealant as applicable to the affected areas according to the Accomplishment Instructions of Bombardier Service Bulletin 601R–28–060, Revision A, dated March 30, 2005.

(4) Application of sealant prior to the effective date of this AD according to Bombardier Service Bulletin 601R–28–051, dated May 12, 2003, satisfies the requirements of paragraph (f)(1) of this AD.

(5) Inspection and application of sealant and fillet seal prior to the effective date of this AD according to Bombardier Service Bulletin 601R–28–060, dated January 28, 2004, satisfy the corresponding requirements of paragraphs (f)(2) and (f)(3) of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: 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. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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, 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 Canadian Airworthiness Directive CF–2007–17, dated September 4, 2007; and Bombardier Service Bulletins 601R–28–051 and 601R–28–060, both Revision A, both dated March 30, 2005; for related information.

Material Incorporated by Reference

(i) You must use Bombardier Service Bulletin 601R–28–051, Revision A, dated March 30, 2005; and Bombardier Service Bulletin 601R–28–060, Revision A, dated March 30, 2005; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on January 31, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2343 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0153; Directorate Identifier 2007–NM–243–AD; Amendment 39–15372; AD 2008–03–21]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F.27 Mark 050 Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated 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:

* * * * *

Recently, it was discovered that the inspection procedure as described by Fokker 50 Non-Destructive Testing Manual (NDTM), Part 6, Chapter 53–30–02, which is referenced by Fokker 50 Maintenance Review Board (MRB) Tasks Number 530000–00–04 and 530000–00–08 [currently required per AD (BLA) 2002–061], did not show the correct inspection areas. In addition to the existing procedure, the area at the kink in the bottom fuselage skin, the actual chine line, must be inspected. Investigation revealed that a number of aircraft have already passed the relevant inspection thresholds of 20,000 and 45,000 flight cycles by a considerable margin. As a result, it may be possible that cracks have developed and remained undetected. * * *

* * * * *

The unsafe condition is cracking and subsequent failure of the fuselage bottom skin, which could result in reduced structural integrity of the fuselage. This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective February 26, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of February 26, 2008.

We must receive comments on this AD by March 12, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

SUPPLEMENTARY INFORMATION:

Discussion

The Civil Aviation Authority—The Netherlands (CAA–NL), which is the aviation authority for the Netherlands, has issued Dutch Airworthiness Directive NL–2006–009 R1 dated September 28, 2006 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

* * * * *

Recently, it was discovered that the inspection procedure as described by Fokker 50 Non-Destructive Testing Manual (NDTM), Part 6, Chapter 53–30–02, which is referenced by Fokker 50 Maintenance Review Board (MRB) Tasks Number 530000–00–04 and 530000–00–08 [currently required per AD (BLA) 2002–061], did not show the correct inspection areas. In addition to the existing procedure, the area at the kink in the bottom fuselage skin, the actual chine line, must be inspected. Investigation revealed that a number of aircraft have already passed the relevant inspection thresholds of 20,000 and 45,000 flight cycles by a considerable margin. As a result, it may be possible that cracks have developed and remained undetected. To prevent future use of the incorrect procedure in NDTM, Part 6, chapter 53–30–02, Fokker Services has removed this procedure from the NDTM and replaced by chapter 53–30–03 (refer to NDTM Temporary Revisions No. 53–004 and 53–005 dated September 15, 2006). Furthermore the Fokker 50/60 Maintenance Planning Document (refer to MPD Temporary Revision No. 53–009 dated August 15, 2006) has been revised to delete references to the incorrect procedure and to include references to the correct procedure of NDTM, Part 6, chapter 53–30–03. This condition, if not corrected, could result in failure of the fuselage bottom skin. Since an unsafe condition has been identified that is likely to exist or develop on aircraft of this type design, CAA–NL has originally published AD NL–2006–009, which is now replaced by NL–2006–009 R1.

This directive requires a one-time inspection of the fuselage bottom skin at the chine line, of the area not covered by the procedure of NDTM, Part 6, chapter 53–30–02. This one-time inspection consists of two parts:

—A detailed visual inspection. The visual inspection is described in Fokker Services Service Bulletin SBF50–53–058 (dated June 30, 2006).
—An eddy-current inspection. The eddy-current inspection is described in Fokker Services Service Bulletin SBF50–53–059 (dated August 24, 2006).

The unsafe condition is cracking and subsequent failure of the fuselage bottom skin, which could result in reduced structural integrity of the fuselage. Corrective actions include repairing any cracking. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Fokker Services B.V. has issued Service Bulletins SBF50–53–058, dated June 30, 2006, and SBF50–53–059, dated August 24, 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 This 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 the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

There are no products of this type currently registered in the United States. However, this rule is necessary to ensure that the described unsafe condition is addressed if any of these products are placed on the U.S. Register in the future.

Differences Between the 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 required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a **Note** within the AD.

FAA's Determination of the Effective Date

Since there are currently no domestic operators of this product, notice and opportunity for public comment before issuing this AD are unnecessary.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2008–0153; Directorate Identifier 2007–NM–243–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2008–03–21 Fokker Services B.V: Amendment 39–15372. Docket No. FAA–2008–0153; Directorate Identifier 2007–NM–243–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective February 26, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Fokker Model F.27 Mark 050 airplanes, certificated in any category; serial numbers 20103 through 20172 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 53: Fuselage.

Reason

(e) The mandatory continued airworthiness information (MCAI) states:

* * * * *

Recently, it was discovered that the inspection procedure as described by Fokker 50 Non-Destructive Testing Manual (NDTM), Part 6, Chapter 53–30–02, which is referenced by Fokker 50 Maintenance Review Board (MRB) Tasks Number 530000–00–04 and 530000–00–08 [currently required per AD (BLA) 2002–061], did not show the correct inspection areas. In addition to the

existing procedure, the area at the kink in the bottom fuselage skin, the actual chine line, must be inspected. Investigation revealed that a number of aircraft have already passed the relevant inspection thresholds of 20,000 and 45,000 flight cycles by a considerable margin. As a result, it may be possible that cracks have developed and remained undetected. To prevent future use of the incorrect procedure in NDTM, Part 6, chapter 53–30–02, Fokker Services has removed this procedure from the NDTM and replaced by chapter 53–30–03 (refer to NDTM Temporary Revisions No. 53–004 and 53–005 dated September 15, 2006). Furthermore the Fokker 50/60 Maintenance Planning Document (refer to MPD Temporary Revision No. 53–009 dated August 15, 2006) has been revised to delete references to the incorrect procedure and to include references to the correct procedure of NDTM, Part 6, chapter 53–30–03. This condition, if not corrected, could result in failure of the fuselage bottom skin. Since an unsafe condition has been identified that is likely to exist or develop on aircraft of this type design, CAA–NL has originally published AD NL–2006–009, which is now replaced by NL–2006–009 R1.

This directive requires a one-time inspection of the fuselage bottom skin at the chine line, of the area not covered by the procedure of NDTM, Part 6, chapter 53–30–02. This one-time inspection consists of two parts:

—A detailed visual inspection. The visual inspection is described in Fokker Services Service Bulletin SBF50–53–058 (dated June 30, 2006).

—An eddy-current inspection. The eddy-current inspection is described in Fokker Services Service Bulletin SBF50–53–059 (dated August 24, 2006).

The unsafe condition is cracking and subsequent failure of the fuselage bottom skin, which could result in reduced structural integrity of the fuselage. Corrective actions include repairing any cracking.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Before the accumulation of 20,000 total flight cycles, or within 3 weeks after the effective date of this AD, whichever occurs later, perform a detailed visual inspection for cracks of the fuselage bottom skin chine line between fuselage station (STA) 6675 and STA 15375 in accordance with Part 3, Steps A. and B., of the Accomplishment Instructions of Fokker Service Bulletin SBF50–53–058, dated June 30, 2006. If any crack is found appearing through the paint layer, before further flight, remove the paint to determine the extent of the cracking and repair in accordance with the instructions in the service bulletin.

(2) Before the accumulation of 45,000 total flight cycles, or within 3 weeks after the effective date of this AD, whichever occurs later, perform a detailed visual inspection for cracks of the fuselage bottom skin chine line between STA 1320 and STA 3100 in accordance with Part 3, Steps C. and D., of the Accomplishment Instructions of Fokker Service Bulletin SBF50–53–058, dated June 30, 2006. If any crack is found appearing through the paint layer, before further flight remove the paint to determine the extent of the cracking and repair in accordance with the instructions in the service bulletin.

(3) In all cases, whether or not cracks were found and repaired in accordance with the requirements in paragraphs (f)(1) and (f)(2) of this AD: Within 1,000 flight cycles after the visual inspections required by paragraphs (f)(1) and (f)(2) of this AD or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, do an eddy current inspection of the fuselage bottom skin chine line (between the same fuselage stations as covered by the visual inspection) in accordance with Part 3 of the Accomplishment Instructions of Fokker Service Bulletin SBF50–53–059, dated August 24, 2006. If any crack is found during any eddy-current inspection, repair before further flight in accordance with the instructions in the service bulletin.

(4) If any crack is found as a result of any inspection requirement of this directive, within 30 days after the inspection or 30 days after the effective date of this AD, whichever occurs later, report all findings to the Type Certificate holder at the following address: Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: Although the MCAI or service information allows flight with cracks of different lengths on the fuselage bottom skin chine line between certain fuselage stations, this AD requires accomplishing the applicable repair before further flight if any crack is found.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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, 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 Mandatory Continuing Airworthiness Information (MCAI) CAA–NL Dutch Airworthiness Directive NL–2006–009 R1 dated September 28, 2006; and Fokker Service Bulletins SBF50–53–058, dated June 30, 2006, and SBF50–53–059, dated August 24, 2006; for related information.

Material Incorporated by Reference

(i) You must use Fokker Service Bulletin SBF50–53–058, dated June 30, 2006; and Fokker Service Bulletin SBF50–53–059, dated August 24, 2006; as applicable, to do the actions required by this AD, unless the AD specifies otherwise. Fokker Service Bulletin SBF50–53–059 contains the following effective pages:

Page Nos.	Revision level shown on page	Date shown on page
1, 3, 5, 7, 9, 11, 13, 15	Original	August 24, 2006.
2, 4, 6, 8, 10, 12, 14, 16	Original	August 21, 2006.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on January 31, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2362 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28921; Directorate Identifier 2007–NM–091–AD; Amendment 39–15371; AD 2008–03–20]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–300, –400, and –500 Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 737–300, –400, and –500 series airplanes. This AD requires, among other actions, modifying the door-mounted escape system of the forward right side door slide compartment. This AD results from reports indicating that the forward right escape slide inflated 90 degrees out of alignment after deployment from the forward right side slide compartment. We are issuing this AD to prevent the escape slide from being unusable during an emergency evacuation and consequent injury to passengers or crewmembers.

DATES: This AD becomes effective March 17, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 17, 2008.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.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 AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Robert Hettman, Aerospace Engineer, Cabin Safety & Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6457; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Boeing Model 737–300, –400, and –500 series airplanes. That NPRM was published in the **Federal Register** on August 16, 2007 (72 FR 45972). That NPRM proposed to require, among other actions, modifying the door-mounted escape system of the forward right side door slide compartment.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received.

Support for NPRM

Boeing and the Air Transport Association (ATA), on behalf of its member Continental, support the NPRM as proposed.

Request To Allow Replacement of Entire Compartment Assembly

The ATA requests that operators be allowed to replace the entire compartment assembly rather than modifying it in accordance with Boeing Special Attention Service Bulletin 737–25–1567, dated March 21, 2007 (referred to as the appropriate source of service information in the AD for accomplishing the required modification). The ATA has concerns about the availability of the slide compartment parts from Boeing.

We partially agree with the ATA. We agree that replacing the entire compartment assembly may be an alternative method of compliance (AMOC) to the modification requirements of this AD. However, we do not have service information which describes such a replacement. We consider delaying issuance of this AD until Boeing revises Boeing Special Attention Service Bulletin 737–25–1567 or develops other service information to be inappropriate, since we have determined that an unsafe condition exists and that modification of the door-mounted escape system must be done to ensure continued safety. However, under the provision of paragraph (h) of this AD, we might consider requests for approval of an AMOC if sufficient data are submitted to substantiate that such a design change would provide an acceptable level of safety.

In consideration of the ATA's concern about parts availability, we have confirmed with Boeing that it can provide the material listed in Boeing Special Attention Service Bulletin 737–25–1567 within the 60-month compliance time. The only new component required to modify the compartment assembly is the material for the enlarged window. Therefore, we have made no change to the final rule in this regard.

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

There are about 1,949 airplanes of the affected design in the worldwide fleet. This AD will affect about 660 airplanes of U.S. registry. The required modification and installation actions will take about 2 work hours per airplane, at an average labor rate of $80 per work hour. Required parts will cost about $207 per airplane. Based on these figures, the estimated cost of the AD for U.S. operators is $242,220, or $367 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this 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. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–03–20 Boeing: Amendment 39–15371. Docket No. FAA–2007–28921; Directorate Identifier 2007–NM–091–AD.

Effective Date

(a) This AD becomes effective March 17, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 737–300, –400, and –500 series airplanes, certificated in any category; as identified in Boeing Special Attention Service Bulletin 737–25–1567, dated March 21, 2007.

Unsafe Condition

(d) This AD results from reports indicating that the forward door escape slide inflated 90 degrees out of alignment after deployment from the forward right side slide compartment. We are issuing this AD to prevent the escape slide from being unusable during an emergency evacuation and consequent injury to passengers or crewmembers.

Compliance

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

Modification and Installation

(f) Within 60 months after the effective date of this AD, modify the door-mounted escape system of the forward right side door slide compartment, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–25–1567, dated March 21, 2007.

Prior to or Concurrent Requirement

(g) Prior to or concurrently with the requirements of paragraph (f) of this AD, accomplish the requirements of AD 2004–02–08, amendment 39–13443.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle 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) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(i) You must use Boeing Special Attention Service Bulletin 737–25–1567, dated March 21, 2007, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207 for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on January 30, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2363 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0003; Airspace Docket No. 08–ASW–1]

Establishment of Class E Airspace; Lexington, OK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action establishes Class E2 airspace at Lexington, OK. Additional controlled airspace is necessary to accommodate aircraft using new RNAV Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAP) at Muldrow Army Heliport. The FAA proposes this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Muldrow Army Heliport, Lexington, OK.

DATES: *Effective Dates:* 0901 UTC April 10, 2008. Comments for inclusion in the rules Docket must be received March 27, 2008. The Director of the **Federal Register** approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–0003/Airspace Docket No. 08–ASW–1, at the beginning of your comments. You may also submit comments through the Internet at *http://regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office, telephone number 1–800–647–5527, is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Joe Yadouga, Central Service Center, System Support Group, Federal Aviation Administration, Southwest Region, Fort Worth, Texas 76193–0530; telephone number (817) 222–5597.

SUPPLEMENTARY INFORMATION:

The Direct Final Rule Procedure

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

Comments Invited

Although this action is in the form of a direct final rule, and was not preceded by a notice of proposed rulemaking, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. An electronic copy of this document may be downloaded from *http://www.regulations.gov.* Communications should identify both docket numbers and be submitted in triplicate to the address specified under the caption **ADDRESSES** above or through the Web site. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes Class E2 airspace at Lexington, OK providing the airspace required to support the new Copter RNAV (GPS) Runway 17 approach developed for IFR landings at Muldrow Army Heliport, OK. No Class E2 airspace exists in the area so new airspace must be developed which will serve IFR operations into Muldrow Army Heliport. Controlled airspace extending upward from the surface is required to encompass all SIAP and for the safety of IFR operations at Muldrow Army Heliport, Lexington, OK. Designations for class E2 airspace areas extending upward from the surface of the earth are published in the FAA Order 7400.9R, signed August 15, 2007 and effective September 15, 2007, which is incorporated by reference in 14 CFR Part 71.1. Class E2 designations listed in this document will be published subsequently in the Order.

Agency Findings

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

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49, of the United States Code. 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.

This rulemaking is promulgated under the authority described in subtitle VII, Part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E2 airspace near Lexington, OK.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

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

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

§ 71.1 Amended

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, Airspace Designation and Reporting Points, signed August 15, 2007, and effective September 15, 2007, is amended as follows:

Paragraph 6002 Class E2 airspace areas extending upward from the surface of the earth.

* * * * *

ASW OK E2 Lexington, OK [New]

Muldrow Army Heliport
(lat. 35°01′58″ N., long. 97°13′90″ W.)

That airspace extending upward from the surface to and including 3,600 feet above mean sea level (MSL) within a 3.7-mile radius of the Muldrow Army Heliport, OK and within 3 miles each side of the Muldrow runway 175 Copter RNAV (GPS) Runway 17 approach course extending north from the 3.7 mile radius to the 6.8 mile extension. This airspace is effective during specific dates and times established in advance by Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in Forth Worth, TX on January 25, 2008.

Delisa Kik,

Acting Manager, System Support Group, ATO Central Service Center.

[FR Doc. 08–525 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0024; Airspace Docket No. 08–AGL–4]

Establishment of Class E5 Airspace; Black River Falls, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action establishes Class E5 airspace at Black River Falls, WI. Additional controlled airspace is necessary to accommodate aircraft using

new RNAV Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAP) at Black River Falls Area. The FAA proposes this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Black River Falls Area Airport, Black River Falls, WI.

DATES: *Effective Dates:* 0901 UTC April 10, 2008. Comments for inclusion in the rules Docket must be received by March 27, 2008. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–0024/Airspace Docket No. 08–AGL–4, at the beginning of your comments. You may also submit comments through the Internet at *http://regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office, telephone number 1–800–647–5527, is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Joe Yadouga, Central Service Center, System Support Group, Federal Aviation Administration, Southwest Region, Fort Worth, Texas 76193–0530; telephone number (817) 222–5597.

SUPPLEMENTARY INFORMATION:

The Direct Final Rule Procedure

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

Comments Invited

Although this action is in the form of a direct final rule, and was not preceded by a notice of proposed rulemaking, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. An electronic copy of this document may be downloaded from *http://www.regulations.gov*. Communications should identify both docket numbers and be submitted in triplicate to the address specified under caption **ADDRESSES** above or through the Web site. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes Class E5 airspace at Black River Falls, WI providing the airspace required to support the new RNAV (GPS) Runway 08 approach developed for IFR landings at Black River Falls Area Airport. No Class E5 airspace exists in the area so new airspace must be developed which will serve IFR operations into Black River Falls Area Airport. Controlled airspace extending upward from the surface is required to encompass all SIAP and for the safety of IFR operations at Black River Falls Area Airport, Black River Falls, WI. Designations for Class E5 airspace areas extending upward from 700 feet above the surface of the earth are published in the FAA Order 7400.9R, signed August 15, 2007 and effective September 15, 2007, which is incorporated by reference in 14 CFR Part 71.1. Class E5 designations listed in this document will be published subsequently in the Order.

Agency Findings

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

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in subtitle VII, Part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E5 airspace near Black River Falls, WI.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

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

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

§ 71.1 Amended

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, Airspace Designation and Reporting Points, signed August 15, 2007, and effective September 15, 2007, is amended as follows:

Paragraph 6005 Class E5 airspace areas extending upward from the surface of the earth.

* * * * *

AGL WI E5 Black River Falls, WI

Black River Falls Area Airport
(lat. 44°15′02.7″ N., long. 90°51′19.01″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Black River Falls Area Airport and within 3.9 miles each side of RNAV (GPS) Runway 08 approach course and extending from 6.4-mile radius to 8.8 miles west of the airport. This airspace is effective during specific dates and times established in advance by Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in Fort Worth, TX on January 25, 2008.

Delisa Kik,

Acting Manager, System Support Group, ATO Central Service Center.

[FR Doc. 08–528 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF STATE

22 CFR Part 42

[Public Notice: 6100]

Visas: Documentation of Immigrants Under the Immigration and Nationality Act, as Amended

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This rule revises the photo requirement as part of the application process for a Diversity Immigrant Visa, to require that the photo be in color. Color photographs enhance facial recognition and reduce the opportunity for fraud.

DATES: This rule is effective February 11, 2008.

FOR FURTHER INFORMATION CONTACT: Charles Robertson, Legislation and Regulations Division, Visa Services, Department of State, 2401 E Street, NW., Room L–603D, Washington, DC 20520–0106, (202) 663–1202, e-mail (*robertsonce@state.gov*).

SUPPLEMENTARY INFORMATION:

Why is the Department promulgating this rule?

In the past, photographs submitted at the time of electronically filing petitions for consideration under INA 203(c) for issuance of diversity immigrant visas could be in either color or black and white. As part of the general harmonization of photo requirements for all visa functions, this requirement is being amended to make color photos the only acceptable photographs for a petition for consideration for diversity visa issuance. Compared to black and white, color photographs enhance the facial recognition process and reduce the opportunity for fraud.

Regulatory Findings

Administrative Procedure Act

This regulation involves a foreign affairs function of the United States and, therefore, in accordance with 5 U.S.C. 553(a)(1), is not subject to the rule making procedures set forth at 5 U.S.C. 553.

Regulatory Flexibility Act/Executive Order 13272: Small Business

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth at sections 603 and 604 of the Regulatory Flexibility Act (5 U.S.C. 603 and 604). Nonetheless, consistent with section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. This regulates individual aliens who seek consideration for diversity immigrant visas and does not affect any small entities, as defined in 5 U.S.C. 601(6).

The Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Public Law 104–4, 109 Stat. 48, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more by State, local, or tribal governments, or by the private sector. This rule will not result in any such expenditure, nor will it significantly or uniquely affect small governments.

The Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign based companies in domestic and import markets.

Executive Order 12866

The Department of State has reviewed this proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and has determined that the benefits of the proposed regulation justify its costs. The Department does not consider the proposed rule to be an economically significant action within the scope of section 3(f)(1) of the Executive Order since it is not likely to have an annual effect on the economy of $100 million or more or to adversely affect in a material way the economy, a sector of the economy, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities.

Executive Orders 12372 and 13132: Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders No. 12372 and No. 13132.

Paperwork Reduction Act

This rule does not impose information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

List of Subjects in 22 CFR Part 42

Immigration, Photographs, Visas.

■ Accordingly, for the reasons set forth above, Title 22 part 42 is amended as follows:

PART 42—[AMENDED]

■ 1. The authority citation for part 42 continues to read as follows:

Authority: 8 U.S.C. 1104; Pub. L. 107–56, sec. 421.

■ 2. Revise § 42.33 paragraph (b)(2) (iii) to read as follows:

§ 42.33 Diversity immigrants.

* * * * *

(b) * * *

(2) * * *

(iii) The image must be in color.

* * * * *

Dated: January 31, 2008.

Maura Harty,

Assistant Secretary for Consular Affairs, Department of State.

[FR Doc. E8–2463 Filed 2–8–08; 8:45 am]

BILLING CODE 4710–06–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–126; MB Docket No. 05–243; RM–11363; RM–11364, RM–11365]

Radio Broadcasting Services; Various Locations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division amends the FM Table of Allotments by substituting Channel 259C for vacant Channel 273C at Meeteetse, Wyoming. Channel 259C can be allotted to Meeteetse, Wyoming in conformity with the Commission's Rules without a site restriction at reference coordinates 44–09–26 NL and 108–52–15WL. Additionally, the Audio Division grants three counterproposals filed timely in this proceeding. *See* **SUPPLEMENTARY INFORMATION**, supra.

DATES: Effective March 3, 2008.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* MB Docket No. 05–243, adopted January 16, 2008, and released January 18, 2008. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Information Center, 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

The first counterproposal filed jointly by Millcreek Broadcasting, LLC, licensee of Station KUUU(FM), Channel 223C2, South Jordan, Utah; Simmons SLC, LLC, licensee of Station KAOX(FM), Channel 297C2, Kemmerer, Wyoming; 3 Point Media—Coalville, LLC, licensee of Station KCUA(FM), Channel 223C3, Naples, Utah; 3 Point Media—Delta, LLC, licensee of Station KMGR(FM), Channel 240C1, Delta, Utah; and College Creek Broadcasting, LLC, permittee of Station KADQ–FM, Channel 252C2 at Evanston, Wyoming and FM Station KRPX, Channel 237C3 at Wellington, Utah requests the substitution of Channel 252C for Channel 252C2 at Evanston, Wyoming, and modification of the Station KADQ-FM authorization. The reference coordinates for Channel 252C at Evanston are 41–14–14 NL and 110–58–09 WL, located 3.5 kilometers (2.2 miles) south of Evanston. To accommodate the Evanston channel substitution, we are substituting Channel 237C3 for Channel 252C3 at Price, Utah, and modifying the Station KARB(FM) license, which in turn requires the substitution of Channel 233C3 for Channel 237C3 at Wellington, Utah, and modification of the FM Station KRPX authorization. The reference coordinates for Channel 237C3 at Price are 39–36–33 NL and 110–48–50 WL, located 1.1 kilometers (0.7 miles) north of Price. The reference coordinates for Channel 233C3 at Wellington are 39–30–41 NL and 110–45–54 WL, located 4.3 kilometers (2.7 miles) southwest of Wellington. In order to allot Channel 233C3 at Wellington, we are substituting Channel 239C for vacant Channel 233C at Salina, Utah, which in turn requires the substitution of Channel 240C0 for Channel 240C1 at Delta, Utah, reallotting Channel 240C0 from Delta to Randolph, Utah, as its second local service, and modifying the Station KMGR(FM) license. The reference coordinates for Channel 239C at Salina are 38–50–58 NL and 112–00–28 WL, located 17.6 kilometers (11 miles) southwest of Salina. The reference coordinates for Channel 240C0 at Randolph are 41–56–46 NL and 111–00–04 WL, located 34.5 kilometers (21.5 miles) northeast of Randolph. To accommodate the Randolph reallotment, we are substituting Channel 260C3 for Channel 240A at Weston, Idaho, and modifying the Station KLZX(FM) license. The reference coordinates for Channel 260C3 at Weston are 41–52–18 NL and 111–48–31 WL, located 23.2 kilometers (14.4 miles) southwest of Weston. The Channel 260C3 at Weston requires the substitution of Channel 228C for Channel 260C at Burley, Idaho, and modification of Station KZDX(FM)'s license to facilitate this change. The reference coordinates for Channel 228C at Burley are 42–29–33 NL and 113–44–44 WL, located 6.1 kilometers (3.8 miles) southwest of Burley. In order to allot Channel 228C at Burley, we are substituting Channel 230C for Channel 229C at Pocatello, Idaho, and modifying the Station KZBQ(FM) license. The reference coordinates for Channel 230C at Pocatello are 42–51–57 NL and 112–30–46 WL, located 5.6 kilometers (3.5 miles) west of Pocatello. To accommodate Channel 260C3 at Weston, we are substituting Channel 261C3 for Channel 261C2 at Soda Spring, Idaho, reallotting Channel 261C3 from Soda Springs, Idaho to Wilson, Wyoming, as its first local service, and modifying the Station KITT(FM)'s license. The reference coordinates for Channel 261C3 at Wilson are 43–27–40 NL and 110–45–09 WL, located 10.8 kilometers (6.7 miles) southeast of Wilson. In order to eliminate the gray area created by the Wilson reallotment, we are reallotting Channel 297C2 from Kemmerer, Wyoming to Shelley, Idaho, as its second local service, and modifying the Station KAOX(FM) license. The reference coordinates for Channel 297C2 at Shelley are 43–02–00 NL and 111–55–34 WL, located 41.8 kilometers (26 miles) south of Shelley. To facilitate the Shelley reallotment, we are substituting Channel 300C1 for Channel 296C1 at Idaho Falls, Idaho, and modifying the Station KEQO(FM)'s license and substituting Channel 223C1 for Channel 223C3 at Naples, Utah, reallotting Channel 223C1 from Naples, Utah, to Diamondville, Wyoming and modifying the Station KCUA(FM) license. The reference coordinates for Channel 300C1 at Idaho Falls are 43–46–04 NL and 111–57–57 WL, located 33.9 kilometers (21.1 miles) north of Idaho Falls. The reference coordinates for Channel 223C1 at Diamondville are 41–54–14 NL and 110–31–06 WL, located 13.9 kilometers (8.6 miles) north of Diamondville. In order to allot Channel 223C1 to Diamondville, we are substituting Channel 223A for Channel 223C2 at South Jordan, Utah, and modifying the Station KUUU(FM) license. The reference coordinates of Channel 223A at South Jordan are 40–27–11 NL and 111–56–36 WL, located 12.2 kilometers (7.6 miles) south of South Jordan. Moreover, we are substituting Channel 255C2 for Channel 253C2 at Roosevelt, Utah, reallotting Channel 255C2 from Roosevelt, Utah, to Naples, Utah, to prevent removal of Naples' sole local service, and modifying the Station KIFX(FM) license. The reference coordinates of Channel 255C2 at Naples are 40–33–24 NL and 109–38–08 WL, located 18.5 kilometers (11.5 miles) northwest of Naples. To accommodate the Naples reallotment, we are substituting Channel 268C3 for vacant Channel 255C3 at Fruita, Colorado. The reference coordinates for Channel 268C3

at Fruita are 39–06–52 NL and 108–51–09 WL. To accommodate the Randolph reallotment, we are substituting Channel 239C3 for Channel 239C1 at Marbleton, Wyoming, reallotting Channel 239C3 from Marbleton, Wyoming, to Ballard, Utah, as its first local service, and modifying the Station KFMR(FM) authorization. The reference coordinates for Channel 239C3 at Ballard are 40–27–04 NL and 109–56–25 WL, located 18 kilometers (11.2 miles) north of Ballard. To prevent removal of potential first local service at Marbleton, we are allotting Channel 257C1 at Marbleton, Wyoming. The reference coordinates of Channel 257C1 at Marbleton are 42–19–28 NL and 110–19–12 WL, located 30.8 kilometers (19.2 miles) southwest of Marbleton.

The second counterproposal filed jointly by Millcreek Broadcasting, LLC, licensee of Stations KNJQ(FM), Channel 286C, Manti, Utah, KUUU(FM), Channel 223C2, South Jordan, Utah, and KUDD(FM), Channel 300C, Roy, Utah; Simmon SLC, LS, LLC, licensee of Stations KDWY(FM), Channel 287C2, Diamondville, Wyoming, KAOX(FM), Channel 297C1, Kemmerer, Wyoming, and KRAR(FM), Channel 295C, Brigham City, Utah; 3 Point Media-Coalville, LLC, licensee of Station KCUA(FM), Channel 223C3, Naples, Utah; and College Creek Broadcasting, LLC, permittee of FM Station KHUN, Channel 296C2, Huntington, Utah, FM Station KRID, Channel 243C2, Ashton, Idaho, FM Station KKWY, Channel 293C, Superior, Wyoming, and Station KTYN(FM), Channel 290C1, Thayne, Wyoming requests the allotment of Channel 285C at Milford, Utah, as its first local service and a first aural reception service to 197 persons. The reference coordinates for Channel 285C at Milford are 38–31–11 NL and 113–17–07 WL. This site is located 27.6 kilometers (17.2 miles) northwest of Milford. To accommodate this vacant allotment, we are reallotting Channel 286C from Manti to American Fork, Utah, as the community's first local service, and modifying the Station KNJQ(FM) license. The reference coordinates for Channel 286C at American Fork are 40–39–34 NL and 112–12–05 WL. This site is located 46.6 kilometers (28.9 miles) northwest of American Fork. This reallotment requires the substitution of Channel 290C for Channel 289C at Centerville, Utah and modification of the Station KXRV(FM) license. The reference coordinates for Channel 290C at Centerville are 40–39–34 NL and 112–12–05 WL. This site is located 40 kilometers (24.9 miles) southwest of Centerville. In order to allot Channel 290C to Centerville, we are substituting Channel 245C2 for Channel 290A at Vernal, Utah, and modifying Station KLCY–FM's license and substituting Channel 294C for Channel 293C at Spanish Fork, Utah, and modifying Station KOSY–FM's license. The reference coordinates for Channel 245C2 at Vernal are 40–32–16 NL and 109–41–57 WL. This site is located 17.1 kilometers (10.7 miles) northwest of Vernal. The reference coordinates for Channel 294C at Spanish Fork are 40–39–34 NL and 112–12–05 WL. This site is located 76.2 kilometers (47.4 miles) northwest of Spanish Fork. To accommodate the Channel 294C to Spanish Fork, we are substituting Channel 296C for Channel 295C at Brigham City, Utah, reallotting Channel 296C from Brigham City to Woodruff, Utah, as the community's second local service, and modifying the Station KRAR(FM) license, which in turns requires reallotting Channel 297C2 from Kemmerer, Wyoming to Shelley, Idaho, as its second local service, and modifying the Station KAOX(FM) license. The reference coordinates for Channel 296C at Woodruff are 40–56–07 NL and 111–00–03 WL. This site is located 66.5 kilometers (41.3 miles) south of Woodruff. The reference coordinates for Channel 297C2 at Shelley are 43–02–00 NL and 111–55–34 WL, located 41.8 kilometers (26 miles) south of Shelley. To facilitate the Shelley reallotment, we are substituting Channel 300C1 for Channel 296C1 at Idaho Falls, Idaho, and modifying the Station KEQO(FM) license. The reference coordinates for Channel 300C1 at Idaho Falls are 43–46–04 NL and 111–57–57 WL, located 33.9 kilometers (21.1 miles) north of Idaho Falls. In order to allot Channel 296C to Woodruff, we are substituting Channel 297C2 for Channel 296C2 at Huntington, Utah, and modifying the Station KHUN authorization, which in turn requires reallotting Channel 298C from Orem to Kaysville, Utah, as the community's first local service, and modifying the Station KKAT–FM license. The reference coordinates for Channel 297C2 at Huntington are 39–10–41 NL and 111–01–22 WL. This site is located 17.3 kilometers (10.7 miles) south of Huntington. The reference coordinates for Channel 298C at Kaysville are 40–39–34 NL and 112–12–05 WL. This site is located 47.3 kilometers (29.4 miles) southwest of Kaysville. To accommodate the Kaysville reallotment, we are reallotting Channel 300C from Roy to Randolph, Utah, as the community's second local service and modifying the Station KUDD(FM) license. The reference coordinates for Channel 300C at Randolph are 41–04–48 NL and 111–05–32 WL. This site is located 65.5 kilometers (40.7 miles) south of Randolph. To accommodate Channel 290C at Centerville, we are substituting Channel 286C3 for Channel 290C3 at Thayne, Wyoming, and modifying the Station KTYN(FM) authorization, which in turn requires substituting Channel 243A for vacant Channel 286A at Dubois, Idaho. The reference coordinates for Channel 286C3 at Thayne are 43–06–18 NL and 111–07–17 WL. This site is located 22.7 kilometers (14.1 miles) northwest of Thayne. The reference coordinates for Channel 243A at Dubois are 44–15–50 NL and 112–09–00 WL. This site is located 11.6 kilometers (7.2 miles) northeast of Dubois. The allotment of Channel 286A at Dubois was added to the FM Table in MB Docket No. 04–427. *See* 70 FR 37289, published June 29, 2005. Channel 286A at Dubois was inadvertently removed from the FM Table of Allotments in MB Docket No. 05–210. *See* 72 FR 45813, published August 15, 2007. To accommodate the Dubois vacant allotment, we are substituting Channel 283A for Channel 243C2 at Ashton, Idaho, and modifying the Station KRID authorization. The reference coordinates for Channel 283A at Ashton are 43–58–32 NL and 111–34–40 WL. This site is located 14.9 kilometers (9.3 miles) southwest of Ashton. To accommodate Channel 286C3 at Thayne, we are substituting Channel 288C for Channel 287C2 at Diamondville, Wyoming, reallotting Channel 288C from Diamondville, Wyoming to Oakley, Utah, as the community's second local service, and modifying the Station KDWY(FM) license. The reference coordinates for Channel 288C at Oakley are 40–52–16 NL and 110–59–43 WL. This site is located 31 kilometers (19.3 miles) northeast of Oakley. To prevent removal of Diamondville's sole local service, we are substituting Channel 223C1 for Channel 223C3 at Naples, Utah, reallotting Channel 223C1 from Naples, Utah, to Diamondville, Wyoming and modifying the Station KCUA(FM) license. The reference coordinates for Channel 223C1 at Diamondville are 41–54–14 NL and 110–31–06 WL, located 13.9 kilometers (8.6 miles) north of Diamondville. To prevent removal of Naples' sole local service, we are substituting Channel 255C2 for Channel 253C2 at Roosevelt, Utah, reallotting Channel 255C2 from Roosevelt, to Naples, Utah and modifying the Station KIFX(FM) license. The reference

coordinates of Channel 255C2 at Naples are 40–33–24 NL and 109–38–08 WL, located 18.5 kilometers (11.5 miles) northwest of Naples. To accommodate the Naples reallotment, we are substituting Channel 268C3 for vacant Channel 255C3 at Fruita, Colorado. The reference coordinates for Channel 268C3 at Fruita are 39–06–52 NL and 108–51–09 WL. To accommodate the Diamondville reallotment, we are substituting Channel 223A for Channel 223C2 at South Jordan, Utah, and modifying the Station KUUU(FM) license. The reference coordinates of Channel 223A at South Jordan are 40–27–11 NL and 111–56–36 WL, located 12.2 kilometers (7.6 miles) south of South Jordan. To facilitate Channel 290C to Centerville, we are substituting Channel 292C for Channel 291C at Evanston, Wyoming, and modifying the Station KBMG(FM) license, which in turn requires substituting Channel 298C1 for Channel 293C1 at Superior, Wyoming, and modifying of the Station KKWY authorization. The reference coordinates for Channel 292C at Evanston are 40–52–16 NL and 110–59–43 WL, located 44.2 kilometers (27.5 miles) south of Evanston. The reference coordinates for Channel 298C1 at Superior are 41–25–32 NL and 109–07–42 WL, located 40.5 kilometers (25.1 miles) south of Superior.

The third counterproposal filed jointly by Sand Hill Media Corporation, licensee of Station KADQ–FM, Channel 232C2, Rexburg, Idaho and Sandhill Media Group, LLC, license of Station KUPI–FM, Channel 256C1, Idaho Falls, Idaho, requested Channel 262C2 at Lima, Montana, as the community first local service. However, we allotted alternate Channel 265C2 at Lima, Montana, as its first local service to avoid the ultimate permittee of this vacant allotment to reimburse Brigham Young University for its reasonable expenses associated with changing Station KBYI's frequency to Channel 232C1 at Rexburg. The reference coordinates for Channel 265C2 at Lima are 44–42–58 NL and 112–40–40 WL. This site is located 11.2 kilometers (6.9 miles) northwest of Lima. Additionally, we substituted Channel 232C1 for Channel 263C1 at Rexburg, Idaho and modifying the Station KBYI license to accommodate the substitution of Channel 263C1 for Channel 256C1 at Idaho Falls, Idaho and modification of the FM Station KUPI license. The reference coordinates for Channel 232C1 at Rexburg are 43–45–44 NL and 111–57–30 WL. The site is located 15.4 kilometers (9.6 miles) southwest of Rexburg. The reference coordinates for Channel 263C1 at Idaho Falls are 43–21–06 NL and 12–00–22 WL. The site is located 13 kilometers (8.1 miles) south of Idaho Falls. Moreover, to facilitate the Channel 232C1 substitution at Rexburg, we substituted Channel 233C0 for Channel 233C at Logan, Utah, and modified the Station KVFX(FM) license and substituted Channel 256C2 for Channel 232C2 at Rexburg, Idaho and modified the Station KSNA(FM) license. The reference coordinates for Channel 233C0 at Logan are 41–53–50 NL and 111–57–39 WL. The site is located 20.8 kilometers (12.9 miles) northwest of Logan. The reference coordinates for Channel 256C2 at Rexburg are 43–45–20 NL and 111–57–56 WL. The site is located 16.2 kilometers (10.1 miles) southwest of Rexburg.

The Media Bureau's Consolidated Data Base System will reflect the following FM Channel as the reserved assignment for the listed stations, respectively: Channel 252C in lieu of Channel 252C2 at Evanston, Wyoming for Station KADQ–FM; Channel 237C3 in lieu of Channel 252C3 at Price, Utah for Station KARB(FM); Channel 233C3 in lieu of Channel 237C3 at Wellington, Utah for FM Station KRPX; Channel 240C0 at Randolph, Utah in lieu of Channel 240C1 at Delta, Utah for Station KMGR(FM); Channel 260C3 in lieu of Channel 240A at Weston, Idaho for Station KLZX(FM); Channel 228C in lieu of Channel 260C at Burley, Idaho for Station KZDX(FM); Channel 230C in lieu of Channel 229C at Pocatello, Idaho for Station KZBQ(FM); Channel 261C3 at Wilson, Wyoming in lieu of Channel 261C2 at Soda Spring, Idaho for Station KITT(FM); Channel 297C2 at Shelley, Idaho in lieu of Kemmerer, Wyoming for Station KAOX(FM); Channel 300C1 in lieu of Channel 296C1 at Idaho Falls for Station KEQO(FM); Channel 223C1 at Diamondville, Wyoming in lieu of Channel 223C3 at Naples, Utah for Station KCUA(FM); Channel 223A in lieu of Channel 223C2 at South Jordan, Utah for Station KUUU(FM); Channel 255C2 at Naples in lieu of Channel 253C2 at Roosevelt, Utah for Station KIFX(FM); Channel 239C3 at Ballard, Utah in lieu of Channel 239C1 at Marbleton, Wyoming for Station KFMR(FM); Channel 286C at American Fork, Utah in lieu of Manti, Utah for Station KNJQ(FM); Channel 290C in lieu of Channel 289C at Centerville, Utah for Station KXRV(FM); Channel 245C2 in lieu of Channel 290A at Vernal, Utah for Station KLCY–FM; Channel 294C in lieu of Channel 293C at Spanish Fork, Utah for Station KOSY–FM; Channel 296C at Woodruff, Utah in lieu of Channel 295C at Brigham City, Utah for Station KRAR(FM); Channel 297C2 in lieu of Channel 296C2 at Huntington, Utah for Station KHUN; Channel 298C at Kaysville, Utah in lieu of Orem, Utah for Station KKAT–FM; Channel 300C at Randolph, Utah in lieu of Roy, Utah for Station KUDD(FM); Channel 286C3 in lieu of Channel 290C3 at Thayne, Wyoming for Station KTYN(FM); Channel 283A in lieu of Channel 243C2 at Ashton, Idaho for Station KRID; Channel 288C at Oakley, Utah in lieu of Channel 287C2 at Diamondville, Wyoming for Station KDWY(FM); Channel 292C in lieu of Channel 291C at Evanston, Wyoming for Station KBMG(FM); Channel 298C1 in lieu of Channel 293C1 at Superior, Wyoming for Station KKWY; Channel 232C1 in lieu of Channel 263C1 at Rexburg, Idaho for Station KBYI license; Channel 263C1 in lieu of Channel 256C1 at Idaho Falls, Idaho for Station KUPI–FM license; Channel 256C2 in lieu of Channel 232C2 at Rexburg, Idaho for Station KSNA(FM) license; and Channel 233C0 in lieu of Channel 233C at Logan, Utah for Station KVFX(FM).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ As stated in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Colorado, is amended by removing Channel 255C3 and adding Channel 268C3 at Fruita.

■ 3. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by adding Dubois, Channel 243A.

■ 4. Section 73.202(b), the Table of FM Allotments under Montana, is amended by adding Lima, Channel 265C2.

■ 5. Section 73.202(b), the Table of FM Allotments under Utah is amended by adding Milford, Channel 285C; and removing Channel 233C and adding Channel 239C at Salina.

■ 6. Section 73.202(b), the Table of FM Allotments under Wyoming, is amended by adding Marbleton, Channel 257C1 and removing Channel 273C and adding Channel 259C at Meeteetse.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E8–2458 Filed 2–8–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 080117051–8123–02]

RIN 0648–XF17

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

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

ACTION: Temporary rule; extension of temporary area and gear restrictions.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations will continue to apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,767 nm^2 (6,061 km^2), northeast of Boston, MA, for an additional 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: The area and gear restrictions were initially effective 0001 hours January 26, 2008, through 2400 hours February 9, 2008. This notice extends the restricted period from 0001 hours February 10, 2008, through 2400 hours February 24, 2008.

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

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

SUPPLEMENTARY INFORMATION:

Electronic Access

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

Background

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

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

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm^2 (257 km^2)) such that right whale density is equal to or greater than 0.04 right whales per nm^2 (3.43 km^2). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On January 13, 2008, an aerial survey reported two aggregations of right whales, totaling seven individuals: four whales in the proximity of 42° 37′ N. latitude and 70° 01′ W. longitude, and three whales in the proximity of 42° 51′ N. latitude and 70° 04′ W. longitude. These positions lie northeast of Boston, Massachusetts, and southeast of Portsmouth, New Hampshire, respectively. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

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

NMFS reviewed the options and factors noted above and on January 24, 2008, published a temporary rule in the **Federal Register** (73 FR 4118) to announce the establishment of a DAM zone with restrictions on anchored gillnet and lobster trap gear for a 15–day period. On February 4, 2008, a subsequent survey conducted over the DAM zone indicated that four whales were still present in the area northeast of Boston, MA, and the DAM zone trigger of 0.04 right whales per square nm (3.43 km^2) continues to be met in this portion of the original DAM zone. Therefore, in order to further protect the right whales in this DAM zone, pursuant to 50 CFR 229.32(g)(3)(v), NMFS is exercising its authority to extend the restrictions on lobster trap and anchored gillnet gear for an additional 15 day period.

The extended DAM Zone is bound by the following coordinates:

42° 56′ N., 69° 33′ W. (NW Corner)
42° 16′ N., 69° 33′ W.
42° 16′ N., 70° 33′ W.
42° 56′ N., 70° 33′ W.
42° 56′ N., 69° 33′ W. (NW Corner)

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

Lobster Trap/pot Gear

Fishermen utilizing lobster trap/pot gear within the portions of Northern Nearshore Lobster Waters, Northern Inshore State Lobster Waters, and the Stellwagen Bank/Jeffrey's Ledge Restricted Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

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

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

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

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portions of Other Northeast Gillnet Waters and the Stellwagen Bank/Jeffrey's Ledge Restricted Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per string;
4. The breaking strength of each net panel weak link must not exceed 1,100 lb (498.8 kg). The weak link requirements apply to all variations in net panel size. One weak link must be placed in the center of the floatline and one weak link must be placed in the center of each of the up and down lines at both ends of the net panel. Additionally, one weak link must be placed as close as possible to each end of the net panels on the floatline; or, one weak link must be placed between floatline tie-loops between net panels and one weak link must be placed where the floatline tie-loops attach to the bridle, buoy line, or groundline at each end of a net string;
5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and
6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours February 10, 2008, through 2400 hours February 24, 2008, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

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

Classification

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

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

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

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

makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

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

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

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

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

Dated: February 5, 2008.

Samuel D. Rauch III,

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

[FR Doc. 08–597 Filed 2–6–08; 2:07 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 070709302–8019–02]

RIN 0648–AV17

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Atlantic Group Spanish Mackerel Commercial Trip Limit in the Southern Zone; Change in Start Date

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

ACTION: Final rule.

SUMMARY: In accordance with the framework procedure for adjusting management measures of the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP), NMFS changes the start date of the commercial trip limit for Atlantic migratory group Spanish mackerel in the southern zone to March 1. The intended effect of this final rule is to conform the trip limit to the beginning of the fishing year for Atlantic migratory group Spanish mackerel.

DATES: This final rule is effective March 12, 2008.

ADDRESSES: Copies of the final regulatory flexibility analysis (FRFA) and the South Atlantic Fishery Management Council's framework procedure for adjustment of the start date of the commercial trip limit for Atlantic migratory group Spanish mackerel in the southern zone and related matters may be obtained from the South Atlantic Fishery Management Council, 4055 Faber Place, Suite 201, North Charleston, SC 29405; phone: 843–571–4366, toll free 866–SAFMC–10; fax: 843–769–4520; e-mail: *safmc@safmc.net*.

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, telephone: 727–824–5305, fax: 727–824–5308, e-mail: *Susan.Gerhart@noaa.gov*.

SUPPLEMENTARY INFORMATION: The fisheries for coastal migratory pelagic resources are regulated under the FMP. The FMP was prepared jointly by the Gulf of Mexico and South Atlantic Fishery Management Councils and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. In accordance with the framework procedures of the FMP, the South Atlantic Fishery Management Council (Council) recommended and the Regional Administrator, Southeast Region, NMFS approved, a regulatory change relating to Atlantic migratory group Spanish mackerel. The change is within the scope of the management measures that may be adjusted under the framework procedure, as specified in 50 CFR 622.48(c).

On January 3, 2008, NMFS published a proposed rule to change the start date of the commercial trip limit for Atlantic migratory group Spanish mackerel and requested public comment (73 FR 439). Two public comments were received on the proposed rule. Both comments were in favor of the proposed regulatory action, therefore no changes were made in the final rule as a result of such comments. The rationale for this measure is contained in the Council's framework action and in the preamble to the proposed rule and is not repeated here.

Classification

The Administrator, Southeast Region, NMFS, determined that this regulatory change is consistent with the Council's framework action and is necessary for the conservation and management of the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic and is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of E.O. 12866.

A FRFA was prepared for this action. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of significant economic issues raised by public comments, NMFS responses to those comments, and a summary of the analyses completed to support the action. A copy of the full analysis is available from the Council (see **ADDRESSES**). A summary of the analysis follows.

This rule will change the start date for the 3,500–lb (1,588–kg) trip limit in the southern zone for Atlantic migratory group Spanish mackerel to March 1. The purpose of this action is to correct an unintended inconsistency created by Amendment 15 to the FMP, effective August 8, 2005 (70 FR 39187, July 5, 2005), which redefined the fishing year for Atlantic migratory group king mackerel and Spanish mackerel from April-March to March-February, but did not specify the Spanish mackerel trip limit for March.

No comments were received on the IRFA or on the economic impacts of the

proposed rule. Therefore, no changes were made in the final rule as a result of such comments.

This rule is expected to affect all federally permitted commercial vessels that harvest Atlantic migratory group Spanish mackerel off the Florida east coast. As of January 2006, 1,333 vessels possessed Federal commercial Spanish mackerel permits. However, only 532 of these vessels had homeports on the Atlantic coast (Maine through Miami-Dade County, Florida), of which 300 vessels had homeports on the Florida east coast, and only 312 vessels reported landings of Atlantic migratory group Spanish mackerel in the required Federal logbook system for the 2005–2006 fishing year. Additional vessels may fish exclusively within state waters, where neither a Federal permit nor logbook reporting is required. While these vessels would not directly be subject to this rule, the State of Florida's commercial trip limits for Spanish mackerel have, to date, been adjusted to mirror those for adjacent Federal waters.

Although the total number of vessels that operate in the Atlantic migratory group Spanish mackerel fishery, as well as their production characteristics, varies from year to year, data on the 312 vessels that reported landings of this species in the 2005–2006 fishing year were used to determine average revenue characteristics for this fishery. Most of the vessels that operate in the Spanish mackerel fishery have permits for and participate in king mackerel, snapper-grouper, and other commercial fisheries. During the 2005–2006 fishing season, these vessels harvested, on average, 5,391 lb (2,445 kg) of Atlantic group Spanish mackerel. This accounted for 24 percent, approximately $5,300 (2006 dollars), of the estimated average annual gross revenue, approximately $22,200 (2006 dollars), from all logbook-reported landings. The annual vessel maximum estimated gross revenue from all species harvested by vessels operating in the Spanish mackerel fishery ranged from approximately $182,000 to $342,000 (2006 dollars) for the fishing years 2001–2002 through 2005–2006.

The Atlantic migratory group Spanish mackerel fishery has been managed via staged trip limits since November 1992 for Florida's east coast, starting with a 3,500–lb (1,588–kg) trip limit from April through November. There is an unlimited weekday limit and a 1,500–lb (680–kg) weekend limit from December 1 until 75 percent of the adjusted quota is harvested. This is followed by a 1,500–lb (680–kg) trip limit on all days until 100 percent of the adjusted quota is harvested, and a 500–lb (227–kg) trip limit thereafter until the end of the fishing year. The trip limit elsewhere (Georgia through New York) remains at 3,500 lb (1,588 kg) all year. During the past decade, the Florida east coast has accounted for more than 70 percent of the fishery's landings.

Very few logbook-reported trips in the fishery as a whole have reached 3,500 lb (1,588 kg), usually less than 1 percent of all trips each year since the 1998–1999 fishing season. The average harvest of Atlantic migratory group Spanish mackerel per trip has been approximately 500–700 lb (227–318 kg), and the median harvest, approximately 100–300 lb (45–136 kg). Over this period, Atlantic migratory group Spanish mackerel accounted for on average approximately 60–72 percent of the estimated trip gross revenue from all species harvested.

Gear use in the fishery has changed since the mid–1990s. Prior to the mid–1990s, gillnets were the leading gear in the fishery. Since the implementation of Federal regulations that limit the use of gillnets in Federal waters in 1994 and the prohibition of the use of gillnets in Florida state waters in 1995, fishermen have adjusted their fishing practices, and cast nets have become the predominant gear on the Florida east coast. Hand lines have challenged gillnets for second place.

Little data are available since the start of the fishing year was changed to March 1. While the inconsistency between the fishing year and trip limits created the opportunity for unlimited harvests in March, to date, the fishery has not responded with increased harvests relative to previous years, with March harvests in 2006 and 2007 being less than those of either 2004 or 2005.

Some fleet activity may exist in the commercial fishery for Atlantic migratory group Spanish mackerel, but the extent of such activity is unknown. Additional permits, both state and Federal, and associated revenues may be linked to an entity through affiliation rules, but such affiliation links cannot be made using existing data. Therefore, all vessels operating in the Atlantic migratory group Spanish mackerel fishery are assumed to represent independent entities for the purpose of this analysis.

The Small Business Administration (SBA) has established size criteria for all major industry sectors in the U.S. including fish harvesters, for-hire operations, fish processors, and fish dealers. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined average annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all affiliated operations worldwide. Based on the annual averages and maximums for estimated gross revenue per vessel provided above, it is determined that, for purposes of this analysis, all entities that would be affected by this rule are small business entities.

No direct or indirect adverse economic effects on any affected entities have been identified or are expected to occur as a result of this rule. Although the current inconsistency between the start of the Atlantic migratory group Spanish mackerel fishing year and the specification of the commercial trip limit created the opportunity for increased harvests in March, available data do not indicate this has altered fishing behavior such that it would be adversely impacted by the establishment of a 3,500–lb (1,588–kg) trip limit. Further, even if this rule were to result in reduction in harvest and revenues from Spanish mackerel for some entities, the intent of the action is to enable larger harvests of Spanish mackerel in the months prior to March, when harvests of other species, notably snapper-grouper species, are constrained due to recent regulatory change. Allowing unlimited trip limits for Spanish mackerel at the start of the season increases the likelihood of quota-triggered lower limits at the end of the fishing year, leading to reduced alternative fishing opportunities and lower profits for fishermen subject to reduced harvest opportunities in the snapper-grouper fishery. To the extent that access to Spanish mackerel at the end of the fishing year is improved by limiting harvest in March, this rule would, therefore, be expected to result in increased total harvest opportunities and net benefits (profits) to the participants in these fisheries. These increased benefits, however, cannot be quantified with available data.

This rule will not alter existing reporting, record-keeping, or permitting requirements.

One alternative to this action, the status quo, was considered. The status quo would not establish a trip limit for the Florida east coast in March and would not, therefore, achieve the Council's objective. No other alternatives to this action were considered because no other start date for the trip limit would be reasonable other than the beginning of the fishing year, March 1. To start the trip limit on any other day in March would continue to allow unlimited harvest of the species on those days and continue to increase the possibility of an early closure with

associated economic disruptions. Current rules already establish trip limits for April 1 to the end of February, so this amendment only applies to March.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: February 6, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator For RegulatoryPrograms, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 622.44, paragraph (b)(1)(ii)(A) is revised to read as follows:

§ 622.44 Commercial trip limits.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) From March 1 through November 30, in amounts exceeding 3,500 lb (1,588 kg).

* * * * *

[FR Doc. E8–2485 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 28
Monday, February 11, 2008

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS–2006–0153]

RIN 0579–AC25

South American Cactus Moth; Quarantine and Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the domestic quarantine regulations to establish regulations to restrict the interstate movement of South American cactus moth host material, including nursery stock and plant parts for consumption, from infested areas of the United States. This action would help prevent the artificial spread of South American cactus moth into noninfested areas of the United States.

DATES: We will consider all comments that we receive on or before April 11, 2008.

ADDRESSES: You may submit comments by either of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2006-0153* to submit or view comments and to view supporting and related materials available electronically.

Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS–2006–0153, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2006–0153.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Joel Floyd, Planning and Preparedness Team Leader, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 137, Riverdale, MD 20737–1236; (301) 734–4396.

SUPPLEMENTARY INFORMATION:

Background

The South American cactus moth (*Cactoblastis cactorum*) is a grayish-brown moth with a wingspan of 22 to 35 millimeters (approximately 0.86 to 1.4 inches) that is indigenous to Argentina, southern Brazil, Paraguay, and Uruguay. It is a serious quarantine pest of *Opuntia* spp., and an occasional pest of *Nopalea* spp., *Cylindropuntia* spp., and *Consolea* spp., four closely related genera of the family *Cactaceae*. After an incubation period following mating, the female South American cactus moth deposits an egg stick resembling a cactus spine on the host plant. The egg stick, which consists of 70 to 90 eggs, hatches in 25 to 30 days and the larvae bore into the cactus pad to feed, eventually hollowing it out and killing the plant. Within a short period of time, the South American cactus moth can destroy whole stands of cactus.

In the 1920s, the South American cactus moth was introduced into Australia and other areas as a biological control agent of invasive prickly pear cactus (*Opuntia* spp.). Its success led to its introduction into the Caribbean and Hawaii in the 1950s. In 1989, it was detected in southern Florida, where it was most likely introduced through imported infested nursery plants. More recently, South American cactus moth has been discovered in other parts of Florida, as well as in Georgia, South Carolina, and Alabama, and it continues to spread north and west. It is projected that, at the same rate of spread as seen in Florida, without any control measures, the moth may reach Texas by 2008 by natural spread along the Gulf Coast.

The Southwestern United States and Mexico are home to 114 native species of *Opuntia*, which are highly valued for their ecological and agricultural uses. The rooting characteristics of *Opuntia* spp. reduce wind and rain erosion, encouraging the growth of other plants in degraded areas. In addition, many species of birds, mammals, reptiles, and insects eat, nest in, or otherwise rely on *Opuntia* spp. for survival. *Opuntia* spp. are also important sources of food, medicine, cosmetics, and dye. In Mexico, *Opuntia* spp. are an important agricultural commodity, and it is estimated that 2 percent of the value and production of Mexico's agriculture comes from them. In the Southwestern United States, *Opuntia* spp. are only a minor agricultural crop, but are popular plants in the landscaping and ornamental nursery industries. *Opuntia* spp. can also be an important source of emergency forage for cattle grazing during drought periods. If the South American cactus moth were to spread to these areas, there would be significant ecological and economic damage.

Currently, cactus plants or parts thereof moving from Hawaii, Puerto Rico, or the U.S. Virgin Islands into the continental United States are prohibited or restricted under 7 CFR part 318 in order to prevent the dissemination of South American cactus moth. With limited exceptions, all plants, including cacti, imported into the United States for propagation from foreign countries are required to be accompanied by a phytosanitary certificate and to be inspected at an Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), plant inspection station in accordance with 7 CFR part 319. Any propagative plant material found to be infested with the South American cactus moth currently must be returned to its place of origin, treated, or destroyed. Since the South American cactus moth larvae are internal feeders, they are difficult to detect during normal inspection. Therefore, the current regulations that require only inspection may not provide an adequate safeguard to prevent the introduction and spread of South American cactus moth. APHIS is in the process of amending these territorial and foreign cactus moth regulations to better

address the risks associated with the movement of host material from areas where South American cactus moth is known to occur.

In order to provide a barrier to the natural westward spread of South American cactus moth, APHIS, in cooperation with the Agricultural Research Service, USDA, and funding provided by the Government of Mexico, is testing a sterile insect release program along the U.S. Gulf Coast. However, without a domestic quarantine program to address the artificial spread of the pest by restricting the movement of host material from infested States, this barrier alone will not be effective in stopping the westward movement of the South American cactus moth. Therefore, we are proposing to amend the domestic quarantine notices in 7 CFR part 301 by adding a new subpart, ''South American Cactus Moth'' (§§ 301.55 through 301.55–9, referred to below as the regulations). The regulations would provide for the designation of quarantined areas and would restrict the interstate movement of regulated articles from quarantined areas into or through nonquarantined areas. These proposed provisions are described in detail below.

Restrictions on Interstate Movement of Regulated Articles (§ 301.55)

Proposed § 301.55 would prohibit the interstate movement of regulated articles from any quarantined area except in accordance with the regulations. This section would also contain a footnote explaining that any properly identified inspector is authorized, upon probable cause, to stop and inspect persons and means of conveyance moving in interstate commerce and to hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of regulated articles as provided in sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754).

Definitions (§ 301.55–1)

Proposed § 301.55–1 would contain definitions of the following terms: *Administrator, Animal and Plant Health Inspection Service (APHIS), cactus plants, certificate, compliance agreement, departmental permit, infestation, inspector, interstate, limited permit, moved (move, movement), person, Plant Protection and Quarantine (PPQ), quarantined area, regulated article, South American cactus moth*, and *State*. These proposed terms and their definitions are set out in the regulatory text at the end of this document.

Regulated Articles (§ 301.55–2)

Certain articles present a risk of spreading the South American cactus moth if they are moved from quarantined areas without restrictions. We would call these articles regulated articles, and would impose restrictions on their movement because the South American cactus moth can survive in these materials if present and could possibly be transported to noninfested areas. Paragraphs (a) through (c) of proposed § 301.55–2 would list the following as regulated articles:

- The South American cactus moth, in any living stage of its development;
- Cactus plants or parts thereof (excluding seeds and canned, preserved, or frozen pads or fruits) of the following genera: *Consolea, Cylindropuntia, Nopalea*, and *Opuntia*; and
- Any other product, article, or means of conveyance when an inspector determines that it presents a risk of spreading the South American cactus moth and the person in possession of the product, article, or means of conveyance has been notified in writing that it is subject to the restrictions in the regulations.

The last item listed above, which would provide for the designation of ''any other product, article, or means of conveyance'' as a regulated article, would be intended to address the risks presented by, for example, a truck that may have inadvertently picked up plant material or adult South American cactus moths while driving through fields, thus enabling an inspector to designate that truck as a regulated article in order to ensure that any necessary risk-mitigating measures are carried out.

Quarantined Areas (§ 301.55–3)

Paragraph (a) of proposed § 301.55–3 would provide the criteria for the inclusion of States, or portions of States, in the list of quarantined areas. Under these criteria, any State or portion of a State in which the South American cactus moth is found by an inspector, in which the Administrator has reason to believe that the South American cactus moth is present, or that the Administrator considers necessary to regulate due to the area's inseparability for quarantine enforcement purposes from localities in which the South American cactus moth has been found, would be listed as a quarantined area. These proposed criteria would also provide that we would designate less than an entire State as a quarantined area only if we determine that the State has adopted and is enforcing restrictions on the intrastate movement of regulated articles that are equivalent to those imposed on the interstate movement of regulated articles and that the designation of less than the entire State as a quarantined area would prevent the interstate spread of the South American cactus moth. In practice, the latter determination—that the designation of less than an entire State would prevent the interstate spread of the South American cactus moth—would be based, at least in part, on our finding that infestations are confined to the quarantined areas as a result of natural breaks between infested areas and noninfested areas, known as zones, and would eliminate the need for designating an entire State as a quarantined area. APHIS would likely adopt existing buffer zones that have been established under the States' current eradication programs.

Paragraph (b) of proposed § 301.55–3 would provide that we may temporarily designate any nonquarantined area in a State as a quarantined area when we determine that the nonquarantined area meets the criteria for designation as a quarantined area described in § 301.55–3(a). In such cases, we would give the owner, person in possession of the nonquarantined area, or, in the case of publicly owned land, the person responsible for the management of the nonquarantined area, a copy of the regulations along with written notice of the area's temporary designation as a quarantined area, after which time the interstate movement of any regulated article from the area would be subject to the regulations. This proposed provision would be necessary to prevent the spread of the South American cactus moth during the time between the detection of the pest and the time a document designating the area as a quarantined area could be made effective and published in the **Federal Register**. In the event that an area's designation as a temporary quarantined area is terminated, we would provide written notice of that termination to the owner or person in possession of the area as soon as would be practicable.

Paragraph (c) would list the areas quarantined because of the presence of the South American cactus moth. Surveys conducted by State agriculture departments in the States of Alabama, Florida, Georgia, and South Carolina during recent years have confirmed the presence of South American cactus moth in both wild and cultivated cactus plants. If these States were to delimit their infestations and implement intrastate quarantines, we would be able to narrow the scope of the quarantine. However, none of these States currently have intrastate quarantines in place. Therefore, we are proposing to designate

the States of Alabama, Florida, Georgia, and South Carolina, in their entirety, as quarantined areas.

Conditions Governing the Interstate Movement of Regulated Articles From Quarantined Areas (§ 301.55–4)

This section would provide criteria for moving regulated articles interstate from quarantined areas. Paragraph (a) would provide that any regulated articles from a quarantined area may be moved interstate if moved with a certificate or limited permit issued and attached in accordance with proposed §§ 301.55–5 and 301.55–8. Seeds and canned, preserved, or frozen pads or fruits of regulated cactus genera would not considered to be regulated articles because the life stages of the South American cactus moth either do not inhabit the specified plant part (i.e., seeds) or would be destroyed by the specified handling, processing, or utilization. As noted previously, we are planning to issue a separate rulemaking to address the risks from cactus moth host material moving into the continental United States from Hawaii and U.S. territories and from foreign countries where South American cactus moth is known to occur.

Paragraph (b) would provide that any regulated articles from a quarantined area may be moved interstate without a certificate or limited permit if the regulated article:

- Originated outside the quarantined area and is either moved in an enclosed vehicle or is completely enclosed by a covering (such as canvas, plastic, or other closely woven cloth) adequate to prevent access by South American cactus moths while moving through the quarantined area;
- Is kept in an enclosed vehicle or the enclosure that contains the regulated article is not opened, unpacked, or unloaded in the quarantined area and the point of origin of the regulated article is indicated on the waybill; and
- Moved through the quarantined area without stopping except for refueling or for traffic conditions, such as traffic lights or stop signs.

Paragraph (c) would provide that a certificate or limited permit would also not be required if the regulated article is moved by the USDA for experimental or scientific purposes in accordance with conditions specified on a departmental permit and with a tag or label bearing the number of the departmental permit issued for the regulated article attached to the outside of the container of the regulated article or attached to the regulated article itself if not in a container.

Issuance and Cancellation of Certificates and Limited Permits (§ 301.55–5)

Certificates would be issued for regulated articles when an inspector or other person authorized to issue certificates finds that the articles have met the conditions of the regulations and may be safely moved interstate without further restrictions.

Specifically, proposed § 301.55–5(a) would provide that a certificate may be issued for the interstate movement of a regulated article by an inspector, or a person operating under a compliance agreement in accordance with proposed § 301.55–6, if the inspector or other authorized person determines that:

- The regulated article to be moved and all other regulated articles on the premises have been grown and maintained indoors in a shadehouse or greenhouse and no other cactus moth host material exists on the premises outside of a shadehouse or greenhouse;
- The regulated article to be moved and all other regulated articles on the premises are maintained on benches that are kept separate from benches containing non-host material;
- The regulated article to be moved and all other regulated articles on the premises have been placed on a 21-day insecticide spray cycle and have been sprayed with *Bacillus thuringiensis* subsp. *kurstaki,* carbaryl, deltamethrin, spinosad, or imidaploprid if maintained in the nursery for longer than 21 days;
- The regulated article to be moved has been sprayed with *Bacillus thuringiensis* subsp. *kurstaki,* carbaryl, spinosad, or imidaploprid 3 to 5 days prior to shipment and inspected and found free of cactus moth egg sticks and larval damage; and
- If the regulated article was moved into the premises from another premises in a quarantined area listed in § 301.55–3, it was immediately placed inside the shadehouse or greenhouse and sprayed with *Bacillus thuringiensis* subsp. *kurstaki,* carbaryl, spinosad, or imidaploprid within 24 hours.

Limited permits would be issued for regulated articles when an inspector finds that, because of a possible pest risk, the articles may be safely moved interstate only subject to further restrictions, such as movement to limited areas or movement for limited purposes. Proposed § 301.55–5 would explain the conditions under which a limited permit would be issued.

Specifically, proposed § 301.55–5(b) would provide that a limited permit may be issued by an inspector for the interstate movement of a regulated article if the inspector determines that the article (1) is to be moved interstate to a specified destination for specified handling, processing or utilization, and that the movement will not result in the spread of the South American cactus moth because life stages of the South American cactus moth will be destroyed by the specified handling, processing, or utilization; (2) will be moved in compliance with any additional conditions imposed by the Administrator under section 414 of the Plant Protection Act (7 U.S.C. 7714) to prevent the spread of the South American cactus moth; and (3) is eligible for interstate movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

We would include a footnote that would provide an address for securing the addresses and telephone numbers of the local Plant Protection and Quarantine (PPQ) offices from which the services of an inspector may be requested.

Paragraph (c) of proposed § 301.55–5 would provide that any person who has entered into and is operating under a compliance agreement may issue a certificate or limited permit for the interstate movement of a regulated article after an inspector has determined that the article is otherwise eligible for a certificate under § 301.55–5(a) or a limited permit under § 301.55–5(b).

Also, § 301.55–5(d) would contain provisions for the cancellation of a certificate or limited permit by an inspector if the inspector determines that the holder of the certificate or limited permit has not complied with conditions of the regulations. This paragraph would also contain provisions for notifying the holder of the reasons for the cancellation and for holding a hearing if there is any conflict concerning any material fact in the event that the person wishes to appeal the cancellation.

Compliance Agreements and Cancellation (§ 301.55–6)

Proposed § 301.55–6 would provide for the use of and cancellation of compliance agreements. Compliance agreements would be provided for the convenience of persons who are involved in the growing, handling, or moving of regulated articles from quarantined areas. A person would be able to enter into a compliance agreement when an inspector has determined that the person requesting the compliance agreement has been made aware of the requirements of the regulations and the person has agreed to comply with the requirements of the regulations and the provisions of the

compliance agreement. This section would contain a footnote that explains where compliance agreement forms may be obtained.

Proposed § 301.55–6 would also provide that an inspector may, either orally or in writing, cancel the compliance agreement upon finding that a person who has entered into the agreement has failed to comply with any of the provisions of the regulations or the terms of the compliance agreement. If the cancellation is oral, the cancellation and the reasons for the cancellation would be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been canceled would be able to appeal the decision, in writing, to the Administrator, within 10 days after receiving written notification of the cancellation and would have to state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully canceled. As promptly as circumstances allow, the Administrator would grant or deny the appeal, in writing, stating the reasons for the decision.

Assembly and Inspection of Regulated Articles (§ 301.55–7)

Proposed § 301.55–7 would provide that any person (other than an inspector or a person operating under a compliance agreement) who desires to move interstate regulated articles which must be accompanied by a certificate or limited permit would have to request that an inspector inspect the articles for movement at least 48 hours before the desired movement. The regulated articles would have to be assembled in a place and manner directed by the inspector.

Attachment and Disposition of Certificates and Limited Permits (§ 301.55–8)

Proposed § 301.55–8 would require the certificate or limited permit issued for movement of the regulated article to be attached, during the interstate movement, to the regulated article, or to a container carrying the regulated article, or to the consignee's copy of the accompanying waybill. If the certificate or limited permit is attached to the consignee's copy of the waybill, the regulated article would have to be sufficiently described on the certificate or limited permit and on the waybill to identify the regulated article. Further, the section would require that the carrier or the carrier's representative furnish the certificate or limited permit to the consignee listed on the certificate or limited permit upon arrival at the location provided on the certificate or limited permit.

Costs and Charges (§ 301.55–9)

Proposed § 301.55–9 would explain the APHIS policy that the services of an inspector that are needed to comply with the regulations would be provided without cost between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays, to persons requiring those services, but that APHIS would not be responsible for any other costs or charges incident to inspections or compliance with the provisions of the quarantine and regulations other than for the services of the inspector.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

South American cactus moth is a pest that attacks primarily prickly pear cacti that can live in arid and coastal areas. In the continental United States, South American cactus moth has been found in Florida, Georgia, South Carolina, and Alabama. It has also been found in Hawaii, Puerto Rico, and the U.S. Virgin Islands, as well as more than 30 foreign countries. Hosts for the pest are the live plants and plant parts (except seeds) of *Consolea, Cylindropuntia, Nopalea,* and *Opuntia,* four genera of the botanical family Cactaceae. *Opuntia* spp. are commonly known as prickly pear cactus.

Opuntia, in particular, has both commercial and ecological value. Most of its commercial value lies in its use as an ornamental plant material for landscaping projects in the more arid areas of the United States Southwest. *Opuntia* also has a small but growing commercial value as a food crop, as there is demand in the United States for edible cactus leaves and fruit, especially in the Hispanic community. Other uses of *Opuntia* include emergency forage for cattle during periods of drought and wildlife feed for game animals. In the United States southwest desert, *Opuntia* plants play a key role in sustaining ecosystems, providing habitat for wildlife and protection against soil erosion. A healthy desert ecosystem also has economic benefits, since it promotes increased tourism, recreation, and hunting.[1]

In this rule we are proposing to establish regulations to restrict the interstate movement of South American cactus moth host material from quarantined areas on the U.S. mainland to non-quarantined areas. Under this rule, such movement would be prohibited, except under certain conditions. Currently, there is no restriction on the interstate movement of South American cactus moth host material from areas on the mainland that have been found to be infested with the pest. In addition, the rule would designate the States of Alabama, Florida, Georgia, and South Carolina, in their entirety, as quarantined areas for South American cactus moth.

All current growers in the four-State quarantined area are believed to produce host materials primarily for use in dish-gardens of mixed species. For these growers, the proposed rule should not be particularly problematic. This is because other species of cactus could easily be substituted for host species cactus in dish-gardens shipped to non-quarantined areas. However, the rule could pose a problem for would-be growers of prickly pear cactus for the small but growing food market.[2] This is because, if found to be infested with South American cactus moth, they might be unable to ship fresh cactus leaves and fruit to non-quarantined areas, including some areas with large Hispanic populations. Although these growers would be able to ship canned, preserved, or frozen cactus food from a quarantined area, consumers prefer the fresh varieties.[3] The number of would-be growers of cactus for use as food in the four-State quarantined area is unknown, but it is likely to be very small, based on the small number of ornamental cactus growers in that area.

To the extent that it prevents the spread of *C. cactorum* on the mainland, the rule would benefit U.S. entities,

[1] Preliminary assessment of the potential impacts and risks of the invasive cactus moth, Cactoblastis cactorum Berg, in the United States and Mexico; Final Report to the International Atomic Energy Agency, April 25, 2005.

[2] The Florida Department of Plant Industry recently promoted the use of prickly pear cactus as a niche crop to fill the Hispanic market demand.

[3] In a 2004 report on cactus leaf pads (nopalitos), the Florida Department of Agriculture and Consumer Services stated that consumers prefer fresh nopalitos. However, the report also stated that shipping them is difficult, a factor that would seem to lessen the negative impact of the rule's restriction on the movement of fresh cactus from the quarantined areas. The report stated that ''cactus pads are thorny and the consumer has the unpleasant task of cleaning them. If the nopalitos are shipped cleaned of thorns they tend to oxidize and have a short shelf life. Some companies dethorn and dice the Nopales, seal them in plastic bags and ship them in refrigerated trucks to U.S. markets, but the quality is low, the price is high, and they spoil within 2–3 days.'' See Nopalitos: Florida's New Niche Production Commodity, Final Report for Agreement #12–25–G–0382.

primarily those in the ornamental nursery and landscape industries in the Southwest. Most commercial nurseries that produce prickly pear cacti as ornamental plants are located in Arizona, followed by California. In Arizona, there are an estimated 40 to 50 such producers in the Phoenix area alone; in California, there are an estimated 30 growers of ornamental cacti. U.S. production of prickly pear cactus for edible use is limited largely to California; many, if not most, cactus growers are small in size.[4]

Based on available information, we conclude that adoption of the rule would not have a significant economic impact on a substantial number of small entities, if for no other reason than few entities, large or small, are likely to be affected. Although hard data are not available, informed APHIS staff estimate that there are no more than about five producers of the host material in the four-State quarantined area, all of whom are believed to be Florida nurseries that produce prickly pear cactus, usually for use in dish-gardens of mixed species. The bulk of U.S. prickly pear cactus production, both for use as an ornamental plant and for use as an edible food, is concentrated in the Southwest, not the four Southeastern States designated as quarantined areas.[5]

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

[4] Source: Lynn Garrett (APHIS) and Irish, M. 2001. The Ornamental Prickly Pear Industry in the Southwestern United States. Florida Entomologist 84(4).

[5] See footnote 4.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2006–0153. Please send a copy of your comments to: (1) Docket No. APHIS–2006–0153, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

APHIS is proposing to establish regulations to quarantine the States of Alabama, Florida, Georgia, and South Carolina because of South American cactus moth and restrict the interstate movement of regulated articles from the quarantined areas. In order to move regulated articles interstate from the quarantined area, regulated parties would have to obtain certificates or limited permits, and they would be able to enter into compliance agreements with APHIS. We are soliciting comments from the public (as well as affected agencies) concerning our information collection and recordkeeping requirements. These comments will help us:

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

(2) Evaluate the accuracy of our estimate of the burden of the information collection, 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 information collection on those who are to respond (such as 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).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.6 hours per response.

Respondents: State plant regulatory officials.

Estimated annual number of respondents: 3.

Estimated annual number of responses per respondent: 10.

Estimated annual number of responses: 30.

Estimated total annual burden on respondents: 18 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we propose to amend 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 issued under Sec. 204, Title II, Public Law 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 issued under Sec. 203, Title II, Public Law 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

2. Part 301 is amended by adding a new Subpart—South American Cactus Moth, §§ 301.55 through 301.55–9, to read as follows:

Subpart—South American Cactus Moth

Sec.

301.55 Restrictions on interstate movement of regulated articles.
301.55–1 Definitions.
301.55–2 Regulated articles.
301.55–3 Quarantined areas.

301.55–4 Conditions governing the interstate movement of regulated articles from quarantined areas.
301.55–5 Issuance and cancellation of certificates and limited permits.
301.55–6 Compliance agreements and cancellation.
301.55–7 Assembly and inspection of regulated articles.
301.55–8 Attachment and disposition of certificates and limited permits.
301.55–9 Costs and charges.

Subpart—South American Cactus Moth

§ 301.55 Restrictions on interstate movement of regulated articles.

No person may move interstate from any quarantined area any regulated article except in accordance with this subpart.[1]

§ 301.55–1 Definitions.

Administrator. The Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator.

Animal and Plant Health Inspection Service (APHIS). The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

Cactus plants. Any of various fleshy-stemmed plants of the botanical family Cactaceae.

Certificate. A document in which an inspector or person operating under a compliance agreement affirms that a specified regulated article is free of South American cactus moth and may be moved interstate to any destination.

Compliance agreement. A written agreement between APHIS and a person engaged in growing, handling, or moving regulated articles, wherein the person agrees to comply with this subpart.

Departmental permit. A document issued by the Administrator in which he or she affirms that interstate movement of the regulated article identified on the document is for scientific or experimental purposes and that the regulated article is eligible for interstate movement in accordance with § 301.55–4(c).

Infestation. The presence of the South American cactus moth or the existence of circumstances that makes it reasonable to believe that the South American cactus moth may be present.

Inspector. Any employee of APHIS or other person authorized by the Administrator to perform the duties required under this subpart.

Interstate. From any State into or through any other State.

Limited permit. A document in which an inspector or person operating under a compliance agreement affirms that the regulated article identified on the document is eligible for interstate movement in accordance with § 301.55–5(b) only to a specified destination and only in accordance with specified conditions.

Moved (move, movement). Shipped, offered for shipment, received for transportation, transported, carried, or allowed to be moved, shipped, transported, or carried.

Person. Any association, company, corporation, firm, individual, joint stock company, partnership, society, or other entity.

Plant Protection and Quarantine (PPQ). The Plant Protection and Quarantine program of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

Quarantined area. Any State, or any portion of a State, listed in § 301.55–3(c) or otherwise designated as a quarantined area in accordance with § 301.55–3(b).

Regulated article. Any article listed in § 301.55–2(a) or (b), or otherwise designated as a regulated article in accordance with § 301.55–2(c).

South American cactus moth. The live insect known as the South American cactus moth, *Cactoblastis cactorum*, in any life stage (egg, larva, pupa, adult).

State. The District of Columbia, Puerto Rico, the Northern Mariana Islands, or any State, territory, or possession of the United States.

§ 301.55–2 Regulated articles.

The following are regulated articles:

(a) The South American cactus moth, in any living stage of its development.[2]

(b) Cactus plants or parts thereof (excluding seeds and canned, preserved, or frozen pads or fruits) of the following genera: *Consolea*, *Cylindropuntia*, *Nopalea*, and *Opuntia*.

(c) Any other product, article, or means of conveyance not listed in paragraphs (a) or (b) of this section that an inspector determines presents a risk of spreading the South American cactus moth, after the inspector provides written notification to the person in possession of the product, article, or means of conveyance that it is subject to the restrictions of this subpart.

§ 301.55–3 Quarantined areas.

(a) Except as otherwise provided in paragraph (b) of this section, the Administrator will list as a quarantined area in paragraph (c) of this section each State, or each portion of a State, in which the South American cactus moth has been found by an inspector, in which the Administrator has reason to believe that the South American cactus moth is present, or that the Administrator considers necessary to quarantine because of its inseparability for quarantine enforcement purposes from localities where South American cactus moth has been found. Less than an entire State will be designated as a quarantined area only if the Administrator determines that:

(1) The State has adopted and is enforcing restrictions on the intrastate movement of the regulated articles that are equivalent to those imposed by this subpart on the interstate movement of regulated articles; and

(2) The designation of less than the entire State as a quarantined area will be adequate to prevent the interstate spread of the South American cactus moth.

(b) The Administrator or an inspector may temporarily designate any nonquarantined area in a State as a quarantined area in accordance with the criteria specified in paragraph (a) of this section. The Administrator will give a copy of this regulation along with written notice of the temporary designation to the owner or person in possession of the nonquarantined area, or, in the case of publicly owned land, to the person responsible for the management of the nonquarantined area. Thereafter, the interstate movement of any regulated article from an area temporarily designated as a quarantined area will be subject to this subpart. As soon as practicable, the area will be added to the list in paragraph (c) of this section or the designation will be terminated by the Administrator or an inspector. The owner or person in possession of, or, in the case of publicly owned land, the person responsible for the management of, an area for which designation is terminated will be given written notice of the termination as soon as practicable.

(c) The following areas are designated as quarantined areas:

Alabama

The entire State.

Florida

The entire State.

Georgia

The entire State.

[1] Any properly identified inspector is authorized, upon probable cause, to stop and inspect persons and means of conveyance moving in interstate commerce and to hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of regulated articles as provided in sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754).

[2] Permit and other requirements for the interstate movement of South American cactus moths are contained in part 330 of this chapter.

South Carolina

The entire State.

§ 301.55–4 Conditions governing the interstate movement of regulated articles from quarantined areas.

Any regulated article may be moved interstate from a quarantined area[3] only if moved under the following conditions:

(a) With a certificate or limited permit issued and attached in accordance with §§ 301.55–5 and 301.55–8;

(b) Without a certificate or limited permit if:

(1) The regulated article originated outside the quarantined area and is either moved in an enclosed vehicle or is completely enclosed by a covering (such as canvas, plastic, or other closely woven cloth) adequate to prevent access by South American cactus moths while moving through the quarantined area; and

(2) The point of origin of the regulated article is indicated on the waybill, and the enclosed vehicle or the enclosure that contains the regulated article is not opened, unpacked, or unloaded in the quarantined area; and

(3) The regulated article is moved through the quarantined area without stopping except for refueling or for traffic conditions, such as traffic lights or stop signs.

(c) Without a certificate or limited permit if the regulated article is moved:

(1) By the United States Department of Agriculture for experimental or scientific purposes;

(2) Pursuant to a departmental permit issued by the Administrator for the regulated article;

(3) Under conditions specified on the departmental permit and found by the Administrator to be adequate to prevent the spread of the South American cactus moth; and

(4) With a tag or label bearing the number of the departmental permit issued for the regulated article attached to the outside of the container of the regulated article or attached to the regulated article itself if not in a container.

§ 301.55–5 Issuance and cancellation of certificates and limited permits.

(a) An inspector[4] may issue a certificate for the interstate movement of a regulated article if the inspector determines that:

(1) The regulated article to be moved and all other regulated articles on the premises have been grown and maintained indoors in a shadehouse or greenhouse and no other cactus moth host material exists on the premises outside of a shadehouse or greenhouse;

(2) The regulated article to be moved and all other regulated articles on the premises are maintained on benches that are kept separate from benches containing non-host material;

(3) The regulated article to be moved and all other regulated articles on the premises have been placed on a 21-day insecticide spray cycle and have been sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid if maintained in the nursery for longer than 21 days;

(4) The regulated article to be moved has been sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid 3 to 5 days prior to shipment and inspected and found free of cactus moth egg sticks and larval damage; and

(5) If the regulated article was moved into the premises from another premises in a quarantined area listed in § 301.55–3, it was immediately placed inside the shadehouse or greenhouse and sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid within 24 hours.

(b) An inspector will issue a limited permit for the interstate movement of a regulated article if the inspector determines that:

(1) The regulated article is to be moved interstate to a specified destination for specified handling, processing, or utilization (the destination and other conditions to be listed in the limited permit), and this interstate movement will not result in the spread of the South American cactus moth because life stages of the South American cactus moth will be destroyed by the specified handling, processing, or utilization;

(2) It is to be moved in compliance with any additional conditions that the Administrator may impose under section 414 of the Plant Protection Act (7 U.S.C. 7714) in order to prevent the spread of the South American cactus moth; and

(3) It is eligible for unrestricted movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

(c) Certificates and limited permits for the interstate movement of regulated articles may be issued by an inspector or person operating under a compliance agreement. A person operating under a compliance agreement may issue a certificate or limited permit for interstate movement of a regulated article after an inspector has determined that the regulated article is eligible for a certificate or limited permit in accordance with paragraphs (a) or (b) of this section.

(d) Any certificate or limited permit that has been issued may be canceled, either orally or in writing, by an inspector whenever the inspector determines that the holder of the limited permit has not complied with this subpart or any conditions imposed under this subpart. If the cancellation is oral, the cancellation will become effective immediately, and the cancellation and the reasons for the cancellation will be confirmed in writing as soon as circumstances permit. Any person whose certificate or limited permit has been canceled may appeal the decision in writing to the Administrator within 10 days after receiving the written cancellation notice. The appeal must state all of the facts and reasons that the person wants the Administrator to consider in deciding the appeal. A hearing may be held to resolve a conflict as to any material fact. Rules of practice for the hearing will be adopted by the Administrator. As soon as practicable, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision.

§ 301.55–6 Compliance agreements and cancellation.

(a) Any person engaged in growing, handling, or moving regulated articles may enter into a compliance agreement when an inspector determines that the person is aware of this subpart, agrees to comply with its provisions, and agrees to comply with all the provisions contained in the compliance agreement.[5]

(b) Any compliance agreement may be canceled, either orally or in writing, by an inspector whenever the inspector finds that the person who has entered into the compliance agreement has failed to comply with this subpart or the terms of the compliance agreement. If the cancellation is oral, the cancellation and the reasons for the cancellation will be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been canceled may appeal the decision, in writing, to the Administrator, within 10 days after receiving written notification

[3] Requirements under all other applicable Federal domestic plant quarantines and regulations must also be met.

[4] Services of an inspector may be requested by contacting local offices of Plant Protection and Quarantine, which are listed in telephone directories.

[5] Compliance agreement forms are available without charge from local Plant Protection and Quarantine offices, which are listed in telephone directories.

of the cancellation. The appeal must state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully canceled. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

§ 301.55–7 Assembly and inspection of regulated articles.

(a) Any person (other than a person authorized to issue limited permits under § 301.55*5(c)) who desires a certificate or limited permit to move a regulated article interstate must request an inspector[6] to examine the articles as far in advance of the desired interstate movement as possible, but no less than 48 hours before the desired interstate movement.

(b) The regulated article must be assembled at the place and in the manner the inspector designates as necessary to comply with this subpart.

§ 301.55–8 Attachment and disposition of certificates and limited permits.

(a) A certificate or limited permit required for the interstate movement of a regulated article must, at all times during the interstate movement, be:

(1) Attached to the outside of the container containing the regulated article; or

(2) Attached to the regulated article itself if not in a container; or

(3) Attached to the consignee's copy of the accompanying waybill. If the certificate or limited permit is attached to the consignee's copy of the waybill, the regulated article must be sufficiently described on the certificate or limited permit and on the waybill to identify the regulated article.

(b) The certificate or limited permit for the interstate movement of a regulated article must be furnished by the carrier or the carrier's representative to the consignee listed on the certificate or limited permit upon arrival at the location provided on the certificate or limited permit.

§ 301.55–9 Costs and charges.

The services of the inspector during normal business hours (8 a.m. to 4:30 p.m., Monday through Friday, except holidays) will be furnished without cost. APHIS will not be responsible for all costs or charges incident to inspections or compliance with the provisions of the quarantine and regulations in this subpart, other than for the services of the inspector.

Done in Washington, DC, this 5th day of February 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–2477 Filed 2–8–08; 8:45 am]

BILLING CODE 3410–34–P

[6] See footnote 4.

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AA99

Weighing, Feed, and Swine Contractors

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Proposed rule.

SUMMARY: We propose to amend four existing scales and weighing regulations issued under the Packers and Stockyards Act (P&S Act) to ensure that payments by live poultry dealers and swine contractors to poultry and swine production contract growers are based on accurate weighing of both inputs and outputs. We propose to amend a regulation on scale tickets to reduce redundant wording and clarify weighing procedures. We propose to amend a regulation on reweighing to add swine contractors to the list of firms that must comply, and to add feed to the list of items for which reweighing may be requested. We propose to amend two regulations on weighing livestock and poultry to add weighing processes for feed, to add a specific time limit for weighing poultry, and to add swine contractors to the list of firms that must comply with care and promptness requirements.

DATES: We will consider comments we receive by April 11, 2008.

ADDRESSES: We invite you to submit comments on this proposed rule. You may submit comments by any of the following methods:

- E-Mail: Send comments via electronic mail to *comments.gipsa@usda.gov.*
- Mail: Send hardcopy written comments to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643–S, Washington, DC 20250–3604.
- Fax: Send comments by facsimile transmission to: (202) 690–2755.
- Hand Delivery or Courier: Deliver comments to: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643–S, Washington, DC 20250–3604.
- Federal e-Rulemaking Portal: Go to *http://www.regulation.gov.* Follow the on-line instruction for submitting comments.

Instructions: All comments should refer to the date and page number of this issue of the **Federal Register**.

Background Documents: Regulatory analyses and other documents relating to this action will be available for public inspection in the above office during regular business hours.

Read Comments: All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call GIPSA Management Support Services staff at (202) 720–7486 to arrange a public inspection of comments.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720–7363, *s.brett.offutt@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Grain Inspection, Packers and Stockyards Administration (GIPSA) is responsible for enforcement of the P&S Act. Under authority delegated to us by the Secretary of Agriculture, we are authorized (7 U.S.C. 228) to make those regulations necessary to carry out the provisions of the P&S Act. We propose to amend the following regulations:

- Section 201.49—Requirements regarding scale tickets evidencing weighing of livestock, live poultry and feed,
- Section 201.76—Reweighing,
- Section 201.82—Care and promptness in weighing and handling livestock and live poultry, and
- Section 201.108–1—Instructions for weighing live poultry.

Violations of these sections of the regulations are deemed to be unfair or deceptive practices and constitute violations of § 202 (7 U.S.C. 192) or § 312 (7 U.S.C. 213) of the P&S Act. Packers and swine contractors may be assessed civil penalties of up to $11,000 (7 U.S.C. 193) for each violation of § 202. Market agencies and dealers may be assessed civil penalties of as much as $11,000 (7 U.S.C. 213) for each violation of § 312. Given the consequences for violating these regulations, it is important that these regulations be clear. Therefore, we propose to amend § 201.49 and § 201.108–1 to remove redundant language.

We also propose to revise § 201.82 and § 201.108–1 to prohibit practices

that we consider to be unfair and deceptive. Specifically, the practices of

- delaying the weighing of livestock and poultry,
- loading poultry from multiple growers into one trailer load,
- failing to use scales correctly, and
- failing to accurately weigh unused feed at the time it is collected could result in incorrect settlement payments to poultry and livestock growers. The proposed rule would specifically prohibit these unfair and deceptive practices. We also propose to amend paragraphs of § 201.76, 201.82, and 201.108–1 that currently apply only to weighing poultry and/or livestock to also include feed. The intended purpose of all the proposed amendments is to ensure that the weighing process is fair and accurate for all growers. Since growers are paid based on their efficiency in converting feed to livestock and poultry, it is important that both the input (feed) and the output (poultry and livestock) be weighed accurately.

A delay in the weighing of poultry or livestock at the slaughter facility can result in a lower payout to the grower because the delay increases the likelihood of ''shrinkage'' of the live poultry or livestock due to death, injury, and other avoidable losses. Loading poultry from several growers onto a single trailer load (a ''split load'') is one cause of such delays and the resulting avoidable losses. We therefore propose to prohibit loading live poultry from multiple growers onto a single trailer load. There is a related issue involving potentially inaccurate weighing when live poultry dealers and swine contractors pick up unused feed from multiple growers and do not weigh the feed on a certified scale at the time of pick up before combining the feed into a single load. We propose that feed for each grower be weighed on a certified scale and that a scale ticket be generated at the time the feed is picked up from each grower, before proceeding to another grower to pick up unused feed. We also propose new requirements for the correct use of on-board weighing systems to ensure that unused feed is weighed accurately at the time of pickup, although we are not requiring that on-board weighing systems be used. The purpose of these requirements is to ensure that growers are compensated based on an accurate accounting of inputs. Without these new requirements for accurate weighing of unused feed, growers could be compensated incorrectly based on an inaccurate accounting of feed used.

Description of Proposed Amendments

We are proposing amendments that both clarify language in current requirements and that add new requirements to ensure fair and accurate weighing of live poultry, swine, and feed.

The proposed amendments that clarify existing requirements involve scale tickets and live poultry weighing. The current § 201.49, ''Requirements regarding scale tickets evidencing weighing of livestock, live poultry, and feed'', contains redundant wording regarding scale tickets issued when weighing livestock, live poultry and feed. The requirements for numbering scale tickets and executing sufficient copies are largely the same for livestock, live poultry, and feed, so we propose to consolidate the general requirements into one new paragraph, § 201.49(a), followed by separate paragraphs containing the specific requirements for livestock, live poultry, and feed. We propose to require that a zero balance be recorded and that the time the zero balance was determined be printed on the scale ticket, consistent with other weighing regulations involving scale tickets. We propose to remove language in § 201.108–1, ''Instructions for weighing live poultry,'' regarding scale tickets that duplicates language in § 201.49. These proposed amendments would avoid potential confusion caused by redundant language and make more clear the requirements that are unique to each commodity.

We also propose to clarify language requiring the number of the person who performed the weighing service to make it clear we mean the identification number of that individual, rather than the telephone number. We propose to clarify language regarding the requirement to record the license number of the truck and trailer, to clarify that this requirement applies to situations involving weighing just the truck, or just the trailer, or both together. We also propose to make language requiring the license number or other identification number of the truck and/or trailer consistent throughout this section.

The other amendments we propose will impose new requirements on live poultry dealers and swine contractors to ensure more accurate weighing for all growers. The proposed amendments that involve new requirements are as follows:

We propose to amend § 201.76, ''Reweighing'' to add ''swine contractors'', to the list of firms required to comply with this regulation. As defined in the Packers and Stockyards Act, as amended, a swine contractor means any person engaged in the business of obtaining swine under a swine production contract for the purpose of slaughtering the swine or selling the swine for slaughter, if the swine is obtained by the person in commerce; or the swine (including products from the swine) obtained by the person is sold or shipped in commerce (7 U.S.C. 182(a)(12)). We also propose to add ''feed'' to the list of items for which reweighing is required on request of any authorized representative of the Secretary.

We propose to amend paragraph (a) of § 201.82, ''Care and Promptness in Weighing and Handling Livestock and Live Poultry'', to include ''swine contractors'' in the list of firms required to comply with this regulation. Presently, paragraph (b) of § 201.82 requires that live poultry dealers purchasing poultry under growout contracts obtain the gross weight for each load of poultry immediately upon arrival at the processing plant. We propose to add a sentence at the end of this paragraph to require that the weighing process begin without delay and to establish the time period within which live poultry dealers must complete the weighing process. Finally, we propose to add a new paragraph (c) to § 201.82 to prohibit the use of split transport trailer loads by live poultry dealers. Split loads of live poultry are loads containing flocks from more than one grower. We believe prohibiting split loads will eliminate the likelihood of live poultry dealers failing to weigh each grower's flock promptly. Failure to weigh poultry promptly can result in weight loss, injury, death or other avoidable loss. We also propose minor clarifying language changes to § 201.82, including noting that this section applies whenever the weight of live poultry is a factor in calculating payment to the grower.

We propose to modify § 201.108–1, ''Instructions for Weighing Live Poultry'', to require additional procedures to ensure accurate weighing. We also propose to add ''feed'' to the title of this section. We propose to modify § 201.108–1 to add language to specifically address the weighing of feed at the time of pickup; § 201.108–1 currently addresses only the weighing of live poultry at the time of pickup. The proposed changes add new procedures for weighing unused feed picked up from one or more poultry growers in a single load, including requirements for operating and maintaining onboard weighing systems and requirements for onboard weighing tickets. The proposed changes will ensure that unused feed is

accurately weighed at the time it is picked up from the grower. Failure to weigh unused feed at the time of pickup, or failure to use appropriately calibrated equipment, can result in inaccurate estimates of weight and inaccurate payment to the grower. Both feed (inputs) and live poultry (outputs) need to be weighed accurately in order to ensure that growers are compensated fairly.

These proposed amendments all have the same purpose, which is to ensure fair and accurate weighing of feed, poultry, and livestock. We believe that without these amendments, there is significant potential for live poultry dealers and swine contractors to engage in unfair and deceptive practices by delaying the weighing of livestock, using scales incorrectly or inaccurately, and denying requests for reweighing.

Options Considered

The only alternative we considered was to make no changes. We believe these amendments are necessary to make §§ 201.49, 201.76, 201.82 and 201.108–1 consistent with other existing regulations and to carry out provisions of the P&S Act.

Effects on Regulated Entities

There should be little to no additional cost incurred by live poultry dealers because of these amendments. Eliminating split loads may increase to a small extent the number of trips that live poultry dealers make to and from growers' facilities. However, split loads can increase processing inefficiencies at the plant, offsetting any transportation cost savings from split loads. Therefore, the prohibition on split loads should have little or no net monetary consequence for live poultry dealers.

Swine contractors may incur some additional cost to comply with these requirements but we expect the costs to be minor and to be outweighed by the benefits of helping ensure proper weighing and, ultimately, accurate payment for the livestock.

Other changes resulting from these proposed amendments should be inconsequential from a monetary standpoint.

Executive Order 12866 and Regulatory Flexibility Act

The Office of Management and Budget designated this rule as not significant for the purposes of Executive Order 12866.

We have determined that these proposed amendments would not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). An initial regulatory flexibility analysis as described in 5 U.S.C. 605 of the Regulatory Flexibility Act is not required or provided here. The proposed amendments would directly affect companies in contractual relationships with swine production contract growers and poultry growers. Most of these entities are slaughterers and processors of swine or poultry with more than 500 employees and do not meet the applicable size standards for small entities presented in the Small Business Administration regulations (13 CFR 121.201). To the extent the proposed amendments do affect small entities, the amendments will not impose substantial new expenses or changes to routine operations.

Small swine production contract growers and poultry growers should benefit indirectly from the proposed amendments, which should provide accurate and fair weighing of their inputs and outputs.

We have considered the effects of this rulemaking action under the Regulatory Flexibility Act and we believe that it will not have a significant impact on a substantial number of small entities. We welcome comments on the cost of compliance with this rule, and particularly on the impact of this proposed rule on small entities. We also welcome comments on alternatives to the proposed rule that could achieve the same purpose with less cost or burden.

Executive Order 12988

These proposed amendments have been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have a retroactive effect. This rule will not pre-empt State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments. The provisions of these amendments will not require administrative procedures be exhausted prior to judicial challenges.

Paperwork Reduction Act

These proposed amendments do not contain new information collection requirements or changes to existing information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

E-Government Act Compliance

GIPSA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 9 CFR Part 201

Reporting and recordkeeping requirements, Poultry and poultry products, Trade practices.

For the reasons set forth in the preamble, we propose to amend 9 CFR part 201 to read as follows:

PART 201—[AMENDED]

1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 222 and 228; 7 CFR 2.22 and 2.81.

2. Revise § 201.49 to read as follows:

§ 201.49 Requirements regarding scale tickets evidencing weighing of livestock, live poultry, and feed.

(a) When livestock, poultry or feed is weighed for the purpose of purchase, sale, acquisition, or settlement, a scale ticket must be issued which must be serially numbered and used in numerical sequence. Sufficient copies must be executed to provide a copy to all parties to the transaction. Unused and partially executed scale tickets must not be left exposed or accessible to other parties and must be kept under lock when the weigher is not at the scale. In instances where the weight values are automatically recorded directly on the account of purchase, account of sale, or other basic transaction record, this record may serve in place of a scale ticket.

(b) *Livestock.* When livestock is weighed for the purpose of purchase or sale, or when livestock is purchased on a carcass weight or carcass grade and weight basis, the hot carcass weights must be recorded using a scale equipped with a printing device, and such printed weights must be retained as part of the person or firm's business records to substantiate settlement on each transaction. In instances where the weight values are automatically recorded directly on the account of purchase, account of sale, or other basic transaction record, this record may serve in place of a scale ticket. Scale tickets or other basic transaction records issued under this section must show:

(1) The name and location of the agency performing the weighing service;

(2) The date of the weighing;

(3) The name of the buyer and seller or consignor, or a designation by which they may be readily identified;

(4) The number of head;

(5) Kind of livestock;

(6) Actual weight of each draft of livestock; and

(7) The name, initials, or identification number of the person who weighed the livestock, or if required by State law, the signature of the weigher.

(c) *Poultry.* When live poultry is weighed for the purpose of purchase, sale, acquisition, or settlement by a live poultry dealer, the scale ticket or other basic transaction record must show:

(1) The name of the agency performing the weighing service;

(2) The name of the live poultry dealer;

(3) The name and address of the grower or seller, and purchaser;

(4) The name, initials, or identification number of the person who weighed the poultry, or if required by State law, the signature of the weigher;

(5) The location of the scale;

(6) The zero balance for both the gross weight and tare weight;

(7) The date and time zero balance was determined;

(8) The gross weight, tare weight, and net weight;

(9) The date and time gross weight and tare weight are determined;

(10) The number of poultry weighed;

(11) The weather conditions;

(12) Whether the driver was on or off the truck at the time of weighing, if applicable; and

(13) The license number or other identification numbers on the truck and trailer, if weighed together, or trailer if only the trailer is weighed; provided, that when live poultry is weighed on a scale other than a vehicle scale, the scale ticket or other basic transaction record need not show the information specified in paragraphs (c)(11) and (c)(12) of this section.

(d) *Feed.* Whenever feed is weighed and the weight of the feed is a factor in determining payment or settlement to a livestock producer or poultry grower, the scale ticket or other basic transaction record must show:

(1) The name of the agency performing the weighing service, or the name and location of the firm responsible for supplying the feed;

(2) The name and address of the livestock producer or poultry grower;

(3) The name, initials or identification number of the person who weighed the feed, or if required by State law, the signature of the weigher;

(4) The location of the scale;

(5) The zero balance for both the gross and tare, when applicable;

(6) The date and time zero balance was determined, when applicable;

(7) The gross weight, tare weight, and net weight of each lot assigned to an individual producer or grower, if applicable;

(8) The date and time gross weight and, if applicable, tare weight, are determined;

(9) The identification of each lot assigned to an individual producer or grower by vehicle or trailer compartment number and seal number, if applicable;

(10) Whether the driver was on or off the truck at the time of weighing, if applicable; and

(11) The license number or other identification numbers on the truck and trailer, if weighed together, or trailer if only the trailer is weighed, if applicable.

3. Revise § 201.76 to read as follows:

§ 201.76 Reweighing.

Stockyard owners, market agencies, dealers, packers, swine contractors and live poultry dealers must reweigh livestock, livestock carcasses, and live poultry or feed on request of any authorized representative of the Secretary.

4. Revise § 201.82 to read as follows:

§ 201.82 Care and promptness in weighing and handling livestock and live poultry.

(a) Each stockyard owner, market agency, dealer, packer, swine contractor and live poultry dealer must exercise reasonable care and promptness with respect to loading, transporting, holding, yarding, feeding, watering, weighing, or otherwise handling livestock, or live poultry to prevent waste of feed, shrinkage, injury, death or other avoidable loss.

(b) Whenever live poultry is obtained under a poultry growing arrangement and the weight of the live poultry is a factor in calculating payment to the grower, the poultry must be transported promptly after loading. The process of obtaining the gross weight must commence immediately upon arrival at the processing plant, holding yard, or other scale normally used for such purpose. This process, which includes but is not limited to fueling, uncoupling the trailer, changing the road tractor to a yard tractor or weighing the trailer only, must be conducted without delay; *specifically*, the time period between arrival and completion of the weighing process must not exceed thirty (30) minutes.

(c) Live poultry dealers must not place poultry from multiple growers on a single live poultry transport trailer or other live poultry transport equipment, creating what is commonly referred to as a ''split load.''

5. Amend § 201.108–1 to:

a. Revise the heading;

b. Revise the first sentence of the introductory text;

c. Revise paragraph (a)(1);

d. Remove paragraph (a)(7);

e. Remove the word ''sensitiveness'' and add in its place the word ''sensitivity'' in (b)(5);

f. Add paragraphs (c) (1) (v) and (vi);

g. Add paragraph (d) (3);

h. Remove paragraph (e) (2) and redesignate paragraphs (e)(3) and (4) as paragraphs (e)(2) and (3).

§ 201.108–1 Instructions for weighing live poultry or feed.

Live poultry dealers who operate scales on which live poultry or feed is weighed for purposes of purchase, sale, acquisition, or settlement are responsible for the accurate weighing of such poultry or feed. * * *

(a) *Balancing the empty scale.* (1) The scale shall be maintained in zero balance at all times. The empty scale shall be balanced each day before weighing begins and thereafter its zero balance shall be verified before any poultry or feed is weighed. The time and date the empty scale is balanced or its zero balance verified must be mechanically printed on the scale ticket or other basic transaction record. In addition, the zero balance of the scale shall be verified whenever a weigher resumes weighing duties after an absence from the scale.

* * * * *

(c) * * *

(1) * * *

(v) A feed hopper attached to an electronic digital scale must be empty of feed and the electronic digital scale must be balanced at zero prior to first weighment for each grower or per truckload, whichever is applicable. The date and time the empty hopper scale is balanced or its zero balance verified must be mechanically printed on the scale ticket or other permanent record that must be attached to the grower's copy of the scale ticket. Further, the hopper must be empty and balanced at zero prior to each weighment.

(vi) An onboard weighing system must be level and locked in position and zero balanced prior to weighing. The date and time the onboard scale is balanced or its zero balance verified must be mechanically printed on the scale ticket or other permanent record that must be attached to the grower's copy of the scale ticket. When more than one grower's feed is weighed, the proceeding grower's gross weight can be used for the next grower's tare weight, and can be repeated until the unit is full.

* * * * *

(d) * * *

(3) When returned feed from a contract poultry grower is picked up and weighed on an onboard weighing system, the weight of the feed must be recorded and a ticket printed. That weight must be used as the tare weight when feed from another contract poultry grower is picked up on the same load.

The procedure must be followed each time another grower's feed is added to the load.

* * * * *

James E. Link,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 08–577 Filed 2–8–08; 8:45 am]

BILLING CODE 3410–KD–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM–50–57]

North Carolina Utilities Commission Public Staff; Withdrawal of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; withdrawal.

SUMMARY: The Nuclear Regulatory Commission (NRC) is withdrawing, at the petitioner's request, a petition for rulemaking (PRM–50–57) (57 FR 2059; January 17, 1992) filed by the North Carolina Utilities Commission Public Staff (petitioner). The petitioner requested that the Commission amend its regulations to substantially reduce or eliminate insurance requirements for nuclear power reactors when all the nuclear reactors on a reactor station site have been shut down or are awaiting decommissioning, and all nuclear fuel has been removed from the reactor site.

ADDRESSES: A copy of the petitioner's email submittal, dated October 29, 2007, requesting withdrawal of the petition is available for public inspection, or copying for a fee, at the NRC's Public Document Room, One White Flint North, 11555 Rockville Pike, Room O1F21, Rockville, Maryland.

Single copies of the petitioner's email submission may be obtained free of charge by writing to Michael T. Lesar, Chief, Rules, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/NRC/ADAMS/index.html*. For the petitioner's e-mail the accession number is ML080320147. From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS) that provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rules, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301–415–7163, or Toll Free: 1–800–368–5642, or by e-mail at *mtl@nrc.gov*.

Dated at Rockville, Maryland, this 5th day of February 2008.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8–2481 Filed 2–8–08; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0150; Directorate Identifier 2007–NM–325–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767–200, –300, and –400ER Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to certain Boeing Model 767 series airplanes. The existing AD currently requires a one-time inspection for missing, damaged, or incorrectly installed parts in the separation link assembly on the deployment bar of the emergency escape system on the entry or service door, and installation of new parts if necessary. This proposed AD would require replacing the separation link assembly on the applicable entry and service doors with an improved separation link assembly, and related investigative and corrective actions if necessary. This proposed AD would also remove certain airplanes from the applicability. This proposed AD results from reports that entry and service doors did not open fully during deployment of emergency escape slides, and additional reports of missing snap rings. We are proposing this AD to prevent failure of an entry or service door to open fully in the event of an emergency evacuation, which could impede exit from the airplane. This condition could result in injury to passengers or crewmembers.

DATES: We must receive comments on this proposed AD by March 27, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.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 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Keith Ladderud, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6435; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

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–2008–0150; Directorate Identifier 2007–NM–325–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://www.regulations.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

On December 21, 2001, we issued AD–2001–26–19, amendment 39–12585 (67 FR 265, January 3, 2002, for certain Boeing Model 767 series airplanes. That AD requires a one-time inspection for missing, damaged, or incorrectly installed parts in the separation link assembly on the deployment bar of the emergency escape system on the entry or service door, and installation of new parts if necessary. That AD resulted from reports that entry and service doors did not open fully during deployment of emergency escape slides on several Boeing Model 767 series airplanes. We issued that AD to prevent failure of an entry or service door to open fully in the event of an emergency evacuation, which could impede exit from the airplane. This condition could result in injury to passengers or crewmembers.

Actions Since Existing AD Was Issued

Since we issued AD–2001–26–19, we have received additional reports of missing snap rings, which are used for securing the separation link assembly. Investigation revealed that the snap rings fell off after they were possibly damaged during the inspection of the separation link assembly as required by paragraph (a) of AD–2001–26–19. As a result, the manufacturer has developed a new corrective action that replaces the snap rings with nuts and washers. Therefore, we have determined that the existing separation link assembly must be secured with a nut and washer instead of a snap ring to adequately address the unsafe condition. This replacement would eliminate the need for inspecting the separation link assembly. We have also removed Model 767–300F series airplanes from the applicability of this proposed AD, since those airplanes are not equipped with the affected escape slides.

Relevant Service Information

We have reviewed Boeing Special Attention Service Bulletin 767–25–0428, dated August 23, 2007, for Model 767–200, –300, and –400ER series airplanes. The service bulletin describes procedures for replacing the separation link assembly having a snap ring with an improved separation link assembly secured with a nut and washer, on the deployment bar of the emergency escape system on the applicable entry and service doors. The service bulletin also describes procedures for doing related investigative and corrective actions if necessary. The related investigative actions include doing a general visual inspection of the separation link housing assembly for worn primer around the assembly, and inspecting the spring in the separation link housing to determine the spring tolerance. The corrective action includes applying two coats of a certain primer if the separation link housing assembly is worn, and replacing any spring that does not fall within a certain tolerance with a new spring. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to develop on other airplanes of the same type design. For this reason, we are proposing this AD, which would supersede AD–2001–26–19. This proposed AD would require accomplishing the actions specified in the service information described previously. This proposed AD would also remove Model 767–300F series airplanes from the applicability.

Costs of Compliance

There are about 1,225 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 355 airplanes of U.S. registry. The new proposed actions would take up to about 6 work hours per airplane, at an average labor rate of $80 per work hour. Required parts would cost up to about $10,671 per airplane. Based on these figures, the estimated cost of the new actions specified in this proposed AD for U.S. operators is $3,958,605, or $11,151 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–12585 (67 FR 265, January 3, 2002) and adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2008–0150; Directorate Identifier 2007–NM–325–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by March 27, 2008.

Affected ADs

(b) This AD supersedes AD 2001–26–19.

Applicability

(c) This AD applies to Boeing Model 767–200, –300, and –400ER series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 767–25–0428, dated August 23, 2007.

Unsafe Condition

(d) This AD results from reports that entry and service doors did not open fully during deployment of emergency escape slides, and additional reports of missing snap rings. We are issuing this AD to prevent failure of an entry or service door to open fully in the event of an emergency evacuation, which could impede exit from the airplane. This condition could result in injury to passengers or crewmembers.

Compliance

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

Replacement

(f) Within 48 months after the effective date of this AD, replace the separation link assembly on the deployment bar of the emergency escape system on all the applicable entry and service doors with an improved separation link assembly, and do all the applicable related investigative and corrective actions, by accomplishing all of the applicable actions specified in the Accomplishment Instructions of Boeing Special Attention Service Bulletin 767–25–0428, dated August 23, 2007.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, Seattle Aircraft Certification Office, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Issued in Renton, Washington, on January 31, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 08–571 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 133

[Docket No. FDA–2008–P–0086] (formerly Docket No. 2000P–0586)

Cheeses and Related Cheese Products; Proposal to Permit the Use of Ultrafiltered Milk; Extension of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; extension of the comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending the comment period until April 11, 2008, for a proposed rule that was published in the **Federal Register** of October 19, 2005 (70 FR 60751). FDA issued a **Federal Register** notice to reopen the comment period on this proposal on December 11, 2007 (72 FR 70251), to seek further comment on only two specific issues raised by the comments concerning the proposed ingredient declaration. The agency is extending this comment period in response to a request to give interested parties additional time to provide the information requested by FDA in that notice.

DATES: Submit written or electronic comments by April 11, 2008.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2008–P–0086, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

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, as described previously, in the **ADDRESSES** portion of this document under *Electronic Submissions*.

Instructions: All submissions received must include the agency name and Docket No(s). and Regulatory Information Number (RIN) (if a RIN number has been assigned) for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov*, 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.regulations.gov* 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: Ritu Nalubola, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2371.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of October 19, 2005 (70 FR 60751), FDA proposed to amend the definitions of ''milk'' and ''nonfat'' milk in § 133.3 (21 CFR 133.3) for cheeses and related cheese products to: (1) Provide for ultrafiltration of milk and nonfat milk; (2) define UF milk and UF nonfat milk as raw or pasteurized milk or nonfat milk that is passed over one or more semipermeable membranes to partially remove water, lactose, minerals, and water-soluble vitamins without altering the casein-to-whey protein ratio of the milk or nonfat milk and resulting in a liquid product; and (3) require that such treated milk be declared in the ingredient statement of the finished food as ''ultrafiltered milk'' and ''ultrafiltered nonfat milk,'' respectively.

The agency received about 24 responses, each containing one or more comments to the 2005 proposal. Most comments supported the proposed use of fluid UF milk in standardized cheeses and related cheese products and several comments encouraged the agency to adopt the definition of fluid UF milk as proposed. However, although they did not disagree that fluid UF milk is significantly different from ''milk,'' several comments opposed the proposed provision to require fluid UF milk or fluid UF nonfat milk to be declared as ''ultrafiltered milk'' or ''ultrafiltered nonfat milk,'' respectively. They cited several reasons for their opposition.

FDA reopened the comment period on the proposed rule on December 11, 2007

(72 FR 70251) to seek public comment only with respect to two issues raised in the comments that opposed the proposed provision to require fluid UF milk or fluid UF nonfat milk to be declared as ''ultrafiltered milk'' or ''ultrafiltered nonfat milk,'' respectively: (1) That, due to economic and logistical burdens, it would be impracticable for cheese manufacturers to comply with the labeling requirement; and (2) that the proposed provision to declare fluid UF milk as ''ultrafiltered milk'' would be misleading to consumers in that consumers incorrectly believe that cheeses that declare ''ultrafiltered milk'' as an ingredient are different from those cheeses that declare ''milk'' as an ingredient or ''milk and ultrafiltered milk'' as ingredients.

The agency has received a request for an additional 60 days to respond to the questions FDA asked in its December 11, 2007, document. The request expressed concern that the reopening of the comment period did not allow adequate time to provide the data and information that FDA requested.

FDA has considered the request and is extending the request for an additional 60 days until April 11, 2008. The agency believes that this additional time will provide interested parties sufficient time to respond to the questions raised in the December 11, 2007, docment.

II. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic submissions will be accepted by FDA through FDMS only.

Dated: February 6, 2008.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E8–2454 Filed 2–8–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF LABOR

29 CFR Part 29

RIN 1205–AB50

Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations; Extension of Time for Comments

AGENCY: Employment and Training Administration, Labor.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This document informs the public that the comment period for the Notice of Proposed Rulemaking (NPRM) for Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, published December 13, 2007 (72 FR 71020), has been extended for 30 days.

DATES: To ensure consideration, comments must be in writing and must be received on or before March 12, 2008.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB50, by either one of the two following methods:

- *Federal e-Rulemaking Portal: www.regulations.gov*. Follow the Web site instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Written comments, disk, and CD-Rom submissions may be mailed or delivered by hand delivery/courier to Thomas M. Dowd, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name, as well as RIN 1205-AB50.

Please be advised that the Department of Labor (Department) will post all comments received on *www.regulations.gov* without making any change to the comments, including any personal information provided. The *www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters safeguard their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses included in their comments. It is the responsibility of the commenter to safeguard his or her information.

Also, please note that due to security concerns, postal mail delivery in Washington, DC, may be delayed. Therefore, in order to ensure that comments receive full consideration, the Department encourages the public to submit comments via the Internet as indicated above.

Docket: The Department will make all the comments it receives available for public inspection during normal business hours at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the proposed rule available, upon request, in large print or electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the proposed rule in an alternate format, contact the office of Thomas M. Dowd at (202) 693–3700 (VOICE) (this is not a toll-free number) or (877) 889–5627 (TTY/TDD). You may also contact Mr. Dowd's office at the address listed above.

FOR FURTHER INFORMATION CONTACT: Sherril Hurd, Acting Regulation Unit Team Leader, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210; E-mail *hurd.sherril@dol.gov*; Telephone (202) 693–3700 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Department is extending by 30 days, the comment period for the NPRM proposing revisions to the apprenticeship regulations published on December 13, 2007 (72 FR 71020).

Regulations that implement the National Apprenticeship Act at Title 29 Code of Federal Regulations (CFR) part 29 have not been updated since first promulgated in 1977. These regulations establish, for certain Federal purposes, labor standards, policies and procedures for the registration, cancellation and deregistration of apprenticeship programs, and apprenticeship agreements. Part 29 also provides for the recognition of a State Apprenticeship Agency (SAA) as an agency authorized to register local apprenticeship programs for Federal purposes, and for the revocation of such recognition. On December 13, 2007, the Department published in the **Federal Register** proposed revisions to update 29 CFR

part 29, to ensure that the National Registered Apprenticeship System has the necessary tools and flexibility to keep pace with changes in the economy, technological advances, and corresponding workforce challenges that have occurred over the past three decades. In particular, the proposed rule updates the procedures for apprenticeship program registration, adds requirements for monitoring of program performance, and clarifies the Department's role as manager of the National Apprenticeship System. In addition, the proposed rule incorporates gender neutral terms and expands the variety of media that may be used in the delivery of related technical instruction. Such revisions will enable the Department to promote apprenticeship opportunity in the 21st century while continuing to safeguard the welfare of apprentices.

The Department published its notice of proposed rulemaking in the **Federal Register** of December 13, 2007 (FR Doc. E7–24178) at 72 FR 71020. The notice invited interested persons to submit written comments on the proposed rule on or before February 11, 2008. The Department received a number of requests for an extension of the comment period. After balancing the interests of timeliness and public participation, the Department has determined that it is in the public's interest to extend the comment period by 30 days. This document extends the comment period through March 12, 2008.

Douglas F. Small,

Deputy Assistant Secretary, Employment and Training Administration.

[FR Doc. E8–2452 Filed 2–8–08; 8:45 am]

BILLING CODE 4510–FR–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–127; MB Docket No. 04–134; RM–10948]

Radio Broadcasting Services; Toquerville, UT

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: The Audio Division dismisses a Petition for Rule Making filed by Calvary Chapel of St. George requesting the reservation of vacant Channel 280C at Toquerville, Utah for noncommercial educational use.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–134, adopted January 16, 2008, and released January 18, 2008. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. (The Commission will not send a copy of this Report and Order pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A), because the proposal was dismissed.)

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E8–2462 Filed 2–8–08; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 73, No. 28
Monday, February 11, 2008

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 6, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

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

Rural Utilities Service

Title: 7 CFR 1783, Revolving Fund Program.

OMB Control Number: 0572–0138.

Summary of Collection: Section 6002 of the Farm Security and Rural Investment Act of 2002 amended the Consolidated Farm and Rural Development Act by adding a grant program that established the Revolving Fund Program (RFP) to assist communities with water or wastewater systems. Qualified private non-profit organizations will receive RFP grant funds to establish a lending program for eligible entities.

Need and Use of the Information: Non-profit organizations applying for the RFP grant(s) must submit an application package that includes an application form, narrative proposal (work plan), various other forms, certifications, and supplemental information. The Rural Development State Offices and the Rural Utilities Service National Office staff will use the information collected to determine applicant eligibility, project feasibility, and the applicant's ability to meet the grant and regulatory requirements. Grant recipients will set up a revolving loan fund to provide loans to finance predevelopment costs of water or wastewater projects, or short-term small capital projects not part of the regular operation and maintenance of current water and wastewater systems.

Description of Respondents: Not-for-profit institutions.

Number of Respondents: 5.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 313.

Rural Utilities Service

Title: 7 CFR 1776, Household Water Well System Grant Program.

OMB Control Number: 0572–0139.

Summary of Collection: The Rural Utilities Service (RUS) is authorized by Section 306E of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926e) to administer and make grants to qualified private non-profit organizations which will use the funds to establish lending programs from which individuals may borrow money for household water well systems under the Household Water Well System program.

Need and Use of the Information: The grant applicants will provide information to be collected as part of the application and grant process through certain documentation, certifications, and completed forms. Grant applicants must show that the project will provide technical and financial assistance to eligible individuals to remedy household well problems. The grant recipients will establish a revolving loan fund lending program to provide water well loans to individuals who own or will own private wells in rural areas. The individual loan recipients may use the funds to construct, refurbish, and service their household well systems for an existing home.

Description of Respondents: Not-for-profit institutions.

Number of Respondents: 10.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,112.

Charlene Parker,
Departmental Information Collection Clearance Officer.

[FR Doc. E8–2510 Filed 2–8–08; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

DEPARTMENT OF AGRICULTURE

U.S. Forest Service

[NM–220–5101–ER–G041]

Notice of Availability of Record of Decision for the Buckman Water Diversion Project Environmental Impact Statement

AGENCIES: Bureau of Land Management, Interior and USDA Forest Service.

ACTION: Notice of Availability.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA), the Bureau of Land Management (BLM) Taos Field Office and USDA Forest Service (Forest Service), Santa Fe National Forest announce the availability of the Record of Decision (ROD) for the Buckman Water Diversion Project located near Santa Fe, New Mexico.

ADDRESSES: Copies of the ROD are available upon request from the Field Manager, Taos Field Office, Bureau of Land Management, 226 Cruz Alta Road, Taos, NM 87571, or via the internet on the following Web site: *http://www.blm.gov/nm*. Copies of the ROD and approved Final Environmental Impact Statement (FEIS) will also be available at the following locations: Forest Service, Santa Fe National Forest, 1474 Rodeo Road, Santa Fe, NM 87505, and Forest Service, Espanola Ranger District, 1710 North Riverside Dr., Espanola, NM 87533.

FOR FURTHER INFORMATION CONTACT: Sam Des Georges, Field Office Manager, Bureau of Land Management, Taos Field Office, 226 Cruz Alta Rd., Taos, NM 87571, telephone—(505) 751–4713; or Sanford Hurlocker, District Ranger, Forest Service, Espanola Ranger District, P.O. Box 3307, Espanola, NM 87533; telephone—(505) 753–7331. Requests for information may be submitted electronically at *http://www.blm.gov/nm*.

SUPPLEMENTARY INFORMATION: The Buckman Water Diversion Project (the Project) is designed to address the immediate need for accessing water supplies for the Project Applicants. The Forest Service and BLM are joint lead agencies for this project, and the Department of Interior, Bureau of Reclamation, City of Santa Fe, and Santa Fe County are cooperating agencies. The City of Santa Fe, Santa Fe County, and Las Campanas Limited Partnership are the ''Project Applicants.''

The BLM's and Forest Service's decision is to authorize rights-of-way and easements to the Project Applicants so that they may construct, operate, and maintain the road improvements, major facilities and associated infrastructure, and their locations as described in the Proposed Action. In addition, several options have been selected for the proposed sediment facility and sand disposal systems; and for a section of treated water pipeline. Power upgrades to service the proposed facilities are also described in the Final Environmental Impact Statement (FEIS).

This decision conforms to existing laws and regulations, provides for resource protection and mitigation, and is consistent with the Santa Fe National Forest Plan and the Taos Resource Management Plan. This decision is based on a comparison of the potential environmental effects of the Proposed Action, other alternatives considered in the FEIS, and comments received during scoping and the 60-day public comment period on the Draft Environmental Impact Statement.

The decisions made by the Forest Service and the BLM, respectively, affect only those lands managed by each agency. The decision related to National Forest System lands is subject to administrative review (appeal) in accordance with 36 CFR 215 (June 2003). A written notice of appeal—clearly stating it is a notice of appeal being filed pursuant to 36 CFR 215.14—must be filed within 45 days from the date of publication of legal notice of this decision in the *Albuquerque Journal*. The publication date in the *Albuquerque Journal*, newspaper of record, is the exclusive means for calculating the time to file an appeal. Those wishing to appeal this decision should not rely upon dates or timeframe information provided by any other source. Individuals or organizations that submitted substantive comments during the comment period specified at 36 CFR 215.6 may appeal this decision. The notice of appeal must meet the appeal content requirements at 36 CFR 215.14. An appeal must be filed (regular mail, fax, e-mail, hand delivery, or express delivery) with the Appeal Deciding Officer. Written appeals must be submitted to: Deputy Regional Forester, Southwestern Region Appeal Deciding Officer, 333 Broadway Blvd., SE., Albuquerque, NM 87102. Appeals may be faxed or e-mailed at Fax: (505) 842–3173, and E-mail: *appeals-southwestern@fs.fed.us*.

The Forest Service's office business hours for those submitting hand-delivered appeals are: 8 a.m. to 4:30 p.m. Monday through Friday, excluding holidays. Electronic comments must be submitted in a format such as an e-mail message, plain text (.txt), rich text format (.rtf), Adobe (.pdf) and Word (.doc) to *appeals-southwestern@fs.fed.us*. The appeal must have an identifiable name attached or verification of identity will be required. A scanned signature may serve as verification on electronic appeals.

The decision related to BLM managed lands may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR 2801.10(a). If an appeal is filed, the notice of appeal must be filed with the Bureau of Land Management, Taos Field Office, Field Office Manager, 226 Cruz Alta Road, Taos, NM 87571, within 30 days of the date the notice of the decision appears in the **Federal Register**. If you wish to file a petition pursuant to 43 CFR 2801.10(b) for a stay (suspension) of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. Copies of the notice of appeal and petition for a stay must also be submitted to the Interior Board of Land Appeals and to the Regional Office of the Solicitor at the same time the original documents are filed with this office.

Dated: January 15, 2008.

Sam Des Georges,

BLM—Taos Field Office Manager.

Dated: January 15, 2008.

Steve Romero,

Acting Forest Supervisor, Santa Fe National Forest.

[FR Doc. E8–2305 Filed 2–8–08; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF COMMERCE

[Docket No. 080204117–8119–01]

Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements

AGENCY: Department of Commerce (DOC).

ACTION: Notice.

SUMMARY: This notice revises and updates the *Department of Commerce (DOC) Pre-Award Notification Requirements for Grants and Cooperative Agreements*, as published in the **Federal Register** (66 FR 49917) on October 1, 2001, as amended on October 30, 2002 (67 FR 66109) and on December 30, 2004 (69 FR 78389). This announcement constitutes a recompilation of the Department of Commerce pre-award requirements for grants and cooperative agreements, including all amendments and revisions to date.

DATES: These provisions are effective Feburary 11, 2008.

FOR FURTHER INFORMATION CONTACT: Gary Johnson, Office of Acquisition Management, Telephone Number—202–482–1679.

SUPPLEMENTARY INFORMATION: The DOC is authorized to award grants and cooperative agreements under a wide range of programs that support economic development; international trade; minority businesses; standards and technology; oceanic/atmospheric services; and telecommunications and information.

It is the policy of the DOC to seek full and open competition for award of discretionary financial assistance funds whenever possible. Moreover, DOC financial assistance must be awarded through a merit-based review and selection process. Notices announcing the availability of Federal funds for new

awards for each DOC competitive financial assistance program will be published in the **Federal Register** and posted on *http://www.grants.gov* by the sponsoring operating unit in the uniform format for an announcement of Federal Funding Opportunity (FFO) mandated by the Office of Management and Budget (OMB). These announcements will reference or include the DOC Pre-Award Notification Requirements identified in sections A and B of this notice, and the program-specific information identified in section C of this notice, and will follow the uniform format for announcements of funding opportunities as identified in section D.

This announcement provides notice of the DOC Pre-Award Notification Requirements that apply to all DOC-sponsored grant and cooperative agreement programs and that may supplement those program announcements which make reference to this notice. Some of the DOC general provisions published herein contain, by reference or substance, a summary of the pertinent statutes or regulations published in the U.S. Code (U.S.C.), **Federal Register**, or Code of Federal Regulations (CFR), or requirements provided in Executive Orders, OMB Circulars (circulars), or Assurances (Forms SF–424B and SF–424D). This notice does not intend to be a derogation of, or amend, any statute, regulation, Executive Order, circular, or Standard Form.

Each individual award notice will complete and include the relevant analyses pursuant to the requirements in Executive Order 12866, Executive Order 13132, the Administrative Procedure Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act, as applicable.

A. The following pre-award notice provisions will apply to all applicants for and recipients of DOC grants and cooperative agreements:

1. Federal Policies and Procedures. Applicants, recipients and subrecipients are subject to all Federal laws and Federal and DOC policies, regulations, and procedures applicable to Federal financial assistance.

2. Debarment, Suspension, Drug-Free Workplace, and Lobbying Provisions. All applicants must comply with the requirements of subpart C of 2 CFR part 1326, ''Nonprocurement Debarment and Suspension,'' 15 CFR part 29, ''Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)'' (November 26, 2003, 68 FR 66534), and 15 CFR part 28, ''New Restrictions on Lobbying,'' including the submission of required forms and obtaining certification from lower tier applicants/bidders.

3. Pre-Award Screening of Applicant's and Recipient's Management Capabilities, Financial Condition, and Present Responsibility. It is the policy of the DOC to make awards to applicants and recipients that are competently managed, responsible, financially capable and committed to achieving the objectives of the award(s) they receive. Therefore, pre-award screening may include, but is not limited to, the following reviews:

(a) Past Performance. Unsatisfactory performance under prior Federal awards may result in an application not being considered for funding.

(b) Credit Checks. A credit check will be performed on individuals, for-profit, and non-profit organizations.

(c) Delinquent Federal Debts. No award of Federal funds shall be made to an applicant that has an outstanding delinquent Federal debt until:

(1) The delinquent account is paid in full;

(2) A negotiated repayment schedule is established and at least one payment is received; or

(3) Other arrangements satisfactory to the DOC are made.

Pursuant to 31 U.S.C. 3720B, unless waived, the DOC is not permitted to extend financial assistance in the form of a loan, loan guarantee, or loan insurance to any person delinquent on a nontax debt owed to a Federal agency. This prohibition does not apply to disaster loans.

Pursuant to 28 U.S.C. 3201(e), a debtor who has a judgment lien against the debtor's property for a debt to the United States shall not be eligible to receive any grant or loan which is made, insured, guaranteed, or financed directly or indirectly by the United States or to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full or otherwise satisfied. The DOC sponsoring operating units may promulgate regulations to allow for waiver of this restriction on eligibility for such grants and cooperative agreements.

(d) Financial Pre-Award Screening. The DOC's Office of Inspector General (OIG) performs pre-award screening procedures to review an applicant's credit rating and related financial information, the status of previous Federal audit findings and recommendations for the applicant, and other relevant data. The following three categories of applicants are exempt from this review: (1) Applicants for awards in amounts of $100,000 or less; (2) applicants who have been recipients of financial assistance from the DOC for three or more consecutive years without any adverse programmatic or audit findings; and (3) applicants that are units of a State or local government or that are accredited colleges and universities.

(e) Individual Background Screening. Unless an exemption applies, an individual background screening will be performed by the OIG on key individuals of organizational units associated with the application at the beginning of the award and at three year intervals thereafter for the life of the award. The exemptions are: the proposed award amount is $100,000 or less; applicants are accredited colleges and universities; applicants are units of a State or local government; applicants are economic development districts designated by EDA, including those entities whose designations are pending, and councils of governments; or the key individual(s) is/are elected officials of State and local governments who are serving in capacities other than their elected capacities when applying for assistance. In addition, if there is a change in the status of the organization and/or key individuals, or the program officer, OIG, or Grants Officer believes there is good reason to conduct a review sooner, a background screening may be requested more frequently. Individual background screenings are conducted to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges (e.g., fraud, theft, perjury), or other matters which significantly reflect on the applicant's business integrity, responsibility, or financial integrity. If any of the conditions listed below in paragraphs (1), (2), or (3) occur, then the DOC reserves the right to take one or more of the following actions: consider suspension/termination of an award immediately for cause; require the removal of any key individual from association with management of and/or implementation of the award and require Grants Officer approval of personnel replacements; require the recipient to make other changes as appropriate; and/or designate the recipient as high risk and amend the award to assign special award conditions, as appropriate, including making changes with respect to the method of payment and/or financial reporting requirements.

(1) A key individual fails to submit the required Form CD–346, *Applicant for Funding Assistance* within 30 days of receipt of the award;

(2) A key individual makes a false statement or omits a material fact on the Form CD–346; or

(3) The individual background screening reveals significant adverse findings that reflect on the business integrity, responsibility, or financial integrity of the recipient and/or key individual.

(f) List of Parties Excluded from Procurement and Nonprocurement Programs. The Excluded Parties Listing System (EPLS) maintained by the General Services Administration (GSA) (found at *http://www.epls.gov*) that lists parties excluded from Federal procurement and nonprocurement programs will be checked to assure that an applicant is not debarred or suspended on a government-wide basis from receiving financial assistance.

(g) Pre-Award Accounting System Surveys. The Grants Office, in cooperation with the OIG when appropriate, may require a pre-award survey of the applicant's financial management system in cases where the recommended applicant has had no prior Federal support, the operating unit has reason to question whether the financial management system meets Federal financial management standards, or the applicant is being considered for a high-risk designation.

4. No Obligation for Future Funding. If an application is selected for funding, the DOC has no obligation to provide any additional future funding in connection with that award. Any amendment of an award to increase funding or to extend the period of performance is at the total discretion of the DOC.

5. Pre-Award Activities. If an applicant incurs any costs prior to receiving an award, it does so solely at its own risk of not being reimbursed by the Government. Notwithstanding any verbal or written assurance that may have been received, there is no obligation on the part of DOC to cover pre-award costs unless approved by the Grants Officer as part of the terms when the award is made, or as authorized for awards that support research by 15 CFR 14.25(e)(4).

6. Freedom of Information Act (FOIA) Disclosure. The FOIA (5 U.S.C. 552 and DOC regulations at 15 CFR part 4) sets forth the process and procedure by which the DOC follows to make requested material, information, and records publicly available. Unless prohibited by law and to the extent required under the FOIA, contents of applications, proposals, and other information submitted by applicants may be released in response to FOIA requests.

7. False Statements. A false statement on an application is grounds for denial or termination of an award, and/or possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

8. Application Forms. Unless the individual programs specify differently in their **Federal Register** notice of availability of funding and/or in the Federal Funding Opportunity announcement, the following forms, family of forms, and/or certifications are required, as applicable, for DOC grants and cooperative agreements: OMB Standard Forms (SF) SF–424, *Application for Federal Assistance;* SF–424A, *Budget Information—Non-Construction Programs*; SF–424B, *Assurances—Non-Construction Programs*; SF–424C, *Budget Information—Construction Programs;* SF–424D, *Assurances—Construction Programs*; SF–424 Family of Forms for Research and Related Programs; SF–424 Short Organizational Family; SF–424 Individual Form Family; and SF–424 Mandatory Family. In addition, Commerce Department (CD) Forms CD–346, *Applicant for Funding Assistance*; CD–511, *Certification Regarding Lobbying*; CD–512, *Certification Regarding Lobbying—Lower-Tier Covered Transactions*; and SF–LLL, *Disclosure of Lobbying Activities*, will be used as appropriate.

9. Environmental Requirements. Environmental impacts must be considered by Federal decision makers in their decisions whether or not to (1) approve a proposal for Federal assistance; (2) approve the proposal with mitigation; or (3) approve a different proposal/grant having less adverse environmental impacts. Federal environmental laws require that the funding agency initiate a planning process with an early consideration of potential environmental impacts that projects funded with Federal assistance may have on the environment. Applicants, recipients and subrecipients must comply with all environmental standards, to include those prescribed under the following statutes and Executive Orders, and shall identify to the awarding agency any impact the award may have on the environment. The failure to do so shall be grounds for not selecting an application. In some cases, if additional information is required after an application is selected, funds can be withheld by the Grants Officer under a special award condition requiring the recipient to submit additional environmental compliance information sufficient to enable the DOC to make an assessment on any impacts that a project may have on the environment.

(a) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Recipients of Federal assistance are required to identify to the awarding agency any impact an award will have on the quality of the human environment, and assist the agency to comply with the National Environmental Policy Act, when the award activities remain subject to Federal authority and control. Applicants for assistance may be required to prepare environmental impact information as part of a proposal.

(b) Floodplain Management, Executive Order 11988 and, Protection of Wetlands, Executive Order 11990, May 24, 1977. Recipients must identify proposed actions located in Federally defined floodplains and wetlands to enable the agency to make a determination whether there is an alternative to minimize any potential harm.

(c) Clean Air Act, Clean Water Act, and Executive Order 11738. Recipients must comply with the provisions of the Clean Air Act (42 U.S.C. 7401 *et seq.*), Clean Water Act (33 U.S.C. §§ 1251 *et seq.*), and Executive Order 11738. Recipients shall not use a facility that EPA has placed on the Excluded Parties List System (EPLS) (*http://www.epls.gov*) in performing any award that is nonexempt under Subpart J of 2 CFR part 1532.

(d) The Flood Disaster Protection Act of 1973 (42 U.S.C. 4002 *et seq.*). Flood insurance, when available, is required for Federally assisted construction or acquisition in flood-prone areas.

(e) The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Recipients must identify any impact or activities that may involve a threatened or endangered species. Federal agencies have the responsibility for ensuring that a protected species or habitat does not incur adverse effects from actions under Federal assistance awards, and for conducting the required reviews under the Endangered Species Act, as applicable.

(f) The Coastal Zone Management Act, as amended (16 U.S.C. 1451 *et seq.*). Funded projects must be consistent with a coastal state's approved management program for the coastal zone.

(g) The Coastal Barriers Resources Act (16 U.S.C. 3501 *et seq.*). Restrictions are placed on Federal funding for actions within a Coastal Barrier System.

(h) The Wild and Scenic Rivers Act, as amended (16 U.S.C. 1271 *et seq.*). This Act applies to awards that may affect existing or proposed components

of the National Wild and Scenic Rivers system.

(i) The Safe Drinking Water Act of 1974, as amended (42 U.S.C. 300f–j). This Act precludes Federal assistance for any project that the EPA determines may contaminate a sole source aquifer so as to threaten public health.

(j) The Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901 *et seq.*). This act regulates the generation, transportation, treatment, and disposal of hazardous wastes, and also provides that recipients of Federal funds give preference in their procurement programs to the purchase of recycled products pursuant to EPA guidelines.

(k) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, the Superfund Amendments and Reauthorization Act of 1986, and the Community Environmental Response Facilitation Act of 1992, as amended (42 U.S.C. 9601 *et seq.*). These requirements address responsibilities for actual or threatened hazardous substance releases and environmental cleanup. There are also requirements regarding reporting and community involvement to ensure disclosure of the release or disposal of regulated substances and cleanup of hazards.

(l) Environmental Justice in Minority Populations and Low Income Populations, Executive Order 12898, February 11, 1994. This Order identifies and addresses adverse human health or environmental effects of programs, policies and activities on low income and minority populations.

10. Limitation of Liability. In no event will the Department of Commerce be responsible for proposal preparation costs if a program fails to receive funding or is cancelled because of other agency priorities. The publication of an announcement of funding availability does not oblige the agency to award any specific project or to obligate any available funds.

B. The following general provisions will apply to all DOC grant and cooperative agreement awards:

1. Administrative Requirements and Cost Principles. The uniform administrative requirements for all DOC grants and cooperative agreements are codified at 15 CFR part 14, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, Other Non-Profit, and Commercial Organizations,'' and at 15 CFR part 24, ''Uniform Administrative Requirements for Grants and Agreements to State and Local Governments.'' The following list of cost principles, which are incorporated by reference in 15 CFR parts 14 and 24, are included in the DOC's grants and cooperative agreements: OMB Circular A–21 (2 CFR part 220), ''Cost Principles for Educational Institutions''; OMB Circular A–87 (2 CFR part 225), ''Cost Principles for State, Local and Indian Tribal Governments''; OMB Circular A–122 (2 CFR part 230), ''Cost Principles for Nonprofit Organizations''; and Federal Acquisition Regulation subpart 31.2, ''Contracts with Commercial Organizations,'' codified at 48 CFR 31.2. Applicable administrative requirements and cost principles are identified in each award and are incorporated by reference into the award. Expenditures for any financial assistance award must be necessary to carry out the authorized project and be consistent with the applicable cost principles.

2. Award Payments. Advances will be limited to the minimum amounts necessary to meet *immediate* disbursement needs, but in no case should advances exceed the amount of cash required for a 30-day period. Any advanced funds that are not disbursed in a timely manner must be returned promptly to the DOC. Certain bureaus within the DOC use the Department of Treasury's Automated Standard Application for Payment (ASAP) system. In order to receive payments under ASAP, recipients will be required to enroll electronically in the ASAP system by providing their Federal Awarding Agency with pertinent information to begin the enrollment process, which allows them to use the on-line and Voice Response System (VRS) method of withdrawing funds from their ASAP established accounts. It is the recipient's responsibility to ensure that its contact information is correct. The funding agency must be provided a Point of Contact name, mailing address, e-mail address, telephone number, DUNS and TIN numbers to commence the enrollment process. In order to be able to complete the enrollment process, the recipient will need to identify a Head of Organization, an Authorizing Official, and a Financial Officer. It is very important that the recipient's banking data be linked to the funding agency's Agency Location Code in order to ensure proper payment under an award. For additional information on this requirement, prospective applicants should contact their Federal Awarding Agency.

3. Federal and Non-Federal Cost Sharing.

(a) Awards that include Federal and non-Federal cost sharing will incorporate a budget consisting of shared allowable costs. If actual allowable costs are less than the total approved budget, the Federal and non-Federal cost shares shall be calculated by applying the approved Federal and non-Federal cost share ratios to actual allowable costs. If actual allowable costs are greater than the total approved budget, the Federal share will not exceed the total Federal dollar amount authorized by the award.

(b) The non-Federal share, whether in cash or in-kind, will be expected to be paid out at the same general rate as the Federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for or later commitment of cash or in-kind contributions. In any case, recipients must meet the cost share commitment over the life of the award.

4. Budget Changes and Transfers Among Cost Categories. When the terms of an award allow the recipient to transfer funds among approved direct cost categories, the transfer authority does not authorize the recipient to create new budget categories within an approved budget unless the Grants Officer has provided prior approval. In addition, the recipient will not be authorized at any time to transfer amounts budgeted for direct costs to the indirect costs line item or vice versa, without written prior approval of the Grants Officer.

5. Indirect Costs.

(a) Indirect costs will not be allowable charges against an award unless specifically included as a line item in the approved budget incorporated into the award. (The term ''indirect cost'' has been replaced with the term ''facilities and administrative costs'' under OMB Circular A–21 (2 CFR part 220), ''Cost Principles for Educational Institutions.'')

(b) Excess indirect costs may not be used to offset unallowable direct costs.

(c) If the recipient has not previously established an indirect cost rate with a Federal agency, the negotiation and approval of a rate will be subject to the procedures in the applicable cost principles and the following subparagraphs:

(1) a. State, local, and Indian Tribal Governments; Educational Institutions; and Non-Profit Organizations (Non-Commercial Organizations).

For those organizations for which the DOC is cognizant or has oversight, the DOC or its designee will either negotiate a fixed rate with carryforward provisions or, in some instances, limit its review to evaluating the procedures described in the recipient's cost

allocation methodology plan. Indirect cost rates and cost allocation methodology reviews are subject to future audits to determine actual indirect costs.

b. Commercial Organizations.

For commercial organizations, ''cognizant federal agency'' is defined as the agency that provides the largest dollar amount of negotiated contracts, including options. If the only federal funds received by a commercial organization are DOC award funds, then the DOC becomes the cognizant federal agency for the purpose of indirect cost negotiations. For those organizations for which the DOC is cognizant, DOC or its designee will negotiate a fixed rate with carry forward provisions for the recipient. ''Fixed rate'' means an indirect cost rate which has the same characteristics as a pre-determined rate, except that the difference between the estimated costs and the actual costs of the period covered by the rate is carried forward as an adjustment to the rate computation of the subsequent period. DOC or its designee will negotiate indirect cost rates using the cost principles found in 48 CFR part 31, ''Contract Cost Principles and Procedures.'' For guidance on how to put an indirect cost plan together go to: *http://www.dol.gov/oasm/programs/boc/costdeterminationguide/main.htm.*

(2) Within 90 days of the award start date, the recipient shall submit to the address listed below documentation (indirect cost proposal, cost allocation plan, etc.) necessary to perform the review. The recipient shall provide the Grants Officer with a copy of the transmittal letter.

Office of Acquisition Management, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Room 6054, Washington, DC 20230.

(3) The recipient can use the fixed rate proposed in the indirect cost plan until such time as the DOC provides a response to the submitted plan. Actual indirect costs must be calculated annually and adjustments made through the carryforward provision used in calculating next year's rate. This calculation of actual indirect costs and the carryforward provision is subject to audit. Indirect cost rate proposals must be submitted annually. Organizations that have previously established indirect cost rates must submit a new indirect cost proposal to the cognizant agency within six months after the close of each recipient's fiscal year.

(4) When the DOC is not the oversight or cognizant Federal agency, the recipient shall provide the Grants Officer with a copy of a negotiated rate agreement or a copy of the transmittal letter submitted to the cognizant or oversight Federal agency requesting a negotiated rate agreement.

(5) If the recipient fails to submit the required documentation to the DOC within 90 days of the award start date, the recipient may be precluded from recovering any indirect costs under the award. If the DOC, oversight, or cognizant Federal agency determines there is a finding of good cause to excuse the recipient's delay in submitting the documentation, an extension of the 90-day due date may be approved by the Grants Officer.

(6) Regardless of any approved indirect cost rate applicable to the award, the maximum dollar amount of allocable indirect costs for which the DOC will reimburse the recipient shall be the lesser of the line item amount for the Federal share of indirect costs contained in the approved budget of the award, or the Federal share of the total allocable indirect costs of the award based on the indirect cost rate approved by an oversight or cognizant Federal agency and current at the time the cost was incurred, provided the rate is approved on or before the award end date.

6. Tax Refunds. Refunds of FICA/FUTA taxes received by a recipient during or after an award period must be refunded or credited to the DOC where the benefits were financed with Federal funds under the award. Recipients are required to contact the Grants Officer immediately upon receipt of these refunds. Recipients are required to refund portions of FICA/FUTA taxes determined to belong to the Federal Government, including refunds received after the award end date.

7. Other Federal Awards with Similar Programmatic Activities. Recipients will be required to provide written notification to the Federal Program Officer and the Grants Officer in the event that, subsequent to receipt of the DOC award, other financial assistance is received to support or fund any portion of the scope of work incorporated into the DOC award. The DOC will not pay for costs that are funded by other sources.

8. Non-Compliance With Award Provisions. Failure to comply with any or all of the provisions of an award, or the requirements of this notice, may have a negative impact on future funding by the DOC and may be considered grounds for any or all of the following enforcement actions: Establishment of an account receivable, withholding payments under any DOC awards to the recipient, changing the method of payment from advance to *reimbursement only*, or the imposition of other special award conditions, suspension of any DOC active awards, and termination of any DOC active awards.

9. Prohibition Against Assignment by the Recipient. Notwithstanding any other provision of an award, recipients may not transfer, pledge, mortgage, or otherwise assign an award, or any interest therein, or any claim arising thereunder, to any party or parties, banks, trust companies, or other financing or financial institutions without the express written approval of the Grants Officer.

10. Non-Discrimination Requirements. There are several Federal statutes, regulations, Executive Orders, and policies relating to nondiscrimination. No person in the United States shall, on the grounds of race, color, national origin, handicap, religion, age, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. These requirements include but are not limited to:

(a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) and the DOC's implementing regulations published at 15 CFR part 8 prohibiting discrimination on the grounds of race, color, or national origin under programs or activities receiving Federal financial assistance;

(b) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) and the DOC's implementing regulations at 15 CFR part 8a prohibiting discrimination on the basis of sex under Federally assisted education programs or activities;

(c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) and the DOC's implementing regulations published at 15 CFR part 8b prohibiting discrimination on the basis of handicap under any program or activity receiving or benefiting from Federal assistance;

(d) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 *et seq.*) and the DOC's implementing regulations published at 15 CFR part 20 prohibiting discrimination on the basis of age in programs or activities receiving Federal financial assistance;

(e) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*) prohibiting discrimination on the basis of disability under programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, as well as public or private entities that provide public transportation;

(f) Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3601 *et seq.*), relating to nondiscrimination in the sale, rental or financing of housing;

(g) Parts II and III of Executive Order 11246, as amended by Executive Orders 11375 and 12086 requiring Federally assisted construction contracts to include the nondiscrimination provisions of sections 202 and 203 of that Executive Order and the Department of Labor's regulations at 41 CFR 60–1.4(b) implementing Executive Order 11246;

(h) Executive Order 13166 (August 11, 2000), ''Improving Access to Services for Persons With Limited English Proficiency,'' and DOC policy guidance issued on March 24, 2003 (68 FR 14180) to Federal financial assistance recipients on the Title VI prohibition against national origin discrimination affecting Limited English Proficient (LEP) persons; and

(i) In recognition of the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which expressly exempts religious organizations from the prohibition against discrimination on the basis of religion. *See* 42 U.S.C. 2000e–1(a).

11. Audits of Organizations Covered by OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations'' and the related Compliance Supplement. Recipients that are subject to OMB Circular A–133, and that expend $500,000 or more in Federal awards in a fiscal year shall have an audit conducted for that year in accordance with the requirements of OMB Circular A–133, issued pursuant to the Single Audit Act of 1984 (Pub. L. No. 98–502), as amended by the Single Audit Act Amendments of 1996 (Pub. L. No. 104–156).

12. Unless otherwise specified in the terms and conditions of the award, in accordance with 15 CFR 14.26(c) and (d), for-profit hospitals, commercial entities, and other organizations not required to follow the audit provisions of OMB Circular A–133 shall have an audit performed when the federal share amount awarded is $500,000 or more over the duration of the project period. An audit is required at least once every two years using the following schedule for audit report submission.

(a) For awards less than 24 months, an audit is required within 90 days from the project expiration date, including the close-out period for the award.

(b) For 2-, or 3-year awards, an audit is required within 90 days after the end of the first year and within 90 days from the project expiration date including the close-out period for the award.

(c) For 4-, or 5-year awards, an audit is required within 90 days after the end of the first year and third year, and within 90 days from the project expiration date including the close-out period for the award.

Some DOC programs have specific audit guidelines that will be incorporated into the award. When DOC does not have a program-specific audit guide available for the program, the auditor will follow the requirements for a program-specific audit as described in OMB Circular A–133, __.235. The Recipient may include a line item in the budget for the cost of the audit.

13. Policies and Procedures for Resolution of Audit-Related Debts. The DOC has established policies and procedures for handling the resolution and reconsideration of financial assistance audits which have resulted in, or may result in, the establishment of a debt (account receivable) for financial assistance awards. These policies and procedures are contained in the **Federal Register** notice dated January 27, 1989. *See* 54 FR 4053. The policies and procedures also are provided in more detail in the *Department of Commerce Financial Assistance Standard Terms and Conditions*.

14. Debts. Any debts determined to be owed the Federal Government shall be paid promptly by the recipient. In accordance with 15 CFR 21.4, a debt will be considered delinquent if it is not paid within 15 days of the due date, or if there is no due date, within 30 days of the billing date. Failure to pay a debt by the due date, or if there is no due date, within 30 days of the billing date, shall result in the imposition of late payment charges. In addition, failure to pay the debt or establish a repayment agreement by the due date, or if there is no due date, within 30 days of the billing date, will also result in the referral of the debt for collection action and may result in the DOC taking further action as specified in the terms of the award. Funds for payment of a debt must not come from other federally sponsored programs. Verification that other Federal funds have not been used will be made, e.g., during on-site visits and audits.

15. Post-Award Discovery of Adverse Information. After an award is made, if adverse information on a recipient or any key individual associated with a recipient is discovered which reflects significantly and adversely on the recipient's responsibility, the Grants Officer may take the following actions:

(a) Require the recipient to correct the conditions.

(b) Consider the recipient to be ''high risk'' and unilaterally impose special award conditions to protect the Federal Government's interest.

(c) Suspend or terminate an active award. The recipient will be afforded due process while effecting such actions.

(d) Require the removal of personnel from association with the management of and/or implementation of the project and require Grants Officer approval of personnel replacements.

16. Competition and Codes of Conduct.

(a) Pursuant to the certification in Form SF–424B, paragraph 3, recipients must maintain written standards of conduct to establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of a personal or organizational conflict of interest, or personal gain in the administration of this award and any subawards.

(b) Recipients must maintain written standards of conduct governing the performance of their employees engaged in the award and administration of subawards. No employee, officer, or agent shall participate in the selection, award, or administration of a subaward supported by Federal funds if such participation would cause a real or apparent conflict of interest. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization in which he/she serves as an officer or which employs or is about to employ any of the parties mentioned in this section, has a financial or other interest in the organization selected or to be selected for a subaward. The officers, employees, and agents of the recipient may not solicit or accept anything of monetary value from subrecipients. However, the recipient may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of a recipient.

(c) All subawards will be made in a manner to provide, to the maximum extent practicable, open and free competition. Recipients must be alert to organizational conflicts of interest as well as other practices among subrecipients that may restrict or eliminate competition. In order to ensure objective subrecipient performance and eliminate unfair competitive advantage, subrecipients

that develop or draft work requirements, statements of work, or requests for proposals will be excluded from competing for such subawards.

(d) For purposes of the award, a financial interest may include employment, stock ownership, a creditor or debtor relationship, or prospective employment with an applicant. An appearance of impairment of objectivity could result from an organizational conflict where, because of other activities or relationships with other persons or entities, a person is unable or potentially unable to act in an impartial manner. It also could result from non-financial gain to the individual, such as benefit to reputation or prestige in a professional field.

17. Minority Owned Business Enterprise. The DOC encourages recipients to utilize minority and women-owned firms and enterprises in contracts under financial assistance awards. The Minority Business Development Agency can assist recipients in matching qualified minority owned enterprises with contract opportunities.

18. Subaward and/or Contract to a Federal Agency. Recipients, subrecipients, contractors, and/or subcontractors may not sub-grant or sub-contract any part of an approved project to any Federal department, agency, instrumentality, or employee thereof, without the prior written approval of the Grants Officer.

19. Foreign Travel. Recipients must comply with the provisions of the Fly America Act, 49 U.S.C. 40118. The Fly America Act requires that Federal travelers and others performing U.S. Government-financed foreign air travel must use U.S. flag carriers, to the extent that service by such carriers is available. Foreign air carriers may be used only in specific instances, such as when a U.S. flag air carrier is unavailable, or use of U.S. flag carrier service will not accomplish the agency's mission. The implementing Federal Travel Regulations are found at 41 CFR 301–10.131 through 301–10.143.

20. Purchase of American-Made Equipment and Products. Recipients are hereby notified that they are encouraged, to the greatest extent practicable, to purchase American-made equipment and products with funding provided under DOC financial assistance awards.

21. Intellectual Property Rights.

(a) Inventions. The rights to any invention made by a recipient under a DOC financial assistance award are determined by the Bayh-Dole Act, as amended (Pub. L. No. 96–517), and codified at 35 U.S.C. 200 *et seq.*, except as otherwise required by law. The specific rights and responsibilities are described in more detail in 37 CFR part 401 and in particular, in the standard patent rights clause in 37 CFR 401.14, which is incorporated by reference into awards. Recipients of DOC financial assistance awards are required to submit their disclosures and elections electronically using the Interagency Edison extramural invention reporting system (iEdison) at *http://www.iedison.gov.* Recipients may obtain a waiver of this electronic submission requirement by providing to the DOC compelling reasons for allowing the submission of paper copies of reports related to inventions.

(b) Patent Notification Procedures. Pursuant to Executive Order 12889, the DOC is required to notify the owner of any valid patent covering technology whenever the DOC or its financial assistance recipients, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the recipient uses or has used patented technology under this award without a license or permission from the owner, the recipient will be required to notify the Grants Officer. This notice does not necessarily mean that the government authorizes and consents to any copyright or patent infringement occurring under the financial assistance.

(c) Data, Databases, and Software. The rights to any work produced or purchased under a DOC financial assistance award are determined by 15 CFR 14.36 or 24.34, as applicable. Such works may include data, databases or software. The recipient owns any work produced or purchased under a DOC financial assistance award subject to DOC's right to obtain, reproduce, publish or otherwise use the work or authorize others to receive, reproduce, publish or otherwise use the data for Federal Government purposes.

(d) Copyright. The recipient may copyright any work produced under a DOC financial assistance award subject to the DOC's royalty-free nonexclusive and irrevocable right to reproduce, publish or otherwise use the work or authorize others to do so for Federal Government purposes. Works jointly authored by the DOC and recipient employees may be copyrighted but only the part authored by the recipient is protected because, under 17 U.S.C. 105, works produced by Government employees are not copyrightable in the United States. On occasion, the DOC may ask the recipient to transfer to DOC its copyright in a particular work when the DOC is undertaking the primary dissemination of the work. Ownership of copyright by the Federal Government through assignment is permitted by 17 U.S.C. 105.

22. Seat Belt Use. Pursuant to Executive Order 13043, recipients shall seek to encourage employees and contractors to enforce on-the-job seat belt policies and programs when operating recipient/company-owned, rented or personally owned vehicles.

23. Research Involving Human Subjects. All proposed research involving human subjects must be conducted in accordance with 15 CFR part 27, ''Protection of Human Subject.'' No research involving human subjects is permitted under any DOC financial assistance award unless expressly authorized by the Grants Officer.

24. Federal Employee Expenses. Federal agencies are generally barred from accepting funds from a recipient to pay transportation, travel, or other expenses for any Federal employee unless specifically approved in the terms of the award. Use of award funds (Federal or non-Federal) or the recipient's provision of in-kind goods or services for the purposes of transportation, travel, or any other expenses for any Federal employee, may raise appropriation augmentation issues. In addition, DOC policy prohibits the acceptance of gifts, including travel payments for Federal employees, from recipients or applicants regardless of the source.

25. Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects. Pursuant to Executive Order 13202, ''Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects,'' as amended by Executive Order 13208, unless the project is exempted under section 5(c) of the Order, bid specifications, project agreements, or other controlling documents for construction contracts awarded by recipients of grants or cooperative agreements, or those of any construction manager acting on their behalf, shall not: (1) Include any requirement or prohibition on bidders, offerors, contractors, or subcontractors about entering into or adhering to agreements with one or more labor organizations on the same or related construction project(s); or (2) otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or

remain signatories or otherwise adhering to agreements with one or more labor organizations, on the same or other related construction project(s).

26. Minority Serving Institutions (MSIs) Initiative. Pursuant to Executive Orders 13256, 13230, and 13270, the DOC is strongly committed to broadening the participation of MSIs in its financial assistance award programs. The DOC's goals include achieving full participation of MSIs in order to advance the development of human potential, strengthen the Nation's capacity to provide high-quality education, and increase opportunities for MSIs to participate in and benefit from Federal financial assistance programs. The DOC encourages all applicants and recipients to include meaningful participation of MSIs. Institutions eligible to be considered MSIs are listed on the Department of Education's Web site at: *http://www.ed.gov/offices/OCR/minorityinst.html.*

27. Access to Records. The Inspector General of the DOC, or any of his or her duly authorized representatives, the Comptroller of the United States and, if appropriate, the State, shall have access to any pertinent books, documents, papers and records of the parties to a grant or cooperative agreement, whether written, printed, recorded, produced, or reproduced by any electronic, mechanical, magnetic or other process or medium, in order to make audits, inspections, excerpts, transcripts, or other examinations as authorized by law. An audit of an award may be conducted at any time.

28. Scientific or Research Misconduct. Scientific or research misconduct refers to the fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. It does not include honest errors or differences of opinion. The recipient organization has the primary responsibility to investigate allegations and provide reports to the Federal Government. Funds expended on an activity that is determined to be invalid or unreliable because of scientific misconduct may result in a disallowance of costs for which the institution may be liable for repayment to the awarding agency. The Office of Science and Technology Policy at the White House published in the **Federal Register** on December 6, 2000, a final policy that addressed research misconduct. The policy was developed by the National Science and Technology Council (65 FR 76260). The DOC requires that any allegation be submitted to the Grants Officer, who will also notify the OIG of such allegation. Generally, the recipient organization shall investigate the allegation and submit its findings to the Grants Officer. The DOC may accept the recipient's findings or proceed with its own investigation. The Grants Officer shall inform the recipient of the DOC's final determination.

29. Intergovernmental Personnel Act of 1970 (42 U.S.C. 4728–4763). Recipients must comply with this Act relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of the Office of Personnel Management Standards for a Merit System of Personnel Administration (5 CFR part 900, Subpart F).

30. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*) and the DOC's implementing regulations issued at 15 CFR part 11. These provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or Federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

31. Historic Preservation. Recipients must assist the DOC in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended, and the Advisory Council on Historic Preservation Guidelines (16 U.S.C. 470 *et seq.*); the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a–1 *et seq.*); Protection and Enhancement of the Cultural Environment, Executive Order 11593; Locating Federal Facilities on Historic Properties in our Nation's Central Cities, Executive Order 13006; and Indian Sacred Sites, Executive Order 13007.

32. Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 *et seq.*). This Act prohibits the use of lead-based paint in construction or rehabilitation of residential structures.

33. Hatch Act (5 U.S.C. 1501–1508 and 7324–7328). This Act limits the political activities of employees or officers of State or local governments whose principal employment activities are funded in whole or in part with Federal funds.

34. Labor standards for Federally-assisted construction subagreements (wage guarantees). Recipients must comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. 276a to 276a–7); the Copeland Act (40 U.S.C. 276c and 18 U.S.C. 874); and the Contract Work Hours and Safety Standards Act (40 U.S.C. 327—333).

35. Care and Use of Live Vertebrate Animals. Recipients must comply with the Laboratory Animal Welfare Act of 1966 (Pub. L. No. 89–544), as amended (7 U.S.C. 2131 *et seq.*) (animal acquisition, transport, care, handling, and use in projects) and implementing regulations, 9 CFR parts 1, 2, and 3; the Endangered Species Act (16 U.S.C. 1531 *et seq.*); Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) (taking possession, transport, purchase, sale, export or import of wildlife and plants); The Nonindigenous Aquatic Nuisance Prevention and Control Act (16 U.S.C. 4701 *et seq.*) (ensure preventive measures are taken or that probable harm of using species is minimal if there is an escape or release); and all other applicable statutes pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by Federal financial assistance. No research involving vertebrate animals is permitted under any DOC financial assistance award unless authorized by the Grants Officer.

36. Publications, Videos, and Acknowledgment of Sponsorship. Publication of the results of a research project in appropriate professional journals and production of videos or other media is encouraged as an important method of recording and reporting scientific information. It is also a constructive means to expand access to federally funded research. The recipient is required to submit a copy to the funding agency and when releasing information related to a funded project include a statement that the project or effort undertaken was or is sponsored by DOC. The recipient is also responsible for assuring that every publication of material (including Internet sites and videos) based on or developed under an award, except scientific articles or papers appearing in scientific, technical or professional journals, contains the following disclaimer: ''This [report/video] was prepared by [recipient name] under award [number] from [name of operating unit], U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the [name of operating unit] or the U.S. Department of Commerce.''

37. Homeland Security Presidential Directive—12. If the performance of a grant award requires recipient organization personnel to have unsupervised physical access to a Federally controlled facility for more than 180 days or access to a Federal information system, such personnel must undergo the personal identity

verification credential process. In the case of foreign nationals, the DOC will conduct a check with U.S. Citizenship and Immigration Services' (USCIS) Verification Division, a component of the Department of Homeland Security (DHS), to ensure the individual is in a lawful immigration status and that they are eligible for employment within the U.S. Any items or services delivered under a financial assistance award shall comply with the Department of Commerce personal identity verification procedures that implement Homeland Security Presidential Directive—12, FIPS PUB 201, and OMB Memorandum M–05–24. The recipient shall insert this clause in all subawards or contracts when the subaward recipient or contractor is required to have physical access to a Federally controlled facility or access to a Federal information system.

38. Compliance with Department of Commerce Bureau of Industry and Security Export Administration Regulations

(a) This clause applies to the extent that a financial assistance award involves access to export-controlled information or technology.

(b) In performing a financial assistance award, the recipient may gain access to export-controlled information or technology. The recipient is responsible for compliance with all applicable laws and regulations regarding export-controlled information and technology, including deemed exports. The recipient shall establish and maintain effective export compliance procedures at non-DOC facilities throughout performance of the financial assistance award. At a minimum, these export compliance procedures must include adequate controls relating to physical, verbal, visual and electronic access to export-controlled information and technology.

(c) Definitions

(1) *Deemed Export.* The Export Administration Regulations (EAR) define a deemed export as any release of technology or source code subject to the EAR to a foreign national, both in the United States and abroad. Such release is ''deemed'' to be an export to the home country of the foreign national. 15 CFR 734.2(b)(2)(ii).

(2) *Export-controlled information and technology.* Export-controlled information and technology subject to the EAR (15 CFR 730–774), implemented by the DOC's Bureau of Industry and Security, or the International Traffic In Arms Regulations (ITAR) (22 CFR 120–130), implemented by the Department of State, respectively. This includes, but is not limited to, dual-use items, defense articles and any related assistance, services, software or technical data as defined in the EAR and ITAR.

(d) The recipient shall control access to all export-controlled information and technology that it possesses or that comes into its possession in performance of a financial assistance award, to ensure that access is restricted, or licensed, as required by applicable Federal laws, Executive Orders, and/or regulations.

(e) Nothing in the terms of this financial assistance award is intended to change, supersede, or waive the requirements of applicable Federal laws, Executive Orders or regulations.

(f) The recipient shall include this clause, including this paragraph (f), in all lower tier transactions (subawards, contracts, and subcontracts) under this financial assistance award that may involve access to export-controlled information technology.

39. The Trafficking Victims Protection Act of 2000 (22 U.S.C. 7104(g)), as amended, and the implementing regulations at 2 CFR part 175. This Act authorizes termination of financial assistance provided to a private entity, without penalty to the Federal Government, if the recipient or subrecipient engages in certain activities related to trafficking in persons.

40. The Federal Funding Accountability and Transparency Act of 2006 (Pub. L. No. 109–282). This Act requires that the Federal government establish a single searchable awards Web site by January 1, 2008 to enable the public to see where Federal funds for grant and contract awards are being spent. Subaward and subcontract data will be required on the Web site by January 1, 2009. Funding data retroactive to October 1, 2006 must be reported by all Federal agencies and their recipient and subrecipient organizations. Data elements will include:

- Name of entity receiving award;
- Award amount;
- Transaction type, funding agency, Catalog of Federal Domestic Assistance Number, and descriptive award title;
- Location of: Entity, primary location of performance (City/State/Congressional District/Country); and
- Unique identifier of entity.

The data will be required within 30 days of an award. The DOC will be implementing this Act, which will require recipients and subrecipients to report the required data.

C. The **Federal Register** notice announcing the availability of Federal funds for each DOC competitive financial assistance program will contain only the following program-specific information: Summary description of program; deadline date for receipt of applications; addresses for submission of applications; information contacts (including electronic access); the amount of funding available; statutory authority; the applicable *Catalog of Federal Domestic Assistance* (CFDA) number(s); eligibility requirements; cost-sharing or matching requirements; Intergovernmental Review requirements; evaluation criteria used by the merit reviewers; selection procedures, including funding priorities/selection factors/policy factors to be applied by the selecting official; and administrative and national policy requirements.

D. The DOC follows the uniform format for an announcement of Federal Funding Opportunity (FFO) for discretionary grants and cooperative agreements established by OMB in a policy letter published in the **Federal Register** (68 FR 37370, June 23, 2003). These FFOs are available at *http://www.grants.gov* or from the information contact listed in the **Federal Register** notice. Applicants are strongly encouraged to apply through *http://www.grants.gov.* It can take seven (7) to ten (10) business days to register with *http://www.grants.gov*, and registration is required only once. Applicants should consider the time needed to register with *http://www.grants.gov*, and should begin the registration process well in advance of the application due date if they have never registered. Applicants should allow themselves adequate time to submit the proposal through *http://www.grants.gov*, as the deadline for submission cannot be extended and there is the potential for human or computer error during the electronic submission process.

E. Universal Identifier: Applicants should be aware that they will be required to provide a Dun and Bradstreet Data Universal Numbering System number during the application process. See the June 27, 2003 **Federal Register** notice (68 FR 38402) for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free Duns number request line at 1–866–705–5711 or by accessing the Grants.gov Web site at: *http://www.grants.gov.*

Executive Order 12866

This notice has been determined to be ''not significant'' for purposes of Executive Order 12866, ''Regulatory Planning and Review.''

Administrative Procedure Act and Regulatory Flexibility Act

Because notice and comment are not required under 5 U.S.C. 553, or any other law, for this notice relating to public property, loans, grants benefits or contracts (5 U.S.C. 553(a)), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice.

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Paperwork Reduction Act

These regulatory actions do not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act. Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection-of-information, subject to the requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, unless that collection of information displays a currently valid OMB control number. The use of the following family of forms has been approved by OMB under the following control numbers: (1) SF–424 Family: 0348–0041, 0348–0044, 4040–0003, and 4040–0004; (2) SF–424 Research and Related Family: 4040–0001; SF–424 Individual Family: 4040–0005; (3) SF–424 Mandatory Family: 4040–0002; and (4) SF–424 Short Organizational Family: 4040–0003. The use of Forms SF–LLL and CD–346 are approved by OMB under the control numbers 0348–0046 and 0605–0001, respectively.

Catalog of Federal Domestic Assistance

This notice affects all of the grant and cooperative agreement programs funded by the DOC. The *Catalog of Federal Domestic Assistance* can be accessed on the Internet under the DOC Grants Management Web site at *http://www.cfda.gov.*

List of Subjects

Accounting, Administrative practice and procedures, Grants administration, Grant programs—economic development, Grant programs—oceans, atmosphere and fisheries management, Grant programs—minority businesses, Grant programs—technology, Grant programs—telecommunications, Grant programs—international, Reporting and recordkeeping requirements.

Al Sligh, Jr.,

Director for Acquisition Management and Procurement Executive.

[FR Doc. E8–2482 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–FA–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–802]

Amendment to the Agreement Suspending the Antidumping Investigation on Uranium From the Russian Federation

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

EFFECTIVE DATE: February 1, 2008.

SUMMARY: The Department of Commerce (''the Department'') and the Russian Federation's Federal Atomic Energy Agency (''Rosatom'') have signed an amendment to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation (''Suspension Agreement''). The amendment will allow the Russian Federation (''Russia'') to export Russian uranium products to the U.S. market in accordance with the export limits and other terms detailed in the amendment.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon at (202) 482–0162, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

Background

On October 30, 1992, the Department suspended the antidumping duty investigation involving uranium from Russia on the basis of an agreement by its government to restrict the volume of direct or indirect exports to the United States in order to prevent the suppression or undercutting of price levels of U.S. domestic uranium. *See Antidumping; Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan; Suspension of Investigations and Amendment of Preliminary Determinations*, 57 FR 49220 (October 30, 1992).

The Suspension Agreement was subsequently amended, by agreement of both governments, on March 11, 1994, October 3, 1996, and May 7, 1997. *See, respectively, Amendment to Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 59 FR 15373 (April 1, 1994); *Amendments to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 61 FR 56665 (November 4, 1996); and *Amendment to Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 62 FR 37879 (July 15, 1997). On July 31, 1998, the Department notified interested parties of an administrative change with respect to the Suspension Agreement. *See Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 63 FR 40879 (July 31, 1998).

On November 27, 2007, the United States and Russia initialed a draft amendment to the Suspension Agreement. On December 4, 2007, the Department published the draft amendment in the **Federal Register** and invited comments from interested parties, to be submitted by January 3, 2008. *See Initialed Draft Amendment to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation; Request for Comment*, 72 FR 68124 (December 4, 2007). On December 17, 2007, the Department received initial comments on the draft amendment from Power Resources, Inc. and Crow Butte Resources, Inc. On December 31, 2007, pursuant to a request by interested parties, the Department extended the comment period deadline until January 10, 2008. *See Extension of Time to Submit Comments Concerning the Initialed Draft Amendment to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 72 FR 74272 (December 31, 2007). The Department received comments from the following parties: Ad Hoc Utilities Group; AREVA S.A. and its affiliated entities; Fuelco LLC; General Electric; Louisiana Energy Services, L.P.; Nuclear Energy Institute; Nukem, Inc.; Power Resources, Inc., Crow Butte Resources, Inc., and Uranium Resources, Inc.; Progress Energy; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union; USEC Inc. and United States Enrichment Corporation; and Westinghouse Electric Company LLC.

On February 1, 2008, after consideration of the interested party comments received, U.S. Secretary of Commerce Carlos M. Gutierrez and the Director of Russia's Federal Atomic Energy Agency (Rosatom), S.V. Kiriyenko, signed a finalized amendment to the Suspension Agreement. The amendment allows for

exports of Russian uranium products to the U.S. market in accordance with the export limits and other terms detailed in the amendment. The text of the amendment follows in Annex 1 to this notice.

Dated: February 5, 2008.

Ronald K. Lorentzen,

Acting Deputy Assistant Secretary for Import Administration.

Annex 1

Amendment to the Agreement Suspending the Antidumping Investigation on Uranium From the Russian Federation

The Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation is amended as set forth below.

The Preamble is amended by deleting the last two paragraphs (which were added to the Agreement in 1994) and adding the following paragraph to the end:

The Department and ROSATOM acknowledge that, for purposes of the Agreement, as amended (the ''Agreement''), the successor in interest to MINATOM is the Federal Atomic Energy Agency (''ROSATOM''). All references to MINATOM in this Agreement shall be understood to indicate ROSATOM. All exports of Russian Uranium Products are executed through the Russian Government-Owned entity Techsnabexport (''TENEX''). All references to TENEX include its successors and its affiliated companies. All references to ''Customs'' shall be understood to indicate United States Customs and Border Protection.

Section II.—Definitions—is amended by deleting definitions (g) ''U.S. producer,'' (h) ''for consumption,'' (i) ''End-user,'' (j) ''Spot Contract,'' and (k) ''Newly-produced,'' and by adding the following definitions:

(l) ''Russian Uranium Products'' means all products described in Section III, Product Coverage, of the Agreement.

(m) ''Low-Enriched Uranium'' (''LEU'') means uranium of which the content of the fissile isotope uranium-235 has been increased through enrichment to more than 0.7 percent, but less than 20 percent, by weight.

(n) ''Initial Core'' means the LEU necessary to start a U.S. nuclear reactor that is entering service for the first time.

(o) ''Effective Date'' means the date on which this amendment is signed by both parties.

(p) ''Year'' or ''Relevant Period'' means ''Calendar Year''.

Section IV.—Export Limits—The following new paragraphs are added at the beginning of this section. The status of the other provisions of section IV is set forth in Appendix 1.

A. Beginning on the Effective Date, TENEX may immediately enter into contracts for the sale of Russian Uranium Products in the United States, directly to U.S. utilities or otherwise.

B. Beginning in 2011, Russian Uranium Products in any form may be exported to the United States up to the limits set forth below. These limits are expressed in KgU as LEU, at a product assay of 4.4 and a tails assay of 0.3 percent. The Department and ROSATOM will consult and agree within two months after the Effective Date on how to convert and apply against these export limits Russian Uranium Products which are other than LEU. Russian Uranium Products exported to the United States will be counted against these export limits, employing the formula in section II(a), where necessary.

1. The annual export limits are as follows:

2011—16,559	2016—480,146
2012—24,839	2017—490,710
2013—41,398	2018—492,731
2014—485,279	2019—509,058
2015—455,142	2020—514,754

These limits were derived from the reference data in the World Nuclear Association's 2005 ''Global Nuclear Fuel Market Supply and Demand 2005–2030.'' The Department shall adjust these export limits in 2016 and 2019 to match the projected reactor demand for subsequent years in that publication or its successor, and also to increase the total export limit for the remaining years by the net amount by which the export limits for previous years have fallen short of the export limits that would have been derived from the revised demand figures for those years, with any additional export allowances being divided equally between the revised export limits for the remaining years. Russian Uranium Products may be exported to the United States under a contract entered into after the Effective Date and approved by the Department under this Agreement, even if such exports exceed the export limits in effect at the time of delivery.

2. After the Effective Date, Russian Uranium Products may be sold in, and exported to, the United States to fulfill contracts for the supply of Initial Cores without being subject to the export limits in this Agreement.

3. After the Effective Date, LEU in the United States pursuant to the contracts described in Appendix C to the Agreement, and stored as of the Effective Date at the facilities of U.S. producers (i.e., the EUP stockpile), may be sold in the United States or exported from the United States without being subject to the export limits in this Agreement, provided such sales occur prior to January 1, 2014. Any amount sold after December 31, 2013, shall be charged against the export limit for the year in which it is sold or the first subsequent year in which the export limit has not been reached.

4. After the Effective Date, Russian Uranium Products may be imported for processing and certified for re-export pursuant to sections IV. G and H, without being subject to the export limits in section IV.B.1.

C. If, at any time, the Department determines that the available supply of Russian Uranium Products is or will be insufficient to meet U.S. demand, the Department may increase the export limits in this Agreement.

D. Except for any increase added pursuant to section IV.C, if, in any year, the Department permits any Russian Uranium Products to enter the United States in excess of the export limit for that year, the amount of the excess shall be charged against the export limit for the first subsequent year in which the export limit has not been contractually obligated. If the amount entered in any year falls below the export limit for that year, the amount of the shortfall may be added to the export limit for the subsequent year, up to 10 percent of the export limit for the year in which the shortfall occurs.

E. In negotiating contracts involving the export of Russian Uranium Products to the United States, ROSATOM/TENEX shall charge market rates for conversion.

F. The Russian LEU in reactor fuel rods or assemblies exported to the United States shall be counted against the export limits in this Agreement. ROSATOM/TENEX shall charge market rates for fuel rods and assemblies themselves.

The following sentence is added at the end of the sixth paragraph of section IV.H., which begins ''For re-export entered under the 36 month limitation * * *'':

The Department of Commerce shall instruct Customs to liquidate such entries as promptly as possible, and in all cases within ten (10) days of receiving confirmation of the re-export shipment out of the United States. If the Department does not issue such instruction to Customs within ten (10) days of receiving confirmation of the re-export shipment out of the United States, on the next business day, the Department shall provide ROSATOM with a written explanation of the exact and specific reason(s) for the delay and a date certain by which the Department shall issue instructions to Customs to

liquidate the entries. The Department shall provide notice of re-export of any such uranium to TENEX.

N. Russian Uranium Products sold pursuant to a multi-year contract entered into after the Effective Date and approved by the Department may be delivered in accordance with the provisions of this Amendment regardless of any modification to or reduction in the quantity that may be delivered under the export limits or any modification to or any interruption in the effectiveness of, including termination of, this Agreement.

Section V.—Export License/Certificates—is amended by replacing paragraphs B and C with the paragraphs below and adding new paragraph F as follows:

B. Export licenses shall be issued, and export certificates shall be endorsed by the competent Russian Government authority, for all direct and indirect exports of Russian Uranium Products to the United States. Such export certificates shall remain valid for entry into the United States for 120 days from the Date of Export.

C. Russian Uranium Products may enter the United States if: (1) They were sold pursuant to a contract approved by the Department under this Agreement; (2) are accompanied by (a) a valid export license and certificate and (b) a valid purchase and/or delivery order issued in accordance with the contract approved by the Department under this Agreement showing the specific product and tails assays, as applicable; and (3) do not exceed the export limits in section IV.

F. Any contract, or amendment thereto, for the sale of Russian Uranium Products for exportation to the United States shall be submitted to the Department for approval, along with the documents listed in Appendix 2 to this Amendment. If the maximum quantities to be exported under a contract, when cumulated with the maximum quantities that may be exported under all other approved contracts, are not in excess of the export limits under this Agreement, and the information listed in Appendix 2 has been submitted to the Department, the Department shall approve the contract within 15 days (or the next business day if the 15th day falls on a weekend or holiday).

Section VII.—Anticircumvention—is amended by replacing section VII.D with new paragraph D and adding new paragraph J as follows:

D. In addition to the above requirements, the Department shall direct Customs to require all importers of uranium products into the United States, regardless of stated country of origin, to submit at the time of entry written statements certifying the following:

1. The country(ies) in which the ore was mined and, if applicable, converted, enriched, and/or fabricated, for all imports; and

2. That the uranium products being imported were not obtained under any arrangement, swap, exchange, or other transaction designed to circumvent the export limits established by the Agreement, or the limitations set forth in 43 U.S.C. 2297h–10(b) of the USEC Privatization Act, 42 U.S.C. 2297h, *et seq.*, and the *Procedures for Delivery of HEU Natural Uranium Component in the United States*, as revised. *Procedures for Delivery of HEU Natural Uranium Component in the United States*, 64 Fed. Reg. 42930 (August 6, 1999).

J. Neither ROSATOM nor TENEX will circumvent this Agreement or frustrate the attainment of its objectives by entering into any contract involving the exportation to the United States of LEU in quantities exceeding the export limits in this Agreement.

Section VIII.—Monitoring—is amended by adding the reporting requirements listed in Appendix 3 to this Amendment.

Section XII.—Duration—is amended by replacing the first two paragraphs with the following:

As of the Effective Date of this Amendment, each of the petitioners in the suspended investigation, or their legal successors, has filed with the Department an irrevocable letters expressly withdrawing the petition in the antidumping investigation, effective December 31, 2020. These letters are attached to this Amendment as Appendix 4. The Agreement will terminate on December 31, 2020. Upon its termination on December 31, 2020, the Department shall terminate the antidumping investigation effective on that date.

The Department, before the Effective Date, acknowledges the remand of the U.S. Court of International Trade of September 26, 2007, in *Techsnabexport* v. *United States*, Ct. No. O6–00228, including the Court's direction that ''Commerce follow the precedent by which it is bound, articulated in the Eurodif cases.'' As directed by the Court of International Trade, the Department will abide by the Eurodif decisions in its determination of the likelihood of continued or recurring dumping. Therefore, on the Effective Date, Techsnabexport will file a motion in *Techsnabexport* v. *United States* under Rule 41 of the U.S. Court of International Trade Rules. The United States will not appeal the September 26th decision in *Techsnabexport* v. *United States.*

In addition, the Department shall conduct sunset reviews under 19 U.S.C. 1675(c) in the years 2011 and 2016. All parties agree that the sunset reviews shall be expedited, pursuant to 19 U.S.C. 1675(C)(4) and (C)(3)(B), respectively, at both the Department of Commerce and the International Trade Commission.

Section XIII.—Conditions—is amended by adding, before the first paragraph, an ''A,'' and by adding the following new paragraph at the end of section XIII:

B. This Agreement will be applied consistent with any applicable decision of the U.S. Courts, including the *Eurodif* decisions. Such decisions shall be applied to this Agreement (including by amendment, if necessary) no later than six (6) months after the appropriate decision, unless the Department and ROSATOM agree otherwise.

Section XIV.—Other Provisions—is amended by replacing existing paragraph B with the following new paragraph B, and by replacing the second part of paragraph C with the following:

B. For all purposes relating to the Agreement, the Department and ROSATOM shall be represented by, and all communications and notices shall be given and addressed to: *Department Contact:* United States Department of Commerce, Assistant Secretary for Import Administration, International Trade Administration, Washington, DC 20230. *ROSATOM Contact:* State Secretary, Deputy Director, Federal Atomic Energy Agency, (ROSATOM), Staromonetnyy per., 26, 119180, Moscow, Russian Federation.

C. If U.S. law, regulation, administrative practice, or policy should change in any manner, including by U.S. court decision or legislative or administrative action, that would result in relatively less favorable treatment for the Russian Federation as compared to any other country, or if the United States should enter into any agreement or understanding or take any action that would cause that result, the parties will promptly, *i.e.*, within six (6) months, enter into consultations with a view to amending this Agreement so as to eliminate such less favorable treatment to the extent permitted by U.S. law.

Signed on this 1st day of February, 2008.

For the U.S. Department of Commerce:

Carlos M. Gutierrez,

U.S. Secretary of Commerce.

For ROSATOM:

S.V. Kiriyenko,

Director, Federal Atomic Energy Agency, (ROSATOM).

Appendix 1

Section IV.—Export Limits—The status of the other paragraphs of section IV, other than the newly-added paragraphs, is as follows:

1994 matched sales provisions (IV, IV.A—IV–E)—hereby deleted.

1992 Sections IV. A–IV.C.1—deleted in 1994.

1992 Sections IV. C 2–3 and IV.D—hereby deleted.

1992 Sections IV. E–IV.G—remain in effect.

1992 Section IV. H, first two paragraphs—deleted in 1997.

1997 Section H—remains in effect.

1992 Sections IV. I–IV.M.1 remain in effect.

1996 Section IV.M.2—remains in effect.

1992 Section IV.M.2—ineffective as of 1997.

Appendix 2

Pursuant to section V.F, the following documents should accompany any contract for the sale of Russian Uranium Products for exportation to the United States which is submitted to the Department for approval:

1. A copy of the signed contract pursuant to which the Russian Uranium Products shall be imported (showing the contract date and key terms such as price, quantity, delivery requirements and estimated delivery schedule);

2. A description of the physical material being imported;

3. Identification of the Russian supplier of the Russian Uranium Products;

4. For each contract, the maximum volume of each type of Russian Uranium Product that may be exported to the United States pursuant to the contract each year;

5. For sales pursuant to Section IV.B.2, the documentation necessary to demonstrate that deliveries meet the definition of Initial Cores (*e.g.*, a combined construction and operating license (COL), etc.).

Appendix 3

Pursuant to section VIII, the following additional reporting requirements are agreed to by ROSATOM and the Department:

1. Beginning the Effective Date, no later than 30 days after the end of each calendar quarter, to the extent permitted by Russian law, ROSATOM shall submit an updated master export schedule to the Department showing the following for each year (from the first year of validity of the Amendment through 2020) for any material to be delivered in the United States pursuant to contracts under this Agreement: (a) Estimated deliveries, and (b) completed deliveries. All such reports submitted by ROSATOM shall be subject to release under Administrative Protective Order (''APO'') to counsel for interested parties to the proceeding.

2. Beginning the Effective Date, no later than 30 days after the end of each semi-annual period, to the extent permitted by U.S. law, the Department shall provide semi-annual reports to ROSATOM, via its U.S. attorney under APO, of all individual imports (for consumption and for processing and re-export) of Russian Uranium Products to the United States, together with such additional information as is necessary and appropriate to monitor implementation of the Agreement, as agreed to by ROSATOM and the Department. For every transaction for which the Department withholds information on the basis that its disclosure is not permitted under U.S. law, the Department shall submit to ROSATOM the fullest description permitted under U.S. law of the information withheld and the legal basis for not disclosing it.

3. For purposes of the Department's reporting on imports for consumption, to the extent permitted under U.S. law, the Department shall provide the following:

a. *Quantity:* Indicate units of measure sold and/or entered, e.g., pounds U308, Kilograms U, SWU, etc.

b. *Date of Importation:* The date Customs confirmed the Department's shipment clearance instructions.

c. *Date of Export:* The date the Export Certificate is endorsed.

d. *Export Certificate:* The Export Certificate number corresponding to each individual import.

e. *Total Sales Value:* Indicate currency used.

f. *Importer of Record:* Name and address.

4. For purposes of the Department's reporting on imports for processing and re-export, to the extent permitted under U.S. law, the Department shall provide the following:

a. Filing date of request for approval filed with the Department.

b. Certificate for Re-Export number, as listed on the Certificate for Re-Export.

c. Date of issuance by ROSATOM of the Certificate for Re-Export, as listed on the Certificate for Re-Export.

d. Date of Export, as listed on the Certificate for Re-Export.

e. Party requesting approval, as listed on the request for approval.

f. Customer, as listed on the Certificate for Re-Export.

g. Total quantity, expressed in KGU, U308 and, as applicable, SWUs, as listed on the Certificate for Re-Export.

h. Date of importation, as relied upon by the Department for purposes of determining annual usage of the quota.

i. Time frame for re-export (i.e., 12-month or 36-month), as listed on the Certificate for Re-Export.

j. Scheduled date for re-export, as relied upon by the Department for purposes of determining annual usage of the quota.

k. Notice of re-export filed with the Department, including the date of such notification and the actual date of re-export.

Appendix 4

[Available in the Department's Central Records Unit, HCHB Room 1117].

[FR Doc. 08–608 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(C–533–825)

Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review

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

SUMMARY: On August 6, 2007, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of administrative review of the countervailing duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from India for the period January 1, 2005 through December 31, 2005. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Notice of Preliminary Results and Rescission, in Part, of Countervailing Duty Administrative Review*, 72 FR 43607 (August 6, 2007) (*Preliminary Results*). Based on the results of our verification and our analysis of the comments received, the Department has revised the subsidy rates for the respondents; Garware Polyester Ltd. (Garware) and MTZ Polyfilms, Ltd. (MTZ). The final subsidy rates for the reviewed companies are listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: February 11, 2008

FOR FURTHER INFORMATION CONTACT: Elfi Blum or Sean Carey, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0197, or (202) 482–3964, respectively.

SUPPLEMENTARY INFORMATION:

Background

Since the publication of the *Preliminary Results*, the following events have occurred. As provided in 782(i) of the Tariff Act of 1930, as amended (the Act), the Department conducted a verification of the questionnaire responses submitted by the Government of India (GOI), Garware, and MTZ from September 11 through September 25, 2007. We used standard verification procedures, including on–site examination of relevant records and original source documents. Our verification results are outlined in the verification memoranda, public versions of which are on file in the Central Records Unit (CRU), room 1117 of the Main Commerce Building. *See* ''Verification of the Questionnaire Responses Submitted by the Government of India (GOI)'' (December 7, 2007) (*GOI Verification Report*); ''Verification of the Questionnaire Responses Submitted by Garware Polyester, Ltd. (Garware)'' (December 7, 2007) (*Garware Verification Report*); and ''Verification of the Questionnaire Responses Submitted by MTZ Polyfilms Ltd. (MTZ)'' (December 7, 2007) (*MTZ Verification Report*). On December 20, 2007, Dupont Teijin Films, Mitsubishi Polyester Film of America, and Toray Plastics (America), Inc. (collectively, the Petitioners), Garware, and MTZ filed case briefs. Garware, MTZ and Petitioners filed rebuttal briefs on December 28, 2007. Based on a request by MTZ, a public hearing was held on January 10, 2008.

Scope of the Order

For purposes of the order, the products covered are all gauges of raw, pretreated, or primed Polyethylene Terephthalate Film, Sheet and Strip, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance–enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET film are classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the order is dispositive.

Analysis of Comments Received

Following the release of the verification reports for the GOI, Garware and MTZ, we gave interested parties an opportunity to comment on our *Preliminary Results*. All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the *Issues and Decision Memorandum for the 2005 Countervailing Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India*, from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration to David M. Spooner, Assistant Secretary for Import Administration (February 4, 2008) (*Issues and Decision Memorandum*), which is hereby adopted by this notice. The *Issues and Decision Memorandum* also contains a complete analysis of the programs covered by this review and the methodologies used to calculate the subsidy rates. A list of the comments raised in the briefs and addressed in the *Issues and Decision Memorandum* is appended to this notice. The *Issues and Decision Memorandum* is on file in the CRU, and can be accessed directly on the Web at *http://www.trade.gov/ia/*.

Changes Since the Preliminary Results

Based on our verification and analysis of comments received, we have made some adjustments in the methodology that was used in the *Preliminary Results* for calculating Garware's and MTZ's subsidy rates under several programs. All changes are discussed in detail in the *Issues and Decision Memorandum*.

Final Results of Review

In accordance with section 751(a)(1)(A) of the Act and 19 CFR 351.221(b)(5), we calculated individual *ad valorem* subsidy rates for the producers/exporters, Garware and MTZ, the only producers/exporters subject to review for the calendar year 2005, the period of review (POR) for this administrative review.

Manufacturer/Exporter	Net Subsidy Rate
Garware Polyester Ltd.	10.37%
MTZ Polyfilms Ltd.	33.94%

Assessment and Cash Deposit Instructions

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results of review to liquidate shipments of subject merchandise by Garware and MTZ entered, or withdrawn from warehouse, for consumption on or after January 1, 2005 through December 31, 2005, at 10.37 percent and 33.94 percent, respectively, *ad valorem* of the entered value. We will also instruct CBP to collect cash deposits of estimated countervailing duties, at these rates, on shipments of the subject merchandise by Garware and MTZ entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of review. For all non–reviewed companies, the Department has instructed CBP to assess countervailing duties at the cash deposit rates in effect at the time of entry, for entries between January 1, 2005 and December 31, 2005. The cash deposit rates for all companies not covered by this review are not changed by the results of this review.

Return or Destruction of Proprietary Information

This notice serves as a reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 4, 2008.

David M. Spooner,

Assistant Secretaryfor Import Administration.

Appendix I

List Of Issues Addressed In The Issues And Decision Memorandum

Comment 1: Countervailability Determination and Cash–Deposit Adjustment for the Target Plus Scheme
Comment 2: Countervailing the Total Subsidy Provided by the Pre- and Post–Shipment Program
Comment 3: The Countervailability of the Advance License Program (ALP)
Comment 4: The Denominator in the Benefit Calculation for Export Promotion Capital Goods Scheme (EPCGS)
Comment 5: Calculation Methodology for EPCGS
Comment 6: Partial Fulfillment of the EPCGS Export Obligation
Comment 7: The Interest Rate Used to Calculate the EPCGS Benefit

Comment 8: EPCGS Benefits for Machinery Not Used to Produce Subject Merchandise
Comment 9: The Treatment of Countervailing Duties in the Benefit Calculation for EPCGS
Comment 10: Company Specific Average Useful Life (AUL) for MTZ
Comment 11: Purchases From a Union Territory
Comment 12: Adjustments to Cash Deposit Rates to Account for Program–Wide Changes
Comment 13: State of Maharashtra (SOM) Sales Tax Exemption
Comment 14: Timetable for the Department to Consider Arguments

[FR Doc. E8–2467 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–351–841), (A–570–924), (A–549–825), (A–520–803)

Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China, Thailand, and the United Arab Emirates: Postponement of Preliminary Determinations of Antidumping Duty Investigations

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

EFFECTIVE DATE: February 11, 2008.

FOR FURTHER INFORMATION CONTACT: Mike Heaney for Brazil, Erin Begnal for the People's Republic of China, Stephen Bailey for Thailand, and Douglas Kirby for the United Arab Emirates, AD/CVD Operations, Offices 6, 7, and 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4475, (202) 482–1442, (202) 482–0193 and (202) 482–3782, respectively.

SUPPLEMENTARY INFORMATION:

Postponement of Preliminary Determinations

On October 26, 2007, the Department of Commerce (the Department) initiated the antidumping duty investigations of polyethylene terephthalate film, sheet, and strip (PET Film) from Brazil, the People's Republic of China, Thailand, and the United Arab Emirates. *See Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from Brazil, the People's Republic of China, Thailand, and the United Arab Emirates: Initiation of Antidumping Duty Investigations*, 72 FR 60801 (October 26, 2007). The notice of initiation stated that the Department would issue its preliminary determinations for these investigations no later than 140 days after the date of issuance of the initiation (i.e., March 6, 2008) in accordance with section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act). Id. at 60806.

On January 23, 2008, DuPont Teijin Films, Mitsubishi Polyester of America, SKC Inc. and Toray Plastics (America), Inc. (collectively, petitioners) made a timely request pursuant to section 733(c)(1) of the Act and 19 CFR 351.205(e) for a postponement of the preliminary determinations with respect to Brazil, the People's Republic of China, Thailand, and the United Arab Emirates. The petitioners requested postponement of the preliminary determinations with respect to these four countries, explaining that they need time to evaluate questionnaire responses, the submissions of which were extended by the Department. Additionally, petitioners stated that they intend to file sales–below-cost allegations with respect to Thailand and the United Arab Emirates, and anticipated that the Department will need time to adequately analyze these allegations.

For the reasons identified by the petitioners and because there are no compelling reasons to deny the request, the Department is postponing the deadline for the preliminary determinations with respect to Brazil, the People's Republic of China, Thailand, and the United Arab Emirates pursuant to section 733(c)(1)(A) of the Act by 50 days to April 25, 2008. The deadline for the final determinations will continue to be 75 days after the date of the preliminary determinations, unless extended.

This notice is issued and published pursuant to sections 733(c)(2) and 777(I) of the Act, and 19 CFR 351.205(f)(1).

Dated: February 4, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–2460 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–822]

Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review

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

SUMMARY: On August 6, 2007, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Mexico. *See Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review*, 72 FR 43600 (August 6, 2007) (*Preliminary Results*). This review covers sales of subject merchandise made by ThyssenKrupp Mexinox S.A. de C.V. (Mexinox) for the period July 1, 2005 to June 30, 2006. Based on our analysis of the comments received, we have made changes in the margin calculation; therefore, the final results differ from the preliminary results. The final weighted–average dumping margin for the reviewed firm is listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: February 11, 2008.

FOR FURTHER INFORMATION CONTACT: Maryanne Burke or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5604 and (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 6, 2007, the Department published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Mexico for the period July 1, 2005, to June 30, 2006. *See Preliminary Results*. In response to the Department's invitation to comment on the preliminary results of this review, Allegheny Ludlum Corporation, United Auto Workers Local 3303, Zanesville Armco Independent Organization, Inc. and the United Steelworkers of America (collectively, petitioners) and Mexinox filed their case briefs on November 13, 2007.[1] Mexinox submitted its rebuttal

[1] On September 11, 2007, we issued a memorandum stating that the Department would

brief on November 19, 2007, while petitioners filed their rebuttal brief on November 20, 2007. Also, at Mexinox's request, the Department held a public hearing on December 6, 2007.

On September 4, 2007, we published in the **Federal Register** our notice partially extending the time limit for this review until January 10, 2008. *See Stainless Steel Sheet and Strip in Coils from Mexico: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review*, 72 FR 50663 (September 4, 2007). On January 14, 2008, we published in the **Federal Register** our notice fully extending the time limit for this review until February 4, 2008. *See Stainless Steel Sheet and Strip in Coils from Mexico: Second Extension of Time Limit for Final Results of Antidumping Duty Administrative Review*, 73 FR 2222 (January 14, 2008).

Period of Review

The period of review (POR) is July 1, 2005 to June 30, 2006.

Scope of the Order

For purposes of this administrative review, the products covered are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat–rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.*, cold–rolled, polished, aluminized, coated, *etc.*) provided that it maintains the specific dimensions of sheet and strip following such processing. The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.13.00.81, 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.20.8000, 7220.20.9030, 7220.20.9060, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under review is dispositive.

Excluded from the review of this order are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (*i.e.*, flat–rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.*, cold–rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat–rolled product of stainless steel, not further worked than cold–rolled (cold–reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* chapter 72 of the HTSUS, ''Additional U.S. Note'' 1(d).

Flapper valve steel is also excluded from the scope of the order. This product is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus–or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of this order. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron–chromium-cobalt alloy stainless strip is also excluded from the scope of this order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as ''Arnokrome III.''[2]

Certain electrical resistance alloy steel is also excluded from the scope of this order. This product is defined as a non–magnetic stainless steel manufactured to American Society of Testing and Materials (''ASTM'') specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep

postpone the briefing schedule for the final results until cost verification reports were issued for Mexinox. *See* Memorandum to the File, dated September 11, 2007.

[2] ''Arnokrome III'' is a trademark of the Arnold Engineering Company.

rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as ''Gilphy 36.''[3]

Certain martensitic precipitation–hardenable stainless steel is also excluded from the scope of this order. This high–strength, ductile stainless steel product is designated under the Unified Numbering System (''UNS'') as S45500–grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as ''Durphynox 17.''[4]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of this order. These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.*, carpet knives).[5] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as ''GIN4 Mo.'' The second excluded stainless steel strip in coils is similar to AISI 420–J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is ''GIN5'' steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, ''GIN6.''[6]

[3] ''Gilphy 36'' is a trademark of Imphy, S.A.

[4] ''Durphynox 17'' is a trademark of Imphy, S.A.

[5] This list of uses is illustrative and provided for descriptive purposes only.

[6] ''GIN4 Mo,'' ''GIN5'' and ''GIN6'' are the proprietary grades of Hitachi Metals America, Ltd.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (the Tariff Act), we verified sales and cost information provided by Mexinox, using standard verification procedures such as the examination of relevant sales and financial records. Our verification results are outlined in the public and proprietary versions of our verification reports, which are on file in the Central Records Unit (CRU) in room 1117 of the main Department building. *See* ''Verification of the Sales Response of Mexinox in the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico,'' dated August 16, 2007 (Sales Verification Report). *See also* ''Verification of the Cost Response of Mexinox in the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico,'' dated November 2, 2007 (Cost Verification Report).

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum (Decision Memorandum) from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, dated February 4, 2008, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the CRU in room B–099 of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly via the Internet at *www.ia.ita.doc.gov/fm/index.html*. The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made the following changes to the margin calculation:

- In accordance with the major input test we made adjustments to the reported costs of direct material costs for certain grades. *See* ''Cost of Production and Constructed Value Calculation Adjustments for the Final Results - ThyssenKrupp Mexinox S.A. de C.V., '' dated February 4, 2008 (Final Results Cost Calculation Memorandum).
- We revised Mexinox's reported cost of production to include a certain depreciation expense related to a new production line installed during the POR. *See id*.
- We revised Mexinox's and Ken–Mac Metal Inc.'s financial expense ratio to exclude certain interest income offsets from the numerator, and exclude packing from the denominator. *See id*.
- We revised Mexinox's general and administrative expenses to exclude a portion of one of the income offsets originally claimed by Mexinox. *See id*.

These changes are discussed in the relevant sections of the Decision Memorandum and Cost Calculation Memorandum. *See also* Memorandum to the File, ''Analysis of Data Submitted by ThyssenKrupp Mexinox S.A. de C.V (Mexinox) for the Final Results of Stainless Steel Sheet and Strip in Coils from Mexico (A–201–822)'' (Final Analysis Memorandum), dated February 4, 2008.

In addition, we have made changes made to Mexinox's reported cost database as a result of first day corrections identified by Mexinox during our cost verification. *See* Cost Verification Report at Exhibit 1.

Final Results of Review

We determine the following weighted–average percentage margin exists for the period July 1, 2005 to June 30, 2006:

Manufacturer / Exporter	Weighted Average Margin (percentage)
ThyssenKrupp Mexinox S.A. de C.V.	2.31 percent

Assessment

The Department will determine, and U.S. Customs and Border Protection

(CBP) shall assess, antidumping duties on all appropriate entries, pursuant to section 751(a)(1) of the Tariff Act and 19 CFR 351.212(b). The Department calculated an assessment rate for each importer of the subject merchandise covered by the review. Upon issuance of the final results of this review, for any importer–specific assessment rates calculated in the final results that are above *de minimis* (*i.e.*, at or above 0.50 percent), we will issue appraisement instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. Pursuant to 19 CFR 356.8(a), the Department intends to issue assessment instructions to CBP 41 days after the date of publication of these final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Notice of Policy Concerning Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by Mexinox for which Mexinox did not know the merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the 30.85 percent all–others rate if there is no company–specific rate for an intermediary involved in the transaction. *See id.* for a full discussion of this clarification.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results of administrative review, consistent with section 751(a)(1) of the Tariff Act: (1) the cash deposit rate for the reviewed company will be the rate listed above; (2) if the exporter is not a firm covered in this review, but was covered in a previous review or the original less than fair value (LTFV) investigation, the cash deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 30.85 percent, the all–others rate established in the LTFV investigation. *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Mexico*, 64 FR 40560 (July 27, 1999). These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification to Interested Parties

This notice also serves as a final 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 Department's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition 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 or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: February 4, 2008.

David M. Spooner,

Assistant Secretaryfor Import Administration.

Appendix – Issues in Decision Memorandum

General Issues

Comment 1: Revocation
Comment 2: Offsetting for U.S. Sales that Exceed Normal Value

Adjustments to United States Price

Comment 3: U.S. Indirect Selling Expenses

Comment 4: Temporary Import Bonds

Adjustments to Normal Value

Comment 5: Handling Expense
Comment 6: Circumstance–of-Sale Adjustment

Cost of Production

Comment 7: Major Input Rule
Comment 8: Employee Profit Sharing
Comment 9: Year–End Inflation Adjustment to G&A
Comment 10: Depreciation
Comment 11: Interest Expense
Comment 12: Packing Expense
Comment 13: G&A Expense

[FR Doc. E8–2464 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Notice of Intent to Prepare a Joint Environmental Impact Statement / Environmental Impact Report for the Proposed Relocation of the National Oceanic and Atmospheric Administration's Southwest Fisheries Science Center located in La Jolla, California

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Intent to prepare a joint National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) and California Environmental Quality Act (CEQA) Environmental Impact Report (EIR); request for comments.

SUMMARY: NOAA announces its intent to prepare a joint EIS/EIR to analyze the environmental impacts of relocating its Southwest Fisheries Science Center (SWFSC) near the Scripps Institution of Oceanography (SIO) within the University of California at San Diego (UCSD) campus in La Jolla, California.

Publication of this notice is to request public participation during preparation of the EIS/EIR to help determine the scope of environmental issues and range of alternatives to be addressed, and to provide information as to how to participate.

DATES: A public scoping meeting will held on the following date:Wednesday, February 20, 2008 – 5 p.m. tour of SWFSC and 6 p.m. meeting start time, SWFSC Lab, Building A, Large Conference Room, 8604 La Jolla Shores Drive, La Jolla, CA 92037.

FOR FURTHER INFORMATION CONTACT: Anne Elston, Environmental Research Analyst, SRI International, 333 Ravenswood Avenue, G 234, Menlo Park, CA 94025–3493; e-mai *anne.elston@sri.com*

SUPPLEMENTARY INFORMATION: The National Marine Fisheries Service (NMFS) is responsible for the management, conservation, and protection of living marine resources within the U.S. Exclusive Economic

Zone. The SWFSC in La Jolla, California, manages and conducts research involving Pacific fisheries and marine mammal research for the protection and management of these resources throughout the Western Pacific and the Antarctic. The existing SWFSC facility, built in 1964, is currently adjacent to a coastal bluff that is undergoing severe erosion and retreat. NOAA proposes to construct a new SWFSC building to replace its existing NMFS administrative and marine research facilities currently located in La Jolla, California. A minimum of two existing at risk SWFSC structures would be removed and the property currently used by NOAA would be returned to the UCSD for other appropriate uses.

NOAA is the lead Federal agency for implementation of the NEPA. The University of California is the lead agency under the CEQA. The existing and preferred sites for the SWFSC headquarters are at the UCSD campus. The NMFS, SIO and other marine research organizations conduct independent and joint research at the SWFSC and its salt water laboratory facilities.

The proposed project will require construction of a new facility to support SWFSC administrative and marine research operations. The preferred site will enable NMFS, SIO, and others to continue collaboration within a wide range of programmatic marine research disciplines. NOAA, in cooperation with UCSD, has decided to prepare a joint EIS/EIR to analyze the environmental impacts of relocating the SWFSC facilities at UCSD.

Other alternative actions considered are:

Use of other NOAA facility locations in California and other Pacific Coast states;

Use of alternative sites at or adjacent to SIO for collaborative research; and

Use of existing alternative NOAA facilities and properties away from UCSD.

This joint EIS/EIR will analyze environmental impacts that may result from construction and/or operation of the proposed facilities. These potential environmental issues to be addressed include: land use and coastal zone management; aesthetics; geology; hydrology and water resources; biological resources and protected species; utilities and public services; transportation and traffic circulation, recreational resources; air quality; noise and vibration; visual effects and aesthetics; cultural resources; and socioeconomics and land use; and cumulative effects.

The most salient and foreseeable environmental topics of greatest interest are expected to be aesthetics, transportation and traffic, hydrology, and short term noise effects.

Interested parties who wish to submit suggestions or comments regarding the scope or content on the proposed EIS/EIR are invited to attend the public scoping meeting.

Dated: February 6, 2008.

William F. Broglie,

Chief Administrative Officer, National Oceanic and Atmospheric Administration.

[FR Doc. E8–2457 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–12–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

ENVIRONMENTAL PROTECTION AGENCY

Coastal Nonpoint Pollution Control Program: Approval Decision on Florida's and South Carolina's Coastal Nonpoint Pollution Control Programs

AGENCY: National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the U.S. Environmental Protection Agency.

ACTION: Notice of Intent to Approve the Florida and South Carolina Coastal Nonpoint Programs.

SUMMARY: Notice is hereby given of the intent to fully approve the Florida and South Carolina Coastal Nonpoint Pollution Control Programs (coastal nonpoint program) and of the availability of the draft decision documents fully approving the Florida and South Carolina coastal nonpoint programs. Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA), 16 U.S.C. section 1455b, requires States and Territories with coastal zone management programs that have received approval under section 306 of the Coastal Zone Management Act, 16 U.S.C. section 1455, to develop and implement coastal nonpoint programs. Coastal States and Territories were required to submit their coastal nonpoint programs to the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) for approval in July 1995. NOAA and EPA conditionally approved the Florida and South Carolina coastal nonpoint programs on November 18, 1997 and February 23, 1998, respectively. NOAA and EPA have drafted approval decisions describing how Florida and South Carolina have satisfied the conditions placed on their programs and therefore have a fully approved coastal nonpoint program.

NOAA and EPA are making the draft decisions for the Florida and South Carolina coastal nonpoint programs available for a 30-day public comment period. If comments are received, NOAA and EPA will consider whether such comments are significant enough to affect the decision to fully approve the programs.

Copies of the draft Approval Decisions can be found on the NOAA Web site at *http://coastalmanagement.noaa.gov/czm/6217/findings.html* or may be obtained upon request from: Allison Castellan, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland 20910, phone (301) 713–3155, x125, e-mail *Allison.Castellan@noaa.gov.*

DATES: Individuals or organizations wishing to submit comments on the draft Approval Decisions should do so by March 12, 2008.

ADDRESSES: Comments should be made to: John King, Chief, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland 20910, phone (301) 713–3155, x188, e-mail *John.King@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Allison Castellan, Coastal Programs Division, (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland 20910, phone (301) 713–3155, x125, e-mail *Allison.Castellan@noaa.gov.*

(Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Administration)

Dated: February 5, 2008.

John H. Dunnigan,

Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

Benjamin H. Grumbles,

Assistant Administrator, Office of Water, Environmental Protection Agency.

[FR Doc. 08–596 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–08–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD61

Marine Mammals; File No. 10080

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

ACTION: Notice; receipt of application for amendment.

SUMMARY: Notice is hereby given that Dr. Kathryn A. Ono, Department of Biological Sciences, University of New England, Biddeford, ME, has requested a major amendment to Permit No. 10080 for research on marine mammals.

DATES: Written, telefaxed, or e-mail comments must be received on or before March 12, 2008.

ADDRESSES: The amendment request and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 427–2521; and

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978) 281–9300; fax (978) 281–9394.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301) 427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 10080.

FOR FURTHER INFORMATION CONTACT: Tammy Adams or Jaclyn Daly, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The amendment is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 10080, issued on December 18, 2007 (72 FR 72996) and valid through December 31, 2012, authorizes research to examine expanding populations of the Western North Atlantic stocks of harbor seals (*Phoca vitulina concolor*) and gray seals (Halichoerus grypus) in the Gulf of Maine. In addition to capture and sampling activities, the permit authorizes harassment of up to 1000 gray seals annually incidental to boat approaches to seals on haul outs. In consideration of the increasing size of this population, the applicant has requested an increase in the number of seals that may be harassed by this activity: up to 2000 annually.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), NMFS has initially determined that issuance of the proposed permit is consistent with a category of activities identified in NOAA Administrative Order 216–6 that do not individually or cumulatively have the potential to pose significant impacts on the quality of the human environment and are therefore exempted from further environmental review and requirements to prepare environmental review documents.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: February 5, 2008.

Tammy C Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–2489 Filed 2–8–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Missile Defense Advisory Committee

AGENCY: Department of Defense; Missile Defense Agency (MDA).

ACTION: Notice of Closed Meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended) and the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended) and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting will take place.

Name of Committee: Missile Defense Advisory Committee.

Dates of Meeting: Tuesday, February 26 and Wednesday, February 27, 2008.

Time: 8 a.m. to 5 p.m. Security clearance and visit requests are required for access.

Location: 7100 Defense Pentagon, Washington, DC 20301–7100.

Purpose of the Meeting: At this meeting, the Committee will receive classified briefings by Missile Defense Agency senior staff, Program Managers, senior Department of Defense leaders, representatives from industry and the Services on the appropriate role for the Missile Defense Agency in Cruise Missile Defense.

Agenda: Topics tentatively scheduled for discussion include, but are not limited to administrative work; Current and Potential Service Capabilities and Responsibilities in Joint Cruise Missile Defense; Review of Governing Directives; and an Update on MDA's Engineering Capabilities and Responsibilities.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155 the Missile Defense Agency has determined that the meeting shall be closed to the public. The Director, Missile Defense Agency, in consultation with the Missile Defense Agency Office of General Counsel, has determined in writing that the public interest requires that all sessions of the committee's meeting will be closed to the public because they will be concerned with classified information and matters covered by section 5 U.S.C. 552b(c)(1).

Committee's Designated Federal Officer: Mr. Al Bready, *mdac@mda.mil*, phone/voice mail 703–695–6438, or mail at 7100 Defense Pentagon, Washington, DC 20301–7100.

SUPPLEMENTARY INFORMATION: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the membership of the Missile Defense Advisory Committee about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the Missile Defense Advisory Committee.

All written statements shall be submitted to the Designated Federal Officer for the Missile Defense Advisory Committee, in the following formats: One hard copy with original signature and one electronic copy via e-mail (acceptable file formats: Adobe Acrobat

PDF, MS Word or MS PowerPoint), and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Designated Federal Officer is as stated above and can also be obtained from the GSA's Federal Advisory Committee Act Database—*https://www.fido.gov/facadatabase/public.asp*.

Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the Missile Defense Advisory Committee until its next meeting. The Designated Federal Officer will review all timely submissions with the Missile Defense Advisory Committee Chairperson and ensure they are provided to all members of the Missile Defense Advisory Committee before the meeting that is the subject of this notice.

FOR FURTHER INFORMATION CONTACT: Mr. Al Bready, Designated Federal Officer at *mdac@mda.mil*, phone/voice mail 703–695–6438, or mail at 7100 Defense Pentagon, Washington, DC 20301–7100.

Dated: February 4, 2008.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–2494 Filed 2–8–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

[DOD–2007–OS–0052]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to Alter a System of Records.

SUMMARY: The Office of the Secretary of Defense is altering a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on March 12, 2008 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Office of the Secretary of Defense, Privacy Act Coordinator, Records Management Section, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard at (703) 588–2386.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r), of the Privacy Act of 1974, as amended, was submitted on February 4, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: February 5, 2008.

L.M. Bynum,

Alternative OSD Federal Register Liaison Officer, Department of Defense.

DMDC 02

SYSTEM NAME:

Defense Eligibility Records (October 1, 2007, 72 FR 55757).

CHANGES:

* * * * *

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Active duty members and other Uniform Servicemembers, i.e., Department of Defense (DoD), Coast Guard, NOAA and USPHS; Reserve Members; National Guard members; State National Guard Employees; Presidential Appointees of all Federal Government agencies; DoD and Uniformed Service civil service employees, except Presidential appointees; Disabled American veterans; DoD and Uniformed Service contract employees; Former members (Reserve service, discharged RR or SR following notification of retirement eligibility); Medal of Honor recipients; Non-DoD civil service employees; U.S. Military Academy Students; Non-appropriated fund DoD and Uniformed Service employees (NAF); Non-Federal Agency Civilian associates, i.e., American Red Cross Emergency Services paid employees, Non-DoD contract employees; Reserve retirees not yet eligible for retired pay; Retired military members eligible for retired pay; Foreign Affiliates; DoD OCONUS Hires; DoD Beneficiaries; Civilian Retirees; Dependents; Members of the general public treated for a medical emergency in a DoD Medical Facility; Emergency Contact Person; Care Givers; Prior Military Eligible for VA benefits''.

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete ''index fingerprints'' at the end of the sentence and replace with ''primary and secondary fingerprints''.

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Routine Use #5 Delete entry and replace with ''To Federal agencies and/or their contractors, in response to their requests, for purposes of authenticating the identity of individuals who, incident to the conduct of official business, present the Common Access Card or similar identification as proof of identity to gain physical or logical access to government and contractor facilities, locations, networks, or systems''.

Add a new routine use:

To the Office of Personnel Management:

To conduct computer matching programs regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a), for the purpose of: (1) Providing to OPM all reserve military members eligible for TRICARE Reserve Select (TRS) to be matched against the OPM Central Personnel Data File (OPM/GOVT–1) for the purpose of identifying those reserve military members who are also Federal civil service employees. This disclosure by OPM will provide the DoD with the FEHB eligibility and Federal employment information necessary to determine continuing eligibility for the TRS program. Only those reservists not eligible for FEHB are eligible for TRS. (Section 1076d of title 10)

* * * * *

DMDC 02

SYSTEM NAME:

Defense Eligibility Records.

SYSTEM LOCATION:

EDS—Service Management Center, 1075 West Entrance Drive, Auburn Hills, MI 48326–2723.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty members and other Uniform Servicemembers, i.e. Department of Defense (DoD), Coast Guard, NOAA and USPHS; Reserve Members; National Guard members; State National Guard Employees; Presidential Appointees of all Federal

Government agencies; DoD and Uniformed Service civil service employees, except Presidential appointees; Disabled American veterans; DoD and Uniformed Service contract employees; Former members (Reserve service, discharged RR or SR following notification of retirement eligibility); Medal of Honor recipients; Non-DoD civil service employees; U.S. Military Academy Students; Non-appropriated fund DoD and Uniformed Service employees (NAF); Non-Federal Agency Civilian associates, i.e. American Red Cross Emergency Services paid employees, Non-DoD contract employees; Reserve retirees not yet eligible for retired pay; Retired military members eligible for retired pay; Foreign Affiliates; DoD OCONUS Hires; DoD Beneficiaries; Civilian Retirees; Dependents; Members of the general public treated for a medical emergency in a DoD Medical Facility; Emergency Contact Person; Care Givers; Prior Military Eligible for VA benefits.

CATEGORIES OF RECORDS IN THE SYSTEM:

Computer files containing beneficiary's name, Service or Social Security Number, enrollment number, relationship of beneficiary to sponsor, residence address of beneficiary or sponsor, date of birth of beneficiary, sex of beneficiary, branch of Service of sponsor, dates of beginning and ending eligibility, number of family members of sponsor, primary unit duty location of sponsor, race and ethnic origin of beneficiary, occupation of sponsor, rank/pay grade of sponsor, disability documentation, Medicare eligibility and enrollment data, primary and secondary fingerprints and photographs of beneficiaries, blood test results, dental care eligibility codes and dental x-rays.

Catastrophic Cap and Deductible (CCD) transactions, including monetary amounts; CHAMPUS/TRICARE claim records containing enrollee, participant and health care facility, provider data such as cause of treatment, amount of payment, name and Social Security or tax identification, number of providers or potential providers of care; citizenship data/country of birth; civil service employee employment information (agency and bureau, pay plan and grade, nature of action code and nature of action effective date, occupation series, dates of promotion and expected return from overseas, service computation date); claims data; compensation data; contractor fee payment data; date of separation of former enlisted and officer personnel; demographic data (kept on others beyond beneficiaries) date of birth, home of record state, sex, race, education level; Department of Veterans Affairs disability payment records; digital signatures where appropriate to assert validity of data; email (home/work); emergency contact information; immunization data; Information Assurance (IA) Work Force information; language data; military personnel information (rank, assignment/deployment, length of service, military occupation, education, and benefit usage); pharmacy benefits; reason leaving military service or DoD civilian service; Reserve member's civilian occupation and employment information; education benefit eligibility and usage; special military pay information; SGLI/FGLI; stored documents for proofing identity and association; workforces information (e.g. Acquisition, First Responders); Privacy Act audit logs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 10 U.S.C. Chapters 53, 54, 55, 58, and 75; 10 U.S.C. 136; 31 U.S.C. 3512(c); 50 U.S.C. Chapter 23, Internal Security; DoD Directive 1341.1, Defense Enrollment/Eligibility Reporting System; DoD Instruction 1341.2, DEERS Procedures; 5 U.S.C. App. 3 (Pub. L. 95–452, as amended (Inspector General Act of 1978)); Pub. L. 106–265, Federal Long-Term Care Insurance; and 10 U.S.C. 2358, Research and Development Projects; 42 U.S.C., Chapter 20, Subchapter I–G, Registration and Voting by Absent Uniformed Services Voters and Overseas Voters in Elections for Federal Office, Sec. 1973ff, Federal responsibilities and DoD Directive 1000.4, Federal Voting Assistance Program (FVAP); Homeland Security Presidential Directive 12, Policy for a common Identification Standard for Federal Employees and Contractors; 38 CFR part 9.20, Traumatic injury protection, Servicemembers' Group Life Insurance and Veterans' Group Life Insurance; and E.O. 9397 (SSN).

PURPOSE(S):

The purpose of the system is to provide a database for determining eligibility to DoD entitlements and privileges; to support DoD health care management programs; to provide identification of deceased members; to record the issuance of DoD badges and identification cards, i.e. Common Access Cards (CAC) or beneficiary cards; and to detect fraud and abuse of the benefit programs by claimants and providers to include appropriate collection actions arising out of any debts incurred as a consequence of such programs.

To authenticate and identify DoD affiliated personnel (e.g., contractors); to assess manpower, support personnel and readiness functions; to perform statistical analyses; identify current DoD civilian and military personnel for purposes of detecting fraud and abuse of benefit programs; to register current DoD civilian and military personnel and their authorized dependents for purposes of obtaining medical examination, treatment or other benefits to which they are entitled; to ensure benefit eligibility is retained after separation from the military; information will be used by agency officials and employees, or authorized contractors, and other DoD Components for personnel and manpower studies; and to assist in recruiting prior-service personnel.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To the Social Security Administration (SSA) to perform computer data matching against the SSA Wage and Earnings Record file for the purpose of identifying employers of Department of Defense (DoD) beneficiaries eligible for health care. This employer data will in turn be used to identify those employed beneficiaries who have employment-related group health insurance, to coordinate insurance benefits provided by DoD with those provided by the other insurance. This information will also be used to perform computer data matching against the SSA Master Beneficiary Record file for the purpose of identifying DoD beneficiaries eligible for health care who are enrolled in the Medicare Program, to coordinate insurance benefits provided by DoD with those provided by Medicare.

2. To other Federal agencies and state, local and territorial governments to identify fraud and abuse of the Federal agency's programs and to identify debtors and collect debts and overpayment in the DoD health care programs.

3. To each of the fifty states and the District of Columbia for the purpose of conducting an on going computer matching program with state Medicaid agencies to determine the extent to which state Medicaid beneficiaries may be eligible for Uniformed Services health care benefits, including

CHAMPUS, TRICARE, and to recover Medicaid monies from the CHAMPUS program.

4. To provide dental care providers assurance of treatment eligibility.

5. To Federal agencies and/or their contractors, in response to their requests, for purposes of authenticating the identity of individuals who, incident to the conduct of official business, present the Common Access Card or similar identification as proof of identity to gain physical or logical access to government and contractor facilities, locations, networks, or systems.

6. To State and local child support enforcement agencies for purposes of providing information, consistent with the requirements of 29 U.S.C. 1169(a), 42 U.S.C. 666(a)(19), and E.O. 12953 and in response to a National Medical Support Notice (NMSN) (or equivalent notice if based upon the statutory authority for the NMSN), regarding the military status of identified individuals and whether, and for what period of time, the children of such individuals are or were eligible for DoD health care coverage.

Note: Information requested by the States is not disclosed when it would contravene U.S. national policy or security interests (42 U.S.C. 653(e)).

7. To the Department of Health and Human Services (HHS):

a. For purposes of providing information, consistent with the requirements of 42 U.S.C. 653 and in response to an HHS request, regarding the military status of identified individuals and whether, and for what period of time, the children of such individuals are or were eligible for DoD healthcare coverage.

Note: Information requested by HHS is not disclosed when it would contravene U.S. national policy or security interests (42 U.S.C. 653(e)).

b. For purposes of providing information so that specified Medicare determinations, specifically late enrollment and waiver of penalty, can be made for eligible (1) DoD military retirees and (2) spouses (or former spouses) and/or dependents of either military retirees or active duty military personnel, pursuant to section 625 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2002 (as codified at 42 U.S.C. 1395p and 1395r).

c. To the Office of Child Support Enforcement, Federal Parent Locator Service, pursuant to 42 U.S.C. 653 and 653a; to assist in locating individuals for the purpose of establishing parentage; establishing, setting the amount of, modifying, or enforcing child support obligations; or enforcing child custody or visitation orders; the relationship to a child receiving benefits provided by a third party and the name and SSN of those third party providers who have a legal responsibility. Identifying delinquent obligors will allow State Child Support Enforcement agencies to commence wage withholding or other enforcement actions against the obligors.

8. To the American Red Cross for purposes of providing emergency notification and assistance to members of the Armed Forces, retirees, family members or survivors.

9. To the Department of Veterans Affairs (DVA):

a. To provide military personnel and pay data for present and former military personnel for the purpose of evaluating use of veterans' benefits, validating benefit eligibility and maintaining the health and well being of veterans and their family members.

b. To provide identifying military personnel data to the DVA and its insurance program contractor for the purpose of notifying separating eligible Reservists of their right to apply for Veteran's Group Life Insurance coverage under the Veterans Benefits Improvement Act of 1996 (38 U.S.C. 1968) and for DVA to administer the Traumatic Servicemember's Group Life Insurance (TSGLI) (Traumatic Injury Protection Rider to Servicemember's Group Life Insurance (TSGLI), 38 CFR 9.20).

c. To register eligible veterans and their dependents for DVA programs.

d. Providing identification of former military personnel and survivor's financial benefit data to DVA for the purpose of identifying military retired pay and survivor benefit payments for use in the administration of the DVA's Compensation and Pension Program (38 U.S.C. 5106). The information is to be used to process all DVA award actions more efficiently, reduce subsequent overpayment collection actions, and minimize erroneous payments.

e. To conduct computer matching programs regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a), for the purposes of:

(1) Providing full identification of active duty military personnel, including full time National Guard/Reserve support personnel, for use in the administration of DVA's Compensation and Pension benefit program. The information is used to determine continued eligibility for DVA disability compensation to recipients who have returned to active duty so that benefits can be adjusted or terminated as required and steps taken by DVA to collect any resulting over payment (38 U.S.C. 5304(c)).

(2) Providing military personnel and financial data to the Veterans Benefits Administration, DVA for the purpose of determining initial eligibility and any changes in eligibility status to insure proper payment of benefits for GI Bill education and training benefits by the DVA under the Montgomery GI Bill (Title 10 U.S.C., Chapter 1606—Selected Reserve and Title 38 U.S.C., Chapter 30—Active Duty), the REAP educational benefit (Title 10 U.S.C., Chapter 1607), and the National Call to Service enlistment educational benefit (Title 10, Chapter 510). The administrative responsibilities designated to both agencies by the law require that data be exchanged in administering the programs.

(3) Providing identification of reserve duty, including full time support National Guard/Reserve military personnel, to the DVA, for the purpose of deducting reserve time served from any DVA disability compensation paid or waiver of VA benefit. The law (10 U.S.C. 12316) prohibits receipt of reserve pay and DVA compensation for the same time period, however, it does permit waiver of DVA compensation to draw reserve pay.

(4) Providing identification of former active duty military personnel who received separation payments to the DVA for the purpose of deducting such repayment from any DVA disability compensation paid. The law requires recoupment of severance payments before DVA disability compensation can be paid (10 U.S.C. 1174).

f. To provide identifying military personnel data to the DVA for the purpose of notifying such personnel of information relating to educational assistance as required by the Veterans Programs Enhancement Act of 1998 (38 U.S.C. 3011 and 3034).

10. To DoD Civilian Contractors and grantees for the purpose of performing research on manpower problems for statistical analyses.

11. To consumer reporting agencies to obtain current addresses of separated military personnel to notify them of potential benefits eligibility.

12. To Defense contractors to monitor the employment of former DoD employees and military members subject to the provisions of 41 U.S.C. 423.

13. To Federal and Quasi Federal agencies, territorial, state, and local governments to support personnel functions requiring data on prior military service credit for their employees or for job applications. To

determine continued eligibility and help eliminate fraud and abuse in benefit programs and to collect debts and over payments owed to these programs. Information released includes name, Social Security Number, and military or civilian address of individuals. To detect fraud, waste and abuse pursuant to the authority contained in the Inspector General Act of 1978, as amended (Pub. L. 95–452) for the purpose of determining eligibility for, and/or continued compliance with, any Federal benefit program requirements.

14. To Federal and Quasi Federal agencies, territorial, state and local governments, and contractors and grantees for the purpose of supporting research studies concerned with the health and well being of active duty, reserve, and retired personnel or veterans, to include family members. DMDC will disclose information from this system of records for research purposes when DMDC:

a. Has determined that the use or disclosure does not violate legal or policy limitations under which the record was provided, collected, or obtained;

b. Has determined that the research purpose (1) cannot be reasonably accomplished unless the record is provided in individually identifiable form, and (2) warrants the risk to the privacy of the individual that additional exposure of the record might bring;

c. Has required the recipient to (1) establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and (2) remove or destroy the information that identifies the individual at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research project, unless the recipient has presented adequate justification of a research or health nature for retaining such information, and (3) make no further use or disclosure of the record except (A) in emergency circumstances affecting the health or safety of any individual, (B) for use in another research project, under these same conditions, and with written authorization of the Department, (C) for disclosure to a properly identified person for the purpose of an audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or (D) when required by law;

d. Has secured a written statement attesting to the recipients' understanding of, and willingness to abide by these provisions.

15. To Federal and State agencies for purposes of obtaining socioeconomic information on Armed Forces personnel so that analytical studies can be conducted with a view to assessing the present needs and future requirements of such personnel.

16. To Federal and state agencies to validate demographic data (e.g., Social Security Number, citizenship status, date and place of birth, etc.) for individuals in DoD personnel and pay files so that accurate information is available in support of DoD requirements.

17. To the Bureau of Citizenship and Immigration Services, Department of Homeland Security, for purposes of facilitating the verification of individuals who may be eligible for expedited naturalization (Pub. L. 108–136, Section 1701, and E.O. 13269, Expedited Naturalization).

18. To the Federal voting program to provide unit and email addresses for the purpose of notifying the military members where to obtain absentee ballots.

19. To the Department of Homeland Security for the conduct of studies related to the health and well-being of Coast Guard members and to authenticate and identify Coast Guard personnel.

20. To Coast Guard recruiters in the performance of their assigned duties.

21. To the Office of Personnel Management: To conduct computer matching programs regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a), for the purpose of: (1) Providing to OPM all reserve military members eligible for TRICARE Reserve Select (TRS) to be matched against the OPM Central Personnel Data File (OPM/GOVT–1) for the purpose of providing those reserve military members that are also Federal civil service employees. This disclosure by OPM will provide the DoD with the FEHB eligibility and Federal employment information necessary to determine continuing eligibility for the TRS program. Only those reservists not eligible for FEHB are eligible for TRS. (Section 1076d of title 10).

The DoD ''Blanket Routine Uses'' published at the beginning of OSD's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on magnetic tapes and disks, and are housed in a controlled computer media library.

RETRIEVABILITY:

Records about individuals are retrieved by an algorithm which uses name, Social Security Number, date of birth, rank, and duty location as possible inputs. Retrievals are made on summary basis by geographic characteristics and location and demographic characteristics. Information about individuals will not be distinguishable in summary retrievals. Retrievals for the purposes of generating address lists for direct mail distribution may be made using selection criteria based on geographic and demographic keys.

SAFEGUARDS:

Computerized records are maintained in a controlled area accessible only to authorized personnel. Entry to these areas is restricted to those personnel with a valid requirement and authorization to enter. Physical entry is restricted by the use of locks, guards, and administrative procedures (e.g., fire protection regulations).

Access to personal information is restricted to those who require the records in the performance of their official duties, and to the individuals who are the subjects of the record or their authorized representatives. Access to personal information is further restricted by the use of passwords, which are changed periodically. All individuals granted access to this system of records are to have received Information Assurance and Privacy Act training.

RETENTION AND DISPOSAL:

Data is destroyed when superseded or when no longer needed for operational purposes, whichever is later.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Director, Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955–6771.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Deputy Director, Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955–6771.

Written requests should contain the full name, Social Security Number (SSN), date of birth, and current address and telephone number of the individual.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Privacy Act Officer,

Office of Freedom of Information, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

Written requests should contain the full name, Social Security Number (SSN), date of birth, and current address and telephone number of the individual.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the Privacy Act Officer, Office of Freedom of Information, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

RECORD SOURCE CATEGORIES:

Individuals, personnel, pay, and benefit systems of the military and civilian departments and agencies of the Defense Department, the Coast Guard, the Public Health Service, the National Oceanic and Atmospheric Administration, Department of Veterans Affairs, and other Federal agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–2492 Filed 2–8–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

[DoD–2008–OS–0008]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Logistics Agency, DOD.

ACTION: Notice to Delete Two Systems of Records.

SUMMARY: The Defense Logistics Agency is deleting two systems of records notices to its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This action will be effective without further notice on March 12, 2008 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: DP, 8725 John J. Kingman Road, Stop 2533, Fort Belvoir, VA 22060–6221.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler at (703) 767–5045.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: February 5, 2008.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DMDC 09

SYSTEM NAME:

Archival Purchase Card File (January 31, 2008, 73 FR 5819).

REASON:

The Defense Manpower Data Center (DMDC) no longer receives Privacy Act program support from the Defense Logistics Agency (DLA). DMDC will receive privacy support from the Office of the Secretary of Defense (OSD) under Administrative Instruction 81. The above system notice was transferred to the OSD's inventory of Privacy Act systems of records as DMDC 09, Archival Purchase Card File on January 31, 2008, 73 FR 5819; DLA is deleting this notice from its Privacy Act systems of records inventory.

DMDC 10

SYSTEM NAME:

Defense Biometric Identification Data System (DBIDS) (January 31, 2008, 73 FR 5818).

REASON:

The Defense Manpower Data Center (DMDC) no longer receives Privacy Act program support from the Defense Logistics Agency (DLA). DMDC will receive privacy support from the Office of the Secretary of Defense (OSD) under Administrative Instruction 81. The above system notice was transferred to the OSD's inventory of Privacy Act systems of records as DMDC 10, Defense Biometric Identification Data System (DBIDS) on January 31, 2008, 73 FR 5818; therefore, DLA is deleting this notice from its Privacy Act systems of records inventory.

[FR Doc. E8–2496 Filed 2–8–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Board of Visitors, United States Military Academy (USMA)

AGENCY: Department of the Army, DoD.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting will take place:

1. *Name of Committee:* United States Military Academy Board of Visitors.
2. *Date:* Wednesday, February 27, 2008.
3. *Time:* 1 p.m.–4 p.m. Members of the public wishing to attend the meeting will need to show photo identification in order to gain access to the meeting location. All participants are subject to security screening.
4. *Location:* Rayburn House Office Building, Washington, DC 20515 (exact room location is to be determined and will be published prior to February 27, 2008).
5. *Purpose of the Meeting:* This is the 2008 Organizational Meeting of the USMA Board of Visitors (BoV). Members of the Board will be provided updates on Academy issues.
6. *Agenda:* The Academy leadership will provide the Board updates on the following: Accreditation, United States Military Academy Preparatory School (USMAPS) move to West Point, Gender Relations, The Academy Campaign Plan, Infrastructure, Residential Communities Initiative (RCI), Resource Update, Class Composition Goals, and Cadet Surveys. The Board will discuss proposed meeting dates for the 2008 Summer and Fall meetings, and will hold elections for the 2008 Chairperson and Vice-Chairperson.
7. *Public's Accessibility to the Meeting:* Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis.
8. *Committee's Designated Federal Officer or Point of Contact:* Ms. Cynthia Kramer, (845) 938–5078, *Cynthia.kramer@us.army.mil*.

SUPPLEMENTARY INFORMATION: Any member of the public is permitted to file a written statement with the USMA Board of Visitors. Written statements should be sent to the Designated Federal Officer (DFO) at: United States Military

Academy, Office of the Secretary of the General Staff (MASG), 646 Swift Road, West Point, NY 10996–1905 or faxed to the Designated Federal Officer (DFO) at (845) 938–3214. Written statements must be received no later than five working days prior to the next meeting in order to provide time for member consideration. By rule, no member of the public attending open meetings will be allowed to present questions from the floor or speak to any issue under consideration by the Board.

FOR FURTHER INFORMATION CONTACT: Ms. Cynthia Kramer, (845) 938–5078 (fax: 845–938–3214) or via e-mail: *Cynthia.kramer@us.army.mil*.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–2499 Filed 2–8–08; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 12, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, *e.g.*, ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: February 5, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Reinstatement.

Title: Annual Protection and Advocacy for Assistive Technology (PAAT) Program Performance Report.

Frequency: Annually.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden: Responses: 57. *Burden Hours:* 912.

Abstract: The Annual PAAT Program Performance Report will be used to analyze and evaluate the PAAT Program administered by eligible systems in states. These systems provide services to eligible individuals with disabilities to assist in the acquisition, utilization, or maintenance of assistive technology devices or assistive technology services. The Rehabilitation Services Administration (RSA) uses the form to meet specific data collection requirements of section 5 of the Assistive Technology Act of 1998, as amended (AT Act). PAAT programs must report annually using the form, which is due on or before December 30 of each year. The Annual PAAT Performance Report has enabled RSA to furnish the President and Congress with data on the provision of protection and advocacy services and has helped to establish a sound basis for future funding requests. Data from the form have been used to evaluate the effectiveness of eligible systems within individual states in meeting annual priorities and objectives. These data also have been used to indicate trends in the provision of services from year to year.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3535. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–2490 Filed 2–8–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before April 11, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each

proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 5, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.

Title: Adult ESL Literacy Impact Study.

Frequency: On Occasion; Weekly; Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; Individuals or household.

Reporting and Recordkeeping Hour Burden: Responses: 9,080. Burden Hours: 2,108.

Abstract: The Adult ESL Literacy Impact Study is an evaluation of the effectiveness of a literacy curriculum in improving the English reading and speaking skills of adult ESL learners who have low levels of literacy in their native language. This evaluation employs a random assignment design to compare the outcomes of adult learners who receive the literacy instruction to those who receive the instruction that is normally provided through adult education programs.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3580. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–2491 Filed 2–8–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Science; Basic Energy Sciences Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Basic Energy Sciences Advisory Committee (BESAC). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, February 21, 2008, 9:30 a.m. to 5:15 p.m., and Friday, February 22, 2008, 8:30 a.m. to 12 p.m.

ADDRESSES: Bethesda North Marriott Hotel and Conference Center, 5701 Marinelli Road, North Bethesda, MD 20852.

FOR FURTHER INFORMATION CONTACT: Karen Talamini; Office of Basic Energy Sciences; U.S. Department of Energy; Germantown Building, Independence Avenue, Washington, DC 20585; Telephone: (301) 903–4563.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance with respect to the basic energy sciences research program.

Tentative Agenda: Agenda will include discussions of the following:

- News from DOE.
- News from the Office of Basic Energy Sciences.
- Update on COV of the Chemical Sciences, Geosciences and Biosciences Division.
- Reports of the BESAC Grand Challenges Subcommittee.
- Update of the Linac Coherent Light Source.
- Update on Nanotechnology.

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Karen Talamini at (301) 903–6594 (fax) or *karen.talamini@science.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; 1E–190, Forrestal Building; 1000 Independence Avenue, SW.; Washington, DC 20585; between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC, on February 5, 2008.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. E8–2488 Filed 2–8–08; 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, Office of Energy Efficiency and Renewable 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: February 21, 2008 from 2 p.m. to 3 p.m. EDT.

FOR FURTHER INFORMATION CONTACT: Gary Burch, STEAB Designated Federal Officer, Acting Assistant Manager, Office of Commercialization and & Project Management, 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 the Office of 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. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

Notes: The notes of the teleconference will be available for public review and copying within 60 days on the STEAB Web site, *http://www.steab.org.*

Issued at Washington, DC, on February 5, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–2487 Filed 2–8–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency Information Collection Activities: Submission for OMB Review; Comment Request.

SUMMARY: The EIA has submitted the Coal Program Package to the Office of Management and Budget (OMB) for revision and a three-year extension under section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (44 U.S.C. 3501 *et seq.*, at 3507(h)(1)).

DATES: Comments must be filed by March 12, 2008. If you anticipate that you will be submitting comments but find it difficult to do so within that period, you should contact the OMB Desk Officer for DOE listed below as soon as possible.

ADDRESSES: Send comments to OMB Desk Officer for DOE, Office of Information and Regulatory Affairs, Office of Management and Budget. To ensure receipt of the comments by the due date, submission by fax at (202) 395–7285 or e-mail to *Nathan_J._Frey@omb.eop.gov* is recommended. The mailing address is 726 Jackson Place, NW., Washington, DC 20503. The OMB DOE Desk Officer may be telephoned at (202) 395–7345. (A copy of your comments should also be provided to EIA's Statistics and Methods Group at the address below.)

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Grace Sutherland. To ensure receipt of the comments by the due date, submission by fax (202–586–5271) or e-mail (*grace.sutherland@eia.doe.gov*) is also recommended. The mailing address is Statistics and Methods Group (EI–70), Forrestal Building, U.S. Department of Energy, Washington, DC 20585–0670. Ms. Sutherland may be contacted by telephone at (202) 586–6264.

SUPPLEMENTARY INFORMATION: This section contains the following information about the energy information collection submitted to OMB for review: (1) The collection numbers and title; (2) the sponsor (i.e., the Department of Energy component; (3) the current OMB docket number (if applicable); (4) the type of request (i.e., new, revision, extension, or reinstatement); (5) response obligation (i.e., mandatory, voluntary, or required to obtain or retain benefits); (6) a description of the need for and proposed use of the information; (7) a categorical description of the likely respondents; and (8) an estimate of the total annual reporting burden (i.e., the estimated number of likely respondents times the proposed frequency of response per year times the average hours per response).

1. Forms EIA–1, 3, 4, 5, 6Q, 7A, 8A and 20, ''Coal Program Package.''
2. Energy Information Administration.
3. OMB Number 1905–0167.
4. Revision and three-year extension.
5. Mandatory.
6. The coal surveys collect data on coal production, consumption, stocks, prices, imports and exports. Data are published in various EIA publications. Respondents are manufacturing plants, producers of coke, purchasers and distributors of coal, coal mining operators, and coal-consuming electric utilities.
7. Business or other for-profit; Federal Government; State, Local or Tribal Government.
8. 4,474 hours.

Due to the changing structure of the electric power industry over the course of the last several years, the EIA–20 standby survey will include independent power producers in the event of an emergency, thus activating the use of the survey to provide information on the primary sources of electric power in the U.S.

Please refer to the supporting statement as well as the proposed forms and instructions for more information about the purpose, who must report, when to report, where to submit, the elements to be reported, detailed instructions, provisions for confidentiality, and uses (including possible nonstatistical uses) of the information. For instructions on obtaining materials, see the **FOR FURTHER INFORMATION CONTACT** section.

Statutory Authority: Section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13) (44 U.S.C. 3501 *et seq.*, at 3507(h)(1))

Issued in Washington, DC, February 5, 2008.

Jay H. Casselberry,

Agency Clearance Officer, Agency Clearance Officer, Energy Information Administration.

[FR Doc. E8–2486 Filed 2–8–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC08–566–000; FERC–566]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

February 1, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the collection of information are due April 7, 2008.

ADDRESSES: Copies of sample filings of the proposed information collection can be obtained from the Commission's

Documents & Filing Web site (*http://www.ferc.gov/docs-filings/elibrary.asp*) or by contacting the Federal Energy Regulatory Commission, Attn: Michael Miller, Office of the Executive Director, ED–34, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing. For paper filing, the original and 14 copies of such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and refer to Docket No. IC08–566–000.

Documents filed electronically via the Internet must be prepared in the acceptable filing format and in compliance with the Federal Energy Regulatory Commission's submission guidelines. Complete filing instructions and acceptable filing formats are available at (*http://www.ferc.gov/help/submission-guide/electronic-media.asp*). To file the document electronically, access the Commission's Web site and click on Documents & Filing, E-Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the eLibrary link. For user assistance, contact *ferconlinesupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov.*

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–566 ''Annual Report of a Utility's Twenty Largest Purchasers'' (OMB No. 1902–0114) is used by the Commission to implement the statutory provisions of section 305 of the Federal Power Act (FPA), (16 U.S.C. 825d), as amended by Title II, section 211 of the Public Utility Regulatory Policies Act of 1978 (PURPA). FPA section 305—Officials Dealing in Securities; Interlocking Directorates—requires that each public utility annually ''publish'' a list, pursuant to rules prescribed by the Commission, of the purchasers of the 20 largest annual amounts of electric energy sold by such public utility during any one of three previous calendar years. The required filers, the filing deadline, the specific information to be filed, and the requirement to publicly provide the information are all specifically mandated by the FPA. The Commission is not empowered to amend or waive these statutory requirements. Requirements the Commission has the authority to amend, such as the filing format and method, are found in the Commission's regulations in 18 CFR 46.3.

The FPA requires public utilities to publish and file with the Commission a list of their largest customers and the identification of public utility board members who are also board members of the utility's largest customers.[1] This data on *interlocking directorates* allows the Commission to inquire into and determine whether public or private interests will be adversely affected by the holding of such positions.

Under the current OMB authorization, the Commission requires the filing of FERC–566 in hardcopy. However, the Commission has directed under RM07–16–000[2] to allow for the voluntary electronic submittal of many required filings, including the FERC–566, which is expected by early 2008. The implementation of eFiling 7.0 would eliminate the current burden of mailing or hand-delivering these filings in hardcopy.

Action: The Commission is requesting a three-year extension of the current expiration date and proposes to make the filing of the FERC–566 more efficient by the end of 2007 under RM07–16–000.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)×(2)×(3)
242	1	6	1,452

The estimated total cost to respondents is $85,261, [1,452 hours divided by 2,080 hours[3] (times $126,384[4] equals $88,226, *rounded off*). The cost of filing FERC–566 per respondent is $365 (*rounded off*) 2.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and using technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting existing ways to comply with any previously applicable filing instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting or otherwise disclosing the information.

The cost estimate for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) The accuracy of the agency's burden estimate of the proposed information collection, including the validity of the methodology and assumptions used to calculate the reporting burden; (2) ways to enhance the quality, utility and clarity of the information to be collected; and (3) the proposal to

[1] *Annual Report of Interlocking Positions,* FERC Form 561, OMB No. 1902–0099, collects the interlocking directorate information.

[2] *Filing Via the Internet,* RM07–16–000, 72 FR 65659 (2007), FERC Stats. & Regs. ¶ 31,259.

[3] Number of hours an employee works.

[4] Average annual salary per employee.

provide the option to collect FERC–566 electronically during 2008, as indicated under RM07–16–000 000 and any reduction in burden that option might allow filers.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2407 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC08–561–000; FERC Form 561]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

February 1, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the collection of information are due April 7, 2008.

ADDRESSES: An example of this information collection can be obtained from the Commission's Documents & Filing Web site (*http://www.ferc.gov/docs-filings/elibrary.asp*) or by contacting the Federal Energy Regulatory Commission, Attn: Michael Miller, Office of the Executive Director, ED–34, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing. For paper filing, the original and 14 copies of such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and refer to Docket No. IC08–561–000.

Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission's submission guidelines. Complete filing instructions and acceptable filing formats are available at (*http://www.ferc.gov/help/submission-guide/electronic-media.asp*). To file the document electronically, access the Commission's Web site and click on Documents & Filing, E-Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the eLibrary link. For user assistance, contact *ferconlinesupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov.*

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC Form 561 ''Annual Report of Interlocking Positions'' (OMB No. 1902–0099) is used by the Commission to implement the statutory provisions of section 305 of the Federal Power Act (FPA), as amended by Title II, section 211 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. 825d). FPA section 305—Officials Dealing in Securities—Interlocking Directorates requires the annual reporting by public utility officers and directors of similar types of positions they hold with financial institutions, insurance companies, utility equipment and fuel providers, and with any of an electric utility's twenty largest purchasers of electric energy.[1] The FPA mandates the information that must be filed, the required filers, the requirement to make the information available to the public, and the filing deadline. The Commission is not empowered to amend or waive these statutory requirements. Requirements the Commission has the authority to amend, such as filing format and method, can be found in 18 CFR part 46 and section 131.31.

Without this information collection, the Commission and the public would not be able to inquire into and determine whether public or private interests will be adversely affected by the holding of such positions.

Under the current OMB authorization, the Commission requires the FERC Form 561 filings in hardcopy with an optional diskette containing a spreadsheet of the interlocking directorate information. However, the Commission has indicated under RM07–16–000,[2] to allow for the voluntary electronic submittal of many required filings, including the FERC Form 561, by early 2008. Through eFiling 7.0, the form will be filed in Adobe Acrobat with an optional electronic spreadsheet attachment. Implementation of eFiling 7.0 will eliminate the current burden of mailing and hand-delivering the filings in hardcopy.

Action: The Commission is requesting a three-year extension of the current expiration date, and proposes to make the filing of the FERC Form 561 more efficient during 2008 under RM07–16–000.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)×(2)×(3)
1996	1	.25	499

The estimated total cost to respondents is $21,516. [499 hours divided by 2080 hours[3] per year, times $126,384[4] equals $30,320]. The cost per respondent is $15 (rounded off).

[1] *Annual Report of a Utility's Twenty Largest Purchasers,* FERC–566, OMB No. 1902–0114, collects information from the twenty largest purchasers.

[2] *Filing Via the Internet,* RM07–16–000, 72 FR 65659 (2007), FERC Stats. & Regs. ¶ 31,259.

[3] Number of hours an employee works each year.

[4] Average annual salary per employee.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, using technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable filing instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The cost estimate for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) The accuracy of the agency's burden estimate of the proposed information collection, including the validity of the methodology and assumptions used to calculate the reporting burden; (2) ways to enhance the quality, utility and clarity of the information to be collected; and (3) the proposal to provide the option to collect FERC Form 561 electronically by late 2007, as proposed under RM07–16–000 and any reduction in burden that option might allow filers.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2410 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12944–000]

Morgantown Hydro, LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

February 4, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12944–000.

c. *Date filed:* August 8, 2007.

d. *Applicant:* Morgantown Hydro, LLC.

e. *Name of Project:* Morgantown Lock and Dam Hydroelectric Project.

f. *Location:* Monongahela River in Monongalia County, West Virginia. It would use the U.S. Army Corps of Engineers' Morgantown Lock and Dam.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, COO, Symbiotics, LLC, P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–4126.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–12944–000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project using the U.S. Army Corps of Engineers' Morgantown Lock and Dam and operated in a run-of-river mode would consist of: (1) A new powerhouse and switchyard; (2) two turbine/generator units with a combined installed capacity of 9 megawatts; (3) a new 13-mile-long above-ground 25-kilovolt transmission line extending from the switchyard to an interconnection point with Monongahela Power Company's distribution system; and (4) appurtenant facilities. The proposed Morgantown Lock and Dam Project would have an average annual generation of 26 gigawatt-hours.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCONLINESUPPORT@FERC.GOV.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work

proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', and ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2415 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12946–000]

Goodwin Hydro, LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

February 4, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12946–000.

c. *Date filed:* August 8, 2007.

d. *Applicant:* Goodwin Hydro, LLC.

e. *Name of Project:* Goodwin Dam Hydroelectric Project.

f. *Location:* Stanislaus River in Tuolumne and Calaveras counties, California. It would use the existing Goodwin Dam owned by Oakdale Irrigation District and San Joaquin Irrigation District.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, COO, Symbiotics, LLC, P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–4126.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–12946–000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project using the Oakdale Irrigation District and the San Joaquin Irrigation District's Goodwin Dam and operated in a run-of-river mode would consist of: (1) A new 300-foot-long, 120-inch-diameter steel penstock; (2) a new powerhouse and switchyard; (3) two turbine/generator units with a combined installed capacity of 5 megawatts; (4) a new 3-mile-long above ground 15-kilovolt transmission line extending from the switchyard to an interconnection point with the Tuolumne County Public Power Agency's distribution system; and (5) appurtenant facilities. The proposed Goodwin Dam Project would have an average annual generation of 22 gigawatt-hours.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCONLINESUPPORT@FERC.GOV.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', and ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2416 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12949–000]

Arkansas River Hydro 3, LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

February 4, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12949–000.

c. *Date filed:* August 14, 2007.

d. *Applicant:* Arkansas River Hydro 3, LLC.

e. *Name of Project:* Lock and Dam #3 Hydroelectric Project.

f. *Location:* Arkansas River in Lincoln County, Arkansas. It would use the U.S. Army Corps of Engineers' Lock and Dam #3.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, COO, Symbiotics, LLC, P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–4126.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–12949–000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project using the U.S. Army Corps of Engineers' Lock and Dam #3 and operated in a run-of-river mode would consist of: (1) A new powerhouse and switchyard; (2) four turbine/generator units with a combined installed capacity of 100 megawatts; (3) a new 2.6-mile-long above ground 69-kilovolt transmission line extending from the switchyard to an interconnection point with the local utility's distribution system; and (4) appurtenant facilities. The proposed Lock and Dam #3 Project would have an average annual generation of 300 gigawatt-hours.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCONLINESUPPORT@FERC.GOV.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the

particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', and ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2419 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12948–000]

Clementine Dam Hydro, LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

February 4, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12948–000.

c. *Date filed:* August 8, 2007.

d. *Applicant:* Clementine Dam Hydro, LLC.

e. *Name of Project:* Clementine Dam Hydroelectric Project.

f. *Location:* American River in Placer County, California. It would use the U.S. Army Corps of Engineers' Clementine Dam.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, COO, Symbiotics, LLC, P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–4126.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–12948–000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project using the U.S. Army Corps of Engineers' Clementine Dam and operated in a run-of-river mode would consist of: (1) A new 250-foot-long, 240-inch-diameter steel penstock; (2) a new powerhouse and switchyard; (3) one turbine/generator unit with an installed capacity of 3 megawatt; (4) a new 22-mile-long above ground 15-kilovolt transmission line extending from the switchyard to an interconnection point with the local utility's distribution system; and (5) appurtenant facilities. The proposed Clementine Dam Project would have an average annual generation of 16 gigawatt-hours.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCONLINESUPPORT@FERC.GOV*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36).

Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', and ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2418 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12947–000]

Imperial Hydro, LLC; Notice of Application Accepted for Filing and Soliciting Motions to Intervene, Protests, and Comments

February 4, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12947–000.

c. *Date Filed:* August 8, 2007.

d. *Applicant:* Imperial Hydro, LLC.

e. *Name of Project:* Imperial Diversion Dam Hydroelectric Project.

f. *Location:* Colorado River in Imperial County, California. It would use the U.S. Bureau of Reclamation's Imperial Diversion Dam.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)—825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, COO, Symbiotics, LLC, P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–4126.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–12947–000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project using the U.S. Bureau of Reclamation's Imperial Diversion Dam and operated in a run-of-river mode would consist of: (1) A new powerhouse and switchyard; (2) two turbine/generator units with a combined installed capacity of 2.1 megawatts; (3) a new 1-mile-long above ground 12.5-kilovolt transmission line extending from the switchyard to an interconnection point with the local utility's distribution system; and (4) appurtenant facilities. The proposed Imperial Diversion Dam Project would have an average annual generation of 10 gigawatt-hours.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCONLINESUPPORT@FERC.GOV*. For TTY, call (202) 502–8659. A copy is

also available for inspection and reproduction at the address in item h above.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', and ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2417 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13050–000]

NT Hydro; Notice of Application Accepted for Filing and Soliciting Comments, Protests, and Motions To Intervene

February 4, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 13050–000.

c. *Date filed:* October 15, 2007.

d. *Applicant:* NT Hydro.

e. *Name and Location of Project:* The proposed Summer Lake Pumped Storage Hydroelectric Project would be located in Lake County, Oregon, utilizing the existing Summer Lake, and would be located on U.S. Forest Service (FS) and U.S. Bureau of Land Management (BLM) land.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant contact:* Mr. Ted Sorenson, Sorenson Engineering, 5203 South 11th East Idaho Falls, ID 83404, (208) 522–8069.

h. *FERC Contact:* Tom Papsidero, (202) 502–6002.

i. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–13050–000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

j. *Description of Existing Facilities and Proposed Project:* The proposed Summer Lake Pumped Storage Project would consist of an excavated upper reservoir and Summer Lake. The upper reservoir is located on FS lands and the lower reservoir is located on a combination of private, BLM and state lands. The upper reservoir proposed to be excavated on White Ridge is located at an elevation of approximately 6,890 ft above sea level (ASL). The excavated reservoir would have a surface area of approximately 80 acres and a storage capacity of approximately 2,000 acre-feet. Summer Lake, which receives water from various springs and intermittent runoff streams, is located at elevation 4,145 ft ASL. Summer Lake has an approximate storage capacity of 320,000 acre-ft. The upper excavated reservoir and Summer Lake would be connected by an 11,000-foot-long pipeline consisting of two 8-foot-diameter steel pipes with a hydraulic capacity of approximately 700 cfs each. A powerhouse/pumphouse would be located near the shore of Summer Lake, containing two 128 MW generating units. A new 12-mile-long 128-kV transmission line would be constructed to interconnect the proposed project with an existing Bonneville Power Administration 500-kV, AC transmission line located north of Summer Lake. The project would have an average annual generation of 934.4 GWH.

k. *Location of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2420 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13080–000]

Putnam Green Power, LLC Notice of Application Accepted for Filing and Soliciting Comments, Protests, and Motions To Intervene

February 4, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 13080–000.

c. *Date filed:* November 27, 2007.

d. *Applicant:* Putnam Green Power, LLC.

e. *Name and Location of Project:* The proposed Cargill Falls Hydroelectric Project would be located on the

Quinebaug River, in the Town of Putnam, Windham County, Connecticut.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant contact:* Leanne Parker, CEO, Putnam Green Power, LLC, 58 Pomfret Street, Putnam, CT 06260, (860) 928–1500.

h. *FERC Contact:* Tom Papsidero, (202) 502–6002.

i. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the project number (P–13080–000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

j. *Description of Existing Facilities and Proposed Project:* The proposed project would consist of constructing a new powerhouse and appurtenant works at the site of the existing Cargill Falls Dam located at river mile 34 on the Quinebaug River. Flows would be diverted at the intake structure to the new powerhouse and returned to the river approximately 435 feet downstream via a new tailrace channel. The proposed project would consist of the existing dam and intake structure; new fish passage facilities; an existing underground water conduit; a new penstock; a new powerhouse with generating and control equipment; and a new tailrace and switchyard. The project would interconnect to the existing Connecticut Light and Power (CL&P) utility pole number 1192 via a new underground feed approximately 300 feet long. The new feed would be located entirely on property controlled by Putnam Green Power LLC. Transmission would continue off-site via an existing 480-volt overhead transmission line and connect with the existing CL&P Putnam substation located directly across the river from the powerhouse.

The existing dam consists of a concrete gravity overflow spillway section approximately 60-foot-long and 5-foot-high and a gravity concrete gated spillway section approximately 85-foot-long and 6-foot-high, separated by a natural rock outcrop about 70-foot-long. The project impoundment has a normal surface elevation of 253.4 feet above mean sea level (msl) and is approximately 2,000-foot-long, the width of the impoundment varies between 300 and 500 feet. The impoundment area is approximately 13 acres, with an approximate storage capacity of 65 acre feet (at normal pool elevation of 253.4 feet msl).

The existing intake structure is located at the south end of the dam, and consists of four concrete intake gates 3-foot-wide and 5-foot-high which are currently sealed by steel plates, a masonry forebay about 30-foot-long by 30-foot-wide by 10-foot-deep, trash racks, and provisions for a new fish bypass facility. Putnam Green Power would modify the intake structure as required and install headgates to control flows to the powerhouse; repair the existing trashrack as necessary; and install fish passage facilities in consultation with the state and federal resource agencies. The existing underground conduit extends from the intake south under CT Route 44 for approximately 135 feet to the Cargill Mills complex where it bifurcates into two conduits, each leading to abandoned hydro-generating facilities. The underground conduit upstream of the bifurcation would be restored. The conduits downstream of the bifurcation would be replaced with a new single penstock, approximately 135-foot-long.

The new powerhouse would be a concrete structure approximately 48-foot-long and 34-foot-wide. New generating equipment will be installed consisting of a single, vertical axis Kaplan turbine direct connected to a synchronous generator. The turbine would have a hydraulic capacity of approximately 940 cubic feet per second (cfs) and a nominal rating of 2 MW. The powerhouse would also contain auxiliary electrical and mechanical equipment and a fully automated digital control system.

A new concrete tailrace approximately 30-foot-long by 20-foot-wide would return water to the Quinebaug River. A new switchyard would be located adjacent to the power house. The switchyard would include a new generator step-up transformer, switchgear and metering equipment. Interconnection would be via an existing overhead line to the CL&P Putnam substation located directly across the river. The turbine would have a nominal rating of 2 MW at a net head of 28-feet. Average annual energy production is estimated to be approximately 9.2 GWH.

k. *Location of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to

submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2421 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2206–032]

Progress Energy Carolinas, Inc.; Notice of Application for Non-Project Use of Project Lands and Waters and Soliciting Comments, Motions to Intervene, and Protests

February 4, 2008.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use of Project Lands and Waters.

b. *Project No:* 2206–032.

c. *Date Filed:* December 7, 2007.

d. *Applicant:* Progress Energy Carolinas, Inc.

e. *Name of Project:* Yadkin-Pee Dee River Hydroelectric Project, Tillery Development.

f. *Location:* This project is located on the Yadkin Pee Dee River in North Carolina. The Tillery Development is located in Stanly and Montgomery counties, North Carolina. This project does not occupy any Tribal or federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a), 825(r), 799, and 801.

h. *Applicant Contact:* Mr. Cecil Gurganus, Manager of Hydropower Operations; Progress Energy Carolinas, Inc.; (910) 439–5211, extension 1205.

i. *FERC Contact:* Any questions on this notice should be addressed to Shana High at (202) 502–8674.

j. *Deadline for filing comments and or motions:* March 4, 2008.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. Please include the project number (P–2206–032) on any comments or motions filed. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages e-filings.

k. *Description of Request:* Progress Energy has requested Commission authorization to permit Jordan Timberlands, Inc., to modify its existing Dock & Shop Marina. The modifications would result in total of 69 boat slips for this facility. Currently, there are approximately 40 boat slips at this facility. Other work includes seawall construction and improvements to an existing boat ramp. The facility is open to the public.

l. *Location of the Application:* This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described applications. A copy of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be

presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2413 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

January 28, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: CP05–119–003.
Applicants: Cameron Interstate Pipeline LLC.
Description: Cameron submits an abbreviated application for a limited amendment to Cameron's Section 7 authorizations.
Filed Date: 01/15/2008.
Accession Number: 20080118–0174.
Comment Date: 5 p.m. Eastern Time on Monday, February 4, 2008.

Docket Numbers: CP06–275–001.
Applicants: Equitrans, L.P.
Description: Equitrans, L.P., submits Original Sheet No. 4A, *et al.*, to its FERC Gas Tariff, Original Volume No. 1, to be effective March 1, 2008.
Filed Date: 01/18/2008.
Accession Number: 20080124–0379.
Comment Date: 5 p.m. Eastern Time on Monday, February 4, 2008.

Docket Numbers: RP96–312–176.
Applicants: Tennessee Gas Pipeline Company.
Description: Tennessee Gas Pipeline Company submits a Gas Transportation Agreement and ENI Petroleum U.S. LLC pursuant to Tennessee Rate Schedule Agreement and a Firm Transportation Negotiated Rate Letter Agreement dated 12/31/07.
Filed Date: 01/23/2008.
Accession Number: 20080124–0377.
Comment Date: 5 p.m. Eastern Time on Monday, February 4, 2008.

Docket Numbers: RP96–312–177.
Applicants: Tennessee Gas Pipeline Company.
Description: Tennessee Gas Pipeline Co. submits Original Sheet 413B to FERC Gas Tariff, Fifth Revised Volume 1, to be effective 1/20/08.
Filed Date: 01/24/2008.
Accession Number: 20080125–0202.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 5, 2008.

Docket Numbers: RP99–176–151.
Applicants: Natural Gas Pipeline Co. of America.
Description: Natural Gas Pipeline Company of America submits Transportation Rate Schedule FTS Agreements with negotiated rate exhibits between Enbridge Marketing (US) LP.
Filed Date: 01/25/2008.
Accession Number: 20080128–0015.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 6, 2008.

Docket Numbers: RP06–200–042.
Applicants: Rockies Express Pipeline LLC.
Description: Rockies Express Pipeline LLC submits Second Revised Sheet 9H *et al.* to FERC Gas Tariff, Second Revised Volume 1, to be effective 1/25/08.
Filed Date: 01/24/2008.
Accession Number: 20080125–0203.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 5, 2008.

Docket Numbers: RP07–99–003.
Applicants: ANR Pipeline Company.
Description: ANR Pipeline Company submits Substitute Seventeenth Sheet 570 to FERC Gas Tariff, Original Volume 2, to be effective 1/1/08.
Filed Date: 01/24/2008.
Accession Number: 20080125–0204.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 5, 2008.

Docket Numbers: RP08–97–003.
Applicants: ANR Pipeline Company.
Description: ANR Pipeline Co. submits Substitute Eighteenth Revised Sheet 570 to FERC Gas Tariff, Original Volume 2, to be effective 1/1/08.
Filed Date: 01/24/2008.
Accession Number: 20080125–0205.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 5, 2008.

Docket Numbers: RP08–128–001.
Applicants: Northern Border Pipeline Company.
Description: Northern Border Pipeline Company submits Substitute Twelfth Revised Sheet 300 and Substitute Tenth Revised Sheet 300A to FERC Gas Tariff, First Revised Volume 1.
Filed Date: 01/22/2008.
Accession Number: 20080124–0376.
Comment Date: 5 p.m. Eastern Time on Monday, February 4, 2008.

Docket Numbers: RP08–139–001.
Applicants: Iroquois Gas Transmission System, L.P.
Description: Supplement to Filing of Iroquois Gas Transmission System, L.P.
Filed Date: 01/22/2008.
Accession Number: 20080122–5008.
Comment Date: 5 p.m. Eastern Time on Monday, February 4, 2008.

Docket Numbers: RP08–165–000.
Applicants: Texas Gas Transmission, LLC.
Description: Texas Gas Transmission, LLC submits Second Revised Sheet 402 *et al.* to FERC Gas Tariff, Second Revised Volume 1, to be effective 3/1/08.
Filed Date: 01/17/2008.
Accession Number: 20080118–0173.
Comment Date: 5 p.m. Eastern Time on Monday, February 4, 2008.

Docket Numbers: RP08–166–000.
Applicants: Northern Natural Gas Company.
Description: Northern Natural Gas submits available points re Matagorda Offshore Pipeline System.
Filed Date: 01/17/2008.
Accession Number: 20080118–0159.
Comment Date: 5 p.m. Eastern Time on Monday, February 4, 2008.

Docket Numbers: RP08–170–000.
Applicants: National Fuel Gas Supply Corporation.
Description: Natural Fuel Gas Supply Corporation submits Second Revised Sheet 788 *et al.* to FERC Gas Tariff, First Revised Volume 2, to be effective 11/1/07.
Filed Date: 01/23/2008.
Accession Number: 20080124–0378.
Comment Date: 5 p.m. Eastern Time on Monday, February 4, 2008.

Docket Numbers: RP08–171–000.
Applicants: Alliance Pipeline LP.
Description: Alliance Pipeline, LP submits its Third Revised Sheet 279 to its FERC Gas Tariff, Original Volume 1, to be effective 3/1/08.
Filed Date: 01/24/2008.
Accession Number: 20080125–0147.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 5, 2008.

Docket Numbers: RP08–172–000.
Applicants: Trailblazer Pipeline Company LLC.
Description: Trailblazer Pipeline Company LLC submits report on refund of penalty revenues under RP08–172.
Filed Date: 01/25/2008.
Accession Number: 20080128–0014.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 6, 2008.

Docket Numbers: RP08–173–000.
Applicants: Transcontinental Gas Pipe Line Corp.
Description: Transcontinental Gas Pipe Line Corp submits Fortieth Revised Sheet 28 to FERC Gas Tariff, Third Revised Volume 1, to be effective 2/1/08.
Filed Date: 01/25/2008.
Accession Number: 20080128–0116.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 6, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of

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

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

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

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

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2440 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice Filings #1

February 5, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP07–443–002.
Applicants: Iroquois Gas Transmission System, L.P.
Description: Iroquois Gas Transmission System, LP submits Substitute First Revised Sheet 50C et al to FERC Gas Tariff, First Revised Volume 1, to be effective 2/1/08 under RP07–443.
Filed Date: 01/31/2008.
Accession Number: 20080205–0289.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 12, 2008.

Docket Numbers: RP07–711–001.
Applicants: Transcontinental Gas Pipe Line Corp.
Description: Response of Transcontinental Gas Pipe Line Corporation with requested explanations to the October 31, 2007 Commission Order under RP07–711.
Filed Date: 11/15/2007.
Accession Number: 20071115–5060.
Comment Date: 5 p.m. Eastern Time on Monday, February 11, 2008.

Docket Numbers: RP08–167–001.
Applicants: TransColorado Gas Transmission Company LC.
Description: TransColorado Gas Transmission Company, LLC submits Substitute Original Sheet 267 to FERC Gas Tariff, Second Revised Volume 1, to be effective 12/28/07 under RP08–167.
Filed Date: 01/31/2008.
Accession Number: 20080205–0290.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 12, 2008.

Docket Numbers: RP08–183–000.
Applicants: Northern Natural Gas Company.
Description: Petition of Northern Natural Gas Company for a limited waiver of tariff provisions under RP08–183.
Filed Date: 01/31/2008.
Accession Number: 20080205–0288.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 12, 2008.

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

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

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

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

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–2448 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

February 1, 2008.

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

Docket Numbers: ER91–569–038.
Applicants: Entergy Services, Inc.
Description: Entergy Arkansas, Inc and Entergy Gulf States Louisiana, LLC

et al. reports a non-material change in status pursuant to the requirements of Order 652.

Filed Date: 01/30/2008.

Accession Number: 20080131–0090.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER01–138–005.

Applicants: Delta Person Limited Partnership.

Description: Delta Person Limited Partnership submits a notice of non-material change in status in compliance with the reporting requirements of FERC's Order 652.

Filed Date: 01/30/2008.

Accession Number: 20080131–0091.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER01–316–027.

Applicants: ISO New England Inc.

Description: ISO New England Inc. submits its Index of Customers for the fourth quarter of 2007.

Filed Date: 01/30/2008.

Accession Number: 20080131–0057.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER04–805–007.

Applicants: Wabash Valley Power Association, Inc.

Description: Wabash Valley Power Association, Inc submits a Notice of Change in Status in compliance with FERC's Order 652.

Filed Date: 01/30/2008.

Accession Number: 20080131–0092.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER06–275–003.

Applicants: Northeast Utilities Service Company.

Description: The Connecticut Light & Power Co *et al.* submits a report updating the Commission on the status of four major transmission projects in Southwest Connecticut and providing accounting information etc.

Filed Date: 01/30/2008.

Accession Number: 20080131–0060.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER06–739–009; ER06–738–009; ER02–537–012; ER03–983–008; ER07–501–005; ER07–758–004.

Applicants: East Coast Power Linden Holding, LLC; Cogen Technologies Linden Ventures, L.P.; Fox Energy Company LLC; Birchwood Power Partners, L.P.; Shady Hills Power Company, L.L.C.

Description: The GE Companies submits Notice of Change in Status resulting from the completion of the transaction authorized by the Commission pursuant to Order 652.

Filed Date: 01/29/2008.

Accession Number: 20080131–0146.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 19, 2008.

Docket Numbers: ER07–407–003; ER07–342–002; ER07–522–002.

Applicants: High Prairie Wind Farm II, LLC; Telocaset Wind Power Partners, LLC; Old Trail Wind Farm, LLC.

Description: High Prairie Wind Farm II, LLC *et al.* submits a notice of non-material change in status in compliance with FERC's Order 652.

Filed Date: 01/30/2008.

Accession Number: 20080131–0093.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER07–1105–003.

Applicants: Cedar Creek Wind Energy, LLC.

Description: Cedar Creek Wind Energy, LLC submits an amendment to its Rate Schedule FERC 1.

Filed Date: 01/25/2008.

Accession Number: 20080130–0181.

Comment Date: 5 p.m. Eastern Time on Friday, February 15, 2008.

Docket Numbers: ER07–1399–001.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection LLC notifies FERC of the effective dates of two executed interconnection service agreements with Connective Delmarva Generation, Inc *et al.*

Filed Date: 01/31/2008

Accession Number: 20080201–0124.

Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: ER08–15–001.

Applicants: Midwest ISO Transmission Owners.

Description: Midwest ISO Transmission Owners responds to FERC 11/30/07 Deficiency Letter requesting additional information.

Filed Date: 01/31/2008.

Accession Number: 20080201–0129.

Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: ER08–185–001; ER08–186–001.

Applicants: Ameren Energy Marketing Company.

Description: Ameren Services Company Submits Letter in Support of Compliance Filings Submitted by Ameren Energy Marketing Company and Union Electric Company.

Filed Date: 01/30/2008; 01/30/2008.

Accession Number: 20080131–0088; 20080130–5081; 20080139–5078.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER08–354–001.

Applicants: Wells Fargo Energy Markets, LLC.

Description: Wells Fargo Energy Markets, LLC submits amendments to its application for market-based rate authority.

Filed Date: 01/30/2008.

Accession Number: 20080131–0094.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER08–411–001.

Applicants: Tiger Natural Gas, Inc.

Description: Tiger Natural Gas Inc's amended petition for acceptance of initial tariff, waivers and blanket authority.

Filed Date: 01/30/2008.

Accession Number: 20080131–0059.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER08–490–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits an executed Interim Interconnection Service Agreement with High Trail Wind Farm *et al.*

Filed Date: 01/29/2008.

Accession Number: 20080130–0081.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 19, 2008.

Docket Numbers: ER08–491–000.

Applicants: The Empire District Electric Company.

Description: The Empire District Electric Co. submits its Original Sheet 1 *et al.* to FERC Electric Tariff, First Revised Volume 2, effective 1/29/08.

Filed Date: 01/28/2008.

Accession Number: 20080130–0085.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 19, 2008.

Docket Numbers: ER08–492–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits an executed Interim Interconnection Service Agreement.

Filed Date: 01/29/2008.

Accession Number: 20080130–0082.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 19, 2008.

Docket Numbers: ER08–493–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits an executed Interim Interconnection Service Agreement with Zion Energy, LLC *et al.*

Filed Date: 01/29/2008.

Accession Number: 20080130–0083.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 19, 2008.

Docket Numbers: ER08–494–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection LLC submits an executed interconnection service agreement and an executed interconnection service agreement with Lookout Windpower LLC *et al.*

Filed Date: 01/28/2008.
Accession Number: 20080130–0084.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 19, 2008.

Docket Numbers: ER08–495–000.
Applicants: Kimberly-Clark Corporation.
Description: Kimberly-Clark Corporation submits a Petition for Acceptance of FERC Electric Rate Schedule 1, with an effective dated 1/30/07.
Filed Date: 01/30/2008.
Accession Number: 20080131–0058.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER08–496–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool Inc submits an executed Interconnection Agreement designated as Service Agreement 1602 to the Open Access Transmission Tariff.
Filed Date: 01/30/2008.
Accession Number: 20080131–0061.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER08–497–000.
Applicants: El Paso Electric Company.
Description: El Paso Electric Co. submits its notice of cancellation of its Rate Schedule 18 and all supplements.
Filed Date: 01/30/2008.
Accession Number: 20080131–0095.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER08–498–000.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc submits proposed revisions to its Open Access Transmission Tariff and Market Administration and Control Area Services Tariff.
Filed Date: 01/30/2008.
Accession Number: 20080131–0096.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER08–502–000.
Applicants: Linde Energy Services, Inc.
Description: Linde Energy Services, Inc submits notification of succession.
Filed Date: 01/31/2008.
Accession Number: 20080201–0128.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: ER08–503–000.
Applicants: MidAmerican Energy Company.
Description: MidAmerican Energy Co submits an amended Network Operating Agreement with City of Geneseo, IL.
Filed Date: 01/31/2008.
Accession Number: 20080201–0127.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: ER08–504–000.
Applicants: Florida Power & Light Company.
Description: Florida Power & Light Co submits Rate Schedule 306, the Midway-Hartman #2 138kV Interconnection Agreement with Florida Municipal Power Agency *et al.*
Filed Date: 01/31/2008.
Accession Number: 20080201–0126.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: ER08–505–000.
Applicants: Xcel Energy Services Inc.
Description: Northern States Power Co submits a Notice of Termination of the Transmission Capacity and Planning Agreement between Northern States Power Co and the City of Windom, MN.
Filed Date: 01/31/2008.
Accession Number: 20080201–0125.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES08–21–001; ES08–22–001; ES08–23–001.
Applicants: Kansas Gas and Electric Company, Westar Energy, Inc.
Description: Form 523—Request for Permission to Issue Securities of Kansas Gas and Electric Company, and Westar Energy, Inc.
Filed Date: 01/30/2008.
Accession Number: 20080129–5085.
Comment Date: 5 p.m. Eastern Time on Monday, February 11, 2008.

Docket Numbers: ES08–28–000.
Applicants: International Transmission Company.
Description: Form 523—Request for Permission to Issue Securities of International Transmission Company.
Filed Date: 01/30/2008.
Accession Number: 20080130–5076.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ES08–29–000.
Applicants: ENTERGY SERVICES INC.
Description: Form 523—Entergy Services, Inc. *et al.*—Joint Application for Authorization to Issue Securities.
Filed Date: 01/31/2008.
Accession Number: 20080131–5088.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: ES08–30–000.
Applicants: Entergy Louisiana, LLC.
Description: Form 523—Application of Entergy Louisiana, LLC for Authorization to Issue Securities.
Filed Date: 01/31/2008.
Accession Number: 20080131–5091.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA07–11–002; OA07–33–001.
Applicants: Deseret Generation & Transmission Co-op.
Description: Order No. 890 OATT Compliance Filing of Deseret Generation & Transmission Co-operative, Inc.
Filed Date: 01/31/2008.
Accession Number: 20080131–5108.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: OA07–31–002.
Applicants: Aquila, Inc.
Description: Aquila, Inc. errata filing in Docket No. OA07–31.
Filed Date: 01/31/2008.
Accession Number: 20080131–5010.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: OA07–90–002.
Applicants: MidAmerican Energy Company.
Description: MidAmerican Energy submits substitute tariff sheet and process flow diagram to Attachment C in OA07–90.
Filed Date: 01/31/2008.
Accession Number: 20080131–5041.
Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

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

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

eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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

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

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–2449 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–37–000]

Integrys Energy Group; Notice of Filing

February 4, 2008.

Take notice that on January 29, 2008, Integrys Energy Group, Inc., on behalf of its subsidiaries with electric market-based rate authority, filed a ''Petition for Declaratory Order, pursuant to 18 CFR 207(a) (2007).

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

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

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

Comment Date: 5 p.m. Eastern Time on February 28, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2414 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER08–284–000; ER08–284–001]

Argo Navis Fundamental Power Fund, L.P.; Notice of Issuance of Order

February 1, 2008.

Argo Navis Fundamental Power Fund, L.P. (Argo Navis) filed an application for market-based rate authority, with accompanying rate schedule. The proposed market-based rate schedule provides for the sale of energy, capacity and ancillary services at market-based rates. Argo Navis also requested waivers of various Commission regulations. In particular, Argo Navis requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Argo Navis.

On February 1, 2008, pursuant to delegated authority, the Director, Division of Tariffs and Market Development-West, granted the requests for blanket approval under part 34 (Director's Order). The Director's Order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard concerning the blanket approvals of issuances of securities or assumptions of liability by Argo Navis, should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2007). The Commission encourages the electronic submission of protests using the FERC Online link at *http://www.ferc.gov.*

Notice is hereby given that the deadline for filing protests is March 3, 2008.

Absent a request to be heard in opposition to such blanket approvals by the deadline above, Argo Navis is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Argo Navis, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approvals of Argo Navis's issuance of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2411 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER08–326–000; ER08–326–001 Lehigh Capital, LLC]

Notice of Issuance of Order

February 1, 2008.

Lehigh Capital, LLC (Lehigh Capital) filed an application for market-based rate authority, with accompanying rate schedule. The proposed market-based rate schedule provides for the sale of

energy and capacity at market-based rates. Lehigh Capital also requested waivers of various Commission regulations. In particular, Lehigh Capital requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Lehigh Capital.

On January 31, 2008, pursuant to delegated authority, the Director, Division of Tariffs and Market Development-West, granted the requests for blanket approval under part 34 (Director's Order). The Director's Order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard concerning the blanket approvals of issuances of securities or assumptions of liability by Lehigh Capital, should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2007). The Commission encourages the electronic submission of protests using the FERC Online link at *http://www.ferc.gov*.

Notice is hereby given that the deadline for filing protests is March 3, 2008.

Absent a request to be heard in opposition to such blanket approvals by the deadline above, Lehigh Capital is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Lehigh Capital, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approvals of Lehigh Capital's issuance of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2408 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER08–338–000]

Nexen Marketing U.S.A. Inc.; Notice of Issuance of Order

February 1, 2008.

Nexen Marketing U.S.A. Inc. (Nexen Marketing) filed an application for market-based rate authority, with accompanying rate schedule. The proposed market-based rate schedule provides for the sale of energy and capacity at market-based rates. Nexen Marketing also requested waivers of various Commission regulations. In particular, Nexen Marketing requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Nexen Marketing.

On January 31, 2008, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—West, granted the requests for blanket approval under part 34 (Director's Order). The Director's Order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard concerning the blanket approvals of issuances of securities or assumptions of liability by Nexen Marketing, should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2007). The Commission encourages the electronic submission of protests using the FERC Online link at *http://www.ferc.gov.*

Notice is hereby given that the deadline for filing protests is March 3, 2008.

Absent a request to be heard in opposition to such blanket approvals by the deadline above, Nexen Marketing is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Nexen Marketing, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approvals of Nexen Marketing's issuance of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2409 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP07–191–001]

Port Dolphin Energy, LLC; Notice of Limited Scoping for the Proposed Port Dolphin Project and Request for Comments on Environmental Issues

February 4, 2008.

The Federal Energy Regulatory Commission (FERC or Commission) is cooperating with the U.S. Coast Guard (Coast Guard), the lead federal agency for environmental review of the Port Dolphin Project. This proposal involves the construction and operation of an offshore liquefied natural gas (LNG) deepwater port (under the jurisdiction of the Coast Guard and the Maritime Administration) and associated pipeline facilities, including about 3.9 miles of onshore pipeline under the Commission's jurisdiction. FERC staff is assisting the Coast Guard in its preparation of an environmental impact statement (EIS) that will discuss the environmental impacts of the Port Dolphin Project. This cooperative effort is to comply with the National

Environmental Policy Act of 1969 (NEPA), which requires the Commission to take into account the environmental impact that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity under section 7 of the Natural Gas Act.

NEPA requires the FERC to discover and address concerns the public may have about proposals under its review. This process is referred to as ''scoping.'' On January 18, 2008, Port Dolphin Energy, LLC (Port Dolphin) amended its application with the FERC regarding the proposed onshore pipeline route. Thus, the FERC is opening a scoping period to solicit input from the public and interested agencies *limited to the proposed onshore pipeline and related facilities* (i.e., those under FERC jurisdiction) in Manatee County, Florida. Your input will help determine which issues need to be evaluated in the EIS.[1] Please note that the scoping period will close on March 5, 2008, and comments should be limited to the onshore facilities described in this amended docket. Details on how to submit comments are provided in the Public Participation section of this notice.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. Port Dolphin would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, Port Dolphin could initiate condemnation proceedings in accordance with Florida state law.

This notice is being sent to affected landowners; federal, state, and local government representatives and agencies; elected officials; Native American tribes; other interested parties; and local libraries and newspapers. State and local government representatives are asked to notify their constituents of this proposed project and to encourage them to comment on their areas of concern.[2] If you received this notice, you are on the environmental mailing list for this project and will continue to receive project updates including the draft and final EISs.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Proposed Project (FERC Jurisdictional Facilities)

Port Dolphin proposes to construct about 3.93 miles of 36-inch-diameter pipeline extending from the high water mark in Manatee County (where the offshore pipeline comes ashore) to a new interconnection station (also in Manatee County), where the pipeline would join with the interstate Gulfstream Natural Gas Pipeline and the intrastate TECO/Peoples Pipeline systems. Associated valves and appurtenant facilities are also proposed.

The general location of the proposed onshore pipeline is shown in appendix 1.[3]

Land Requirements for Construction

The construction right-of-way would be 100 feet wide, of which 30 feet would be retained as permanent right-of-way. A total of about 63.6 acres of land would be affected by pipeline construction. Of this, about 13.8 acres would be permanently impacted for operation. The proposed interconnections would be constructed on property owned by Port Dolphin and would encompass a 120-foot by 1,319-foot permanent footprint. The valve station would encompass a 50-foot by 60-foot permanent footprint.

The majority (about 56 percent) of the land crossed by the pipeline route is either classified as urban/industrial (e.g., commercial land and other utility rights-of-way) or as agricultural/rangeland. The remaining land comprises upland forest, wetland, and surface water (e.g., ponds, canals, and ditches).

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EIS and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal including alternative pipeline routes, and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your letter to: Kimberley D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE.; Room 1A, Washington, DC 20426.
- Label one copy of the comments for the attention of Gas Branch 1.
- Reference Docket No. CP07–191–001.
- Mail your comments so that they will be received in Washington, DC on or before March 5, 2008.

The Commission encourages electronic filing of comments. See 18 Code of Federal Regulations 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at *http://www.ferc.gov* under the ''eFiling'' link and the link to the User's Guide. Prepare your submission in the same manner as you would if filing on paper and save it to a file on your hard drive. Before you can file comments you will need to create an account by clicking on ''Login to File'' and then ''New User Account.'' You will be asked to select the type of filing you are making. This filing is considered a ''Comment on Filing.''

Becoming an Intervenor

In addition to involvement in the EIS scoping process, you may want to become an official party to the proceeding known as an ''intervenor.'' Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule

[1] For more information on the overall Port Dolphin Project or the Coast Guard's EIS process, see the July 12, 2007 edition of the **Federal Register**, page 38,116, ''Port Dolphin Energy, LLC, Port Dolphin Energy Liquefied Natural Gas Deepwater Port License Application'' under Department of Transportation/Maritime Administration.

[2] Comments submitted during the Coast Guard's scoping period (July 12–August 13, 2007) for the project as originally proposed do not need to be resubmitted.

[3] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies are available on the Commission's Internet Web site (*http://www.ferc.gov*) at the ''eLibrary'' link or from the Commission's Public Reference Room at 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the ''Additional Information'' section at the end of this notice. Copies of the appendices were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to Port Dolphin.

214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) (see appendix 2).[4] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the full docket number (i.e., CP07–191–001) in the docket number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm*.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–2422 Filed 2–8–08; 8:45 am]

BILLING CODE 6717–01–P

[4] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OA–2007–0933; FRL–8527–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency (Renewal); EPA ICR No. 2260.02, OMB Control No. 2090–0029

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501, *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of information collection and its estimated burden and cost.

DATES: Additional comments must be submitted on or before March 12, 2008.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OA–2007–0933, to (1) EPA online using *www.regulations.gov* (our preferred method), by e-mail to *oei.docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Office of Environmental Information Docket (Mail Code 2822T), 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Vicki Ellis, Office of Cooperative Environmental Management, Mail Code 1601M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–1203; fax number: 202–564–8129; e-mail address: *ellis.vicki@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On November 27, 2007 (72 *FR* 66165), EPA sought comments on this ICR pursuant to CFR 1320.8(d). EPA received one comment during the comment period, which is addressed in the ICR. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OA–2007–0933, which is available for online viewing at *www.regulations.gov,* or in person viewing at the Office of Environmental Information Docket in the EPA Docket Center (EPA/DC), EPA West Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. The EPA/DC 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 Reading Room is 202–566–1744, and the telephone number for the Environmental Information Docket is 202–566–9744.

Use EPA's electronic docket and comment system at *www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency (Renewal).

ICR numbers: EPA ICR No. 2260.02, OMB Control No. 2090–0029.

ICR status: This ICR is currently scheduled to expire on 02/29/2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or

form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The purpose of this information collection request is to assist the United States Environmental Protection Agency (EPA or the Agency) in selecting Federal advisory committee members who will be appointed as Special Government Employees (SGEs), mostly to EPA's scientific and technical committees. To select SGE members as efficiently and cost effectively as possible, the Agency needs to evaluate potential conflicts of interest before a candidate is hired as an SGE and appointed as a member to a committee by EPA's Administrator or Deputy Administrator. Agency officials developed the ''Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency,'' also referred to as Form 3110–48, for a greater inclusion of information to discover any potential conflicts of interest as recommended by the Government Accountability Office.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average one hour per response. 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 which have subsequently changed; 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.

Respondents/Affected Entities: Candidates for membership as Special Government Employees (SGEs) on EPA federal advisory committees.

Estimated total number of potential respondents: 300.

Frequency of response: Annual.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 300 hours.

Estimated total annual costs: $33,000. There are no capital or O&M costs.

Changes in the Estimates: There is an increase of 24 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. The burden estimates have been changed to reflect an expected increase of the number of respondents (from 276 to 300), as well as an increase of respondents costs to complete the form, to cover the next 3 years.

Dated: February 4, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8–2478 Filed 2–8–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2007–1175; FRL–8527–6]

Board of Scientific Counselors, Global Change Research Program Mid-Cycle Review Meetings—February and March 2008

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of two meetings of the Board of Scientific Counselors (BOSC) Global Mid-Cycle Subcommittee.

DATES: The first meeting (a teleconference call) will be held on Thursday, February 28, 2008, from 10:30 a.m. to 12:30 p.m. The second meeting (a teleconference call) will be held on Tuesday, March 4, 2008, from 1 p.m. to 3 p.m. The meetings may adjourn early if all business is finished. Requests for the draft agenda or for making oral presentations at the meetings will be accepted up to 1 business day before each meeting.

ADDRESSES: Participation in the conference calls will be by teleconference only—meeting rooms will not be used. Members of the public may obtain the call-in number and access code for the calls from Monica Rodia, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2007–1175, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2007–1175.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2007–1175.
- *Mail:* Send comments by mail to: Board of Scientific Counselors, Global Change Research Program Mid-Cycle Subcommittee Meetings—Winter 2008 Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. EPA–HQ–ORD–2007–1175.
- *Hand Delivery or Courier.* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC., Attention Docket ID No. EPA–HQ–ORD–2007–1175.

Note: this is not a mailing 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–HQ–ORD–2007–1175. 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *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 *www.regulations.gov* or in hard copy at the Board of Scientific Counselors, Global Change Research Program Mid-Cycle Subcommittee Meetings—Winter 2008 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Monica Rodia, Mail Drop 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1300 Pennsylvania Ave., NW., Washington, DC 20460; via phone/voice mail at: (202) 564–8322; via fax at: (202) 565–2925; or via e-mail at: *rodia.monica@epa.gov*.

SUPPLEMENTARY INFORMATION:

General Information

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at any of the meetings may contact Monica Rodia, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes.

Proposed agenda items for the meetings include, but are not limited to: *Teleconference #1:* discussion of each of the submissions to the charge questions used to develop the draft report; *Teleconference #2:* a review of subsequent changes used to create the final draft, discussion of changes to the final draft and approval of the report. The meetings are open to the public. The subcommittee roster and charge can be accessed at: *http://www.epa.gov/osp/bosc/subcomm-gc_mid.htm*.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Monica Rodia at (202) 564–8322 or *rodia.monica@epa.gov*. To request accommodation of a disability, please contact Monica Rodia, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: February 5, 2008.

Jeff Morris,

Acting Director, Office of Science Policy.

[FR Doc. E8–2476 Filed 2–8–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

February 4, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a current valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before April 11, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit all PRA comments by e-mail or U.S. mail. To submit your comments by e-mail, send them to *PRA@fcc.gov*. To submit your comments by U.S. mail, send them to Leslie F. Smith, Federal Communications Commission, Room 1–C216, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Leslie F. Smith via the Internet at *PRA@fcc.gov* or call (202) 418–0217.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0986.

Title: Competitive Carrier Line Count Report.

Form Number: FCC Form 525.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 1,300 respondents; 4,753 responses.

Estimated Time per Response: 0.5–6 hours.

Obligation to Respond: Required to obtain or retain benefits.

Frequency of Response: On occasion, quarterly and annual reporting requirements; third party disclosure requirement.

Total Annual Burden: 3,707 hours.

Total Annual Cost: $0.00.

Privacy Act Impact Assessment: No impacts.

Nature of Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will use the information requirements to determine whether and to what extent rural telecommunications carriers and competitive eligible telecommunications carriers (ETCs) providing the data are eligible to receive universal service support. This information includes loop counts, by disaggregation zone, for rural incumbent carriers, which is used to calculate the per-line high-cost universal service support amount available to competitive ETCs serving their territories. It also includes loop counts, by disaggregation zone or unbundled network element zone, for competitive ETCs, which is used to calculate the total high-cost universal service support amount available to competitive ETCs. This competitive ETC loop count requirement includes areas served by incumbent non-rural carriers, in addition to incumbent rural carriers, due to the consolidation of information collections included in a previous revision. Additionally, this information collection requires states to certify that incumbent rural carriers and

competitive ETCs are using the high-cost universal service support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Finally, this information collection includes cost data filed by incumbent rural carriers on an as-needed basis to establish eligibility for the safety net and safety valve high-cost universal service support mechanisms.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–2461 Filed 2–8–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of the Third Meeting of the Physical Activity Guidelines Advisory Committee

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science.

ACTION: Notice.

Authority: 42 U.S.C. 217a, section 222 of the Public Health Service Act, as amended. The Committee is governed by the provision of Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

SUMMARY: The U.S. Department of Health and Human Services (HHS) announces the final in a series of three federal advisory committee meetings on the Physical Activity Guidelines for Americans, to be held in Washington, DC. This meeting will be open to the public. The Physical Activity Guidelines Advisory Committee has been charged with reviewing existing scientific literature to identify where there is sufficient evidence to develop a comprehensive set of specific physical activity recommendations. The Committee will prepare a report to the Secretary of HHS that documents the scientific background and rationale for the issuance of Physical Activity Guidelines for Americans. The report will also identify areas where further scientific research is needed. The Committee's recommendations will be utilized by the Department to prepare the final Physical Activity Guidelines. The intent is to issue physical activity recommendations for all Americans that will be tailored as necessary for specific subgroups of the population.

DATES: The Committee will meet February 28–29, 2008 for a day and a half meeting. The February 28 session will be from 8:30 a.m. to 5 p.m. The February 29 session will be from 8:30 a.m. to 1:15 p.m.

ADDRESSES: The meeting will be held in the Hubert Humphrey Building, Room 800, located at 200 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: CAPT Richard Troiano, PhD, Executive Secretary, Physical Activity Guidelines Advisory Committee, Department of Health and Human Services, Office of Public Health and Science, Office of Disease Prevention and Health Promotion, Room LL–100, 1101 Wootton Parkway, Rockville, MD 20852, 240/453–8280 (telephone), 240/453–8281 (fax). Additional information is available on the Internet at *http://www.health.gov/PAguidelines.*

SUPPLEMENTARY INFORMATION: The Physical Activity Guidelines Advisory Committee: The thirteen-member Committee is chaired by William Haskell, PhD, Professor of Medicine, Stanford University School of Medicine. The Vice-Chair is Miriam Nelson, PhD, Director, John Hancock Center for Physical Activity and Nutrition, Friedman School of Nutrition Science and Policy, Tufts University. Other members of the Committee include Rod K. Dishman, PhD, Professor of Exercise Science and Director, Exercise Psychology Laboratory, Department of Kinesiology, University of Georgia; Edward Howley, PhD, Professor Emeritus, Department of Exercise, Sport, and Leisure Studies, University of Tennessee; Wendy Kohrt, PhD, Professor of Medicine, Division of Geriatric Medicine, University of Colorado at Denver and Health Sciences Center; William Kraus, M.D., Professor, Division of Cardiovascular Medicine, Duke University School of Medicine; I-Min Lee, M.D., Sc.D., Associate Professor of Medicine, Harvard Medical School and Associate Professor of Epidemiology, Harvard School of Public Health; Anne McTiernan, M.D., PhD, Director, Prevention Center, Fred Hutchinson Cancer Research Center; Russell Pate, PhD, Associate Vice President for Health Sciences, Office of Research and Health Sciences and Professor, Department of Exercise Science, University of South Carolina; Kenneth Powell, M.D., M.P.H., Public Health and Epidemiologic Consultant; Judith Regensteiner, PhD, Professor Department of Medicine and Director, Center for Women's Health Research, University of Colorado at Denver and Health Sciences Center; James Rimmer, PhD, Professor and Director, National Center on Physical Activity and Disability, Department of Disability and Human Development, University of Illinois at Chicago; and Antronette Yancey, M.D., M.P.H., Professor, Department of Health Services, University of California at Los Angeles School of Public Health.

Purpose of the Meeting: The Advisory Committee will present and discuss the final report and their recommendations to the Secretary. The report to the Secretary will outline the scientific background and rationale for the issuance of Physical Activity Guidelines for Americans. The report will also identify areas where further scientific research is needed. The Committee's recommendations will be utilized by the Department to prepare the final Physical Activity Guidelines. The intent is to develop physical activity recommendations for all Americans that will be tailored as necessary for specific subgroups of the population. The Committee will also hear oral comments from the public.

Public Participation at Meeting: Members of the public are invited to observe the Advisory Committee meeting. On February 29, a portion of the meeting agenda will be allocated for committee members to hear public comments. All individuals wishing to observe and/or make comments at the meeting must indicate their intention to do so by pre-registering at *http://www.health.gov/PAguidelines.* Due to time constraints, a limited number of scheduled time slots for public comments will be made available on a first-come-first-served basis through pre-registration. Comments will also be limited to 1–2 minutes per individual. Attendees that do not pre-register to make comments cannot be guaranteed an opportunity to have his or her comments heard during the meeting. Individuals are encouraged to submit their comments in writing in advance of the meeting through the pre-registration process. Additionally, individuals wishing to only submit written comments may also do so through pre-registration or by e-mail to *PA.Guidelines@hhs.gov.* Please note there will be no public comment session during the Advisory Committee meeting on February 28. Registrations must be completed by February 22. Space for the meeting is limited and registrations will be accepted until maximum room capacity is reached. A waiting list will be maintained should registrations exceed room capacity. Individuals on the waiting list will be contacted as additional space for the meeting becomes available.

Registrants for the Physical Activity Advisory Guidelines Committee meeting must present valid government-

issued photo identification (i.e., driver's license) and should arrive 45 minutes prior to the start of the meeting to clear through security. Security will provide registered attendees badges that must be worn at all times and returned to security prior to exiting the Hubert Humphrey Building.

Registration questions may be directed to Experient at *PAguidelines@experient-inc.com* (e-mail), (703) 525–8333 x3346 (phone) or (703) 525–8557 (fax).

Dated: February 5, 2008.

Penelope Slade Royall,

RADM, USPHS, Deputy Assistant Secretary for Health, Office of Disease Prevention and Health Promotion.

[FR Doc. E8–2453 Filed 2–8–08; 8:45 am]

BILLING CODE 4150–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Innovative Strategies for Increasing Self-Sufficiency (ISIS)—Intervention Strategy Assessment Guide.

OMB No.: New Collection.

Description: The Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing a data collection activity as part of the Innovative Strategies for Increasing Self-Sufficiency (ISIS) demonstration and evaluation. The ISIS project will test a range of promising strategies to promote employment, self-sufficiency, and reduce dependence on cash welfare. The ISIS project will evaluate multiple employment-focused strategies that build on previous approaches and are adapted to the current Federal, State, and local policy environment. The major goals of the project include increasing the empirical knowledge about the effectiveness of a variety of programs for low-income families to sustain employment and advance to positions that enable self-sufficiency, as well as producing useful findings for both policymakers and program administrators.

This proposed information collection activity focuses on identifying promising strategies to be tested as part of the study. Through semi-structured discussions, respondents will be asked to comment on the most important strategies and interventions for potential evaluation.

Respondents: Semi-structured discussions will be held with administrators or staff of State agencies, local agencies, and programs with responsibility for employment-related services or activities for welfare and other low-income families; researchers in the field of welfare policy, poverty, economic self-sufficiency, and low-wage labor markets; and policymakers at various levels of government.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Intervention Strategy Assessment Guide	400	1	.5	200

Estimated Total Annual Burden Hours: 200.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the paper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: February 6, 2008.

Brendan C. Kelly,

Reports Clearance Officer.

[FR Doc. 08–599 Filed 2–8–08; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0055]

Draft Guidance for Industry: Validation of Growth-Based Rapid Microbiological Methods for Sterility Testing of Cellular and Gene Therapy Products; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled ''Guidance for Industry: Validation of Growth-Based Rapid Microbiological Methods for Sterility Testing of Cellular and Gene Therapy Products,'' dated February 2008. The draft guidance document provides manufacturers of cellular and gene therapy products with recommendations on the validation of growth-based Rapid Microbiological Methods (RMMs) for sterility testing of their products. This draft guidance addresses considerations for method validation and determining equivalence of an RMM to sterility assays. This draft guidance applies to somatic cellular therapy and gene therapy products.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115 (g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by May 12, 2008.

ADDRESSES: Submit written requests for single copies of the draft guidance to the

Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Paul E. Levine, Jr. Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N,Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Guidance for Industry: Validation of Growth-Based Rapid Microbiological Methods for Sterility Testing of Cellular and Gene Therapy Products,'' dated February 2008. This draft guidance applies to somatic cellular therapy and gene therapy products. This draft guidance does not apply directly to human cells, tissues, and cellular and tissue products (HCT/Ps) which are regulated solely under section 361 of the Public Health Service Act as described under 21 CFR 1271.10, or HCT/Ps which are regulated as medical devices under 21 CFR part 820. Such products are not subject to the sterility testing provision in § 610.12 (21 CFR 610.12), or to the requirement in 21 CFR 610.9 to demonstrate that an alternative RMM is equivalent to the sterility method specified in the regulations. However, HCT/P and device establishments seeking to validate an RMM may find these recommendations useful.

The principles of RMM validation described in this draft guidance apply only to growth-based RMMs. Growth-based RMMs, like traditional methods of detecting viable microorganisms as described in § 610.12, rely on the ability to recover and detect organisms from the product and demonstrate their viability by multiplication in liquid media. The specific recommendations in this document may not be applicable for non-growth-based RMMs which detect microbiological surrogates. This draft guidance focuses on RMMs with qualitative results (i.e., detection of microorganisms). If the RMM does not have the capability to speciate microorganisms, an additional method for speciation will be needed for investigation of detected contaminants. Early discussions with product review staff at CBER are encouraged for individuals intending to use or develop an RMM at any time in the product lifecycle using growth-based, viability-based, surrogate-based, or RMMs that provide quantitative results.

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirement of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA Regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information to which this draft guidance refers are covered by 21 CFR parts 601 (on BLAs) and 312 (on INDs), and were approved under OMB Control No. 0910–0338 and 0910–0014, respectively.

III. Comments

The draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the draft guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in the brackets in the heading of this document. A copy of the draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic submissions will be accepted by FDA through FDMS only.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/cber/guidelines.htm* or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: January 29, 2008.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E8–2398 Filed 2–8–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Hemoglobin Based Oxygen Carriers: Current Status and Future Directions; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop entitled: Hemoglobin Based Oxygen Carriers: Current Status and Future Directions. The purpose of the public workshop is to discuss the safety of hemoglobin-based oxygen carriers (HBOCs) as related to a variety of potential uses of these investigational products. We are having this discussion because clinical and nonclinical studies of HBOCs, as either blood substitutes or as resuscitation fluids, have raised questions about the safety of these products as a group. The public workshop will feature presentations and roundtable discussions led by experts from academic institutions, government, and industry.

Date and Time: The public workshop will be held on April 29, 2008, from 8:30 a.m. to 5 p.m. and April 30, 2008, from 8:30 a.m. to 5 p.m.

Location: The public workshop will be held at the Lister Hill Center Auditorium, Building 38A, National Institutes of Health, 8800 Rockville Pike, Bethesda, MD 20894.

Contact Person: Rhonda Dawson, Center for Biologics Evaluation and Research (HFM–302), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6129, FAX: 301–827–2843, e-mail: *rhonda.dawson@fda.hhs.gov*.

Registration: Mail or fax your registration information (including name, title, firm name, address, and telephone and fax numbers) to the contact person by April 11, 2008. There

is no registration fee for the public workshop. Early registration is recommended because seating is limited to 175 attendees. Registration on the day of the public workshop will be provided on a space available basis beginning at 7:30 a.m.

If you need special accommodations due to a disability, please contact Rhonda Dawson at least 7 days in advance of the workshop.

SUPPLEMENTARY INFORMATION: FDA; the National Heart, Lung, and Blood Institute, National Institutes of Health; and the Department of Health and Human Services' Office of the Secretary and Office of Public Health and Science are co-sponsoring this public workshop. The primary goal of the workshop is to discuss what is known about the safety of HBOCs, and possible paths forward for development of these products. Topics to be discussed on April 29, 2008, will include: (1) Introduction to the issues and unmet needs surrounding HBOC development, (2) overview of the physiology and chemistry of hemoglobin in HBOCs, (3) nitric oxide physiology and pathophysiology related to HBOCs, (4) review of nonclinical studies of HBOCs, (5) risk-benefit considerations in clinical trials of HBOCs, (6) proposed clinical indications for HBOCs, and (7) industry's experience with HBOC clinical trials. Panel deliberations on the safety and efficacy of HBOCs in various clinical settings and potential mechanisms of effects on organs will be the main topics of discussion on April 30, 2008. We also will discuss future development pathways with a focus on the use and development of animal models, biochemical redesign approaches, and alternative clinical designs where benefit exceeds risk.

Please note that on January 15, 2008, the FDA Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic submissions will be accepted by FDA through FDMS only.

Transcripts: Transcripts of the public workshop may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857, approximately 15 working days after the public workshop at a cost of 10 cents per page. A transcript of the public workshop will be available on the Internet at *http://www.fda.gov/cber/minutes/workshop-min.htm*.

Dated: February 4, 2008.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E8–2397 Filed 2–8–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Interdisciplinary, Community-Based Linkages; Notice of Request for Nominations

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) is requesting nominations to fill five (5) upcoming vacancies on the Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL).

Authority: 42 U.S.C. 294f, section 756 of the PHS Act, as amended. The Advisory Committee is governed by provisions of Public Law (Pub. L.) 92–463, as amended (5 U.S.C. Appendix 2) which sets forth standards for the formation and use of advisory committees.

DATES: The Agency must receive nominations on or before March 12, 2008.

ADDRESSES: All nominations are to be submitted by mail to Louis D. Coccodrilli, Designated Federal Official, ACICBL, Bureau of Health Professions (BHPr), HRSA, Parklawn Building, Room 9–05, 5600 Fishers Lane; Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Adriana Guerra, Public Health Fellow, Division of Medicine and Dentistry, by e-mail *aguerra@hrsa.gov* or telephone, (301) 443–6194.

SUPPLEMENTARY INFORMATION: Under the authorities that established the ACICBL, the Federal Advisory Committee Act of October 6, 1972 (Pub. L. 92–463), and section 2119 of the Act, 42 U.S.C. 00aa–19, as added by Pub. L. 99–660 and amended, HRSA is requesting nominations for five (5) voting members.

The ACICBL provides advice and recommendations to the Secretary and to the Congress concerning policy, program development and other matters of significance related to interdisciplinary, community-based training grant programs authorized under sections 751–756, Title VII, Part D of the Public Health Service Act. The ACICBL prepares an annual report describing the activities conducted during the fiscal year, identifying findings and developing recommendations to enhance Title VII Interdisciplinary, Community-Based Training Grant Programs. The Annual Report is submitted to the Secretary of the U.S. Department of Health and Human Services, and ranking members of the Committee on Health, Education, Labor and Pensions of the Senate, and the Committee on Energy and Commerce of the House of Representatives.

The Department of Health and Human Services is requesting a total of five (5) nominations for voting members of the ACICBL from schools that have administered or are currently administering awards from the following programs: Allied Health—one (1) nominee, Geriatric Education and Training Programs—one (1) nominee, and Health Education and Training Centers (HETCs)—one (1) nominee. Nominations are also requested for two (2) students, residents, and/or fellow representatives.

The legislation governing this Committee requires a fair balance of health professionals who represent the general population with regard to a broad geographic distribution and an evenness of urban and rural areas, along with professionals who are women and minorities. As such, the pool of appropriately qualified nominations should reflect these requirements to the degree possible.

Interested individuals may nominate multiple qualified professionals for membership to the ACICBL to allow the Secretary a diverse listing of highly qualified potential candidates. Nominees willing to serve as members of the ACICBL should not have an appearance of a conflict of interest that would preclude their participation. Potential candidates will be asked to provide detailed information concerning consultancies, research grants, or contracts to permit an evaluation of possible sources of conflicts of interest. In addition, a curriculum vitae and a statement of interest will be required of the nominee to support experience working with Title VII Interdisciplinary, Community-Based Training Grant Programs, expertise in the field, and personal desire in participating on a National Advisory Committee. Qualified candidates will be invited to serve a two or three-year term. All nominations must be received no later than March 12, 2008.

Dated: February 5, 2008.

Alexandra Huttinger,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. E8–2396 Filed 2–8–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

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

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended, because the premature disclosure of information and the discussions would be likely to significantly frustrate implementation of recommendations.

Name of Committee: President's Cancer Panel.

Date: March 5, 2008.

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

Agenda: The panel will discuss the report format and recommendations for the 2007–2008 meeting series.

Place: National Cancer Institute, Office of the Director, National Institutes of Health, 6116 Executive Blvd., Suite 212, Bethesda, MD 20892. (Teleconference.)

Contact Person: Abby Sandler, PhD, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd., Suite 212, Bethesda, MD 20892, 301–451–9399.

Any interested person may file written comments with the committee by forwarding the comments to the Contact Person listed on this notice. The comments should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person. Information is also available on the Institute's/Center's home page: *deainfo.nci.nih.gov/advisory/pcp/pcp.htm,* where an agenda and any additional information for the meeting will be posted when available.

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

Dated: February 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–581 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

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

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

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Biorepository and Limited Access Data Set Information Coordinating Center.

Date: March 3, 2008.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate contract proposals.

Place: Hilton Washington Dulles Airport Hotel, 13869 Park Center Road, Herndon, VA 20171.

Contact Person: David A. Wilson, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7204, Bethesda, MD 20892–7924, (301) 435–0299, *wilsonda2@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Mentored Clinical Scientist Research Career Development Awards.

Date: March 13–14, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Rina Das, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7200 Bethesda, MD 20892–7924, (301) 435–0297, *dasr2@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Ancillary Studies in Clinical Trials.

Date: March 25, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Yingying Li-Smerin, MD, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20892–7924, (301) 435–0277, *lismerin@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Exploratory/Developmental Grants Phase II (R 33's).

Date: March 27–28, 2008.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

Contact Person: Keith A. Mintzer, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7186, Bethesda, MD 20892–7924, (301) 435–0280, *mintzerk@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: February 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–586 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

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

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

Name of Committee: National Institute of Allergy and Infectious Diseases Special

Emphasis Panel; The Immune Response to Viral Infections in Lymph Nodes.

Date: March 6, 2008.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Room 3127, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Erica L. Brown, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–451–2639, *ebrown@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–578 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

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

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

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; ''Biodefense and Emerging Infectious Diseases Research Opportunities''.

Date: March 5, 2008.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Room #3129, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Eleazar Cohen, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, Room 3129, 6700 B Rockledge Drive, Bethesda, MD 20892, 301–435–3564, *ec17w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–579 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; Notice of Closed Meeting

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

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

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, Review R03, R21, F30 Applications.

Date: March 6, 2008.

Time: 11:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Room 674, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Raj K. Krishnaraju, PhD, MS, Scientific Review Officer, Scientific Review Branch, National Inst of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr., Rm 4AN 32J, Bethesda, MD 20892, 301–594–4864, *kkrishna@nidcr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: February 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–580 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences Notice of Closed Meeting

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

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

Name of Committee: Minority Programs Review Committee, MBRS Review Subcommittee B.

Date: March 13, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: John J. Laffan, PhD, Scientific Review Administrator, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18J, Bethesda, MD 20892, 301–594–2773, *LaffanJo@nigms.nih.gov.*

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

Dated: February 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–582 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

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

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

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Competitive Research (Score) Grant Applications.

Date: March 3, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Arthur L. Zachary, PhD, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–12, Bethesda, MD 20892, (301) 594–2886, *zacharya@nigms.nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Minority Biomedical Research Support in Behavior.

Date: March 3, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Hotel and Executive Meeting Center, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Rebecca H. Johnson, PhD, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18C, Bethesda, MD 20892, (301) 594–2771, *johnsonrh@nigms.nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Minority Biomedical Research Support in Chemistry.

Date: March 11–12, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

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

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Collaborative Studies on Systems Biology of Complex Phenotypes.

Date: March 13, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Hilton Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Arthur L. Zachary, PhD, Scientific Review Administrator, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–12, Bethesda, MD 20892, (301) 594–2886, *zacharya@nigms.nih.gov.*

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

Dated: February 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–583 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

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

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

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Biomedical Research and Research Training Review Subcommittee A.

Date: March 6, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20817.

Contact Person: Carole H. Latker, PhD, Scientific Review Administrator, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18, Bethesda, MD 20892, (301) 594–2848, *latkerc@nigms.nih.gov.*

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

Dated: February 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–584 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

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

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

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID DMID Clinical Proteomics Centers for Infectious Diseases and Biodefense.

Date: March 3–4, 2008.

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

Agenda: To review and evaluate contract proposals.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Contact Person: Alec Ritchie, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID/DHHS,

6700 B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–435–1614, *aritchie@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February, 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–585 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

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

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

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; Outstanding New Environmental Scientist Award.

Date: March 6–7, 2008.

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

Agenda: To review and evaluate grant applications.

Place: The Radisson Governor's Inn, I–40 at Davis Drive, Exit 280, Research Triangle Park, NC 27709.

Contact Person: Janice B. Allen, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Science, P.O. Box 12233, MD EC–30/Room 3170 B, Research Triangle Park, NC 27709, 919/541–7556.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: January 31, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–587 Filed 2–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Inspectorate America Corporation, as a Commercial Gauger and Laboratory

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation and approval of Inspectorate America Corporation, as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, Inspectorate America Corporation, 2 Williams Street, Chelsea, MA 02150, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov*. Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://cbp.gov/xp/cgov/import/operations_support/labs_scientific_svcs/commercial_gaugers/*.

DATES: The accreditation and approval of Inspectorate America Corporation, as commercial gauger and laboratory became effective on July 24, 2007. The next triennial inspection date will be scheduled for July 2010.

FOR FURTHER INFORMATION CONTACT: Commercial Gauger Laboratory Program Manager, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: January 31, 2008.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. E8–2432 Filed 2–8–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Notice of Issuance of Final Determination Concerning Military-Grade Flashlight and Replacement Part

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that the Bureau of Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of certain military-grade flashlights and their replacement parts to be offered to the United States Government under an undesignated government procurement contract. Based on the facts presented, the final determination found that the United States is the country of origin of both the subject flashlights and their replacement parts for purposes of U.S. Government procurement.

DATES: The final determination was issued on February 5, 2008. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of February 11, 2008.

FOR FURTHER INFORMATION CONTACT: Holly Files, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202–572–8740).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on February 5, 2008, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain military-grade flashlights and their replacement parts to be offered to the United States Government under an undesignated government procurement contract. The CBP ruling number is H017620. This final determination was issued at the request of Energizer Battery, Inc. under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of

the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18).

The final determination concluded that, based upon the facts presented, assembly in the United States of various foreign-origin components with a U.S.-origin light emitting diode (LED) substantially transforms both the subject flashlight and its replacement part into products of the United States. Therefore, the country of origin of both the military-grade flashlight and the replacement part is the United States for purposes of U.S. Government procurement.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), states that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: February 5, 2008.

Myles B. Harmon,

Acting Executive Director, Office of Regulations and Rulings, Office of International Trade.

HQ H017620

February 5, 2008.

[MAR–02 OT:RR:CTF:VS H017620 HEF]

Category: Marking.

Mr. Steven P. Sonnenberg, Sonnenberg & Anderson, 300 South Wacker Drive, 12th Floor, Chicago, Illinois 60606.

RE: U.S. Government Procurement; Final Determination; Country of origin of a flashlight and replacement part; 19 CFR. part 177

Dear Mr. Sonnenberg:

This is in response to your letter dated September 13, 2007, requesting a final determination on behalf of Energizer Battery, Inc. (''Energizer''), pursuant to subpart B of part 177, Customs and Border Protection (''CBP'') Regulations (19 CFR 177.21 *et seq.*). Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (codified at 19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of a military-grade flashlight and replacement part. We note that Energizer is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination. Confidential treatment for certain business information identified in your request for a final determination will be extended in accordance with your request. Photographs of the flashlight and the replacement part, at various stages of manufacture, were submitted with your request.

Facts

You advise that Energizer intends to sell the subject flashlight to consumers and to the U.S. military. A subcomponent of the flashlight, the lens head subassembly, may be sold separately as a replacement part for the subject flashlights. You indicate that the flashlight has many features that render it suitable for military use. The flashlight provides long-lasting light emitting diode (''LED'') lighting and infrared lighting, the latter of which is invisible to the naked eye. It has a heavy-duty design and can withstand the impact of being dropped twenty or more feet. In addition, it can also be clipped to a standard issue military vest.

Both the subject military flashlight and the replacement lens head subassembly are manufactured in the United States from U.S. and foreign-origin components. The following operations occur within the United States:

Assembly of Lens Head Subassembly

1. The LED is manufactured to Energizer's specifications by a third party in the United States.
2. The LED is mounted to a foreign-origin ''hex board'' by another third party in the United States and shipped to an Energizer facility in Vermont.
3. A foreign-origin, partially assembled half lens and separate printed circuit board (''PCB'') are imported to Energizer's Vermont facility. At the facility, the LED/hex board subassembly is mounted to a heat sink on the half lens with the use of two small screws.
4. Wires are spot soldered to the positive and negative terminals of the LED.
5. The following foreign-origin components are assembled together: a lens reflector, lens, and rubber gasket.
6. The resulting subassembly from step 5 is attached to the LED and half lens to form the lens head subassembly that will be used either in the flashlight or sold separately as a replacement part.
7. The lens head subassembly's wiring, soldering, and physical connections are inspected.

Assembly of the Flashlight

1. If the lens head subassembly described above will be incorporated into a finished flashlight, its wires are routed through a foreign-origin plastic body or case to corresponding battery contacts.
2. Foreign-origin gaskets are attached for weatherproofing.
3. The second half of the body or case is attached with six screws.
4. Final testing is performed, which includes the use of devices capable of perceiving infrared light.

You explain that all final products undergo testing of their white, red, blue and infrared lights by the use of an infrared detection device. Manufacturing and inspection staff at the Vermont facility will use troubleshooting skills to identify and, if possible, correct any mechanical or electronic deficiencies revealed by the testing. In addition, you state that Energizer has expended significant resources in connection with the design exploration, development, detailing, and modeling of this product in the United States.

Issue

What are the countries of origin of the flashlight and the replacement part for purposes of U.S. Government procurement?

Law and Analysis

Pursuant to subpart B of part 177, Customs Regulations (19 CFR 177.21 *et seq.*), which implements Title III of the Trade Agreements Act of 1979, as amended (''TAA,'' codified at 19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth at 19 U.S.C. 2518(4)(B):

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of

part 177 consistent with the Federal Procurement Regulations. *See* 19 CFR 177.21. In this regard, CBP recognizes that the Federal Procurement Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1). The Federal Procurement Regulations define ''U.S.-made end product'' as:

> * * * an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

48 CFR 25.003

Therefore, the question presented in this final determination is whether, as a result of the operations performed in the United States, the flashlight and replacement part are substantially transformed into products of the United States.

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of the operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens* v. *United States,* 6 Ct. Int'l Trade 204, 573 F. Supp. 1149 (1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). If the manufacturing or combining process is a minor one that leaves the identity of the imported article intact, a substantial transformation has not occurred. *Uniroyal, Inc.* v. *United States,* 3 Ct. Int'l Trade 220, 542 F. Supp. 1026 (1982). Assembly operations that are minimal or simple, as opposed to complex or meaningful, generally will not result in a substantial transformation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97.

In order to determine whether a substantial transformation occurs when components of various origins are assembled to form completed articles, CBP considers the totality of the circumstances and makes such decisions on a case-by-case basis. The country of origin of the article's components, the extent of the processing that occurs within a given country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, facts such as resources expended on product design and development, the extent and nature of post-assembly inspection procedures, and the worker skill required during the actual manufacturing process will be considered when analyzing whether a substantial transformation has occurred; however, no one such factor is determinative.

You assert that the U.S.-origin LED imparts the essential character to the flashlight and the replacement lens head subassembly. In addition to having a high monetary value relative to the other components, it generates the primary light in both products. The LED is manufactured to Energizer's specifications in order to provide certain desirable characteristics regarding the light's color, intensity, durability, coverage, and efficiency. You also note that the foreign-origin reflector is engineered to maximize these particular characteristics.

You claim that as a result of the manufacturing, assembly, and testing processes performed in the United States, the foreign-origin components undergo a substantial transformation such that both the flashlight and the replacement lens head subassembly become products of the United States for purposes of U.S. Government procurement.

In Headquarters Ruling Letter (''HRL'') 563236, dated July 6, 2005, CBP examined whether multi-line telephone sets assembled in Mexico from parts of Mexican and foreign origin were products of Mexico for purposes of U.S. Government procurement. Among the foreign components imported into Mexico for the assembly of the telephone sets were printed circuit assemblies (''PCAs'') from Malaysia. The handsets, liquid crystal displays, microphone assemblies, and stands incorporated into the telephones were of Mexican origin. In reaching a determination that the telephone sets were products of Mexico, CBP noted that the telephone sets were comprised of certain essential parts (such as the handsets) that were of Mexican origin. Moreover, many of the components lacked any functionality prior to their assembly within the telephone set.

In HRL 962528, dated February 18, 2000, CBP considered the eligibility of a rechargeable power failure light for duty free treatment under the Generalized System of Preferences. In that case, the power failure light was assembled in Thailand from various Thai and foreign origin components, including a PCB assembled in Thailand. CBP found that the process of assembling various components into a PCB resulted in a substantial transformation of the imported components. Moreover, CBP found that the assembly of the PCB with a bulb holder assembly, a plug blade assembly, and the upper and lower housing assemblies to make the finished power failure light substantially transformed the PCB.

Based on the totality of the circumstances and consistent with the CBP rulings cited above, we find that the various imported components (individual parts and subassemblies) are substantially transformed as a result of the operations performed in the United States to produce both the replacement lens head subassembly and the finished flashlight. Under each manufacturing scenario, the imported components lose their individual identities and become an integral part of a new article possessing a new name, character, and use. In support of this conclusion, we agree that the U.S.-origin LED imparts the essential character to both the replacement part and the finished product, as it generates the primary light of both products. We also recognize that Energizer has expended significant resources in connection with the design and development of the subject flashlight in the United States. Moreover, the U.S.-origin LED and the labor performed in the United States during the assembly and testing operations represent a majority of the costs associated with the production of both the replacement lens head subassembly and the finished flashlight.

Holding

Based upon the specific facts of this case, we find that the imported components of the flashlight and replacement lens head subassembly are substantially transformed as a result of the described manufacturing operations performed in the United States. The country of origin of the flashlight and the replacement lens head subassembly is the United States.

Sincerely,

Myles B. Harmon,

Acting Executive Director, Office of Regulations and Rulings, Office of International Trade.

[FR Doc. E8–2429 Filed 2–8–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5202–N–01]

Mortgage and Loan Insurance Programs Under the National Housing Act—Debenture Interest Rates

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice announces changes in the interest rates to be paid on debentures issued with respect to a loan or mortgage insured by the Federal Housing Administration under the provisions of the National Housing Act (the Act). The interest rate for debentures issued under section 221(g)(4) of the Act during the 6-month period beginning January 1, 2008, is 4⅛ percent. The interest rate for debentures issued under any other provision of the Act is the rate in effect on the date that the commitment to insure the loan or mortgage was issued, or the date that the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. The interest rate for debentures issued under these other provisions with respect to a loan or mortgage committed or endorsed during the 6-month period beginning January 1, 2008, is 4½ percent. However, as a result of an amendment to section 224 of the Act, if an insurance claim relating to a mortgage insured under sections 203 or 234 of the Act and endorsed for insurance after January 23, 2004, is paid in cash, the debenture interest rate for purposes of calculating a claim shall be the monthly average yield, for the month in which the default on the mortgage occurred, on United States Treasury Securities adjusted to a constant maturity of 10 years.

FOR FURTHER INFORMATION CONTACT: Yong Sun, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 5148, Washington, DC 20410–8000; telephone (202) 402–4778 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Section 224 of the National Housing Act (12 U.S.C. 1715o) provides that debentures issued under the Act with respect to an insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4) of the Act) will bear interest at the rate in effect on the date the commitment to insure the loan or mortgage was issued, or the date the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. This provision is implemented in HUD's regulations at 24 CFR 203.405, 203.479, 207.259(e)(6), and 220.830. These regulatory provisions state that the applicable rates of interest will be published twice each year as a notice in the **Federal Register**.

Section 224 further provides that the interest rate on these debentures will be set from time to time by the Secretary of HUD, with the approval of the Secretary of the Treasury, in an amount not in excess of the annual interest rate determined by the Secretary of the Treasury pursuant to a statutory formula based on the average yield of all outstanding marketable Treasury obligations of maturities of 15 or more years.

The Secretary of the Treasury (1) has determined, in accordance with the provisions of section 224, that the statutory maximum interest rate for the period beginning January 1, 2008, is 4½ percent; and (2) has approved the establishment of the debenture interest rate by the Secretary of HUD at 4½ percent for the 6-month period beginning January 1, 2008. This interest rate will be the rate borne by debentures issued with respect to any insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4)) with insurance commitment or endorsement date (as applicable) within the first 6 months of 2008.

For convenience of reference, HUD is publishing the following chart of debenture interest rates applicable to mortgages committed or endorsed since January 1, 1980:

Effective interest rate	on or after	prior to
9½	Jan. 1, 1980	July 1, 1980
9⅞	July 1, 1980	Jan. 1, 1981
11¾	Jan. 1, 1981	July 1, 1981
12⅞	July 1, 1981	Jan. 1, 1982
12¾	Jan. 1, 1982	Jan. 1, 1983
10¼	Jan. 1, 1983	July 1, 1983
10⅜	July 1, 1983	Jan. 1, 1984
11½	Jan. 1, 1984	July 1, 1984
13⅜	July 1, 1984	Jan. 1, 1985
11⅝	Jan. 1, 1985	July 1, 1985
11⅛	July 1, 1985	Jan. 1, 1986
10¼	Jan. 1, 1986	July 1, 1986
8¼	July 1, 1986	Jan. 1, 1987
8	Jan. 1, 1987	July 1, 1987
9	July 1, 1987	Jan. 1, 1988
9⅛	Jan. 1, 1988	July 1, 1988
9⅜	July 1, 1988	Jan. 1, 1989
9¼	Jan. 1, 1989	July 1, 1989
9	July 1, 1989	Jan. 1, 1990
8⅛	Jan. 1, 1990	July 1, 1990
9	July 1, 1990	Jan. 1, 1991
8¾	Jan. 1, 1991	July 1, 1991
8½	July 1, 1991	Jan. 1, 1992
8	Jan. 1, 1992	July 1, 1992
8	July 1, 1992	Jan. 1, 1993
7¾	Jan. 1, 1993	July 1, 1993
7	July 1, 1993	Jan. 1, 1994
6⅝	Jan. 1, 1994	July 1, 1994
7¾	July 1, 1994	Jan. 1, 1995
8⅜	Jan. 1, 1995	July 1, 1995
7¼	July 1, 1995	Jan. 1, 1996
6½	Jan. 1, 1996	July 1, 1996
7¼	July 1, 1996	Jan. 1, 1997
6¾	Jan. 1, 1997	July 1, 1997
7⅛	July 1, 1997	Jan. 1, 1998

Effective interest rate	on or after	prior to
6⅜	Jan. 1, 1998	July 1, 1998
6⅛	July 1, 1998	Jan. 1, 1999
5½	Jan. 1, 1999	July 1, 1999
6⅛	July 1, 1999	Jan. 1, 2000
6½	Jan. 1, 2000	July 1, 2000
6½	July 1, 2000	Jan. 1, 2001
6	Jan. 1, 2001	July 1, 2001
5⅞	July 1, 2001	Jan. 1, 2002
5¼	Jan. 1, 2002	July 1, 2002
5¾	July 1, 2002	Jan. 1, 2003
5	Jan. 1, 2003	July 1, 2003
4½	July 1, 2003	Jan. 1, 2004
5⅛	Jan. 1, 2004	July 1, 2004
5½	July 1, 2004	Jan. 1, 2005
4⅞	Jan. 1, 2005	July 1, 2005
4½	July 1, 2005	Jan. 1, 2006
4⅞	Jan. 1, 2006	July 1, 2006
5⅜	July 1, 2006	Jan. 1, 2007
4¾	Jan. 1, 2007	July 1, 2007
5	July 1, 2007	Jan. 1, 2008
4½	Jan. 1, 2008	July 1, 2008

Section 215 of Division G, Title II of Pub. L. 108–199, enacted January 23, 2004 (HUD's 2004 Appropriations Act) amended section 224 of the Act, to change the debenture interest rate for purposes of calculating certain insurance claim payments made in cash. Therefore, for all claims paid in cash on mortgages insured under section 203 or 234 of the National Housing Act and endorsed for insurance after January 23, 2004, the debenture interest rate will be the monthly average yield, for the month in which the default on the mortgage occurred, on United States Treasury Securities adjusted to a constant maturity of 10 years, as found in Federal Reserve Statistical Release H–15. The Federal Housing Administration has codified this provision in HUD regulations at 24 CFR 203.405(b) and 24 CFR 203.479(b).

Section 221(g)(4) of the Act provides that debentures issued pursuant to that paragraph (with respect to the assignment of an insured mortgage to the Secretary) will bear interest at the ''going Federal rate'' in effect at the time the debentures are issued. The term ''going Federal rate'' is defined to mean the interest rate that the Secretary of the Treasury determines, pursuant to a statutory formula based on the average yield on all outstanding marketable Treasury obligations of 8-to 12-year maturities, for the 6-month periods of January through June and July through December of each year. Section 221(g)(4) is implemented in the HUD regulations at 24 CFR 221.255 and 24 CFR 221.790.

The Secretary of the Treasury has determined that the interest rate to be borne by debentures issued pursuant to section 221(g)(4) during the 6-month period beginning January 1, 2008, is 4⅛ percent.

HUD expects to publish its next notice of change in debenture interest rates in July 2008.

The subject matter of this notice falls within the categorical exemption from HUD's environmental clearance procedures set forth in 24 CFR 50.19(c)(6). For that reason, no environmental finding has been prepared for this notice.

(Authority: Sections 211, 221, 224, National Housing Act, 12 U.S.C. 1715b, 1715l, 1715o; Section 7(d), Department of HUD Act, 42 U.S.C. 3535(d).)

Dated: February 1, 2008.

Brian D. Montgomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E8–2514 Filed 2–8–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5159–C–01]

Notice of Funding Availability for the Fiscal Year 2007 Public Housing Neighborhood Networks Program; Technical Correction

AGENCY: Office of the Public and Indian Housing, HUD.

ACTION: Technical Corrections to Fiscal Year 2007 NOFA for the Public Housing Neighborhood Networks Program.

SUMMARY: On December 11, 2007, HUD published its Fiscal Year (FY) 2007 Notice of Funding Availability (NOFA) for the Public Housing Neighborhood Networks Program. In today's **Federal Register** notice, HUD announces that it has removed the Adobe application from Grants.gov for this NOFA, extended the deadline date for submission of applications, and clarifies why the Adobe package has been removed.

DATES: The application deadline date for the Public Housing Neighborhood Networks Program NOFA has been extended to March 14, 2008.

FOR FURTHER INFORMATION CONTACT: Questions regarding this Technical Correction should be directed to the Office of Departmental Grants Management and Oversight, Office of Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 3156, Washington, DC 20410–5000; telephone number (202) 708–0667. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Submission or Resubmission of Applications with PureEdge

On December 11, 2007 (72 FR 70458), HUD published its FY2007 NOFA for the Public Housing Neighborhood Networks Program and posted it to *Grants.gov*, making applications available in both PureEdge and Adobe 8.1.1 formats. HUD has recently determined that applications submitted using the Adobe Application Package posted to *Grants.gov* will cause problems during submission if any individuals working on the application have not used Adobe 8.1.1 to complete the application. Specifically, if any individual working on the application does not use Adobe 8.1.1, the application becomes corrupt and not

accepted by *Grants.gov.* To ensure there are no issues with applicants being able to successfully submit their application, HUD is withdrawing the Adobe application package (COMP ID NN–01) from the *Grants.gov* Web site but leaving the PureEdge package in place. Applicants who have signed up for the *Grants.gov* notification service will be automatically notified when the Adobe package has been removed. Applicants that have not signed up for the notification service should check the *Grants.gov* Web site at *https://apply07.grants.gov/apply/forms_apps_idx.html* for the modification to the announcement posting following publication of this Notice. Applicants must use the PureEdge package; Adobe packages will be rejected. Applicants can download the PureEdge version from the *Grants.gov* Web site at: *https://apply07.grants.gov/apply/forms_apps_idx.html.* Applicants who were working with the PureEdge application (Comp ID: NN–PUREEDGE–FORMAT) do not have to download again. Only those working with the Adobe application (Comp ID: NN–0) must download the PureEdge version.

II. Extension of Deadline Date and Important Resubmission Instructions

HUD is extending the Neighborhood Networks deadline date to March 14, 2008, to provide applicants the opportunity and time to download the PureEdge application, complete the application including all attachments and faxes, and submit the application to *Grants.gov* in time to meet the new deadline date. Applicants that previously submitted a PureEdge application do not have to resubmit a new application, unless they want to add information revising the original submission. Applicants that attempted to submit using Adobe 8.1.1 must download the PureEdge application format and resubmit the application plus all attachments and faxes.

Applicants filing a revised application electronically must also submit a new set of any documents faxed to HUD but should do so only after they submit an entire, complete application to *Grants.gov* and after the applicant receives validation of the application from *Grants.gov*. Applicants should allow 48 hours for validation of their revised application to occur and then resend the faxed material. This process will ensure that the resubmitted faxes are associated with the resubmitted application. Failure to follow these instructions will result in faxes not being associated to the most recent application and therefore not available to HUD reviewers. HUD will not search previously submitted applications for faxed materials.

Dated: February 5, 2008.

Paula Blunt,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. E8–2466 Filed 2–8–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Human Capital, Performance and Partnerships; National Invasive Species Council

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of Availability—Draft of the 2008–2012 National Invasive Species Management Plan; Extension of Public Comment Period.

SUMMARY: Pursuant to Executive Order 13112, the National Invasive Species Council (NISC) is announcing a 30-day extension of the public comment period for the draft of the *2008–2012 National Invasive Species Management Plan.* The Order established NISC as an inter-agency council to prevent and control invasive species in order to minimize their economic, ecological and human health impacts. The Council, which is co-chaired by the Secretaries of Agriculture, Commerce and the Interior also includes the departments of State, Defense, Transportation, Homeland Security, Treasury, Health and Human Services, as well as the Environmental Protection Agency, the U.S. Trade Representative, the U.S. Agency for International Development and the National Aeronautics and Atmospheric Administration. The Plan is intended to address invasive species in the areas of prevention, early detection and rapid response, control, restoration and organizational collaboration. Text of the *2008–2012 National Invasive Species Management Plan* is available in PDF format at *http://www.invasivespeciesinfo.gov.*

DATES: *The public comment period for the draft Plan has been extended.* All comments must now be received by close of business on March 12, 2008.

ADDRESSES: National Invasive Species Council, Office of the Secretary, 1849 C Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Kelsey Brantley, National Invasive Species Council Senior Program Analyst:

E-mail: *Kelsey_Brantley@ios.doi.gov*; Phone: 202–513–7243; Fax: (202) 371–1751.

SUPPLEMENTARY INFORMATION:

Executive Order 13112 on Invasive Species (EO 13112) was issued in 1999 and established the National Invasive Species Council (NISC) which is co-chaired by the Secretaries of the Interior, Agriculture and Commerce. EO 13112 directed the Secretary of the Interior to establish an Invasive Species Advisory Committee (ISAC) composed of diverse nonfederal stakeholders to advise NISC. The broad mission of NISC is to provide planning, coordination and national leadership to prevent and control the harmful impacts of invasive species to the economy, the environment as well as animal and human health.

Section 5 of EO 13112 directed NISC to issue the National Invasive Species Management Plan, as well as to revise and update the Plan on a regular basis. The first version of the National Invasive Species Management Plan, *''Meeting the Challenge''*, was issued in January of 2001 (2001 Plan). The purpose of the Plan was to provide a general blueprint for federal action in coordination with State, local, Tribal, and private programs and international cooperation to prevent the introduction of invasive species, provide for their control and minimize the economic, environmental and human health impacts.

This document is the first revision of the 2001 Plan, as mandated by EO 13112. The *2008–2012 National Invasive Species Management Plan (2008 Plan)* will provide direction for federal efforts (including overall strategy and objectives) to prevent, control and minimize invasive species and their impacts within the next five (5) fiscal years (2008 through 2012). If necessary, it may be updated more frequently to reflect changes in circumstances, agency plans and priorities. NISC member agencies, ISAC members, NISC staff, stakeholders and other experts have provided input in drafting this revision, which is intended to replace the 2001 Plan.

Federal, State, local and Tribal governments, as well as the private sector, have taken significant steps to meet the challenges posed by invasive species. These steps set the stage for the 2008 Plan and provide direction and focus. An estimated 67% of the 2001 Plan's 57 action items have been completed or are in progress. However significant challenges remain and much remains to be done to prevent and control invasive species in a

coordinated and cost efficient manner. Long-range strategic planning, consistent with other government agencies' strategic plans is necessary to address complex invasive species issues. The 2008 Plan establishes five, long-term Strategic Goals that focus Federal efforts in the areas of invasive species work related to:

(1) Prevention;

(2) Early Detection and Rapid Response;

(3) Control and Management;

(4) Restoration; and

(5) Organizational Collaboration.

The Strategic Goals are ongoing and serve as guideposts for managing invasive species. Each Strategic Goal has an associated Strategic Action Plan with long-term Objectives and shorter-term Implementation Tasks and Performance Elements. Where practicable, Implementation Tasks define specific Performance Elements that can be used to gauge progress. Work in Research, Information and Data Management and International Cooperation (which were addressed in separate sections in the 2001 Plan) are elements critical to achieving each of the five Strategic Goals and are included in the pertinent sections of the 2008 Plan.

The 2008 Plan is not a comprehensive list of all Federal invasive species actions. It is a targeted set of priority Strategic Action Plans and Objectives that are intended to be completed in the next five years. The accomplishment of specific Implementation Tasks and Performance Elements will be dependent upon agency budgets, and in some cases, legal or regulatory changes.

Invasive species issues cannot be addressed by Federal programs and actions alone. As reflected in EO 13112, State, local, Tribal and private programs and policies are critical to success. Therefore, receiving public comment on this proposed 2008 Plan is an important component of any strategy to address and reduce the harmful impacts of invasive species.

Submitting Comments: Text of the *2008–2012 National Invasive Species Management Plan* is available in PDF format at *http://www.invasivespeciesinfo.gov.* Printed copies of the Plan may be obtained by mail or e-mail request to the address below. Written comments should be addressed to Lori Williams, NISC Executive Director, U.S. Department of the Interior, Office of the Secretary, National Invasive Species Council (OS/NISC), 1849 C Street, NW., Washington, DC 20240. Comments can also be e-mailed to *invasivespecies@ios.doi.gov. The public comment period for the draft Plan has been extended.* Comments must now be received by close of business on March 12, 2008.

Dated: February 6, 2008.

Lori C. Williams,

Executive Director.

[FR Doc. E8–2502 Filed 2–8–08; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Land Acquisitions; Elk Valley Rancheria, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Final Agency Determination to take land into trust under 25 CFR Part 151.

SUMMARY: The Assistant Secretary—Indian Affairs made a final agency determination to acquire approximately 203.5 acres of land into trust for the Elk Valley Rancheria of California on January 4, 2008. This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1.

FOR FURTHER INFORMATION CONTACT: George Skibine, Office of Indian Gaming, MS–3657 MIB, 1849 C Street, NW., Washington, DC 20240; Telephone (202) 219–4066.

SUPPLEMENTARY INFORMATION: This notice is published to comply with the requirement of 25 CFR 151.12(b) that notice be given to the public of the Secretary's decision to acquire land in trust at least 30 days prior to signatory acceptance of the land into trust. The purpose of the 30-day waiting period in 25 CFR 151.12(b) is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs. On January 4, 2008, the Assistant Secretary—Indian Affairs decided to accept approximately 203.5 acres of land into trust for the Elk Valley Rancheria of California under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. 465. The 203.5 acre parcel is located in Del Norte County, California. The parcel will be used for construction and operation of a class II and class III gaming facility. The real property situated in the County of Del Norte, State of California, is described as follows:

Parcel One

That portion of Section 35, Township 16 North, Range 1 West, Humboldt Meridian, described as follows:

PARCEL 2 as shown on the Parcel Map filed in the office of the County Recorder of Del Norte County, California, on December 28, 1979, in Book 4 of Parcel Maps, page 75.

EXCEPT therefrom those portions thereof conveyed to the County of Del Norte, by deeds recorded October 18,1979, in Book 237, Official Records, page 609, and May 19, 1986, in Book 310, Official Records, page 444.

Parcel Two

A 30-foot wide easement for road and utility purposes lying 30 feet westerly of and adjacent to the following described line:

BEGINNING at a point on the west line of Parcel 3 of the land conveyed to Del Norte County by OWEN W. BAUER by deed dated August 31, 1979, said point being North 185.0 feet from the most southwesterly corner of said Parcel 3, and running; thence northerly along westerly lines of Parcels 3 and 2 of the land conveyed to the County of Del Norte by OWEN W. BAUER to the south line of Parcel 1 as said parcel is shown on the parcel map filed for OWEN W. BAUER on December 28, 1979 in Book 4 of Parcel Maps, pages 75 through 78, in the office of the County Recorder of Del Norte County, California.

Parcel Three

An easement for water removal purposes on the following described parcel of land.

BEGINNING at a point S 32 degrees 00 minutes 20 seconds W (equals S 30 degrees 36 minutes 09 seconds W true meridian) a distance of 1607.35 feet from the northeast corner of section 34, Township 16 North, Range 1 West, Humboldt Meridian, and running:

(1) Thence South 60 degrees East, 45.21 feet;

(2) Thence South 30 degrees West, 70.00 feet;

(3) Thence North 60 degrees West, 150.00 feet;

(4) Thence North 30 degrees East, 70.00 feet;

(5) Thence South 60 degrees East, 104.79 feet to the point of beginning.

The bearings and distances contained in this easement description are based upon the California Coordinate System, Zone 1, multiply distances by 0.9999742 to obtain ground level distances.

Parcel Four

An easement for water pipe lines, said easement to be 20.0 feet in width, lying

10.0 feet on each side of the following described centerline:

BEGINNING at a point S 32 degrees 00 minutes 20 seconds W (equals S 30 degrees 36 minutes 09 seconds W true meridian) a distance of 1607.35 feet from the northeast corner of Section 34, Township 16 North, Range 1 West, Humboldt Meridian, and running:

(1) Thence South 76 degrees 39 minutes 35 seconds East, 153.58 feet;

(2) Thence South 76 degrees 46 minutes 42 seconds East, 206.05 feet;

(3) Thence South 72 degrees 25 minutes 39 seconds East, 153.79 feet;

(4) Thence South 81 degrees 07 minutes 49 seconds East, 162.47 feet;

(5) Thence North 84 degrees 03 minutes 26 seconds East, 158.59 feet;

(6) Thence North 36 degrees 54 minutes 36 seconds East, 75 feet, more or less, to Parcel ''2'' as said parcel is shown on the parcel map filed for OWEN W. BAUER on December 28, 1979 in Book 4 of Parcel Maps, pages 75 through 78 inclusive, in the office of the County Recorder of Del Norte County, California. The sidelines of this easement shall coincide with the boundary of the land described in Easement ''B'' hereinabove described on the west and Parcel 2 of said Bauer map on the east.

The bearings and distances contained in this easement description are based upon the California Coordinate System, Zone 1, multiply distances by 0.9999742 to obtain ground level distances. APN: 115–02–28

Dated: February 1, 2008.

Carl J. Artman,

Assistant Secretary—Indian Affairs.

[FR Doc. E8–2501 Filed 2–8–08; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–6671–G, AA–6671–H, AA–6671–C2; AK 964–1410–HY–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Bay View Incorporated. The lands are in the vicinity of Ivanof Bay, Alaska, and are located in:

Seward Meridian, Alaska

T. 50 S., R. 66 E.,

Secs. 16, 20, and 21;

Secs. 22, 26, and 27.

Containing 1,443.73 acres.

T. 50 S., R. 67 E.,

Secs. 21, 27, and 28;

Secs. 34, 35, and 36.

Containing approximately 1,615 acres.

T. 50 S., R. 68 W.,

Sec. 23.

Containing 0.43 acres.

Aggregating approximately 3,059 acres.

Notice of the decision will also be published four times in the *Anchorage Daily News.*

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until March 12, 2008, to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION, CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Michael Bilancione,

Land Transfer Resolution Specialist, Land Transfer Adjudication I.

[FR Doc. E8–2504 Filed 2–8–08; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

[Docket No. MMS–2007–OMM–0013]

MMS Information Collection Activity: 1010–0170—Coastal Impact Assistance Program (CIAP), Revision of a Collection; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of a revision of an information collection (1010–0170).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), MMS is inviting comments on a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) concerns the paperwork requirements in the Coastal Impact Assistance Program (CIAP) State Plan Guidelines. The Energy Policy Act of 2005 gave responsibility to MMS for CIAP by amending section 31 of the Outer Continental Shelf Lands Act (43 U.S.C. 1356a; Appendix A).

DATES: Submit written comments by April 11, 2008.

ADDRESSES: You may submit comments by any of the following methods listed below.

- *Electronically:* go to *http://www.regulations.gov.* Under the tab ''More Search Options,'' click Advanced Docket Search, then select ''Minerals Management Service'' from the agency drop-down menu, then click ''submit.'' In the Docket ID column, select MMS–2008–OMM–0013 to submit public comments and to view supporting and related materials available for this rulemaking. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link. The MMS will post all comments.
- Mail or hand-carry comments to the Department of the Interior; Minerals Management Service; Attention: Cheryl Blundon; 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference ''Information Collection 1010–0170'' in your comments.

SUPPLEMENTARY INFORMATION:

Title: Coastal Impact Assistance Program (CIAP).

OMB Control Number: 1010–0170.

Abstract: With the passage of the Energy Policy Act of 2005 (EPAct), the Minerals Management Service (MMS) was given responsibility for the Coastal Impact Assistance Program (CIAP) through the amendment of section 31 of the Outer Continental Shelf Lands Act (43 U.S.C. 1356a, Appendix A).

The CIAP recognizes that impacts from Outer Continental Shelf (OCS) oil and gas activities fall disproportionately on the coastal states and localities nearest to where the activities occur, and where associated facilities are located. The CIAP legislation appropriates money for eligible states and coastal political subdivisions for coastal restoration/improvement projects. The MMS shall disburse $250 million to eligible producing states and coastal political subdivisions (CPSs) through a grant program. The funds

allocated to each state are based on the proportion of qualified OCS revenues offshore the individual state to total qualified OCS revenues from all states. In order to receive funds, the states submit CIAPs detailing how the funds will be expended. Alabama, Alaska, California, Louisiana, Mississippi, and Texas are the only eligible states under EPAct. Counties, parishes or equivalent units of government within those states lying all or in part within the coastal zone, as defined by section 304(1) of the Coastal Zone Management Act (CZMA) 1972, as amended, are the Coastal Political Subdivisions (CPSs) eligible for CIAP funding, a total of 67 local jurisdictions. All funds will be disbursed through a grant process.

In September 2006, CIAP draft guidelines were written which were then amended in May 2007. As this program has evolved and developed, more information needs to be submitted by the government jurisdictions to meet all the requirements of the CIAP State Plan Guidelines as well as requirements on the procurement contracts. To approve a plan, legislation requires that the Secretary of the Interior must be able to determine that the funds will be used in accordance with EPAct criteria and that projects will use the funds according to the EPAct. To confirm appropriate use of funds, MMS requires affirmation of grantees meeting Federal, state, and local laws and adequate project descriptions.

This information collection request revises the original ICR to include the additional information needed to fulfill the requirements of the MMS CIAP grant program.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2). No items of a sensitive nature are collected. Responses are required to obtain or retain benefits.

Frequency: On occasion.

Estimated Number and Description of Respondents: Approximately 6 states and 67 CPSs.

Estimated Reporting and Recordkeeping ''Hour'' Burden: The currently approved annual reporting burden for this collection is 12,600 hours. The following chart details the individual components and respective hour burden estimates of this ICR. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

CIAP reporting and/or recordkeeping requirement	Hour Burden
Project narrative	42
Submit annual performance reports	8
Submit bi-annual performance reports	8
Notify MMS in case of delays, adverse conditions, etc., which impair ability to meet objectives of the award including statement of action take or contemplated or assistance required (included non-construction and construction grants)	4
Request termination and supporting information.*	6
Retain all records/documentation for 3 years	** 30
Retain records longer than 3 years if they relate to claim, audit, litigation, etc. Exempt under 5 CFR 1320.4(a)(2), (c)	0
Telephone follow-up discussion on financial capabilities	8
Develop language and individual signage at CIAP sites—estimated 30 construction projects with temp signs initially—permanent signs 2–4 years.*	8
Submission of photographs/cds of projects for tracking purposes.*	4
Voluntarily submit draft Coastal Impact Assistance Plan with appropriate supporting documentation	1
Submit final Coastal Impact Assistance Plan and all supporting documentation (i.e., Governor's certification of public participation; Appendices C, D, and E)	1
Request delay by states for submitting final plan, with relevant data	1
Request minor changes and/or amendments to a plan	8

* Initially determined that this will be minimal burden, for the first 3 years, until more respondents are actively involved in a CIAP project.
** Minutes.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have identified no ''non-hour cost'' burdens for this collection.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency '' * * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * * ''. Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the ''non-hour cost'' burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this notice and address them in our submission for OMB approval. As a result of your comments, we will make

any necessary adjustments to the burden in our submission to OMB.

Public Comment Procedures: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware 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 your personal identifying information from public review, we cannot guarantee that we will be able to do so.

MMS Information Collection Clearance Officer: Arlene Bajusz, (202) 208–7744.

Dated: February 4, 2008.

E.P. Danenberger,

Chief, Office of Offshore Regulatory Programs.

[FR Doc. E8–2428 Filed 2–8–08; 8:45 am]

BILLING CODE 4310–MR–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 January 26, 2008. Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 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 February 26, 2008.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

ARIZONA

Maricopa County

Bunch, E.C., House, 5602 W. Lamar Rd., Glendale, 08000123.

COLORADO

Grand County

Shadow Mountain Trail, (Rocky Mountain National Park MPS) E. side of Shadow Mt. Lake, Grand Lake, 08000124.

Tonahutu Creek Trail, (Rocky Mountain National Park MPS) Roughly along Tonahutu Cr. to Flattop Mt., Grand Lake, 08000130.

Larimer County

Lake Haiyaha Trail, (Rocky Mountain National Park MPS) Roughly along Bear, Nymph & Dream Lakes, then up Chaos Canyon, Estes Park, 08000125.

Lost Lake Trail, (Rocky Mountain National Park MPS) Roughly along N. Fork Big Thompson R., Estes Park, 08000126.

North Inlet Trail, (Rocky Mountain National Park MPS) Roughly along N. Inlet & Hallett Cr. to Flattop Mt., Grand Lake, 08000127.

Ypsilon Lake Trail, (Rocky Mountain National Park MPS) Along ridge between Chiquita Cr. & Roaring R., Estes Park, 08000131.

INDIANA

Marion County

Nurses' Sunken Garden and Convalescent, Bounded by Michigan St., Rotary Bldg., West Dr. & Union Bldg., Indianapolis, 08000132.

MINNESOTA

Washington County

Bergstein, Monitz, Shoddy Mill and Warehouse, 6046 Stagecoach Rd., Oak Park Heights, 08000133.

NEW JERSEY

Mercer County

East Trenton Public Library, 701 N. Clinton St., Trenton, 08000134.

Monmouth County

Squan Beach Life-Saving Station #9, Ocean & 2nd Aves., Manasquan, 08000135.

Morris County

Pompton Plains Railroad Station, 33 Evans Place, Pequannock, 08000136.

Somerset County

Robert, Robert, House, 25 West End Ave., Somerville, 08000137.

NEW YORK

Albany County

Knox Street Historic District, Knox St. between Madison Ave. & Morris St., Albany, 08000138.

Herkimer County

South Ann Street—Mill Street Historic District, S. Ann & Mill Sts., Little Falls, 08000139.

New York County

Fraunces Tavern, 54 Pearl St., New York 08000140.

Onondaga County

Hotel Syracuse, 500 S. Warren St., Syracuse, 08000141.

Orange County

Dodge—Greenleaf House, 2009 NY 211, Otisville, 08000142.

Queens County

St. George's Church, 135-32 38th Ave., Flushing, 08000143.

Schenectady County

Bishop Family Lustron House, (Lustron Houses in New York MPS) 26 Slater Dr., Schenectady, 08000144.

Enlarged Double Lock No. 23, Old Erie Canal, Rice Rd., Rotterdam, 08000145.

Westchester County

Hadden—Margolis House, 61 Winfield Ln., Harrison, 08000146.

OHIO

Cuyahoga County

Strongsville Town Hall, 18825 Royalton Rd., Strongsville, 08000147.

Lawrence County

Brunberg Building, 222 S. 3rd St., Ironton, 08000148.

Marlow Theatre, S. 3rd & Park Sts., Ironton, 08000149.

OKLAHOMA

Greer County

Jay Buckle Springs, E. of Co. Rd. N1840, 500 ft. N. of jct. with Co. Rd. E1420, Reed, 08000150.

Oklahoma County

Fidelity National Building, 200 N. Harvey Center, Oklahoma City, 08000151.

RHODE ISLAND

Bristol County

Jennys Lane Historic District, Jennys Ln., Mathewson & Rumstick Rds.

Newport County

St. Mary's Church Complex, 14 William St., Newport, 08000153.

SOUTH CAROLINA

York County

Bleachery Water Treatment Plant, (Rock Hill MPS) Stewart Ave., Rock Hill, 08000154.

Rock Hill Body Company, (Rock Hill MPS) 601 W. Main St., Rock Hill, 08000155.

Rock Hill Cotton Factory (Boundary Increase), (Rock Hill MPS) 130 W. White St., Rock Hill, 08000156.

VERMONT

Addison County

Bottum Farm, (Agriculture Resources of Vermont MPS) 1423 North St., New Haven, 08000157.

Windham County

Tontine Building, 500 Coolidge Hwy., Guilford, 08000158.

Windsor County

Old Christ Church, (Religious Buildings, Sites and Structures in Vermont MPS) Jct. of VT 12 and Gilead Brook Rd., Bethel, 08000159.

WISCONSIN

Grant County

Kinney, Patrick and Margaret, House, 424 N. Fillmore St., Lancaster, 08000160.

[FR Doc. 08–590 Filed 2–8–08; 8:45 am]

BILLING CODE 4312–51–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–747 (Final)]

Fresh Tomatoes From Mexico

AGENCY: United States International Trade Commission.

ACTION: Suspension of antidumping investigation.

SUMMARY: Effective January 22, 2008, the Department of Commerce (''Commerce'') suspended its antidumping investigation on fresh tomatoes from Mexico (73 FR 4831, January 28, 2008). The basis for the suspension is an agreement between Commerce and producers/exporters that account for substantially all imports of this product from Mexico, wherein each signatory producer/exporter agreed to revise its prices to eliminate completely the injurious effects of exports of this merchandise to the United States. Accordingly, the U.S. International Trade Commission (''Commission'') gives notice of the suspension of its antidumping investigation involving imports of fresh tomatoes from Mexico.

EFFECTIVE DATE: January 22, 2008.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION: On November 1, 2007, a second five-year review on fresh tomatoes from Mexico was instituted to determine whether termination of the suspended investigation on fresh tomatoes from Mexico would be likely to lead to continuation or recurrence of material injury (72 FR 61903, November 1, 2007). On November 26, 2007, Mexican tomato growers/exporters accounting for a significant percentage of all fresh tomatoes imported into the United States from Mexico provided written notice to Commerce of their withdrawal from the agreement suspending the antidumping investigation on fresh tomatoes from Mexico. Effective January 18, 2008, the Department of Commerce terminated the suspension agreement, terminated the five-year review of the suspended investigation, and resumed the antidumping investigation on fresh tomatoes from Mexico because the suspension agreement no longer covered substantially all imports of fresh tomatoes from Mexico (73 FR 2887, January 16, 2008). Accordingly, effective January 18, 2008, the U.S. International Trade Commission terminated its review and resumed its antidumping investigation involving imports of fresh tomatoes from Mexico (73 FR 5869, January 31, 2008).

Authority: This investigation is being suspended under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.40 of the Commission's rules (19 CFR 207.40).

By order of the Commission.

Issued: February 5, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–2439 Filed 2–8–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—International Electronics Manufacturing Initiative

Notice is hereby given that, on December 27, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), International Electronics Manufacturing Initiative (''iNEMI'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Endicott Interconnect Technologies, Inc. (EIT), Endicott, NY; Dyconex AG, Bassersdorf, SWITZERLAND; Huawei Technologies Co., Ltd., Shenzhen, PEOPLE'S REPUBLIC OF CHINA; MED-EL Elektromedizinische Geräte GmbH, Innsbruck, AUSTRIA; and Test Research, Inc., Taipei, TAIWAN have been added as parties to this venture.

Also, Coherent, Inc., Santa Clara, CA; Dell, Inc., Round Rock, TX; FCI, Versailles, FRANCE; IBM Corporation, Somers, NY; KLA Tencor Corporation, San Jose, CA; Medtronic, Inc., Minneapolis, MN; Microsoft Corporation, Redmond, WA; and Supresta, Ardsley, NY have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and iNEMI intends to file additional written notifications disclosing all changes in membership.

On June 6, 1996, iNEMI filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 28, 1996 (61 FR 33774).

The last notification was filed with the Department on December 27, 2006. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 12, 2007 (72 FR 6577).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 08–592 Filed 2–8–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Petroleum Environmental Research Forum

Notice is hereby given that, on November 15, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Petroleum Environmental Research Forum (''PERF'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Petroleo Brasileiro S.A. (PETROBRAS) Research and Development Center (CENPES), Rio de Janeiro, BRAZIL has been added as a party to this venture.

No other changes have been made in either the membership or planned

activity of the group research project. Membership in this group research project remains open, and PERF intends to file additional written notifications disclosing all changes in membership.

On February 10, 1986, PERF filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 14, 1986 (51 FR 8903).

The last notification was filed with the Department on November 23, 2005. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 5, 2006 (71 FR 17142).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 08–591 Filed 2–8–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0007]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review; Registrants Inventory of Drugs Surrendered—DEA Form 41.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 72, Number 234, page 68899 on December 6, 2007, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until March 12, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

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

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

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

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

Overview of this Information Collection

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

(2) Title of the Form/Collection: Registrants' Inventory of Drugs Surrendered—DEA Form 41.

(3) Agency form number, if any, and the applicable component of the Department sponsoring the collection:

Form number: DEA Form 41.

Component: Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice.

(4) Affected public who will be asked or required to respond, as well as a brief abstract:

Primary: Business or other for-profit.

Other: Not-for-profit institutions, federal government, state, local or tribal government.

Abstract: Title 21 CFR 1307.21 requires that any registrant desiring to voluntarily dispose of controlled substances shall list these controlled substances on DEA Form 41 and submit the form to the nearest DEA office. The DEA Form 41 is used to account for destroyed controlled substances, and its use is mandatory.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 22,500 respondents will respond annually, taking 30 minutes to complete each form.

(6) An estimate of the total public burden (in hours) associated with the collection: 11,250 annual burden hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: February 4, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. E8–2497 Filed 2–8–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0009]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review; Controlled Substances Import/Export Declaration—DEA Form 236.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 72, Number 234, page 68899 on December 6, 2007, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until March 12, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of

information are encouraged. Your comments should address one or more of the following four points:

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

—Evaluate the accuracy of the agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

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

Overview of This Information Collection

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

(2) *Title of the Form/Collection:* Controlled Substances Import/Export Declaration—DEA Form 236.

(3) Agency form number, if any, and the applicable component of the Department sponsoring the collection:

Form number: DEA Form 236.

Component: Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice.

(4) Affected public who will be asked or required to respond, as well as a brief abstract:

Primary: Business or other for-profit.

Other: None.

Abstract: DEA–236 provides the DEA with control measures over the importation and exportation of controlled substances as required by United States drug control laws and international treaties.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 278 respondents, 4,868 responses annually, taking 18 minutes to complete each form.

(6) An estimate of the total public burden (in hours) associated with the collection: 1,460.4 annual burden hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: February 4, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. E8–2498 Filed 2–8–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

February 5, 2008.

The Department of Labor (DOL) hereby announces the submission of 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; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *king.darrin@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: John Kraemer, OMB Desk Officer for the Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–6974 (these are not a toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

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: Occupational Safety and Health Administration.

Type of Review: Extension without change of a previously approved collection.

Title of Collection: Fire Brigades (29 CFR 1910.156).

OMB Control Number: 1218–0075.

Agency Form Number: None.

Affected Public: Private Sector: Business or other for-profits and Not-for-profits institutions.

Estimated Number of Respondents: 7,010.

Estimated Total Annual Burden Hours: 5,048.

Estimated Total Annual Costs Burden: $0.

Description: OSHA does not mandate that employers establish fire brigades; however, if they do so, they must comply with certain provisions of the Standard for Fire Brigades. See 29 CFR 1910.156. The Standard imposes the following paperwork requirements on each employer who establishes a fire brigade: Write an organizational statement; ascertain the fitness of employees with specific medical conditions to participate in fire related operations; and provide appropriate training and information to fire brigade members. For additional information, see related notice published on November 21, 2007 at 72 FR 65608.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. E8–2445 Filed 2–8–08; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

Request for a License to Export Radioactive Waste

Pursuant to 10 CFR 110.70(b) ''Public Notice of Receipt of an Application,'' please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an export license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link

http://www.nrc.gov/reading-rm.html at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within thirty days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

A request for a hearing or petition for leave to intervene may be filed with the NRC electronically in accordance with NRC's E-Filing rule promulgated in August 2007, 72 FR 49139 (Aug. 28, 2007). Information about filing electronically is available on timely electronic filing, at least five days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request a digital ID certificate and allow for the creation of an electronic docket.

In addition to a request for hearing or petition for leave to intervene, written comments, in accordance with 10 CFR 110.81, should be submitted within thirty (30) days after publication of this notice in the **Federal Register** to Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications.

The information concerning this license application follows.

NRC Export License Application

DESCRIPTION OF MATERIAL

Name of applicant date of application date received application No. docket No.	Material type	Total quantity	End use	Country of origin
EnergySolutions September 14, 2007 (ML072950080). September 17, 2007 ..... XW013 11005710 Additional Information: December 5, 2007 (ML073400154). January 11, 2008 (ML080150374).	Radioactively contaminated material from nuclear facility operations in Italy requested for import into the U.S. by application dated 09/14/07 (see associated import license application IW023). The material consists of contaminated metals, graphite, dry activity material (e.g., wood, paper, and plastic), liquids (e.g., aqueous and organic-based fluids), and ion exchange resins (treated and untreated).	Maximum activity requested for export is nominally 10% of the activity requested for import in application IW023.	Proposed imports of radioactive waste (see IW023) that does not meet the waste acceptance criteria for the Clive, Utah, facility will be returned to the generator(s) in Italy.	Italy.

Dated this 5th day of February 2008 at Rockville, Maryland.

For the Nuclear Regulatory Commission.

Scott W. Moore,

Deputy Director, Office of International Programs.

[FR Doc. E8–2483 Filed 2–8–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Request for a License to Import Radioactive Waste

Pursuant to 10 CFR 110.70 (c) ''Public Notice of Receipt of an Application,'' please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an import license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within thirty days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

A request for a hearing or petition for leave to intervene may be filed with the NRC electronically in accordance with NRC's E-Filing rule promulgated in August 2007, 72 FR 49139 (Aug. 28, 2007). Information about filing electronically is available on timely electronic filing, at least five days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV*, or by calling (301) 415–1677, to request a digital ID certificate and allow for the creation of an electronic docket.

In addition to a request for hearing or petition for leave to intervene, written comments, in accordance with 10 CFR 110.81, should be submitted within thirty days after publication of this notice in the **Federal Register** to Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications.

The information concerning this license application follows.

NRC IMPORT LICENSE APPLICATION

[Description of material]

Name of applicant, date of application, date received, application No., docket No.	Material type	Total quantity	End use	Country of origin
EnergySolutions, September 14, 2007 (ML072950080), September 17, 2007 IW023, 11005711. Additional Information: December 5, 2007 (ML073400154), January 11, 2008 (ML080150374).	Up to approximately 20,000 tons of radioactively contaminated material from nuclear facility operations; consisting of contaminated metals, graphite, dry activity material (e.g., wood, paper, and plastic), liquids (e.g., aqueous and organic-based fluids), and ion exchange resins (treated and untreated).	Total volume estimated to be approximately 1,000,000 cubic feet. Quantities, types and combinations of radioactive contaminants will vary depending on material, but at no time will they exceed importer's possession limits. The cumulative total quantity for each type of contaminant over the duration of the import license will not exceed 5 kilograms (kg) special nuclear material; 1.0 x 10^6 kg natural/depleted uranium; 20 TBq transuranics (except Pu); and 600 TBq of all other radionuclides.	Contaminated materials are to be inspected, sorted and processed at applicant's facilities in and licensed by the State of Tennessee for recycle and beneficial reuse and/or disposal of as radioactive waste (pending conformity with waste acceptance criteria) at a Clive, Utah disposal facility licensed by the State of Utah. Materials that meet domestic license conditions for unrestricted release may be released. Nonconforming materials would be returned to the generator (see associated export license application XW013).	Italy.

Dated this 5th day of February 2008 at Rockville, Maryland.

For the Nuclear Regulatory Commission.

Scott W. Moore,

Deputy Director, Office of International Programs.

[FR Doc. E8–2484 Filed 2–8–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Withdrawal of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Withdrawal of Regulatory Guide 1.176.

FOR FURTHER INFORMATION CONTACT: Christina Antonescu, Reactor System Engineer, Division of Engineering, Regulatory Guide Development Branch, Office of Nuclear Reactor Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6792 or e-mail: *CEA1@NRC.GOV.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is withdrawing Regulatory Guide (RG) 1.176, ''An Approach for Plant-Specific, Risk-Informed Decisionmaking: Graded Quality Assurance,'' which was published in August 1998, but has been superseded by subsequent rulemaking.

In November 2004, the NRC promulgated Title 10 of the *Code of Federal Regulations* (10 CFR) section 50.69, ''Risk-informed categorization and treatment of structures, systems, and components for nuclear power reactors,'' (69 FR 68008) to permit power reactor licensees and license applicants to implement an alternative regulatory framework with respect to ''special treatment,'' where special treatment refers to those requirements that provides increased quality assurance beyond normal industrial practices that structures, systems, and components (SSCs) perform their design-basis functions. In support of 10 CFR 50.69, the staff issued RG 1.201, ''Guidelines for Categorizing Structures, Systems and Components in Nuclear Power Plants According to Their Safety Significance,'' in January 2006 for trial use. This new framework, consisting of the rule along with RG 1.201, has made the guidance in RG 1.176 obsolete.

II. Further Information

The withdrawal of RG 1.176 does not, in and of itself, alter any prior or existing licensing commitments based on its use. The current version of RG 1.176 represents a method that is no longer acceptable to the staff. RGs may be withdrawn when their guidance is superseded by congressional action, the methods or techniques described in the RG no longer describe an acceptable approach, or the RG does not provide useful information.

RGs are available for inspection or downloading through the NRC's public Web site under ''Regulatory Guides'' collection in the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections.* RGs are also available for inspection at the NRC's Public Document Room (PDR), Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is U.S. NRC PDR, Washington, DC 20555–0001. The PDR staff can be reached by telephone at 301–415–4737 or 800–397–4209, by fax at 301–415–3548, and by e-mail to *pdr@nrc.gov.*

RGs are not copyrighted and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 4th day of February, 2008.

For the Nuclear Regulatory Commission.

Andrea D. Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–2423 Filed 2–8–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Withdrawal of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of withdrawal of Regulatory Guide 1.150.

FOR FURTHER INFORMATION CONTACT: Christina Antonescu, Reactor System Engineer, Division of Engineering, Regulatory Guide Development Branch, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission,

Washington, DC 20555–0001, telephone: 301–415–6792 or e-mail: *CEA1@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is withdrawing without replacement Regulatory Guide (RG) 1.150, ''Ultrasonic Testing of Reactor Vessel Welds During Preservice and Inservice Examinations,'' which was published in February 1983, because it has been superseded by Title 10 of the *Code of Federal Regulations* (10 CFR) section 50.55a(g)(6)(ii)(C)(1), ''Inservice inspection requirements,'' incorporation by reference of an American Society of Mechanical Engineers (ASME) standard.

Specifically, 10 CFR 50.55a(g)(6)(ii)(C)(1) requires both preservice and inservice inspection activities to be performed using personnel, equipment, and procedures qualified in accordance with the ASME, Boiler and Pressure Vessel Code, section XI, Appendix VIII.

II. Further Information

The withdrawal of RG 1.150 does not, in and of itself, alter any prior or existing licensing commitments based on its use. The current version of RG 1.150 represents a method that is no longer acceptable to the staff. RGs may be withdrawn when their guidance is superseded by congressional action, the methods or techniques described in the RG no longer describe an acceptable approach, or the RG does not provide useful information.

RGs are available for inspection or downloading through the NRC's public Web site in the ''Regulatory Guides'' collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections.* RGs are also available for inspection at the NRC's Public Document Room (PDR), Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is U.S. NRC PDR, Washington, DC 20555–0001. The PDR staff can be reached by telephone at 301–415–4737 or 800–397–4209, by fax at 301–415–3548, and by e-mail to *pdr@nrc.gov.*

RGs are not copyrighted and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 4th day of February, 2008.

For the Nuclear Regulatory Commission.

Andrea D.Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–2424 Filed 2–8–08; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Extension of Existing Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17a–13; OMB Control No. 3235–0035; SEC File No. 270–27.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information provided for in the following rule: Rule 17a–13 (17 CFR 240.17a–13) under the Securities Exchange Act of 1934 (15 U.S.C. 78 *et seq.*). The Commission plans to submit a request for approval of extension of the existing collection of information to the Office of Management and Budget.

Rule 17a–13(b) (17 CFR 17a–13(b)) generally requires that at least once each calendar quarter, all registered brokers and dealers physically examine and count all securities held and account for all other securities not in their possession, but subject to the broker-dealer's control or direction. Any discrepancies between the broker-dealer's securities count and the firm's records must be noted and, within seven days, the unaccounted for difference must be recorded in the firm's records. Rule 17a–13(c) (17 CFR 17a–13(c)) provides that under specified conditions, the securities counts, examination, and verification of the broker-dealer's entire list of securities may be conducted on a cyclical basis rather than on a certain date. Although Rule 17a–13 does not require filing a report with the Commission, discrepancies between a broker-dealer's records and the securities counts may be required to be reported, for example, as a loss on Form X–17a–5 (17 CFR 248.617), which must be filed with the Commission under Rule 17a–5 (17 CFR 17a–5). Rule 17a–13 exempts broker-dealers that limit their business to the sale and redemption of securities of registered investment companies and interests or participation in an insurance company separate account and those who solicit accounts for federally insured savings and loan associations, provided that such persons promptly transmit all funds and securities and hold no customer funds and securities. The Rule also does not apply to certain broker-dealers required to register only because they effect transactions in securities futures products.

The information obtained from Rule 17a–13 is used as an inventory control device to monitor a broker-dealer's ability to account for all securities held, in transfer, in transit, pledged, loaned, borrowed, deposited, or otherwise subject to the firm's control or direction. Discrepancies between the securities counts and the broker-dealer's records alert the Commission and the Self Regulatory Organizations (''SROs'') to those firms having problems in their back offices.

Currently, there are approximately 5,700 broker-dealers registered with the Commission. However, given the variability in their businesses, it is difficult to quantify how many hours per year each broker-dealer spends complying with the Rule. As noted, the Rule requires a respondent to account for all securities in its possession. Many respondents hold few, if any, securities; while others hold large quantities. Therefore, the time burden of complying with the Rule will depend on respondent-specific factors, including size, number of customers, and proprietary trading activity. The staff estimates that the average time spent per respondent on the rule is 100 hours per year. This estimate takes into account the fact that more than half the 5,700 respondents—according to financial reports filed with the Commission—may spend little or no time in complying with the rule, given that they do not do a public securities business or do not hold inventories of securities. For these reasons, the staff estimates that the total compliance burden per year is 570,000 hours (5,700 respondents × 100 hours/respondent).

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including

through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to: R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or comments may be sent by e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 60 days of this notice.

Dated: February 4, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2443 Filed 2–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request;

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213

Extension:

Rule 425; OMB Control No. 3235–0521; SEC File No. 270–462.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget the request for extension of the previously approved collection of information discussed below.

Rule 425 (17 CFR 230.425) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) requires the filing of certain prospectuses and communications under Rule 135 (17 CFR 230.135) and Rule 165 (17 CFR 230.165) in connection with business combination transactions. The purpose of the rule is to permit more oral and written communications with shareholders about tender offers, mergers and other business combination transactions on a more timely basis, so long as the written communications are filed on the date of first use. The information provided under Rule 425 is made available to the public upon request. Also, the information provided under Rule 425 is mandatory. Approximately 3,700 issuers file communications under Rule 425 at an estimated .25 hours per response for a total of 925 annual burden hours.

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.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: February 4, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2444 Filed 2–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28143; 812–13352]

Bear Stearns Asset Management, Inc., et al.; Notice of Application

February 5, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c–1 under the Act.

APPLICANTS: Bear Stearns Asset Management, Inc. (the ''Advisor''), ALPS Distributors, Inc. (the ''Distributor''), and Bear Stearns Active ETF Trust (the ''Trust'').

SUMMARY OF APPLICATION: Applicants request an order that permits (a) series of certain open-end management investment companies to issue shares (''ETS'') redeemable in large aggregations only (''Creation Unit Aggregations'') and (b) secondary market transactions in ETS to occur at negotiated market prices.

FILING DATES: The application was filed on December 21, 2006 and amended on August 8, 2007, September 14, 2007, November 5, 2007, December 10, 2007, December 26, 2007, and January 14, 2008.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 26, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants: Advisor and Trust, 237 Park Avenue, New York, New York 10017; Distributor, 1290 Broadway, Suite 1100, Denver, CO 80203.

FOR FURTHER INFORMATION CONTACT: Laura J. Riegel, Senior Counsel, at (202) 551–6873, or Marilyn Mann, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Desk, 100 F Street, NE., Washington, DC 20549–0102 (tel. 202–551–5850).

Applicants' Representations

1. The Trust is an open-end management investment company registered under the Act and formed as a Delaware statutory trust. The Trust is organized as a series fund with one initial series: Bear Stearns Current Yield Fund (the ''Current Yield Fund''). The investment objective of the Current Yield Fund will be to seek as high a level of current income as is consistent with the preservation of capital and liquidity by investing primarily in short-term debt obligations, repurchase agreements and reverse repurchase agreements that meet certain minimum ratings requirements (or if unrated, that the Advisor determines are of comparable quality). The Current Yield Fund's portfolio will have an average dollar-weighted maturity of approximately 180 days.

2. The Advisor plans to introduce future series of the Trust or of other open-end management investment

companies (''Future Funds''). The Future Funds will invest primarily in investment grade fixed-income securities (or, if unrated, that the Advisor determines are of a comparable quality).[1] Applicants request that the order apply to any such Future Funds. Any Future Fund will be (a) advised by the Advisor or an entity controlled by or under common control with the Advisor, and (b) comply with the terms and conditions of the application.[2] The Current Yield Fund and Future Funds together are the ''Funds.'' Each Fund will operate as an actively-managed exchange-traded fund (''ETF'').

3. The Advisor, a New York corporation, is a wholly-owned subsidiary of The Bear Stearns Companies Inc., a holding company that through its subsidiaries (including its principal subsidiary, Bear, Stearns & Co., Inc.) is a United States investment banking, securities trading and brokerage firm serving U.S. and foreign corporations, governments, and institutional and individual investors. The Advisor is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act'') and will serve as investment adviser to all the Funds. The Advisor may retain other investment advisers to act as ''sub-advisors'' to Future Funds (''Subadvisors''). Any Subadvisor will be registered under the Advisers Act. The Distributor, a broker-dealer registered under the Securities Exchange Act of 1934, will act as each Fund's distributor and principal underwriter.

4. ETS of the Funds will be sold in Creation Unit Aggregations initially of 50,000 ETS. All orders to purchase Creation Unit Aggregations must be placed with the Distributor by or through a party that has entered into an agreement with the Distributor (''Authorized Participant''). An Authorized Participant must be a participant in the Depository Trust Company (''DTC,'' and such participant, ''DTC Participant''). Creation Unit Aggregations will be created and redeemed solely in cash at net asset value (''NAV''). Each Fund will sell and redeem Creation Unit Aggregations on each day required by section 22(e) of the Act (each such day, a ''Business Day'').

5. An investor purchasing a Creation Unit Aggregation from a Fund will be charged a fixed fee (''Transaction Fee'') to protect the continuing ETS holders against the possible dilutive transactional expenses in connection with the purchase of Creation Unit Aggregations. From time to time, a Fund may waive or modify the Transaction Fee. The exact amounts of the Transaction Fee will be determined separately for each Fund. The Transaction Fee relevant to each Fund will be fully disclosed in the prospectus (''Prospectus'') and the method of calculating that Transaction Fee will be fully disclosed in the statement of additional information of such Fund. All orders to purchase Creation Unit Aggregations will be placed with the Distributor by or through an Authorized Participant and it will be the Distributor's responsibility to transmit such orders to the Trust. The Distributor also will be responsible for delivering the Prospectus to those persons purchasing Creation Unit Aggregations, and for maintaining records of both the orders placed with it and the acknowledgments furnished by it. In addition, the Distributor will maintain a record of the instructions given to the Trust to implement the delivery of ETS.

6. Purchasers of ETS in Creation Unit Aggregations may hold such ETS or may sell such ETS into the secondary market. ETS will be listed and traded on a national securities exchange as defined in section 2(a)(26) of the Act (''Exchange''). It is expected that one or more member firms of a listing Exchange will be designated to act as a specialist and maintain a market for ETS on the Exchange (the ''Exchange Specialist''). Prices of ETS trading on an Exchange will be based on the current bid/offer market.[3] ETS sold in the secondary market will be subject to customary brokerage fees or commissions.

7. Applicants expect that purchasers of Creation Unit Aggregations will include institutional investors and arbitrageurs. The Exchange Specialist, in providing a fair and orderly secondary market for the ETS, also may purchase Creation Unit Aggregations for use in its market-making activities. Applicants expect that secondary market purchasers of ETS will include both institutional investors and retail investors.[4] Applicants expect that the price at which the ETS trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Unit Aggregations at their NAV, which should ensure that the ETS will not trade at a material discount or premium in relation to their NAV.

8. ETS will not be individually redeemable, and owners of ETS may acquire those ETS from a Fund, or tender such ETS for redemption to the Fund, in Creation Unit Aggregations only. To redeem, an investor will have to accumulate enough ETS to constitute a Creation Unit Aggregation. Redemption orders must be placed by or through an Authorized Participant. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Unit Aggregations.

9. Neither the Trust nor any Fund will be advertised, marketed or otherwise held out as an ''open-end investment company'' or a ''mutual fund.'' Instead, each Fund will be marketed as an ''actively-managed exchange-traded fund.'' All marketing materials that describe the method of obtaining, buying or selling ETS, or refer to redeemability, will prominently disclose that ETS are not individually redeemable and that the owners of ETS may purchase or redeem ETS from a Fund in Creation Unit Aggregations only. The same approach will be followed in shareholder reports and other communications and investor educational materials issued or circulated in connection with the ETS. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of ETS.

10. The Funds' Web site, which will be publicly available prior to the public offering of ETS, will include the Prospectus and other information about the Funds that is updated on a daily basis, including the reported mid-point of the bid-ask spread at the time of the calculation of NAV (''Bid/Ask Price'').

[1] With respect to both the Current Yield Fund and the Future Funds, if a security satisfies the minimum rating requirement at the time of purchase and is subsequently downgraded below that rating, the Advisor will determine what action, including the sale of the security, is in the best interest of the applicable Fund and its shareholders.

[2] All entities that currently intend to rely on the order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

[3] The Exchange intends to disseminate every 15 seconds, during regular trading hours, through the facilities of the Consolidated Tape Association, the indicative intra-day value (''IIV'') of each Fund on a per-ETS basis. An independent third party calculator will calculate the IIV during the hours of trading on the Exchange by dividing (a) the sum of the estimated amount of cash held in the applicable Fund's portfolio, the estimated amount of accrued interest owing to the applicable Fund and the estimated value of the securities held in the applicable Fund's portfolio, minus the estimated amount of liabilities, as of the time of calculation by (b) the total number of outstanding ETS of the Fund. Applicants assert that the calculation and dissemination of IIV will allow for efficient arbitrage and thus avoid the possibility that significant deviations could develop between the market price of ETS and NAV.

[4] ETS will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding ETS. DTC or DTC Participants will maintain records reflecting beneficial owners of ETS.

On each Business Day, before the commencement of trading in ETS on the Exchange, each Fund will disclose on its Web site the identities and quantities of the portfolio securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.[5] Applicants assert that the Web site disclosure of each Fund's portfolio securities and other assets will provide a level of portfolio transparency that is substantially similar to that of index-based ETFs.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c–1 under the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, 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.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Because ETS will not be individually redeemable, applicants request an order that would permit each Fund, as a series of an open-end management investment company, to issue ETS that are redeemable in Creation Unit Aggregations only. Applicants state that investors may purchase ETS in Creation Unit Aggregations from each Fund and redeem Creation Unit Aggregations from each Fund. Applicants further state that because the market price of ETS will be disciplined by arbitrage opportunities, investors should be able to sell ETS in the secondary market at prices that do not vary substantially from their NAV.

Section 22(d) of the Act and Rule 22c–1 under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in ETS will take place at negotiated prices, not at a current offering price described in the Prospectus, and not at a price based on NAV. Thus, purchases and sales of ETS in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing ETS. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) assure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting ETS to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in ETS does not involve the Funds as parties and cannot result in dilution of an investment in ETS, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in ETS will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of ETS and their NAV remains narrow.

Applicants' Conditions

The applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

1. Neither the Trust nor any of the Funds will be advertised or marketed as an open-end investment company or a mutual fund. Each Fund's Prospectus will prominently disclose that the Fund is an ''actively managed exchange-traded fund.'' Each Prospectus also will prominently disclose that ETS are not individually redeemable and will disclose that owners of ETS may acquire those ETS from the Fund and tender those ETS for redemption to a Fund in Creation Unit Aggregations only. Any advertising material that describes the purchase or sale of Creation Unit Aggregations or refers to redeemability will prominently disclose that ETS are not individually redeemable and that owners of ETS may acquire those ETS from a Fund and tender those ETS for redemption to a Fund in Creation Unit Aggregations only.

2. Each Fund's Prospectus will clearly disclose that, for purposes of the Act, ETS are issued by a registered investment company, and that the acquisition of ETS by investment companies and companies relying on sections 3(c)(1) or 3(c)(7) of the Act is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits in section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into an agreement with the Fund regarding the terms of the investment.

3. The Web site for the Funds, which is and will be publicly accessible at no charge, will contain the following information, on a per-ETS basis, for each Fund: (a) The prior Business Day's NAV and the Bid/Ask Price, and a calculation of the premium or discount of the Bid/Ask Price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters (or for the life of the Fund, if shorter).

4. The Prospectus and annual report for each Fund will also include: (a) the information listed in condition 3(b), (i) in the case of the Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the

[5] Applicants note that under accounting procedures followed by the Funds, trades made on the prior Business Day (''T'') will be booked and reflected in NAV on the current Business Day (''T + 1''). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

case of the annual report, for the immediately preceding five years, as applicable; and (b) the cumulative total return and the average annual total return based on NAV and Bid/Ask Price, calculated on a per ETS basis for one-, five- and ten-year periods (or life of the Fund).

5. As long as the Funds operate in reliance on the requested order, ETS will be listed on an Exchange.

6. On each Business Day, before the commencement of trading in ETS on each Fund's Exchange, the Fund will disclose on its Web site the identities and quantities of the portfolio securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.

7. The requested order will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively managed exchange-traded funds.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2399 Filed 2–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28146; 812–13485]

Barclays Global Fund Advisors, et al.; Notice of Application

February 6, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act.

APPLICANTS: Barclays Global Fund Advisors (the ''Adviser''), iShares Trust (the ''Trust'') and SEI Investments Distribution Co. (the ''Distributor'').

SUMMARY OF APPLICATION: Applicants request an order that permits: (a) Series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices; and (c) certain affiliated persons of the series to deposit foreign currency and money market securities into, and receive foreign currency and money market securities from, the series in connection with the purchase and redemption of Creation Units.

FILING DATES: The application was filed on January 25, 2008. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 26, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants: Adviser and Trust, c/o Barclays Global Investors, N.A., 45 Fremont Street, San Francisco, CA 94105; Distributor, One Freedom Valley Drive, Oaks, PA 19456.

FOR FURTHER INFORMATION CONTACT: Bruce R. MacNeil, Senior Counsel, at (202) 551–6817, or Michael W. Mundt, Assistant Director, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Desk, 100 F Street, NE., Washington, DC 20549–0102 (tel. 202–551–5850).

Applicants' Representations

1. The Trust, an open-end management investment company registered under the Act, is organized as a Delaware statutory trust and as a series fund with multiple series. The Trust will offer two new series that will invest substantially all of their assets in foreign money market securities: iShares Euro Currency Fund and iShares Pound Sterling Currency Fund (each a ''New Fund''). Each New Fund will seek to preserve capital and maintain stability of principal by investing in short-term securities that are denominated in the specified local currency and have remaining maturities of sixty days or less (''Portfolio Securities''). Applicants state each New Fund is designed to decrease in value when the value of the U.S. dollar increases relative to the applicable local currency and increase in value when the value of the U.S. dollar falls relative to the applicable local currency. While the value of each New Fund's Portfolio Securities is expected to be relatively constant in local currency terms, a New Fund's net asset value (''NAV'') will be expressed in U.S. dollars. Because of this, fluctuations in the per Share NAV of each New Fund will be caused by fluctuations in the exchange rate between U.S. dollars and the applicable local currency.

2. The Trust plans to offer future series that will hold money market securities denominated in a different local currency than the New Funds (''Future Funds''). Applicants request that the order apply to any such Future Funds. Any Future Fund will be (a) advised by the Adviser, and (b) comply with the terms and conditions of the order. The New Funds and the Future Funds together are the ''New Funds.'' Each New Fund will operate as an actively-managed exchange-traded fund.

3. The Adviser, a California corporation, is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') and will serve as investment adviser to each New Fund. The Distributor, a Pennsylvania corporation, is registered under the Securities Exchange Act of 1934 (''Exchange Act'') and serves as principal underwriter and distributor for the New Funds.

4. Shares of the New Funds will be sold in Creation Units of 25,000 or more. All orders to purchase Creation Units must be placed with the Distributor by or through an ''Authorized Participant,'' an entity that has entered into an agreement with the Distributor and that is a participant in the Depository Trust Company (''DTC,'' and such participant, ''DTC Participant''). Shares of each New Fund will be sold in Creation Units in exchange for a designated amount of the applicable local currency (the ''Currency Deposit''). Each New Fund reserves the right to permit or require the substitution of an amount of securities denominated in the applicable local currency (''Deposit Securities,'' together with the Currency Deposit, the ''Fund Deposit'') to replace

a portion of the Currency Deposit.[1] An investor purchasing a Creation Unit from a New Fund will be charged a fee (''Transaction Fee'') to cover certain transaction costs associated with the issuance of Creation Units. The Distributor will maintain a record of Creation Unit purchases.

5. Purchasers of Shares in Creation Units may hold such Shares or may sell such Shares into the secondary market. Shares will be listed on a national securities exchange, as defined in section 2(a)(26) of the Act (a ''Listing Market''). It is expected that one or more member firms of a Listing Market will be designated to act as a specialist and maintain a market for Shares on the Listing Market (the ''Specialist''). Prices of Shares trading on a Listing Market will be based on the current bid/offer market. Shares sold in the secondary market will be subject to customary brokerage commissions and charges.

6. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). The Specialist, in providing a fair and orderly secondary market for the Shares, also may purchase Creation Units for use in its market-making activities. Applicants expect that secondary market purchasers of Shares will include both institutional investors and retail investors.[2] Applicants expect that the price at which the Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV, which should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

7. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from a New Fund, or tender such Shares for redemption to the New Fund, in Creation Units only. To redeem, an investor will have to accumulate enough Shares to constitute a Creation Unit. Redemption orders must be placed by or through an Authorized Participant. An investor redeeming a Creation Unit generally will receive a specified amount of local currency (the ''Currency Redemption Amount''). Each New Fund reserves the right to substitute Portfolio Securities for all or a portion of the Currency Redemption Amount.[3] A redeeming investor may pay a Transaction Fee to offset transfer and other transaction costs that may be incurred by the New Fund in processing the redemption.

8. Neither the Trust nor any individual New Fund will be marketed or otherwise held out as an ''open-end investment company'' or a ''mutual fund.'' The prospectus (''Prospectus'') for each New Fund will prominently disclose that the New Fund is an ''actively-managed exchange-traded fund.'' All marketing materials that describe the method of obtaining, buying or selling Shares, or refer to redeemability, will prominently disclose that Shares are not individually redeemable and that the owners of Shares may purchase or redeem Shares from a New Fund in Creation Units only. The same approach will be followed in the SAI, shareholder reports and investor educational materials issued or circulated in connection with the Shares. The New Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

9. The New Funds' Web site, which will be publicly available at no charge, will include information about the New Funds that is updated on a daily basis, including the mid-point of the bid-ask spread at the time of the calculation of NAV (''Bid/Ask Price''). On each Business Day, before the commencement of trading in Shares on the Listing Market, each New Fund will disclose the identities and quantities of the Portfolio Securities and other assets held in the New Fund portfolio that will form the basis for the New Fund's calculation of NAV at the end of the Business Day.[4]

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c–1 under the Act; and under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and (a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, 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. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit each New Fund, as a series of an open-end management investment company, to issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units from each New Fund and redeem Creation Units from each New Fund. Applicants

[1] It is intended that, on each day that a New Fund is open, including as required by section 22(e) of the Act (''Business Day''), the New Fund will make available the estimated Fund Deposit. The estimated Fund Deposit is an amount per creation unit expressed in the applicable local currency representing the previous Business Day's Fund Deposit plus the current Business Day's accrued expenses, interest and income. To the extent a New Fund requires a substitution of Deposit Securities for a portion of the Currency Deposit, a description of the Deposit Securities, including the names and amount of the Deposit Securities required to be contributed, will be made available prior to the opening of business on the Listing Market. The Listing Market, or a third-party financial information provider, intends to disseminate, every 15 seconds, during regular trading hours, an approximate amount per Share representing the NAV from the prior Business Day adjusted to reflect the current Business Day's expenses, interest and income calculated using the amortized cost method and the current currency spot rate.

[2] Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. DTC or DTC Participants will maintain records reflecting beneficial owners of Shares.

[3] To the extent a New Fund requires a substitution of Portfolio Securities for the Currency Redemption Amount, a description of the Portfolio Securities, including the names and amount of the Portfolio Securities, will be made available prior to the opening of business on the applicable Listing Market.

[4] Applicants note that under accounting procedures followed by the New Funds, trades made on the prior Business Day (''T'') will be booked and reflected in NAV on the current Business Day (''T + 1''). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

further state that because the market price of Shares will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary substantially from their NAV.

Section 22(d) of the Act and Rule 22c–1 under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (c) assure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of Shares and their NAV remains narrow.

Sections 17(a)(1) and (2) of the Act

7. Section 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person (''second tier affiliate''), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities. Applicants request an exemption from 17(a) under sections 6(c) and 17(b), to permit in-kind purchases and redemptions by persons that are affiliated persons or second-tier affiliates of the New Funds by virtue of holding 5% or more, or in excess of 25%, of the outstanding Shares of one or more of the New Funds.

8. Applicants state that although there is no present intention to permit in-kind purchases, applicants contend that no useful purpose would be served by prohibiting affiliated persons from making in-kind purchases or redemptions of Shares in Creation Units. The deposit procedures for in-kind purchases and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions. Deposit Securities will be valued under the same objective standards applied to valuing Portfolio Securities. Therefore, applicants state that in-kind purchases and redemptions for which relief is requested will afford no opportunity for the affiliated persons and second-tier affiliates described above to effect a transaction detrimental to other holders of Shares. Applicants also believe that these purchases and redemptions will not result in self-dealing or overreaching by those persons of the New Fund.

Applicants' Conditions

The applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

1. Each New Fund's Prospectus will clearly disclose that, for purposes of the Act, Shares are issued by the New Fund and that the acquisition of Shares by investment companies and companies relying on Sections 3(c)(1) or 3(c)(7) of the Act is subject to the restrictions of Section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a New Fund beyond the limits of Section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into an agreement with the New Fund regarding the terms of the investment.

2. As long as each New Fund operates in reliance on the requested order, the Shares will be listed on a Listing Market.

3. Neither the Trust nor any New Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each New Fund's Prospectus will prominently disclose that the New Fund is an ''actively managed exchange-traded fund.'' Each New Fund's Prospectus will prominently disclose that Shares are not individually redeemable and will disclose that the owners of Shares may acquire those Shares from a New Fund and tender those Shares for redemption to a New Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from a New Fund and tender those Shares for redemption to a New Fund in Creation Units only.

4. The Web site for the Trust, which will be publicly accessible at no charge, will contain the following information, on a per Share basis, for each New Fund: (a) The prior Business Day's NAV and the Bid/Ask Price and a calculation of the premium or discount of the Bid/Ask Price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

5. The Prospectus and annual report for each New Fund will also include: (a) The information listed in condition 4(b), (i) in the case of the Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Share basis for one,

five and ten year periods (or life of the New Fund), (i) the cumulative total return and the average annual total return based on NAV and Bid/Ask Price, and (ii) the cumulative total return of the relevant local currency against the U.S. dollar.

6. On each Business Day, before the commencement of trading in Shares on a New Fund's Listing Market, the New Fund will disclose on its website the identities and quantities of the money market securities and other assets held by the New Fund that will form the basis for the New Fund's calculation of NAV at the end of the Business Day.

7. The Adviser and any subadviser, directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the New Fund) to acquire any Deposit Security for a New Fund through a transaction in which the New Fund could not engage directly.

8. The requested order will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively-managed exchange-traded funds.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2451 Filed 2–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of February 11, 2008: An Open Meeting will be held on Wednesday, February 13, 2008 at 10 a.m., in the Auditorium, Room L–002, and a Closed Meeting will be held on Friday, February 15, 2008 at 10 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (4), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a)(3), (4), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Atkins, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matters of the Open Meeting scheduled for Wednesday, February 13, 2008 will be:

1. The Commission will consider whether to propose amendments to its rules regarding the circumstances under which a foreign private issuer is required to register a class of equity securities under section 12(g) of the Exchange Act.

2. The Commission will consider whether to propose a package of amendments to various Commission rules and forms to improve reporting by foreign private issuers. The amendments, if adopted, would allow foreign private issuer status to be tested once a year; change the deadline for annual reports filed by foreign private issuers; revise the annual report and registration statement forms used by foreign private issuers to improve disclosure; and amend the rule regarding going private transactions to reflect recent regulatory changes.

3. The Commission will consider whether to propose amendments to Part 2 of Form ADV under the Investment Advisers Act of 1940 and related rules. The proposed amendments, if adopted, would require investment advisers to provide clients with narrative brochures containing plain English descriptions of the advisers' businesses, services, and conflicts of interest. The proposal also would require advisers to electronically file their brochures with the Commission, and the brochures would be available to the public through the Commission's Web site.

4. The Commission will, as required by section 109 of the Sarbanes-Oxley Act of 2002, review the annual accounting support fee of the Financial Accounting Standards Board.

The subject matter of the Closed Meeting scheduled for Friday, February 15, 2008 will be:

Formal orders of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Resolution of litigation claims; and

A regulatory matter regarding a financial institution.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: February 6, 2008.

Nancy M. Morris,

Secretary.

[FR Doc. E8–2522 Filed 2–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57273; File No. SR–NYSEArca–2008–06]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to the Dissemination of the Index Value for Equity Index-Linked Securities

February 5, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 11, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(2)(c)(ii) to provide that the Exchange will commence delisting or removal proceedings if the value of an index or composite value of the indexes underlying an issuance of Equity Index-Linked Securities[3] is no longer calculated or widely disseminated on at least a 15-second basis with respect to an index or indexes containing only securities listed on a national securities exchange, or on at least a 60-second basis with respect to an index or indexes containing foreign country securities. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities. *See* NYSE Arca Equities Rule 5.2(j)(6).

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

NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(2)(c)(ii) currently provides that the Exchange will commence delisting or removal proceedings of an issue of Equity Index-Linked Securities (unless the Commission has approved continued trading of such Securities) if, among other circumstances, the value of the index or composite value of the indexes underlying such issue is no longer calculated or widely disseminated on at least a 15-second basis. The Exchange proposes to amend NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(2)(c)(ii) to distinguish between indexes consisting solely of U.S. equity securities and those consisting of foreign securities or a combination of U.S. and foreign equity securities. The proposed amendment provides that the Exchange will commence delisting or removal proceedings if the underlying index value or composite index value is no longer calculated or widely disseminated: (1) On at least a 15-second basis with respect to an index or indexes containing only securities listed on a national securities exchange;[4] or (2) on at least a 60-second basis with respect to an index or indexes containing foreign country securities. If the official index value does not change during some or all of the period when trading is occurring on the NYSE Arca Marketplace[5] (for example, for indexes of foreign country securities, because of time zone differences or holidays in the countries where such indexes' component stocks trade), then the last calculated official index value must remain available throughout NYSE Arca Marketplace trading hours.

The Exchange seeks to conform the index dissemination requirements for Equity Index-Linked Securities to those for Investment Company Units, which include exchange-traded funds or ''ETFs,'' under NYSE Arca Equities Rule 5.2(j)(3). Specifically, Commentary .01(b)(2) to NYSE Arca Equities Rule 5.2(j)(3) requires that the value of an international or global index underlying an ETF must be widely disseminated by one or more major market data vendors at least every 60 seconds during the Core Trading Session (9:30 a.m. to 4 p.m. Eastern Time).[6] This 60-second standard reflects limitations, in some instances, on the frequency of intra-day trading information with respect to foreign country securities and that in many cases, trading hours for overseas markets overlap only in part, or not at all, with NYSE Arca Marketplace trading hours. In addition, Commentary .01(b)(2) to NYSE Arca Equities Rule 5.2(j)(3) provides that, if the index value does not change during some or all of the period when trading is occurring on the NYSE Arca Marketplace, the last official calculated index value must remain available throughout NYSE Arca Marketplace trading hours.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with 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 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 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 states that written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of the notice of the filing thereof. The Commission has determined that a 15-day comment period is appropriate in this case.

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–NYSEArca–2008–06 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 SR–NYSEArca–2008–06. 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

[4] The Exchange states that American Depositary Shares and common shares of foreign issuers listed on U.S. national securities exchanges included in an index or indexes would be subject to the 15-second dissemination requirement. E-mail from Timothy J. Malinowski, Director, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated January 30, 2008.

[5] *See* NYSE Arca Equities Rule 1.1(e) (defining NYSE Arca Marketplace).

[6] *See* NYSE Arca Equities Rule 7.34 (describing the hours of the three trading sessions on the Exchange).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does 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–NYSEArca–2008–06 and should be submitted on or before February 26, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2442 Filed 2–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28147; 812–13470]

WisdomTree Trust, et al.; Notice of Application

February 6, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: WisdomTree Trust (the ''Trust'') and WisdomTree Asset Management, Inc. (the ''Adviser'').

SUMMARY OF APPLICATION: Applicants request an order that permits: (a) Series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain affiliated persons of the series to deposit foreign currency and money market securities into, and receive foreign currency and money market securities from, the series in connection with the purchase and redemption of Creation Units; and (d) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

FILING DATES: The application was filed on January 8, 2008, and amended on February 1, 2008. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 26, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants: 380 Madison Avenue, 21st Floor, New York, NY 10017.

FOR FURTHER INFORMATION CONTACT: Bruce R. MacNeil, Senior Counsel, at (202) 551–6817, or Michael W. Mundt, Assistant Director, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Desk, 100 F Street, NE., Washington, DC 20549–0102 (tel. 202–551–5850).

Applicants' Representations

1. The Trust is an open-end management investment company registered under the Act and organized as a Delaware statutory trust. The Trust will offer five new series that will invest substantially all of their assets in foreign money market securities: WisdomTree Euro Fund, WisdomTree British Pound Sterling Fund, WisdomTree Japanese Yen Fund, WisdomTree Australian Dollar Fund and WisdomTree International Currency Income Fund (collectively, the ''Foreign Funds'') and three new series that will invest in U.S. dollar money market securities: WisdomTree U.S. Cash Fund, WisdomTree U.S. Government Cash Fund, and WisdomTree Tax Exempt Cash Fund (collectively, the ''Domestic Funds,'' together with the Foreign Funds, the ''Funds'').

2. Each Fund will invest in high quality money market securities and instruments that provide exposure to money market interest rates or such securities (''Portfolio Securities''). The Foreign Funds will invest in short-term money market securities that are denominated in the currency specified by the Fund's name or in multiple foreign currencies, and the Domestic Funds will invest in money market securities denominated in U.S. dollars. Each Fund's investment objective will be to earn current income while preserving capital and maintaining liquidity. In addition, each Foreign Fund will also have an investment objective to provide investors with exposure to high-quality money market instruments or rates denominated in a particular currency or currencies. Each Foreign Fund is designed to decrease in value when the value of the U.S. dollar increases relative to the applicable foreign currency or currencies and increase in value when the value of the U.S. dollar falls relative to the applicable foreign currency or currencies. While the value of each Foreign Fund's Portfolio Securities is expected to be relatively constant in foreign currency terms, a Foreign Fund's net asset value (''NAV'') will be expressed in U.S. dollars. Because of this, fluctuations in the per-share NAV of each Foreign Fund will be caused by fluctuations in the exchange rate between U.S. dollars and the applicable foreign currency or currencies.

3. The Trust plans to offer future series that will hold money market securities denominated in U.S. dollars, other currencies or baskets of currencies (''Future Funds''). Applicants request that the order apply to any such Future Funds. Any Future Fund will (a) be advised by the Adviser or an entity controlled by or under common control with the Adviser, and (b) comply with the terms and conditions set forth in the application. The Funds and Future Funds together are the ''Funds.'' Each Fund will operate as an actively-managed exchange-traded fund.

4. The Adviser, a Delaware corporation, is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') and serves as investment adviser to each Fund. Each

[9] 17 CFR 200.30–3(a)(12).

Fund may have one or more subadvisers (each, a ''Fund Subadviser''). Any Fund Subadviser will be registered as an investment adviser under the Advisers Act. ALPS Distributors, Inc., a broker-dealer registered under the Securities Exchange Act of 1934 (''Exchange Act''), will serve as distributor and principal underwriter for the Funds (''Distributor'').[1]

5. Shares of the Funds will be sold at a price of between $50 and $200 per Share in Creation Units of at least 25,000 Shares. All orders to purchase Creation Units must be placed with the Distributor by or through an ''Authorized Participant,'' an entity that has entered into an agreement with the Distributor and that is a participant in the Depository Trust Company (''DTC,'' and such participant, ''DTC Participant''). Shares of each Fund generally will be sold in Creation Units in exchange for a ''Currency Deposit,'' a designated amount of currency (foreign currency with respect to the Foreign Funds; U.S. dollars with respect to the Domestic Funds). Each Fund reserves the right to specify money market securities (''Deposit Securities'') for deposit instead of currency. Each Fund will also specify an amount of U.S. dollars (''Dollar Deposit'') equal to any difference between the NAV (per Creation Unit) of a Fund and the total aggregate market value (per Creation Unit) of the Currency Deposit and/or the Deposit Securities. Collectively, the Currency Deposit, any Deposit Securities, and the Dollar Deposit are the ''Portfolio Deposit.''[2]

6. An investor purchasing a Creation Unit from a Fund will be charged a fee (''Transaction Fee'') to prevent the dilution of the interests of the remaining shareholders resulting from costs in connection with the purchase of Creation Units. The maximum Transaction Fees relevant to each Fund will be fully disclosed in the prospectus (''Prospectus'') of such Fund. Orders to purchase Creation Units of a Fund will be placed with the Distributor who will transmit orders to the Trust.

7. Purchasers of Shares in Creation Units may hold such Shares or may sell such Shares into the secondary market. Shares will be listed on a national securities exchange, as defined in section 2(a)(26) of the Act (an ''Exchange''). It is expected that one or more member firms of a listing Exchange that is a national securities exchange will be designated to act as a specialist and maintain a market on the Exchange for Shares trading on the Exchange (the ''Exchange Specialist''), or if Nasdaq is the listing Exchange, one or more member firms of Nasdaq will act as a market maker (''Market Maker'') and maintain a market on Nasdaq for Shares trading on Nasdaq.[3] Prices of Shares trading on an Exchange will be based on the current bid/ask market. Shares sold in the secondary market will be subject to customary brokerage commissions and charges.

8. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). The Specialist, or Market Maker, in providing a fair and orderly secondary market for the Shares, also may purchase Creation Units for use in its market-making activities. Applicants expect that secondary market purchasers of Shares will include both institutional investors and retail investors.[4] Applicants expect that the price at which the Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV, which should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

9. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from a Fund, or tender such Shares for redemption to the Fund, in Creation Units only. To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption orders must be placed by or through an Authorized Participant. An investor redeeming a Creation Unit generally will receive a designated amount of the applicable currency and/or money market securities denominated in the applicable currency and a U.S. dollar component (''Redemption Payment''). A redeeming investor may pay a Transaction Fee, to offset transfer and other transaction costs that may be incurred by the Fund in processing the redemption.

10. Neither the Trust nor any individual Fund will be marketed or otherwise held out as an ''open-end investment company'' or a ''mutual fund.'' The Prospectus for each Fund will prominently disclose that the Fund is an ''actively-managed exchange-traded fund.'' All marketing materials that describe the method of obtaining, buying or selling Shares, or refer to redeemability, will prominently disclose that Shares are not individually redeemable and that the owners of Shares may purchase or redeem Shares from a Fund in Creation Units only. The same approach will be followed in the statement of additional information, shareholder reports and investor educational materials issued or circulated in connection with the Shares. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

11. The Funds' Web site, which will be publicly available at no charge, will include the Prospectus and other information about the Funds that is updated on a daily basis, including the mid-point of the bid-ask spread at the time of the calculation of NAV (''Bid/Ask Price''). On each Business Day, before the commencement of trading in Shares on the Exchange, each Fund will disclose the identities and quantities of the money market securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.[5]

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c–1 under the Act; and under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and

[1] All entities that currently intend to rely on the order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application. An Investing Fund (as defined below) may rely on the order only to invest in Funds and not in any other registered investment company.

[2] At the beginning of each day that a Fund is open, including as required by section 22(e) of the Act (''Business Day''), the Adviser will make available the Portfolio Deposit. An indicative NAV will be disseminated every 15 seconds during trading hours at the Exchange (defined below) representing a per Share value based on the Portfolio Deposit as adjusted to reflect changing currency rates in effect throughout the Business Day.

[3] If Shares are listed on the Nasdaq, no particular Market Maker will be contractually obligated to make a market in Shares, although Nasdaq's listing requirements stipulate that at least two Market Makers must be registered as Market Makers in Shares to maintain the listing. Registered Market Makers are required to make a continuous, two-sided market at all times or be subject to regulatory sanctions.

[4] Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. DTC or DTC Participants will maintain records reflecting beneficial owners of Shares.

[5] Applicants note that under accounting procedures followed by the Funds, portfolio trades made on the prior Business Day (''T'') will be booked and reflected in NAV on the current Business Day (''T+1''). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any Business Day may be booked and reflected in NAV on such Business Day. Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

(a)(2) of the Act; and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, 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. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit each Fund, as a series of an open-end management investment company, to issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units from each Fund and redeem Creation Units from each Fund. Applicants further state that because the market price of Shares will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary substantially from their NAV.

Section 22(d) of the Act and Rule 22c–1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (c) assure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of Shares and their NAV remains narrow.

Section 12(d)(1) of the Act

7. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, or any other broker or dealer from selling its shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

8. Applicants request that the order permit certain investment companies registered under the Act to acquire Shares beyond the limitations in section 12(d)(1)(A) and permit the Funds, any principal underwriter for the Funds, and any broker or dealer registered under the Exchange Act (''Brokers''), to sell Shares beyond the limitations in section 12(d)(1)(B). Applicants request that these exemptions apply to: (a) Any Fund that is currently or subsequently part of the same ''group of investment companies'' as the initial Funds within the meaning of section 12(d)(1)(G)(ii) of the Act, as well as any principal underwriter for the Funds and any Brokers selling Shares of a Fund to an Investing Fund (as defined below); and (b) each management investment company or unit investment trust registered under the Act that is not part of the same ''group of investment companies'' as the Funds within the meaning of section 12(d)(1)(G)(ii) of the Act and that enters into a FOF Participation Agreement (as defined below) with a Fund (such management investment companies are referred to herein as ''Investing Management Companies,'' such unit investment trusts are referred to herein as ''Investing Trusts,'' and Investing Management Companies and Investing Trusts are ''Investing Funds''). Investing Funds do not include the Funds. Each Investing Trust will have a sponsor (''Sponsor'') and each Investing Management Company will have an investment adviser within the meaning of section 2(a)(20)(A) of the Act

(''Investing Fund Adviser'') that does not control, is not controlled by or under common control with the Adviser. Each Investing Management Company may also have one or more investment advisers within the meaning of section 2(a)(20)(B) of the Act (each, a ''Subadviser'').

9. Applicants assert that the proposed transactions will not lead to any of the abuses that section 12(d)(1) was designed to prevent. Applicants submit that the proposed conditions to the requested relief address the concerns underlying the limits in section 12(d)(1), which include concerns about undue influence, excessive layering of fees and overly complex structures.

10. Applicants believe that neither the Investing Funds nor an Investing Fund Affiliate would be able to exert undue influence over the Funds.[6] Applicants propose a condition prohibiting the Investing Fund Adviser or Sponsor; any person controlling, controlled by, or under common with the Investing Fund Adviser or Sponsor; and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Investing Fund Adviser or advised or sponsored by the Sponsor, or any person controlling, controlled by, or under common control with the Investing Fund Adviser or Sponsor (''Investing Fund's Advisory Group'') from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Subadviser; any person controlling, controlled by, or under common control with the Subadviser; and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Subadviser or any person controlling, controlled by, or under common control with the Subadviser (''Investing Fund's Subadvisory Group'').

11. Applicants propose other conditions to limit the potential for undue influence over the Funds, including that no Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Investing Fund Adviser, Subadviser, employee or Sponsor of an Investing Fund, or a person of which any such officer, director, member of an advisory board, Investing Fund Adviser, Subadviser, employee, or Sponsor is an affiliated person (except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

12. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of each Investing Management Company, including a majority of the disinterested directors or trustees, before approving any advisory contract under section 15 of the Act, will be required to determine that the advisory fees charged to the Investing Management Company are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. In addition, the Investing Fund Adviser, trustee of an Investing Trust (''Trustee'') or Sponsor, as applicable, will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation received from a Fund by the Investing Fund Adviser, Trustee or Sponsor, or an affiliated person of the Investing Fund Adviser, Trustee or Sponsor (other than any advisory fees), in connection with the investment by the Investing Fund in the Funds. Applicants also state that any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds set forth in NASD Conduct Rule 2830 (''Rule 2830'').

13. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that a Fund will be prohibited from acquiring securities of any investment company, or of any company relying on section 3(c)(1) or 3(c)(7) of the Act, in excess of the limits contained in section 12(d)(1)(A) of the Act.

14. To ensure that Investing Funds are aware of the terms and conditions of the requested order, the Investing Funds must enter into an agreement with the respective Funds (''FOF Participation Agreement''). The FOF Participation Agreement will include an acknowledgment from the Investing Fund that it may rely on the order only to invest in the Funds and not in any other investment company. The FOF Participation Agreement will further require any Investing Fund that exceeds the 5% or 10% limitations in section 12(d)(1)(A)(ii) and (iii) to disclose in its Prospectus that it may invest in exchange-traded funds and disclose, in ''plain English,'' in its Prospectus the unique characteristics of the Investing Funds investing in investment companies, including but not limited to the expense structure and any additional expenses of investing in investment companies.

Sections 17(a)(1) and (2) of the Act

15. Section 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person (''second tier affiliate''), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities.

16. Applicants seek an exemption from section 17(a) to allow persons who hold (a) 5% or more, or in excess of 25%, of all of the Shares of the Trust or of one or more Funds (or affiliated persons of such affiliated persons that are not otherwise affiliated with the Trust or Funds), or (b) 5% or more, or in excess of 25% of the shares of any other registered investment company (or series) advised by the Adviser, to effect purchases and redemptions through foreign currency and in-kind transactions with a Fund. Applicants also request relief from section 17(a) in order to permit each Fund to sell Shares to and redeem Shares from, and engage in the in-kind transactions that would accompany such sales and redemptions with, any Investing Fund of which it is an affiliated person or a second-tier affiliate because (a) the Investing Fund holds 5% or more of the Shares of one or more Funds, or (b) an Investing Fund

[6] An ''Investing Fund Affiliate'' is an Investing Fund Adviser, Subadviser, Sponsor, promoter, and principal underwriter of an Investing Fund, and any person controlling, controlled by, or under common control with any of those entities. A ''Fund Affiliate'' is an investment adviser, promoter and principal underwriter of a Fund, and any person controlling, controlled by, or under common control with any of those entities.

described in (a) is an affiliated person of the Investing Fund.[7]

17. Applicants contend that no useful purpose would be served by prohibiting the specified affiliated persons from purchasing or redeeming Creation Units with foreign currency and in-kind securities transactions. The deposit procedures for purchases and the redemption procedures for redemptions of Creation Units will be the same for all purchases and redemptions. The Portfolio Deposit and the Redemption Payment will be valued in the same manner as the portfolio securities. Therefore, applicants state the foreign currency and in-kind purchases and redemptions for which relief is requested will afford no opportunity for the affiliated persons of a Fund, or the affiliated persons of such affiliated persons, described above, to effect a transaction detrimental to other holders of Shares. Applicants also believe that these purchases and redemptions will not result in self-dealing or overreaching of the Fund.

18. Applicants state that any consideration paid for Shares in transactions with a Fund will be based on the Fund's NAV. Applicants also state that any transactions directly between the Funds and the Investing Fund will be consistent with the policies of each Investing Fund. Applicants note that the FOF Participation Agreement will require each Investing Fund to represent that any purchase of Creation Units will be accomplished in compliance with the investment restrictions of the Investing Fund and will be consistent with the investment policies set forth in the Investing Fund's registration statement.

Applicants' Conditions

The applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

A. Actively-Managed Exchange-Traded Fund Relief

1. Each Fund's Prospectus will clearly disclose that, for purposes of the Act, Fund Shares are issued by the Fund and that the acquisition of Shares by investment companies and companies relying on sections 3(c)(1) or 3(c)(7) of the Act is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits of section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into a Participation Agreement with the Trust regarding the terms of the investment.

2. As long as the Trust operates in reliance on the requested order, the Shares will be listed on an Exchange.

3. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each Fund's Prospectus will prominently disclose that the Fund is an actively managed exchange traded fund. Each Prospectus also will prominently disclose that Shares are not individually redeemable and will disclose that the owners of Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

4. The Web site maintained for the Trust, which is and will be publicly accessible at no charge, will contain the following information, on a per Share basis, for each Fund: (a) The prior Business Day's NAV and the Bid/Ask Price and a calculation of the premium or discount of the Bid/Ask Price at the time of calculation of the NAV against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

5. The Prospectus and annual report for each Fund will also include: (a) The information listed in condition A.4.(b), (i) in the case of the Fund's Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Share basis for one, five and ten year periods (or life of the Fund), (i) the cumulative total return and the average annual total return based on NAV and Bid/Ask Price, and (ii) the cumulative total return of the relevant foreign currency or currencies against the U.S. dollar if applicable.

6. On each Business Day, before the commencement of trading in Shares on the Fund's listing Exchange, the Fund will disclose on its Web site the identities and quantities of the money market securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.

7. The Adviser or Fund Subadviser, directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Security for a Fund through a transaction in which the Fund could not engage directly.

8. The requested order will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively-managed exchange-traded funds.

B. Section 12(d)(1) Relief

1. The members of an Investing Fund's Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of the Investing Fund's Subadvisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, an Investing Fund's Advisory Group or Investing Fund's Subadvisory Group, each in the aggregate, becomes a holder of more than 25% of the outstanding voting securities of a Fund, it will vote its Shares in the same proportion as the vote of all other holders of the Fund's Shares. This condition does not apply to the Investing Fund's Subadvisory Group with respect to a Fund for which the Subadviser or a person controlling, controlled by, or under common control with the Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Investing Fund or Investing Fund Affiliate will cause any existing or potential investment by the Investing Fund in a Fund to influence the terms of any services or transactions between the Investing Fund or Investing Fund Affiliate and the Fund or Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to assure that the Investing Fund Adviser and any Subadviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or an Investing Fund Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

4. Once an investment by an Investing Fund in the securities of a Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of directors/trustees of

[7] Although applicants expect that most Investing Funds will purchase Shares in the secondary market and will not transact in Creation Units with a Fund, an Investing Fund could seek to transact in Shares directly with a Fund.

the Fund (''Board''), including a majority of the disinterested Board members, will determine that any consideration paid by the Fund to the Investing Fund or an Investing Fund Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (b) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

5. An Investing Fund Adviser or a trustee or Sponsor of an Investing Trust will waive fees otherwise payable to it by the Investing Management Company or Investing Trust in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–1 under the Act) received from a Fund by the Investing Fund Adviser or trustee or Sponsor to the Investing Trust or an affiliated person of the Investing Fund Adviser, trustee or sponsor, other than any advisory fees paid to the Investing Fund Adviser or trustee or Sponsor, or an affiliated person of the Investing Fund Adviser, trustee or Sponsor by the Fund, in connection with the investment by the Investing Management Company or Investing Trust in the Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund by the Subadviser, or an affiliated person of the Subadviser, other than any advisory fees paid to the Subadviser or its affiliated person by the Fund, in connection with the investment by the Investing Management Company in the Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any Affiliated Underwriting.

7. The Board, including a majority of the disinterested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by a Fund in an Affiliated Underwriting once an investment by the Investing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Investing Fund in the Fund. The Board will consider, among other things: (a) whether the purchases were consistent with the investment objectives and policies of the Fund; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

8. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by an Investing Fund in the securities of the Fund exceeds the limits of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Fund in excess of the limits in section 12(d)(1)(A), the Investing Fund and the Fund will execute a FOF Participation Agreement stating, without limitation, that their boards of directors or trustees and their investment advisers, and the trustee and Sponsor of an Investing Trust, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), an Investing Fund will notify the Fund of the investment. At such time, the Investing Fund will also transmit to the Fund a list of names of each Investing Fund Affiliate and Underwriting Affiliate. The Investing Fund will notify the Fund of any changes to the list of names as soon as reasonably practicable after a change occurs. The Fund and the Investing Fund will maintain and preserve a copy of the order, the agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in Rule 2830.

12. No Fund will acquire securities of any investment company or company relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of an affiliated money market fund for short-term cash management purposes.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2450 Filed 2–8–08; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. The information collection packages that may be included in this notice are for new information collections, approval of existing information collections, revisions to OMB-approved information collections, and extensions (no change) of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Written comments and recommendations regarding the information collection(s) should be submitted to the OMB Desk Officer and the SSA Reports Clearance Officer. The information can be mailed, faxed or e-mailed to the individuals at the addresses and fax numbers listed below:

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov*.

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov*.

I. The information collections listed below are pending at SSA and will be submitted to OMB within 60 days from the date of this notice. Therefore, your comments should be submitted to SSA within 60 days from the date of this publication. You can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–0454 or by writing to the address listed above.

1. *Continuing Disability Review Report—20 CFR 404.1589, 416.989—0960–0072.* SSA uses the information collected on Form SSA–454–BK to determine whether an individual who receives Social Security disability benefits continues to be disabled. The SSA–454–BK updates the record of the disabled individual, providing information on recent medical treatment, vocational and education experience, work activity, and evaluations of potential for work for adults. It also collects information on ability of Title XVI children to function without marked and severe limitation. On the basis of the responses provided, SSA obtains medical and other evidence in order to make a determination whether disability, as defined by the Social Security Act, continues or has ended, and, if so, when the disability ended. A continuing disability review (CDR) is typically done when a disabled individual's medical reexamination diary matures, or when medical improvement is reported. The number of CDRs done each fiscal year depends on the number of maturing diaries, reports of medical improvement and SSA budget constraints. The respondents are recipients of benefits based on disability under Title II and/or Title XVI of the Social Security Act.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 398,000.

Frequency of Response: 1.

Average Burden per Response: 60 minutes.

Estimated Annual Burden: 398,000 hours.

2. *Cessation or Continuance of Disability or Blindness Determination and Transmittal—20 CFR 404.1512, 404.1588–1599, 404.1615—0960–0442.* The information collected on the SSA–833–C3/U3 is used to make determinations of whether individuals receiving Title II disability benefits continue to be unable to engage in substantial gainful activity and are still eligible to receive benefits. The respondents are State Disability Determination Services (DDS) employees.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 190,507.

Frequency of Response: 1.

Average Burden per Response: 30 minutes.

Estimated Annual Burden: 95,254 hours.

II. The information collections listed below have been submitted to OMB for clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to the address listed above.

1. *Request for Review of Hearing Decision/Order—20 CFR 404.967–404.981, 416.1467–416.1481—0960–0277.* The HA–520 is needed in order to afford claimants their statutory right under the Social Security Act and implementing regulations to request review of an Administrative Law Judge's (ALJ) hearing decision or dismissal of a hearing request on Title II and Title XVI claims. An individual may request an Appeals Council review by filing a written request. A completed HA–520 ensures that SSA receives the information necessary to establish that the claimant filed the request for review within the prescribed time, and that the claimant has completed the requisite steps to permit review by the Appeals Council. The Appeals Council also uses the information to document the claimant's reason(s) for disagreeing with the ALJ's decision or dismissal, to determine whether the claimant has additional evidence to submit, and to determine whether the claimant has a representative or wants to appoint one. The respondents are claimants requesting review of an ALJ's decision or dismissal of hearing.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 100,000.

Frequency of Response: 1.

Average Burden per Response: 10 minutes.

Estimated Annual Burden: 16,667 hours.

2. *Employee Identification Statement—20 CFR 404.702—0960–0473.* The information collected by Form SSA–4156 is used in scrambled earnings situations when two or more individuals have used the same Social Security Number (SSN), or when an employer (or employers) has reported earnings for two or more employees under the same SSN. The information on the form is used to help identify the individual (and the SSN) to whom the earnings belong. The respondents are employers involved in erroneous wage reporting.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 4,750.

Frequency of Response: 1.

Average Burden per Response: 10 minutes.

Estimated Annual Burden: 792 hours.

3. *Authorization to Disclose Information to Social Security Administration—20 CFR 404.1512 & 20 CFR 416.912—0960–0623.* SSA must obtain sufficient medical evidence to make eligibility determinations for Title II benefits and Title XVI payments. For SSA to obtain medical evidence, an applicant must authorize his or her medical source(s) to release the information to SSA. The applicant may use form SSA–827 to provide consent for the release of information. Generally,

the State DDS completes the form(s) based on information provided by the applicant, and sends the form(s) to the designated medical source(s).

Type of Request: Revision of a currently approved information collection.

READING, SIGNING, AND DATING THE 1ST SSA–827

[10 minutes]

Total respondents	Number of reports by each respondent	Total annual responses	Estimated number of minutes per response	Total burden hours
3,853,928	1	3,853,928	10	642,321

SIGNING AND DATING THREE ADDITIONAL SSA–827S

Total respondents	Number of reports by each respondent	Total annual responses	Estimated number of minutes per response	Total burden hours
3,853,928	3	11,561,784	1	192,696

READING THE EXPLANATION OF THE SSA–827 ON THE INTERNET

Total respondents	Number of reports by each respondent	Total annual responses	Estimated number of minutes per response	Total burden hours
586,232	1	586,232	3	29,312

Collectively:

Number of Respondents: 3,853,928.

Average Burden per Response: 13 minutes to complete all four forms.

Estimated Annual Burden for Reading Internet Explanation: 29,312.

Estimated Annual Burden to Complete the Form: 864,329 hours.

Correction: The first and second **Federal Register** Notices reported incorrect burden information and mentioned two alternate versions of the form which were discontinued previously. We are publishing this correction Notice to show the correct burden information and remove the references to the two discontinued forms.

4. *Epidemiological Research Report—20 CFR 401.165—0960–0701.* Section 311 of the Social Security Independence and Program Improvements Act of 1994 directed SSA to provide support to health researchers involved in epidemiological research. Specifically, when a study is determined to contribute to a national health interest, SSA will furnish information to determine whether a study subject is shown on the SSA administrative records as being alive or deceased (vital status). SSA will recoup all expenses incurred in providing this information. Web-posted questions solicit the information SSA needs to provide the data and to collect the fees. The requestors are scientific researchers who are applying to receive vital status information about individuals from Social Security administrative data records.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 30.

Frequency of Response: 1.

Average Burden per Response: 120 minutes.

Estimated Annual Burden: 60 hours.

Dated: February 6, 2008.

Elizabeth A. Davidson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. E8–2503 Filed 2–8–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 6081]

Defense Trade Advisory Group; Notice of Membership

AGENCY: Department of State.

ACTION: Notice.

The U.S. Department of State's Bureau of Political-Military Affairs' Defense Trade Advisory Group (DTAG) is accepting membership applications. Although applications from individual companies will be considered, the Bureau of Political-Military Affairs is particularly interested in applications from trade associations that represent defense industrial and technology sectors and from academic and other research institutions with expertise in defense technology. Those individuals who have already submitted applications in response to the notice published in the **Federal Register** on August 31, 2007 (72 FR 50437) do not need to reapply.

The DTAG was established as a continuing committee under the authority of 22 U.S.C. Sections 2651a and 2656 and the Federal Advisory Committee Act, 5 U.S.C. App. (''FACA'').

The purpose of the DTAG is to provide the Bureau of Political-Military Affairs with a formal channel for regular consultation and coordination with U.S. private sector defense exporters and defense trade specialists on issues involving U.S. laws, policies, and regulations for munitions exports. The DTAG advises the Bureau on its support for and regulation of defense trade to help ensure that impediments to legitimate exports are reduced while the foreign policy and national security interests of the United States continue to be protected and advanced in accordance with the Arms Export Control Act (AECA), as amended. Major topics addressed by the DTAG include (a) policy issues on commercial defense trade and technology transfer; (b) regulatory and licensing procedures

applicable to defense articles, services, and technical data; (c) technical issues involving the U.S. Munitions List (USML); and (d) questions relating to actions designed to carry out the AECA and International Traffic in Arms Regulations (ITAR).

Members are appointed by the Assistant Secretary of State for Political-Military Affairs on the basis of individual substantive and technical expertise and qualifications, and are drawn from a representative cross-section of U.S. defense industry, association, academic, and foundation personnel, including appropriate technical and military experts. All DTAG members shall be aware of the Department of State's mandate that arms transfers must further U.S. national security and foreign policy interests. DTAG members also shall be versed in the complexity of commercial defense trade and industrial competitiveness, and all members must be able to advise the Bureau on these matters. While members are expected to use their expertise and provide candid advice, national security and foreign policy interests of the United States shall be the basis for all policy and technical recommendations:

DTAG members' responsibilities include:

- Service for a consecutive two-year term which may be renewed or terminated at the discretion of the Assistant Secretary of State for Political-Military Affairs (membership shall automatically terminate for members who fail to attend two consecutive DTAG plenary meetings).
- Making recommendations in accordance with the DTAG Charter and the FACA.
- Making policy and technical recommendations within the scope of the U.S. commercial export control regime as mandated in the AECA, the ITAR, and appropriate directives.

Please note that DTAG members may not be reimbursed for travel, per diem, and other expenses incurred in connection with their duties as DTAG members.

How to apply: Applications in response to this notice must contain the following information: (1) Name of applicant; (2) affirmation of U.S. citizenship; (3) organizational affiliation and title, as appropriate; (4) mailing address; (5) work telephone number; (6) e-mail address; (7) resumé; and (8) summary of qualifications for DTAG membership.

This information may be provided via two methods:

- *E-mailed to the following address: Frantza@state.gov.* In the subject field, please write, ''DTAG Application.''
- *Send in hardcopy to the following address:* Alexandra Frantz, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC 20522–0112.

All applications must be postmarked by March 10, 2008.

Dated: February 5, 2008.

Robert S. Kovac,

Designated Federal Official, Defense Trade Advisory Group, Department of State.

[FR Doc. E8–2495 Filed 2–8–08; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) During the Week Ending November 9, 2007

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*).

The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2007–0037.

Date Filed: November 7, 2007.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: November 28, 2007.

Description: Application of MK Airlines Limited d/b/a British Global Airlines (''BGB'') requesting exemption authority to transport property and mail in foreign charter air transportation between a point or points in the United Kingdom, and a point or points in the United States, either directly or via intermediate or beyond points, with or without stopovers and the right to operate Fifth Freedom cargo charters as authorized on an individual basis under 14 CFR part 212; and a foreign air carrier permit and exemption in foreign charter air transportation of property and mail between (i) a point or points behind any Member State(s) of the European Union, via a point or points in any Member State(s) of the European Union and intermediate points, on the one hand, and a point or points in the United States and beyond on the other hand; (ii) all-cargo charter flights between the United States and any point or points without prior approval; (iii) other charter foreign air transportation of property and mail pursuant to the prior approval requirements under 14 CFR part 212; and (iv) transportation authorized by any additional route or rights made available to European Community carriers in the future. BGB also seeks exemption authority to offer and to contract for the services described prior to March 30, 2008.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–2475 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) During the Week Ending November 2, 2007

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under subpart B (formerly subpart Q) of the Department of Transportation's Procedural Regulations (see 14 CFR 301.201 *et seq.*).

The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2007–0028.

Date Filed: October 29, 2007.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: November 19, 2007.

Description: Application of Hawaiian Airlines, Inc. requesting certificate authority from the United States to the Philippines and related integration authority as provided in the Notice issued August 23, 2005 in Docket OST–2005–22228.

Docket Number: DOT–OST–2007–0030.

Date Filed: October 31, 2007.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: November 21, 2007.

Description: Application of Scandinavian Airlines System (SAS) requesting an exemption and an amended foreign air carrier permit authorizing SAS to conduct operations to and from the United States to the full extent authorized by the recently signed United States-European Union Air Transport Agreement, for flights operations on or after March 30, 2008, including authority to engage in: (i) Foreign scheduled and charter air transportation of persons, property and mail from any point or points behind any Member State of the European Union, via any point or points in the United States and beyond; (ii) foreign scheduled and charter air transportation of persons, property and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area; (iii) foreign scheduled and charter cargo air transportation between any point or points in the United States and any point or points; (iv) other charters pursuant to prior approval requirements; and (v) transportation authorized by any additional route rights made available to European Community carriers in the future.

Docket Number: DOT–OST–2005–20395.

Date Filed: November 2, 2007.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: November 23, 2007.

Description: Amendment No. 1 of Flyjet Limited d/b/a Silverjet (Silverjet) to its application for a foreign air carrier permit and requesting an exemption to seek expanded authority to permit it to engage in: (a) Foreign scheduled and charter air transportation of persons, property, and mail from any point or points behind any Member State of the European Union, via any point or points in any Member state and via intermediate points, to any point or points in the United States and beyond; (b) foreign scheduled and charter air transportation of persons, property and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area; (c) foreign scheduled and charter cargo air transportation between any point or points in the United States and any point or points; (d) other charters; and (e) transportation authorized by any additional route rights made available to European community carriers in the future.

Docket Number: DOT–OST–2007–0033.

Date Filed: October 30, 2007.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: November 20, 2007.

Description: Application of WestCan International Airlines, Inc. requesting a foreign air carrier permit and an exemption for non-scheduled, all-cargo charter flights between Canada and the United States and its possessions.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–2479 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending November 9, 2007

The following Agreements were filed with the Department of Transportation under the sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1383 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: DOT–OST–2007–0041.

Date Filed: November 8, 2007.

Parties: Members of the International Air Transport Association.

Subject: TC123 South Atlantic. Expedited Resolution 002bc and Specified Fares Tables. Package/expedited (PTC123 SATL 0388). Intended effective date: 15 December 2007.

Docket Number: DOT–OST–2007–0042.

Date Filed: November 8, 2007.

Parties: Members of the International Air Transport Association.

Subject: TC12 Mexico, Mid Atlantic, South Atlantic—Europe. (Memo PTC12 MEX–EUR 0094). Minutes: TC12 Passenger Tariff Coordinating Conference Geneva, 3 October 2007. PTC12 Mexico, Mid Atlantic, South Atlantic—Europe. Minutes (Memo PTC12 MEX–EUR 0096). Intended effective date: 1 December 2007.

Docket Number: DOT–OST–2007–0043.

Date Filed: November 8, 2007.

Parties: Members of the International Air Transport Association.

Subject: TC23/123 Africa-South East Asia. Expedited Resolutions and Specified Fares Tables. Intended effective date: 1 November 2007.

Docket Number: DOT–OST–2007–0044.

Date Filed: November 8, 2007.

Parties: Members of the International Air Transport Association.

Subject: Expedited Resolution 002ar (PTC123 0387). Intended effective date: 15 December 2007.

Docket Number: DOT–OST–2007–0045.

Date Filed: November 8, 2007.

Parties: Members of the International Air Transport Association.

Subject: TC1 Longhaul Package Resolutions. (Memo PTC1 0364). Intended effective date: 1 January 2008.

Docket Number: DOT–OST–2007–0046.

Date Filed: November 8, 2007.

Parties: Members of the International Air Transport Association.

Subject: TC23/123 Middle East-South East Asia. Expedited Resolutions and Specified Fares Tables. Intended effective date: 1 November 2007.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–2500 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2007–0108]

National Task Force to Develop Model Contingency Plans to Deal With Lengthy Airline On-Board Ground Delays

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice of membership and first meeting of advisory committee.

SUMMARY: This notice announces the membership and the first meeting of the National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays.

DATES: The first meeting of the Task Force is scheduled for February 26, 2008, from 8:30 a.m. to 5 p.m., Eastern Time.

ADDRESSES: The first meeting of the Task Force will be held at the U.S. Department of Transportation (U.S. DOT), 1200 New Jersey Avenue, SE., Washington, DC, in the Oklahoma City Conference Room on the lobby level of the West Building.

FOR FURTHER INFORMATION OR TO CONTACT THE DEPARTMENT CONCERNING

THE TASK FORCE:
Livaughn Chapman, Jr., or Kathleen Blank-Riether, Office of the General Counsel, U.S. Department of Transportation, 1200 New Jersey Ave., SE., W–96–429, Washington, DC 20590–0001; Phone: (202) 366–9342; Fax: (202) 366–7152; E-mail: *Livaughn.Chapman@dot.gov*, or *Kathleen.Blankriether@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

DOT's Office of Inspector General recommended, in its audit report, entitled ''Actions Needed to Minimize Long, On-Board Flight Delays,'' issued on September 25, 2007, that the Secretary of Transportation establish a national task force of airlines, airports, and the Federal Aviation Administration to coordinate and develop contingency plans to deal with lengthy delays, such as working with carriers and airports to share facilities and make gates available in an emergency.

To effectuate this recommendation, the Department published a notice of intent to form an advisory committee in the **Federal Register** on December 20, 2007 (72 FR 72435). This notice, consistent with the requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, announced the establishment of the Task Force and invited comments, as well as nominations and applications for membership. The Task Force Charter is attached as Appendix 1.

A total of thirty-four (34) applications/nominations for membership on the Task Force were submitted to the docket. In selecting the members of the Task Force, the Department attempted to achieve a balanced membership representing a broad cross-section of the diverse agencies, organizations and individuals that represent airlines, airports, consumer groups and other interested entities in the United States. We also contacted some organizations that had not submitted an application for membership by the January 4 deadline, but whose membership in the Task Force we believed would be beneficial, to encourage their participation. The Secretary of Transportation has now named the members of the Task Force, and their names are listed below as Appendix 2 to this notice. In addition to the Task Force members named by the Secretary, individuals from the Department of Homeland Security, the Federal Aviation Administration, and the Office of the Secretary will participate in the Task Force as non-member participants.

As noted above, the first meeting of the Task Force will take place on February 26, 2008. The agenda topics for the first meeting will include: (1) Orientation about the Federal Advisory Committee Act procedures and the purpose of the task force; (2) an introduction of the issues and discussion of contingency plans, and (3) establishment of working groups. A period of time for public comments, if any, will also be provided.

The Department anticipates that the Task Force will meet at least three additional times in 2008. It is anticipated that all meetings will be held in Washington, DC at the U.S. DOT headquarters building. The Department will publish notices in the **Federal Register** to announce the dates, times, and locations of future meetings. Meetings of the Task Force are open to the public, and time will be provided for comments by members of the public. Since access to the U.S. DOT headquarters building is controlled for security purposes, any member of the general public who plans to attend the first meeting must notify the Department contact noted above ten (10) calendar days prior to the meeting. Attendance will be necessarily limited by the size of the meeting room.

Members of the public may present written comments at any time and, at the discretion of the Chairman and time permitting, oral comments at the meeting. Any oral comments permitted must be limited to agenda items and will be limited to five (5) minutes per person. Members of the public who wish to present oral comments must notify the Department contact noted above via e-mail that they wish to attend and present oral comments at least ten (10) calendar days prior to the meting. For this February 20 meeting, no more than one hour will be set aside for oral comments. Although written material may be filed in the docket at any time, comments regarding upcoming meeting topics should be sent to the Task Force docket, (10) calendar days prior to the meeting. Members of the public may also contact the Department contact noted above to be placed on the Task Force mailing list.

Persons with a disability requiring special accommodations, such as an interpreter for the hearing impaired, should contact the Department contact noted above at least seven (7) calendar days prior to the meeting.

Notice of this meeting is provided in accordance with the FACA and the General Services Administration regulations covering management of Federal advisory committees. (41 CFR part 102–3.)

Conclusion

The First Meeting of the National Task force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays will be held on February 26, 2008, from 8:30 a.m. to 5 p.m., Eastern Time, at the U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC, in the Oklahoma City Conference Room on the lobby level of the West Building.

Issued on: February 5, 2008.

Samuel Podberesky,

Assistant General Counsel for Aviation Enforcement & Proceedings, U.S. Department of Transportation.

Appendix 1—Charter for the National Task Force to Develop Model Contingency Plans to Deal With Lengthy Airline On-Board Ground Delays

Federal Advisory Committee Charter

National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays

U.S. Department of Transportation

1. *Purpose:* This charter establishes the National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays pursuant to the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. 2, and sets forth policies for its operations.

2. *Scope and Objectives:*

a. The Task Force will develop model contingency plans for minimizing the impact of lengthy airline on-board ground delays.

b. The Task Force will be responsible for reviewing incidents involving long, on-board ground delays and their causes; identifying trends and patterns of such events; and recommending workable solutions for mitigating the on-board consumer impact of extraordinary flight disruptions.

c. The Task Force will report to the Secretary of Transportation the results of its consideration and a description of model contingency plans it develops.

d. The Task Force will not exercise program management, regulatory or program guidance responsibilities. It will make no decision directly affecting the programs on which it provides advice. The Task Force will provide a forum for the development, consideration, and communication from a knowledgeable and independent perspective of a strategy for dealing with

lengthy on-board ground delays nationwide.

3. *Duties:* The Task Force will carry out the following tasks:

a. Develop model contingency plans to deal with lengthy air carrier on-board delays.

b. Review incidents involving long, on-board ground delays and their causes; identify trends and patterns of such events; and recommend workable solutions for mitigating the on-board consumer impact of extraordinary flight disruptions.

c. Review existing airline and airport contingency plans for extended tarmac delays for best practices.

d. Report to the Secretary of Transportation the results of its consideration and a description of the model contingency plans developed.

4. *Duration:* The Task Force will remain in existence for 1 year from the effective date of this charter, unless recommended for termination or renewal by the Secretary of Transportation.

5. *Official to Whom the Task Force Reports:* The Task Force will report to the Secretary of Transportation through the sponsor.

6. *Sponsor and Agency Providing Support:* The Office of the General Counsel serves as sponsor of the Task Force and has designated the Assistant General Counsel for Aviation Enforcement and Proceedings as the Designated Federal Official and Chairman of the Task Force. The Sponsor has designated the Federal Aviation Administration's Associate Administrator for Airports as the Vice Chairman of the Task Force. The Chairman of the Task Force will direct the affairs of the Task Force and will provide necessary administrative support, as required by the Federal Advisory Committee Act. At the request of the Chairman, the Vice Chairman will perform these duties.

7. *Delegation:* The Chairman is delegated the authority to require special reports under 49 U.S.C. 41708 to effectuate the duties of the Task Force. The Chairman is also delegated the authority to issue **Federal Register** notices regarding the workings of the Task Force.

8. *Membership:*

a. The Task Force will be composed of individuals appointed by the Secretary of Transportation. Task Force members will be Regular Government Employees and Representatives of airlines, airports and consumer groups in the U.S.

b. Nonparticipation by any member in Task Force activities will be sufficient reason for the appointment of a replacement member by the Secretary of Transportation.

c. The Task Force will ensure that the public is able to present its views to the Task Force in accordance with the Federal Advisory Committee Act.

9. *Task Force Officers:* The Chairman will conduct each meeting using generally accepted meeting management techniques, provide an opportunity for participation by each member and by public attendees, ensure adherence to the agenda, maintain order, and prepare any recommendations to be submitted to the Secretary of Transportation. At the request of the Chairman, the Vice Chairman will perform these duties.

10. *Meetings:*

a. Meetings will be held at the call of or with the advance approval of the Designated Federal Official. The Task Force will meet approximately 4 times the first year in Washington, DC. Special meetings and working group meetings may be called as necessary. Notice of each scheduled meeting will be published in the **Federal Register**.

b. All meetings will be open to the public. Members of the public will be permitted to appear before or file statements with the Task Force. The Designated Federal Official must be present at each Task Force meeting. The official has the authority to adjourn the meeting whenever such action is deemed to be in the public interest. A quorum exists when at least one-half of the appointed members are present. A quorum must exist for any official action, including voting, to occur. In any situation involving voting, the majority vote of members present will prevail. An agenda for each meeting must be approved in advance by the Designated Federal Official.

11. *Compensation:* Members of the Task Force are responsible for their own travel and per diem expenses.

12. *Costs:* Operating expenses are borne by the Task Force Sponsor. The estimated annual cost to the government is $20,000 inclusive of support, report writing, meeting costs, travel, and other logistics.

13. *Availability of Records:* Pursuant to Section 552 of Title 5, United States Code, the records, reports, minutes, agenda, and other documents made available to or by the Task Force will be available for public inspection and duplication in the Office of the Secretary of Transportation. A docket will be established for this Task Force to accomplish this result. To the extent that there is a discussion of issues concerning on-going rulemaking proceedings during a Task Force meeting, the minutes of that meeting will be placed in the appropriate docket.

14. *Reports:* The Designated Federal Official will furnish detailed minutes of each meeting to the Sponsor. The minutes contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Task Force. The Chairman will certify the accuracy of the minutes.

15. *Working Groups:*

a. The Task Force may establish working groups to perform specific assignments with the approval of the Designated Federal Official. The Chairman may designate members from either the Task Force or the public to serve on working groups. Any Working Group Chairman will be a Task Force member. Recording or videotaping of working group meetings may be performed only with the Designated Federal Official's approval.

b. Any recommendations to the Department by working groups are subject to approval by the Task Force as a whole.

16. *Filing Date:* January 3, 2008 is the filing date and the effective date of this charter which will expire 1 year from this filing date, unless sooner terminated or extended.

Appendix 2—Membership of the National Task Force to Develop Model Contingency Plans to Deal With Lengthy On-Board Ground Delays

Samuel Podberesky, Chairman, Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation.

D. Kirk Shaffer, Vice Chairman, Associate Administrator for Airports, Federal Aviation Administration.

Basil Barimo, Vice President, Operations and Safety, Air Transport Association.

Brian Bartal, Project Manager, American Eagle Airlines.

Roger Cohen, President, Regional Airline Association.

Michael C. Collins, Disability Rights Advocate.

James M. Crites, Executive Vice President, Operations, Dallas/Fort Worth International Airport.

Benjamin R. DeCosta, Aviation General Manager, Hartsfield-Jackson International Airport.

George F. Doughty, Executive Director, Lehigh-Northampton Airport Authority.

Charles M. Durham, III, Sr. Manager of Dispatch, ExpressJet Airlines.

Edward P. Faberman, Executive Director, Air Carrier Association of America.

James J. Gaydos, Director, Airport Services, American Airlines.

Kate Hanni, Founder/Spokesperson, Coalition for an Airline Passengers' Bill of Rights.

Steve Hozdulick, Senior Director—Operational Performance, Southwest Airlines.

Kevin Hudson, Senior Manager, Operational Performance, Tracking and Reporting, Frontier Airlines.

William R. Lange, Vice President, Safety & Compliance, Compass Airlines.

Douglas E. Lavin, Regional Vice President, International Air Transport Association—North America.

Tony Lefebvre, Senior Vice President—Customer Service, Spirit Airlines.

D. Leo Malloy, Jr., Vice President, Customer Service, Skyway Airlines/Midwest Connect.

Alex Marren, Vice President, Operational Services, United Airlines.

Deborah C. McElroy, Executive Vice President, Policy and External Affairs, Airports Council International—North America.

Robert K. Muhs, Vice President, System Operations Control, Northwest Airlines.

Patrick V. Murphy, Aviation Consultant, representing U.S. Airways.

Capt. Larry Newman, Chairman, Air Traffic Service Group, Air Line Pilots Association, International.

Bradley, D. Penrod, CEO/Executive Director, Allegheny County Airport Authority.

Paul. M. Ruden, Senior Vice President, Legal and Industry Affairs, American Society of Travel Agents.

Daniel Rutenberg, Vice President, International Airline Passengers Association.

Melissa Sabatine, Vice President of Regulatory Affairs, American Association of Airport Executives.

Leo J. Schefer, President, Washington Airports Task Force.

Lysa C. Scully, Assistant Director, Customer, Cargo, Concessions and Airport Services, the Port Authority of New York and New Jersey.

Jim Tabor, Vice President of Operations, AirTran Airways.

Daniel A. Weiss, Managing Director, International Policy and Regulatory Affairs, Continental Airlines.

Warren R. Wilkinson, Vice President of Government Affairs and Corporate Communications, Republic Airways.

William H. Williams, Jr., Aviation Director, North Carolina Department of Transportation.

Thomas E. Zoeller, President and CEO, National Air Carrier Association.

[FR Doc. E8–2459 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notification of Petition for Approval; Railroad Safety Program Plan

Although not required, the Federal Railroad Administration (FRA) is providing notice that it has received a petition for approval of a Railroad Safety Program Plan (RSPP) submitted pursuant to Title 49 Code of Federal Regulations (CFR) part 236, subpart H. The petition is listed below, including the party seeking approval, and the requisite docket number. FRA is not accepting comments on this RSPP.

Ohio Central Railroad System

[Docket Number FRA–2008–0003]

The Ohio Central Railroad System (OCRS) submitted a petition for approval of an RSPP. The petition, the RSPP, and any related documents have been placed in the requisite docket (FRA–2008–0003) and are available for public inspection.

Interested parties are invited to review the RSPP and associated documents at the DOT Docket Management Facility during regular business hours (9 a.m.–5 p.m.) at 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590. All documents in the public docket are also available for inspection and copying on the internet at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications received into any of our dockets by name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC on February 4, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–2394 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Big West Oil, LLC

[Waiver Petition Docket Number FRA–2007–0025]

The Big West Oil, LLC (FLYJ), a Class III railroad, seeks a waiver of compliance from the requirements of 49 CFR part 223.11 *Requirements for existing locomotives* for locomotive number 1. Specifically, FLYJ petitioned FRA for a waiver for a 600 horsepower diesel electric locomotive, model SW–600, built by the Electro Motive Division of General Motors in 1962. This locomotive is primarily used for industrial switching within an enclosed facility adjacent to the Big West Oil Refinery in Salt Lake City, Utah. The locomotive is stored during non-operational hours within a secure area of the refinery.

Locomotive number 1 is used on a limited basis for industrial switching over 3.5 miles of privately owned track. There are two (2) highway/rail crossings at grade through the industrial property with no overpasses or bridges. The railroad operates Monday to Friday, an average of 4 hours per day, during daylight hours, with a 10 mph speed restriction through the industrial complex. There have been no reports of glazing vandalism along this right-of-way since the operation of this locomotive began in 1999.

The petitioner believes that this locomotive can be safely operated throughout the industrial complex with the current non-compliant safety-type glazing. The cost to FLYJ for installation of all new window frames and compliant FRA Types I & II glazing is significant with only a marginal increase in safety due to the low speed.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2007–

0025) and may be submitted by any of the following methods:

Web site: http://www.regulations.gov. Follow the online instructions for submitting comments.

Fax: 202–493–2251.

Mail: Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

Hand Delivery: 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC on February 4, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–2393 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

BNSF Railway Company

[Docket Number FRA–2007–28812]

BNSF Railway Company (BNSF) seeks a waiver of compliance with certain requirements of 49 CFR part 232—*Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of Train Devices*, and 49 CFR part 215—*Railroad Freight Car Safety Standards*. Specifically, BNSF seeks relief to permit trains received at the U.S./Mexico border at Eagle Pass, Texas (Eagle Pass), from the Ferrocarriles de Mexico, to move from the interchange point without performing the regulatory tests and inspections specified in CFR part 215 and § 232.205(a)(1) at that location. BNSF proposes moving the trains from the border at Milepost (MP) 34 on the Union Pacific Railroad Company's Eagle Pass subdivision, to the Ryan's Ruin Horan Siding at MP 20, a distance of 14 miles where required FRA inspections will be performed. BNSF claims that granting the waiver would expedite train movements and avoid blockages of crossings in Eagle Pass.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2007–28812) and may be submitted by any of the following methods:

Web site: *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Fax: 202–493–2251.

Mail: Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

Hand Delivery: 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov*.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC, on February 4, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–2395 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

FTA Supplemental Fiscal Year 2008 Apportionments and Allocations and Program Information (Bus and Bus Facilities Program and Alternative Analysis Program Earmarks Designated in the Committee Reports Accompanying the Consolidated Appropriations Act, 2008, Extended and Reprogrammed Earmarks and Corrections to Appendix A)

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: Division K of the ''Consolidated Appropriations Act, 2008'' (Pub. L. 110–161), signed into law by President Bush on December 26, 2007, made funds available for all of the surface transportation programs of the Department of Transportation (DOT) for the Fiscal Year (FY) ending September 30, 2008. This notice provides information on the FY 2008 earmarks in the Bus and Bus Facilities program and the Alternatives Analysis program that were in the committee reports that accompanied the Consolidated Appropriations Act, 2008 and corrects Appendix A of the January 28, 2008, **Federal Register** notice. The notice also publishes prior year Bus and Bus Facilities and New Starts earmarks that were extended or reprogrammed in the committee reports.

FOR FURTHER INFORMATION CONTACT: For general information about this notice contact Henrika Buchanan-Smith, Office

of Transit Programs, at (202) 366–2053. Please contact the appropriate FTA regional office for any specific requests for information or technical assistance. Appendix A at the end of this notice includes contact information for FTA regional offices.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Overview
II. FTA Programs
A. Capital Investment Program (49 U.S.C. 5309)—Bus and Bus-Related Facilities
B. Capital Investment Program (49 U.S.C. 5309)—New Starts
C. Alternatives Analysis Program (49 U.S.C. 5339)
Tables
11A. FTA FY 2008 Section 5309 Bus and Bus-related Allocations
12A. FTA Prior Year Unobligated Section 5309 Bus and Bus-related Facilities Allocations
14. Revised FTA Prior Year Unobligated Section 5309 New Starts Allocations
22. FTA FY 2008 Section 5339 Alternative Analysis Allocations
Appendix A

I. Overview

This document allocates the FY 2008 funds designated for specific projects under the committee reports accompanying Division K of the Consolidated Appropriations Act, 2008 (Pub. L. 110–161, December 26, 2007), for the Bus and Bus Facilities program and the Alternatives Analysis Program. It also includes extended or redirected project funds identified in those reports, but it does not include extended or redirected project funds from the most recent congressional clarification letter dated December 19, 2007. FTA will issue directions regarding those projects not included at a later date.

II. FTA Programs

This section of the notice covers FY 2008 funding that was allocated to projects under the Bus and Bus Facilities program and the Alternatives Analysis Program in the committee reports accompanying the Consolidated Appropriations Act. It also includes New Starts and Bus and Bus Facilities projects that were extended or reprogrammed in the committee reports.

A. Capital Investment Program (49 U.S.C. 5309)—Bus and Bus-Related Facilities

This program provides capital assistance for new and replacement buses and related facilities. Funds are allocated on a discretionary basis. Eligible purposes are acquisition of buses for fleet and service expansion, bus maintenance and administrative facilities, transfer facilities, bus malls, transportation centers, intermodal terminals, park-and-ride stations, acquisition of replacement vehicles, bus rebuilds, bus preventive maintenance, passenger amenities such as passenger shelters and bus stop signs, accessory and miscellaneous equipment such as mobile radio units, supervisory vehicles, fare boxes, computers, and shop and garage equipment. Eligible applicants are State and local governmental authorities. Eligible subrecipients include other public agencies, private companies engaged in public transportation and private non-profit organizations.

The information in this section supplements the information that was included in the FTA Apportionment notice published in the **Federal Register** on January 28, 2008.

For more information about Bus and Bus-Related Facilities contact Maria Wright, Office of Transit Programs, at (202) 366–2053.

1. FY 2008 Funding Availability

The Consolidated Appropriations Act, 2008, provides $823,052,962 for the bus and bus facilities program. The amount of funding for projects designated in Section 3044 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA–LU) for Bus and Bus-Related Facilities in FY 2008 is $497,670,593. The amount of funding for projects designated in the Consolidated Appropriations Act, 2008, is $220,599,862. The balance remains unallocated, as shown in the following table. The Consolidated Appropriations Act, 2008, included the proviso, ''that funds available to carry out the bus program under section 5309 of title 49, United States Code, which are otherwise allocated under this act or under SAFETEA–LU, not more than 10 percent may be expended in furtherance of the Department of Transportation's Congestion Initiative or any other new highway congestion initiative.''

BUS AND BUS FACILITY PROGRAM

Total Appropriation	$927,750,000
Ob lim. Reduction/Rescission	−104,697,038
Oversight Deduction	−8,230,530
Total Available for Allocation	814,822,432
SAFETEA–LU Statutory Provisions Projects	497,670,593
Consolidated Appropriations Act Designations	220,599,862
Unallocated	96,551,977

The Consolidated Appropriations Act, 2008, allocations for the Bus and Bus-Related Facilities program are listed in Table 11A. The prior years' earmarks that were extended or reprogrammed in the committee reports are listed in Table 12A.

2. Basis for Allocations

Funds are provided annually under Section 5309 for discretionary allocation for bus and bus facilities projects. There were 313 projects designated in the committee reports accompanying the Consolidated Appropriations Act, 2008, and 32 that were extended or reprogrammed by the Act.

3. Requirements

FTA honors Congressional earmarks for the purpose designated or for purposes eligible under the program. The Consolidated Appropriations Act, 2008, did not include the expanded eligibility of a ''notwithstanding'' provision. However, section 186 of that Act, in relevant part, states that funds provided within FTA's accounts shall be made available for eligible programs, projects and activities at a level of 98 percent of the corresponding amounts identified in the explanatory statement accompanying the Act for Alternatives Analysis and Bus and Bus Facilities. Therefore, if an applicant wants to use FY 2008 funds identified under the Bus and Bus-Related Facilities Program for eligible project activities outside the scope of the project description included in report language, it must submit a request for a legislative change to the House and Senate Committees on Appropriations.

Also, grants made under the Bus and Bus-Related Facilities program must meet all eligibility requirements as outlined in Section 5309 unless otherwise specified in law.

4. Period of Availability

The FY 2008 Bus and Bus-Related Facilities funds not obligated for their original purpose as of September 30, 2010, may be made available for other projects under 49 U.S.C. 5309. Projects that were reprogrammed in the committee reports are available until September 30, 2010; however, projects that were extended in the committee reports are only available until September 30, 2008.

B. Capital Investment Program (49 U.S.C. 5309)—New Starts

The information in this section supplements the information that was included in the FTA Apportionment notice published in the **Federal Register** on January 28, 2008, and includes earmarks extended in report language. For more information contact Cheryl Oliver, Office of Program Management, at (202) 366–2053.

1. FY 2008 Funding Availability

The Consolidated Appropriations Act, 2008, provides $1,569,091,997 for Capital Investment Grants. The total amount allocated for New Starts including Small Starts is $1,534,492,165, as shown in the table below.

NEW STARTS

Total Appropriation	$1,569,091,997
Oversight Deduction	15,690,920
Total Funds to be Allocated	1,553,401,077
Funds Allocated to Specific Projects in Table 13	[a] 1,534,492,165
Unallocated Funds	18,908,912

[a] Includes $20 million for the Denali Commission and Alaska and Hawaii Ferry projects.

FY 2008 New Start project allocations are listed in Table 13 of the **Federal Register** published on January 28, 2008. The revised carryover project allocations are listed in Revised Table 14 of this notice.

2. Basis for Allocation

Congress included authorizations for specific New Starts projects in SAFETEA–LU and included statutory takedowns from the program for Alaska and Hawaii Ferryboats and the Denali Commission. The Consolidated Appropriations Act, 2008, appropriated funds for specific projects and the statutory takedowns. Congress also extended several New Starts earmarks in the committee reports that accompanied the Consolidated Appropriations Act, 2008. The carryover New Starts funding is shown in Revised Table 14.

3. Requirements

New Starts projects are subject to a series of approvals related to planning and project development set forth in 49 CFR Part 611. FTA has published a number of rulemakings and interim guidance documents related to the New Starts program since the passage of SAFETEA–LU. Grantees should reference the FTA Web site at *www.fta.dot.gov* for the most current program guidance about project development and management.

4. Period of Availability

New Starts funds remain available for three fiscal years (including the fiscal year the funds are made available or appropriated plus two additional years.) FY 2008 funds remain available through September 30, 2010. Funds extended by Congress in the report accompanying the Consolidated Appropriations Act, 2008, remain available until September 30, 2008.

5. Other Program or Apportionment Related Information and Highlights

Prior year unobligated allocations for New Starts in the amount of $361,829,170 remain available for obligation in FY 2008. This amount includes $164,608,910 in FY 2005 and prior years, $126,973,589 in FY 2006 and $70,246,671 in FY 2007 unobligated allocations. These unobligated amounts are displayed in Revised Table 14.

C. Alternatives Analysis Program (49 U.S.C. 5339)

The Alternatives Analysis Program provides grants to States, authorities of the States, metropolitan planning organizations, and local government authorities to develop studies as part of the transportation planning process. These studies include an assessment of a wide range of public transportation alternatives designed to address a transportation problem in a corridor or subarea; the development of sufficient information to enable the Secretary to make the findings of project justification and local financial commitment required; the selection of a locally preferred alternative; and the adoption of the locally preferred alternative as part of the state or regional long-range transportation plan.

The information in this section supplements the information that was included in the FTA Apportionment notice published in the **Federal Register** on January 28, 2008. For more information about this program contact Ron Fisher, Office of Planning and Environment, at (202) 366–4033.

1. FY 2008 Funding Availability

The Consolidated Appropriations Act, 2008, provides $24,691,100 to the Alternatives Analysis Program (49 U.S.C. 5339).

ALTERNATIVES ANALYSIS PROGRAM

Total Appropriation	$25,000,000
Ob lim. Reduction/Rescission	−308,900
Total Available	24,691,100

The project allocations are listed in Table 22.

2. Basis for Allocation of Funds

The Consolidated Appropriations Act, 2008, provided an obligation limitation of $24,691,100 derived from reducing the appropriated $25,000,000 by two percent. Projects funded using FY 2008 Alternative Analysis funding were designated in the committee reports that accompanied the Act. Alternative Analysis Program allocations are displayed in Table 22.

3. Requirements

Section 186 of Consolidated Appropriations Act, in relevant part, states that funds provided within FTA's accounts shall be made available for eligible programs, projects and activities at a level of 98 percent of the corresponding amounts identified in the explanatory statement accompanying the Act for Alternatives Analysis and Bus and Bus Facilities. Eligible projects include planning and corridor studies and the adoption of locally preferred alternatives within the fiscally constrained Metropolitan Transportation Plan for that area. Funds awarded under the Alternatives Analysis Program must be shown in the UPWP for MPO(s) with responsibility for that area. Pre-award authority applies to these funds after Congress appropriates funds for these projects. Unless otherwise specified in law, grants made under the Alternatives Analysis Program must meet all eligibility requirements as outlined in Section 5309. If an applicant wants to use FY 2008 funds identified under Alternatives Analysis for eligible project activities outside the scope of the project description included in report language, it must submit a request for a legislative change to the House and Senate Committees on Appropriations.

4. Period of Availability

Funds designated for specific Alternatives Analysis Program projects remain available for obligation for three fiscal years, the year of appropriation plus two additional fiscal years. The FY 2008 funding for projects included in this notice remains available through September 30, 2010. Alternatives Analysis funds not obligated in an FTA grant for their original purpose at the end of the period of availability will generally be made available for other projects.

James S. Simpson

Administrator.

Appendix A

PTA Regional Offices

Richard H. Doyle, Regional Administrator, Region 1—Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617 494–2055.

States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Brigid Hynes-Cherin, Regional Administrator, Region 2—New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. No. 212 668–2170.

States served: New Jersey, New York

Letitia Thompson, Regional Administrator, Region 3—Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215 656–7100.

States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia.

Yvette Taylor, Regional Administrator, Region 4—Atlanta, 230 Peachtree Street, NW, Suite 800, Atlanta, GA 30303, Tel. 404 865–5600.

States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands.

Marisol Simon, Regional Administrator, Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312 353–2789.

States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Robert C. Patrick, Regional Administrator, Region 6—Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817 978–0550.

States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.

Mokhtee Ahmad, Regional Administrator, Region 7— Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816 329–3920.

States served: Iowa, Kansas, Missouri, and Nebraska.

Terry Rosapep, Regional Administrator, Region 8—Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300.

States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.

Leslie T. Rogers, Regional Administrator, Region 9—San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. 415 744–3133.

States served: American Samoa, Arizona, California, Guam Hawaii, Nevada, and the Northern Mariana, Islands

Rick Krochalis, Regional Administrator, Region 10—Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. 206 220–7954.

States served: Alaska, Idaho, Oregon, and Washington

BILLING CODE 4910–57–P

FEDERAL TRANSIT ADMINISTRATION

TABLE 11A

FY 2008 Section 5309 Bus and Bus-Related Facilities Allocations

State	Earmark ID	Project	Original Allocation	Allocation
AK	E2008-BUSP-0653	Statewide Bus and Bus Facilities Enhancements	$375,000	$367,500
AL	E2008-BUSP-0654	Alabama Senior Transportation Program	700,000	686,000
AL	E2008-BUSP-0655	Birmingham Intermodal Transit Facility	400,000	392,000
AL	E2008-BUSP-0656	City of Mobile's Transit System	1,400,000	1,372,000
AL	E2008-BUSP-0657	Huntsville, AL Multimodal Dallas Branch	1,250,000	1,225,000
AR	E2008-BUSP-0658	State of Arkansas, Bus and Bus Facilities	3,350,000	3,283,000
AZ	E2008-BUSP-0659	Bus Expansion--Phoenix, Avondale, Glendale	250,000	245,000
AZ	E2008-BUSP-0660	Buses and Bus Maintenance Facility, Tucson	1,000,000	980,000
AZ	E2008-BUSP-0661	Construction of Intermodal Center, Scottsdale	200,000	196,000
AZ	E2008-BUSP-0662	East Valley Bus Maintenance Facility, Tempe	400,000	392,000
AZ	E2008-BUSP-0663	Main Street Bus Rapid Transit Buses, Mesa	500,000	490,000
AZ	E2008-BUSP-0664	Phoenix Regional Heavy Bus Maintenance Facility	500,000	490,000
AZ	E2008-BUSP-0665	Phoenix/Glendale West Valley Operating Facility	750,000	735,000
CA	E2008-BUSP-0666	Anaheim Regional Intermodal Center, Orange County	600,000	588,000
CA	E2008-BUSP-0667	BART Intermodal Station Infrastructure Improvements to Improve Bus Safety and Access	670,000	656,600
CA	E2008-BUSP-0668	Beach Cities Transit Equipment, Redondo Beach	500,000	490,000
CA	E2008-BUSP-0669	Bus Shelters for Bellflower	500,000	490,000
CA	E2008-BUSP-0670	City of Modesto Bus Maintenance Facility	250,000	245,000
CA	E2008-BUSP-0671	Clean Air Bus Purchase Program, Baldwin Park	400,000	392,000
CA	E2008-BUSP-0672	Culver City Multi-Modal Light Rail Station	670,000	656,600
CA	E2008-BUSP-0673	East County Bus Maintenance Facility, El Cajon	350,000	343,000
CA	E2008-BUSP-0674	Ed Roberts Campus - Berkeley	500,000	490,000
CA	E2008-BUSP-0675	Fairfield/Vacaville Intermodal Station	200,000	196,000
CA	E2008-BUSP-0676	Foothill Transit Oriented Neighborhood	500,000	490,000
CA	E2008-BUSP-0677	Inter-County Express Bus, Orange County	500,000	490,000
CA	E2008-BUSP-0678	Los Angeles Southwest College Transit Center	400,000	392,000
CA	E2008-BUSP-0679	Monrovia Transit Village	500,000	490,000
CA	E2008-BUSP-0680	Monterey Salinas Transit Bus Financing	200,000	196,000
CA	E2008-BUSP-0681	Muni Bus Rehabilitation, San Francisco	1,000,000	980,000
CA	E2008-BUSP-0682	Municipal Transit Operators Coalition (MTOC)	1,100,000	1,078,000
CA	E2008-BUSP-0683	Pacific Station Multimodal-Multiuse Facility	500,000	490,000
CA	E2008-BUSP-0684	Palmdale Transportation Center - Parking Lot	250,000	245,000
CA	E2008-BUSP-0685	Palo Alto Intermodal Transit Center	400,000	392,000
CA	E2008-BUSP-0686	Regional Bus Replacement, San Diego	500,000	490,000
CA	E2008-BUSP-0687	Rio Hondo College Buses - Los Angeles	500,000	490,000
CA	E2008-BUSP-0688	Riverside and Corona Transit Centers	700,000	686,000
CA	E2008-BUSP-0689	SamTrans Revenue Collection System	500,000	490,000
CA	E2008-BUSP-0690	San Diego Balboa Park Trolleys	335,000	328,300
CA	E2008-BUSP-0691	San Joaquin Regional Transit District	750,000	735,000
CA	E2008-BUSP-0692	San Luis Rey Transit Center	250,000	245,000
CA	E2008-BUSP-0693	Santa Maria Intermodal Transit Center	500,000	490,000
CA	E2008-BUSP-0694	Street Shuttle Buses for Artesia	600,000	588,000
CA	E2008-BUSP-0695	Transit Access Passenger Integration, Los Angeles	750,000	735,000
CA	E2008-BUSP-0696	Transit Center, California State Univ, Northridge	400,000	392,000
CA	E2008-BUSP-0697	Tri-Delta Transit Park-and-Ride Lots	500,000	490,000
CA	E2008-BUSP-0698	Venice/Robertson Multi-Modal Station	500,000	490,000
CA	E2008-BUSP-0699	VTA Zero Emission Bus Demonstration Program	400,000	392,000
CA	E2008-BUSP-0700	Yolo County Bus Maintenance Facility Improvements	400,000	392,000
CA	E2008-BUSP-0701	Union City Intermodal Station, Union City	400,000	392,000
CO	E2008-BUSP-0702	Colorado Transit Coalition Statewide Request	3,600,000	3,528,000
CT	E2008-BUSP-0703	Bridgeport Intermodal Center	4,395,000	4,307,100
CT	E2008-BUSP-0704	Intermodal Center, Mansfield	500,000	490,000
CT	E2008-BUSP-0705	Norwalk Pulse Point Facility Safety Improvements	150,000	147,000
CT	E2008-BUSP-0706	Norwich Intermodal Transportation Center	2,010,000	1,969,800
CT	E2008-BUSP-0707	Pace Bus Park-N-Ride Facility, Plainfield	250,000	245,000
CT	E2008-BUSP-0708	South Norwalk Intermodal Facility Phase 2	500,000	490,000
CT	E2008-BUSP-0709	West Haven Intermodal Station	600,000	588,000
DC	E2008-BUSP-0710	Union Station Intermodal Transportation Facility	500,000	490,000
DC/MD/VA	E2008-BUSP-0711	WMATA Bus and Bus Facilities	1,140,000	1,117,200
DE	E2008-BUSP-0712	Automotive Based Fuel Cell Hybrid Bus Program	1,005,000	984,900
DE	E2008-BUSP-0713	Replacement of Fixed Route Transit Buses	670,000	656,600
FL	E2008-BUSP-0714	7th Avenue Transit Hub	500,000	490,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 11A

FY 2008 Section 5309 Bus and Bus-Related Facilities Allocations

State	Earmark ID	Project	Original Allocation	Allocation
FL	E2008-BUSP-0715	Basic Transit Infrastructure, Hillsborough	300,000	294,000
FL	E2008-BUSP-0716	Broward Bus Procurement	200,000	196,000
FL	E2008-BUSP-0717	Broward County Southwest Transit Facility	500,000	490,000
FL	E2008-BUSP-0718	Flagler County Bus and Bus Facilities	500,000	490,000
FL	E2008-BUSP-0719	HART Bus and Paratransit Van Acquisition	300,000	294,000
FL	E2008-BUSP-0720	Jacksonville Intermodal Center	500,000	490,000
FL	E2008-BUSP-0721	Jacksonville Transportation Authority, Bus and Bus Facilities	500,000	490,000
FL	E2008-BUSP-0722	Lakeland Area Mass Transit District, Lakeland	300,000	294,000
FL	E2008-BUSP-0723	Lower Keys Shuttle, Key West	300,000	294,000
FL	E2008-BUSP-0724	LYNX Bus Acquisition, Orlando	1,400,000	1,372,000
FL	E2008-BUSP-0725	Miami Lakes Transit Program	300,000	294,000
FL	E2008-BUSP-0726	Miami-Dade Transit Bus Procurement Plan	700,000	686,000
FL	E2008-BUSP-0727	Multi-Modal Transportation Program Boca Raton	350,000	343,000
FL	E2008-BUSP-0728	North Orange/South Seminole ITS Enhanced Circulator, City of Orlando	1,172,500	1,149,050
FL	E2008-BUSP-0729	Palm Beach County AVL/APC & Fareboxes	750,000	735,000
FL	E2008-BUSP-0730	Pasco County Public Transportation (Bus Purchase)	300,000	294,000
FL	E2008-BUSP-0731	Pinellas Suncoast Transit Auth bus replacement	400,000	392,000
FL	E2008-BUSP-0732	PSTA Bus and Bus Facilities, St. Petersburg	260,000	254,800
FL	E2008-BUSP-0733	Sarasota County Area Transit Bus acquisition	500,000	490,000
FL	E2008-BUSP-0734	StarMetro Intelligent Transpo System, Tallahassee	500,000	490,000
FL	E2008-BUSP-0735	Suntran Bus Acquisition, Marion County	200,000	196,000
FL	E2008-BUSP-0736	Town Center Transit Hub in Miramar	400,000	392,000
FL	E2008-BUSP-0737	Winter Haven Transit Bus and Bus Facility	300,000	294,000
GA	E2008-BUSP-0738	Acquisition of MARTA Clean Fuel Buses	3,000,000	2,940,000
GA	E2008-BUSP-0739	Chatham County, Savannah Bus Facility	400,000	392,000
GA	E2008-BUSP-0740	City of Moultrie Intermodal Facility	350,000	343,000
HI	E2008-BUSP-0741	Honolulu Bus and Paratransit Replacement Program	200,000	196,000
HI	E2008-BUSP-0742	Public Transportation Vehicle Enhancement Project	400,000	392,000
HI	E2008-BUSP-0743	Rural Bus Program for Hawaii, Maui and Kauai Counties	1,560,000	1,528,800
IA	E2008-BUSP-0744	Coralville Intermodal Facility	670,000	656,600
IA	E2008-BUSP-0745	Statewide Bus Replacement	4,690,000	4,596,200
ID	E2008-BUSP-0746	Idaho Transit Coalition Buses and Bus Facilities	3,212,000	3,147,760
ID	E2008-BUSP-0747	Treasure Valley Transit Facilities	288,000	282,240
IL	E2008-BUSP-0748	Berwyn Intermodal Transit Facility	400,000	392,000
IL	E2008-BUSP-0749	Chicago Transit Authority/69th Street Transit Center	500,000	490,000
IL	E2008-BUSP-0750	Grand Ave. Transit Signal Priority Lake County	320,000	313,600
IL	----------	Illinois Bus and Bus Facilities	6,000,000	----------
IL	E2008-BUSP-0751	Downstate Illinois Replacement Buses		2,940,000
IL	E2008-BUSP-0752	Bus and Bus Facilities in Bloomington, Galesburg, Macomb, Peoria, and Rock Island		2,450,000
IL	E2008-BUSP-0753	Macomb Maintenance Facility		245,000
IL	E2008-BUSP-0754	Kankakee's River Valley Metro Operations Facility		245,000
IL	E2008-BUSP-0755	MetroLINK Transit Facility, Rock Island	500,000	490,000
IL	E2008-BUSP-0756	Mobile Data Terminal/Chicago Paratransit Vehicles	200,000	196,000
IL	E2008-BUSP-0757	Mobile data terminals for Pace, Arlington Hts	400,000	392,000
IL	E2008-BUSP-0758	Multimodal Center, Normal	250,000	245,000
IL	E2008-BUSP-0759	PACE South Suburban Signal Transit Signal Priority	250,000	245,000
IL	E2008-BUSP-0760	PACE Suburban Bus Roosevelt Rd/Arlington Hts	250,000	245,000
IL	E2008-BUSP-0761	River Valley Metro, Kankakee	500,000	490,000
IN	E2008-BUSP-0762	City Bus Replacement Plan Lafayette	200,000	196,000
IN	E2008-BUSP-0763	City of Anderson	400,000	392,000
IN	E2008-BUSP-0764	Indianapolis Downtown Transit Center & Fleet Additions	1,490,000	1,460,200
IN	E2008-BUSP-0765	Statewide Electric Hybrid Bus Initiative by the Indiana Transit Association	2,800,000	2,744,000
IN	E2008-BUSP-0766	TRANSPO Bus Operations Center, South Bend	670,000	656,600
KS	E2008-BUSP-0767	Bus Fleet Replacement, Topeka Metropolitan Transit	300,000	294,000
KS	E2008-BUSP-0768	Bus Replacement for Unified Government of Wyandotte County	700,000	686,000
KS	E2008-BUSP-0769	City of Lawrence Bus Replacement	150,000	147,000
KS	E2008-BUSP-0770	Johnson County Transit Bus Replacement	150,000	147,000
KY	E2008-BUSP-0771	Bus Replacement Program, TANK, FT. Wright	250,000	245,000
KY	E2008-BUSP-0772	Fulton County Transit Authority	400,000	392,000
KY	E2008-BUSP-0773	Paducah Area Transit System	2,000,000	1,960,000
KY	E2008-BUSP-0774	TARC Clean Bus program	250,000	245,000
KY	E2008-BUSP-0775	Transit Authority of Northern Kentucky Bus Replacement Project	1,000,000	980,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 11A

FY 2008 Section 5309 Bus and Bus-Related Facilities Allocations

State	Earmark ID	Project	Original Allocation	Allocation
KY	E2008-BUSP-0776	Transportation to Wellness, Covington	200,000	196,000
LA	E2008-BUSP-0777	Multimodel Transportation Facility, Lafayette	825,000	808,500
LA	E2008-BUSP-0778	New Orleans Regional Transit Authority	500,000	490,000
LA	E2008-BUSP-0779	SporTran Buses for the City of Shreveport	250,000	245,000
MA	E2008-BUSP-0780	Attleboro Intermodal Center, Attleboro	500,000	490,000
MA	E2008-BUSP-0781	Brockton Area Transit Authority Bus Replacement	500,000	490,000
MA	E2008-BUSP-0782	Bus Fleet Replacement Project, WRTA, Worcester	200,000	196,000
MA	E2008-BUSP-0783	Commonwealth Avenue Green Line Station	670,000	656,600
MA	E2008-BUSP-0784	Construction of Amesbury Bus Facility	250,000	245,000
MA	E2008-BUSP-0785	Council on Aging, LRTA; Lowell	75,000	73,500
MA	E2008-BUSP-0786	FRTA, Franklin Regional Transit Center	800,000	784,000
MA	E2008-BUSP-0787	Intermodal Stations in Salem and Beverly	250,000	245,000
MA	E2008-BUSP-0788	MART Bus Commuter Facilities	750,000	735,000
MA	E2008-BUSP-0789	MART Commuter Parking and Facilities	750,000	735,000
MA	E2008-BUSP-0790	MBTA Commuter Rail Station Improvements, Melrose	700,000	686,000
MA	E2008-BUSP-0791	Merrimack Valley RTA Buses	400,000	392,000
MA	E2008-BUSP-0792	Newton Rapid Transit Handicap Accessibility	400,000	392,000
MD	E2008-BUSP-0793	Bi-County Transit Center, Langley Park	835,000	818,300
MD	E2008-BUSP-0794	Central MD Transit Operations Facility, Anne Arundel County	670,000	656,600
MD	E2008-BUSP-0795	Maryland Statewide Bus and Bus Facility Program	750,000	735,000
MD	E2008-BUSP-0796	Southern Maryland Commuter Bus Park and Ride Lots	1,300,000	1,274,000
ME	E2008-BUSP-0797	Statewide Buses and Bus Facilities	300,000	294,000
MI	E2008-BUSP-0798	1st District Bus Replacement and Facilities	4,020,000	3,939,600
MI	E2008-BUSP-0799	Alma Dial-A-Ride (Gratiot County)	300,000	294,000
MI	E2008-BUSP-0800	Ann Arbor Transportation Authority Transit Center	750,000	735,000
MI	E2008-BUSP-0801	Belding Dial-A-Ride Vehicle, Equipment Acquisition	48,000	47,040
MI	E2008-BUSP-0802	Berrien County Transit	100,000	98,000
MI	E2008-BUSP-0803	Bus Component Overhaul, Detroit	250,000	245,000
MI	E2008-BUSP-0804	Bus Maintenance Facility, Detroit	750,000	735,000
MI	E2008-BUSP-0805	Clare County Transit Corporation/Harrison Airport Facility	502,500	492,450
MI	E2008-BUSP-0806	Greater Lapeer Transportation Authority, Lapeer	200,000	196,000
MI	E2008-BUSP-0807	Harbor Transit	250,000	245,000
MI	E2008-BUSP-0808	Ionia Dial-A-Ride Vehicle, Equipment Acquisition	392,000	384,160
MI	E2008-BUSP-0809	Isabella County Transportation Commission	500,000	490,000
MI	E2008-BUSP-0810	JTA Bus Replacement	350,000	343,000
MI	E2008-BUSP-0811	Kalamazoo Metro Transit	250,000	245,000
MI	E2008-BUSP-0812	Mass Transportation Authority, Flint Michigan Fiscal Year 2008 Bus and Bus Facilities Program	2,680,000	2,626,400
MI	E2008-BUSP-0813	Midland Dial-a-Ride (Midland County)	179,000	175,420
MI	E2008-BUSP-0814	Muskegon Area Transit System	250,000	245,000
MI	E2008-BUSP-0815	Replacement Buses, Detroit	250,000	245,000
MI	E2008-BUSP-0816	Sanilac Transportation Authority Carsonville	400,000	392,000
MI	E2008-BUSP-0817	STARS Operations Center & Fare Boxes, Saginaw	500,000	490,000
MI	E2008-BUSP-0818	Yates Dial-A-Ride	250,000	245,000
MN	E2008-BUSP-0819	Albert Lea Transit Facility Rehabilitation	300,000	294,000
MN	E2008-BUSP-0820	Greater Minnesota Transit Bus and Bus Facilities	3,000,000	2,940,000
MN	E2008-BUSP-0821	Replacement Small Buses, St. Cloud Metro Buses	820,000	803,600
MN	E2008-BUSP-0822	Transit Bus Facilities, Duluth	400,000	392,000
MN	E2008-BUSP-0823	Union Depot Multi-Modal Hub, St. Paul	670,000	656,600
MN	E2008-BUSP-0824	White Earth Tribal Nation SMART Transit and Buses	400,000	392,000
MO	E2008-BUSP-0825	City Utilities of Springfield Intermodal Transfer Facility	1,500,000	1,470,000
MO	E2008-BUSP-0826	Forest Park Circulator/I-64 Closure Alleviation	750,000	735,000
MO	E2008-BUSP-0827	Franklin County Transit	176,000	172,480
MO	E2008-BUSP-0828	Kansas City Area Transportation Authority Bus Replacement (KCATA)	750,000	735,000
MO	E2008-BUSP-0829	Southeast Missouri Transportation Service (SMTS)	750,000	735,000
MO	E2008-BUSP-0830	St. Louis Metro Bus & Paratransit Rolling Stock	500,000	490,000
MO	E2008-BUSP-0831	Statewide Bus and Bus Facilities	1,500,000	1,470,000
MS	E2008-BUSP-0832	Coast Transit Authority Bus and Bus Facilities	3,000,000	2,940,000
MS	E2008-BUSP-0833	JATRAN Fleet Replacement	1,125,000	1,102,500
MS	E2008-BUSP-0834	LOU Public Transit System, Oxford	875,000	857,500
MT	E2008-BUSP-0835	Bus and Bus Facilities	670,000	656,600
MT	E2008-BUSP-0836	CSKT Reservation Transportation Program	234,500	229,810
NC	E2008-BUSP-0837	Asheville Replacement Buses, Asheville	300,000	294,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 11A

FY 2008 Section 5309 Bus and Bus-Related Facilities Allocations

State	Earmark ID	Project	Original Allocation	Allocation
NC	E2008-BUSP-0838	North Carolina Statewide Bus and Bus Facilities	1,250,000	1,225,000
NC	E2008-BUSP-0839	TTA Replacement Buses	500,000	490,000
NC	E2008-BUSP-0840	Intermodal Transportation Facility, Winston-Salem	400,000	392,000
ND	E2008-BUSP-0841	North Dakota Statewide Transit	1,633,500	1,600,830
NE	E2008-BUSP-0842	Complimentary Paratransit Vehicles	500,000	490,000
NH	E2008-BUSP-0843	I-89 Park and Ride/Bus Terminal	500,000	490,000
NJ	E2008-BUSP-0844	Bus Shuttle Project for Seniors, Irvington	400,000	392,000
NJ	E2008-BUSP-0845	Hudson County Intermodal Station Pedestrian Bridge	300,000	294,000
NJ	E2008-BUSP-0846	Lakeland Multimodal Facility, Phase I	1,340,000	1,313,200
NJ	E2008-BUSP-0847	Morris County Intermodel Park and Ride	500,000	490,000
NJ	E2008-BUSP-0848	Newark Penn Station Intermodel Improvement	1,340,000	1,313,200
NJ	E2008-BUSP-0849	Northern New Jersey Intermodal Stations & Park-N-Ride	200,000	196,000
NJ	E2008-BUSP-0850	Northwest NJ Intermodal Transit Improvements	600,000	588,000
NJ	E2008-BUSP-0851	Passaic/Bergen Intermodal Facilities	500,000	490,000
NJ	E2008-BUSP-0852	South Amboy Intermodal Transportation Initiative	500,000	490,000
NJ	E2008-BUSP-0853	West Orange Township Senior Citizen & Handicap Shuttle Bus	200,000	196,000
NM	E2008-BUSP-0854	Albuquerque Transit Facility Rehabilitation	510,000	499,800
NM	E2008-BUSP-0855	Bus and Bus Facilities, City of Roswell	300,000	294,000
NM	E2008-BUSP-0856	Bus and Bus Facilities, Grant County	1,005,000	984,900
NM	E2008-BUSP-0857	Fleet and Capital Items Los Alamos County Transit System	600,000	588,000
NM	E2008-BUSP-0858	New Mexico Commuter Rail, Santa Fe/Bernalillo Intermodal Facility	1,105,000	1,082,900
NM	E2008-BUSP-0859	Para-Transit Van Replacement, Las Cruces	480,000	470,400
NM	E2008-BUSP-0860	Santa Fe Place Transit Center	600,000	588,000
NM	E2008-BUSP-0861	Santa Fe Trails Transit Vehicles	300,000	294,000
NM	E2008-BUSP-0862	Transit Vehicle Fleet Upgrades	1,248,000	1,223,040
NV	E2008-BUSP-0863	Acquisition of Two Senior Transit Vehicles	100,000	98,000
NV	E2008-BUSP-0864	Central City Intermodal Transportation Terminal	300,000	294,000
NV	E2008-BUSP-0865	Reno & Sparks Intermodal Transportation Centers	750,000	735,000
NV	E2008-BUSP-0866	Statewide Bus and Bus Facilities	750,000	735,000
NV	E2008-BUSP-0867	Sunset (RTC) Maintenance Facility	750,000	735,000
NY	E2008-BUSP-0868	Bronx Zoo Intermodal Transportation Facility	600,000	588,000
NY	E2008-BUSP-0869	Bus Replacement/Service Expansion, Suffolk Co.	250,000	245,000
NY	E2008-BUSP-0870	Central New York Regional Transportation Authority	1,600,000	1,568,000
NY	E2008-BUSP-0871	City of Poughkeepsie Transit Hub	780,000	764,400
NY	E2008-BUSP-0872	CNYRTA Transit Garage - Oneida County, Utica	400,000	392,000
NY	E2008-BUSP-0873	Intermodal Transit Center, Port Chester	700,000	686,000
NY	E2008-BUSP-0874	Jamaica Intermodal Facilities, Jamaica	500,000	490,000
NY	E2008-BUSP-0875	Lincoln Center Corridor Redevelopment Project	500,000	490,000
NY	E2008-BUSP-0876	Long Island Bus Fleet Replacement	500,000	490,000
NY	E2008-BUSP-0877	Nassau County Hub	1,560,000	1,528,800
NY	E2008-BUSP-0878	NFTA, Purchase Hybrid Buses	300,000	294,000
NY	E2008-BUSP-0879	Preliminary Design of a Saratoga Bus Facility	250,000	245,000
NY	E2008-BUSP-0880	Replacement Buses for the Westchester County Bee-Line Bus Systems	780,000	764,400
OH	E2008-BUSP-0881	Bus Purchase, Portage Area Transit, Kent	500,000	490,000
OH	E2008-BUSP-0882	Central Ohio Transit Authority Bus Replacement	600,000	588,000
OH	E2008-BUSP-0883	Greater Dayton RTA Bus Replacement	500,000	490,000
OH	E2008-BUSP-0884	Kent State Geauga, Regional Transit Shelter	450,000	441,000
OH	E2008-BUSP-0885	Kent State Multimodal Transportation Facility	200,000	196,000
OH	E2008-BUSP-0886	Senior Transportation Connection	1,222,000	1,197,560
OH	E2008-BUSP-0887	TARTA Bus and Bus Facilities	1,000,000	980,000
OH	E2008-BUSP-0888	West Price Hill Park and Ride	200,000	196,000
OK	E2008-BUSP-0889	Bus and Paratransit Vans	300,000	294,000
OK	E2008-BUSP-0890	Sect. 5309 Capital Appropriation-Tulsa Transit	250,000	245,000
OR	E2008-BUSP-0891	Sandy Transit Fleet Replacement, Sandy	400,000	392,000
OR	E2008-BUSP-0892	Yamhill County Transit Project	150,000	147,000
PA	E2008-BUSP-0893	69th Street Terminal Parking Facility, Upper Darby Township	500,000	490,000
PA	E2008-BUSP-0894	Advanced CNG Buses Fleet Replacement - CATA	750,000	735,000
PA	E2008-BUSP-0895	Altoona, PA Intermodal Transportation Center	335,000	328,300
PA	E2008-BUSP-0896	Bethlehem Transit Transfer Center	500,000	490,000
PA	E2008-BUSP-0897	Butler Multi-Modal Transit Center	500,000	490,000
PA	E2008-BUSP-0898	Church Street Transportation Center	2,400,000	2,352,000
PA	E2008-BUSP-0899	Expansion of the Scranton Electric Trolley System	200,000	196,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 11A

FY 2008 Section 5309 Bus and Bus-Related Facilities Allocations

State	Earmark ID	Project	Original Allocation	Allocation
PA	E2008-BUSP-0900	Franklin Street Station Intermodal, Reading	1,250,000	1,225,000
PA	E2008-BUSP-0901	Hybrid-Electric Bus Acquisition (SEPTA)	2,000,000	1,960,000
PA	E2008-BUSP-0902	Paoli Transportation Center, Paoli	500,000	490,000
PA	E2008-BUSP-0903	Purchase of transit vehicles, York County	350,000	343,000
PA	E2008-BUSP-0904	Replacement Buses, Centre Area Transportation Authority (CATA)	700,000	686,000
PA	E2008-BUSP-0905	SEPTA Hybrid Fuel Buses	500,000	490,000
PA	E2008-BUSP-0906	SEPTA Interoperability Communications Initiative	670,000	656,600
PA	E2008-BUSP-0907	Vehicle Replacement - DuFAST	600,000	588,000
PA	E2008-BUSP-0908	Union Station Intermodal Trade and Transit Center	400,000	392,000
RI	E2008-BUSP-0909	Rhode Island Public Transit Authority Intelligent Transportation Systems	1,368,900	1,341,522
SC	E2008-BUSP-0910	Columbia Transit Facility	750,000	735,000
TN	E2008-BUSP-0911	CARTA N. Shore Shuttle Parking & Terminal Facility	600,000	588,000
TN	E2008-BUSP-0912	Memphis Area Transit Authority	500,000	490,000
TN	E2008-BUSP-0913	MTSU Intermodal Transportation Hub	200,000	196,000
TN	E2008-BUSP-0914	Tennessee DOT, Bus and Bus Facilities Replacement	4,450,000	4,361,000
TX	E2008-BUSP-0915	Abilene Paratransit Vehicle Replacement	440,000	431,200
TX	E2008-BUSP-0916	Advanced Transit Program / METRO Solutions Bus Expansion	500,000	490,000
TX	E2008-BUSP-0917	Capital Metropolitan Transportation Authority, Austin	260,000	254,800
TX	E2008-BUSP-0918	City of El Paso Paratransit Van Replacement	500,000	490,000
TX	E2008-BUSP-0919	City of El Paso, Neighborhood Circulator	400,000	392,000
TX	E2008-BUSP-0920	City of Lubbock/Citibus for Alternative Fuel Buses	500,000	490,000
TX	E2008-BUSP-0921	Concho Valley Multi-modal Terminal Building	250,000	245,000
TX	E2008-BUSP-0922	Corpus Christi RTA Bus and Bus Facilities	500,000	490,000
TX	E2008-BUSP-0923	Fort Bend County Sienna Plantation Park and Ride	300,000	294,000
TX	E2008-BUSP-0924	Fort Worth Transportation Authority	300,000	294,000
TX	E2008-BUSP-0925	Greater Southeast District Transit Facility	200,000	196,000
TX	E2008-BUSP-0926	Houston Downtown Clean Fuel Transit Initiative	1,500,000	1,470,000
TX	E2008-BUSP-0927	METRO Bus Expansion, Houston	400,000	392,000
TX	E2008-BUSP-0928	Rio Metro Intercity Transit, Hidalgo County	500,000	490,000
TX	E2008-BUSP-0929	The Woodlands Capital Cost of Contracting	300,000	294,000
TX	E2008-BUSP-0930	Urban Commuter Rail Circulator Vehicles	250,000	245,000
TX	E2008-BUSP-0931	VIA Bus Improvement/Facility Modernization, San Antonio	2,475,000	2,425,500
TX	E2008-BUSP-0932	Victoria Bus Replacement	300,000	294,000
UT	E2008-BUSP-0933	Intermodal Facilities	4,200,000	4,116,000
VA	E2008-BUSP-0934	Greater Richmond Transit Company Bus Operations and Maintenance Facility	450,000	441,000
VA	E2008-BUSP-0935	HRT Southside Bus Facility Replacement, Norfolk	700,000	686,000
VA	E2008-BUSP-0936	PRTC Bus Facilities	1,000,000	980,000
VA	E2008-BUSP-0937	Southside Bus Facility Replacement in Hampton Roads	1,200,000	1,176,000
VA	E2008-BUSP-0938	WMATA Bus Safety Initiative	200,000	196,000
VI	E2008-BUSP-0939	VITRAN Purchase USVI	400,000	392,000
VT	E2008-BUSP-0940	Bennington Multi-Modal Facility	335,000	328,300
VT	E2008-BUSP-0941	Bus Replacement for Rural Community Transportation of St. Johnsbury	335,000	328,300
VT	E2008-BUSP-0942	CCTA Buses, Facilities and Equipment	2,680,000	2,626,400
VT	E2008-BUSP-0943	Vans for Vermont Senior Centers	200,000	196,000
VT	E2008-BUSP-0944	Vermont Statewide Buses, Facilities and Equipment	670,000	656,600
WA	E2008-BUSP-0945	Ben Franklin Transit, Fleet Expansion and Modernization	700,000	686,000
WA	E2008-BUSP-0946	Clallam Transit Vehicle Replacement	196,000	192,080
WA	E2008-BUSP-0947	Columbia County Public Transportation Vehicle Replacement	84,000	82,320
WA	E2008-BUSP-0948	Community Transit Vehicle Replacement	1,050,000	1,029,000
WA	E2008-BUSP-0949	C-TRAN Vehicle Replacement	490,000	480,200
WA	E2008-BUSP-0950	Everett Transit Vehicle Replacement	600,000	588,000
WA	E2008-BUSP-0951	Grays Harbor Transit Vehicle Replacement	105,000	102,900
WA	E2008-BUSP-0952	Hybrid Bus Program	300,000	294,000
WA	E2008-BUSP-0955	Intercity Transit Multimodal Facility Olympia	350,000	343,000
WA	E2008-BUSP-0956	Island Transit Vehicle Replacement	420,000	411,600
WA	E2008-BUSP-0957	Jefferson Transit Vehicle Replacement	350,000	343,000
WA	E2008-BUSP-0958	Link Transit Vehicle Replacement	550,000	539,000
WA	E2008-BUSP-0959	Mason Transit Vehicle Replacement	280,000	274,400
WA	E2008-BUSP-0960	Pacific Transit Vehicle Replacement	35,000	34,300
WA	E2008-BUSP-0961	Pierce Transit Peninsula Park & Ride	1,050,000	1,029,000
WA	E2008-BUSP-0962	Port Angles International Gateway Project	350,000	343,000
WA	E2008-BUSP-0963	Pullman Transit Maintenance Facility Expansion	800,000	784,000

FEDERAL TRANSIT ADMINISTRATION

TABLE 11A

FY 2008 Section 5309 Bus and Bus-Related Facilities Allocations

State	Earmark ID	Project	Original Allocation	Allocation
WA	E2008-BUSP-0964	Skagit Transit Bus Replacement	200,000	196,000
WA	E2008-BUSP-0965	Spokane Transit Smart Bus Technology Modernization	700,000	686,000
WA	E2008-BUSP-0966	University Place Intermodal Transit Facility	750,000	735,000
WI	E2008-BUSP-0967	7th District Bus Services	1,250,000	1,225,000
WI	E2008-BUSP-0968	Janesville City Transit System	750,000	735,000
WI	E2008-BUSP-0969	Milwaukee County Bus Capital	500,000	490,000
WI	E2008-BUSP-0970	Wisconsin Statewide Bus and Bus Facilities	3,350,000	3,283,000
	Subtotal		$225,101,900	$220,599,862
	Amount Not Allocated in SAFETEA-LU or FY 2008 Appropriations Act			$96,551,977
	Total Allocations			**$317,151,839**

a/ The Appropriations Committees provide $6,000,000 to the Illinois Department of Transportation (IDOT) for Section 5309 Bus and Bus Facilities grants The Committees expect IDOT will provide at least $3,000,000 for Downstate Illinois replacement buses in Bloomington, Champaign-Urbana, Danville, Decatur, Peoria, Pekin, Quincy, River Valley, Rockford Island, Springfield, Madison County, Rides MTD, South Central MTD, and Macomb Further, the Committees expect IDOT to provide appropriate funds for bus facilities in Bloomington, Galesburg, Macomb, Peoria, and Rock Island, including $250,000 for the Macomb maintenance facility and $250,000 for the Kankakee's River Valley Metro operations facility (The amounts shown for these projects reflect the 2% rescission)

FEDERAL TRANSIT ADMINISTRATION

TABLE 12A

FY 2008 Extended Section 5309 Bus and Bus-Related Facilities Allocations

State	Earmark ID	Project	Unobligated Amount
CA	E2005-BUSP-064	Palo Alto Intermodal Transit Center	728,834
CO	E2005-BUSP-089	Colorado Statewide Bus and Bus Facilities	184,526
CT	E2005-BUSP-090	Bridgeport Intermodal Center	583,427
CT	E2005-BUSP-093	Pulse Point Joint Improvements	168,921
DC	E2005-BUSP-098	Union Station Intermodal Transportation Center, Washington, District of Columbia	728,834
FL	E2004-BUSP-117	Palm Beach Gardens Mass Transit Bus Shelters	19,418
GA	E2004-BUSP-135	Leesburg Train Depot Renovation and Restoration	291,262
GA	E2004-BUSP-140	Regional Transit Project for Quitman, Clay, Randolph and Stewart Counties	485,437
IL	E2005-BUSP-147	Champaign Day Care Center Park-n-Ride	728,834
IL	E2005-BUSP-148	City of Chicago's Free Trolley System	728,833
IN	E2005-BUSP-157	Ivy Tech State College Multimodal Facility	485,888
MA	E2005-BUSP-195	Springfield Union Station, Springfield	6,505,083
MD	E2005-BUSP-198	Glenmont Metrorail Parking Garage Expansion	485,888
MD	E2005-BUSP-199	Howard County Transit Repair Facility	485,888
MS	E2005-BUSP-263	Mississippi Valley State University Mass Transit Program Expansion	194,357
MT	E2005-BUSP-266	Billings Public Bus and Medical Transfer Facility	2,429,445
NY	E2005-BUSP-298	Broome County Hybrid Buses	316,545
NY	E2005-BUSP-301	Central New York Regional Transportation Authority	3,158,279
NY	E2005-BUSP-303	Irvington Intermodal Upgrades	242,945
NY	E2005-BUSP-309	Renaissance Square	6,316,558
NY	E2005-BUSP-310	Rochester Central Bus Terminal	5,441,959
PA	E2005-BUSP-346	Ardmore Transit Center	5,404,669
PA	E2005-BUSP-347	Area Transit Authority	394,784
PA	E2005-BUSP-348	Area Transit Authority of North Central Pennsylvania Passenger Terminal	766,724
PA	E2002-BUSP-292	Callowhill Bus Garage Replacement	3,267,096
PA	E2005-BUSP-364	Mid-County Transit Authority Kittanning	213,792
PA	E2004-BUSP-396	Pittsburgh Water Taxi	970,874
PA	E2005-BUSP-368	Union Station Intermodal Trade and Transit Center, Schuylkill County	1,943,557
PA	E2005-BUSP-369	Union/Snyder Transportation Alliance, Union County Pennsylvania	1,457,667
TN	E2005-BUSP-381	Memphis Airport Intermodal Facility	2,915,334
TX	E2005-BUSP-392	CNG bus replacement	388,711
VA	E2005-BUSP-415	Hampton Roads Transit New Maintenance Facilities	2,186,501
VA	E2005-BUSP-416	I-66 Vienna Metrorail Accessibility Improvements	583,067
	Total Extended Allocations		**$51,203,937**

FEDERAL TRANSIT ADMINISTRATION

TABLE 14

Revised Prior Year Unobligated Section 5309 New Starts Allocations

State	Earmark ID	Project Location and Description	Unobligated Allocation	
FY 2005 and Prior Unobligated Allocations				
AL	E2004-NWST-001	Birmingham Transit Corridor, Alabama	$2,689,626	a/
CT	E2003-NWST-014	Bridgeport Connecticut, Intermodal Transportation	2,458,956	a/
DE	E2003-NWST-019	Wilmington, Delaware, Train Station Improvements	1,327,165	a/
DE	E-2003-NWST-106	Wilmington, Delaware, Downtown Transit Corridor	3,854,249	a/
DE	E2004-NWST-013	Wilmington, Delaware, Train Station Improvements	1,476,268	a/
HI	E2002-NWST-800	Honolulu, Hawaii Bus Rapid Transit	1,548,000	b/
NV	E2003-NWST-040	Las Vegas, Nevada, Resort Corridor Fixed Guideway	6,885,077	c/
NV	E2004-NWST-034	Las Vegas, Nevada, Resort Corridor Fixed Guideway	19,683,577	c/
NM	E2000-NWST-268	Greater Albuquerque Mass Rail Transit Project	3,326,316	d/
NM	E2001-NWST-307	Albuquerque/Greater Albuquerque Mass Transit Project	495,321	d/
NM	E2002-NWST-348	Albuquerque, NM Light Rail Project	990,013	d/
PA	E2005-NWST-042	Harrisburg, Pennsylvania, Corridor One	877,000	f/
PA	E2004-NWST-041	Philadelphia, Pennsylvania, Schuylkill Valley MetroRail	13,778,504	e/
PA	E2005-NWST-043	Philadelphia, Pennsylvania, Schuylkill Valley MetroRail	9,920,000	e/
VA	E2002-NWST-700	Dulles Corridor Project	24,750,327	a/
VA	E2003-NWST-017	Dulles Corridor Project	26,064,934	a/
VA	E2004-NWST-012	Dulles Corridor Rapid Transit Project	19,683,577	a/
VA	E2005-NWST-055	Dulles Corridor Rapid Transit Project	24,800,000	f/
	Subtotal FY 2005 and Prior Unobligated Allocations		*$164,608,910*	
FY 2006 Unobligated Allocations				
AK, HI	E2006-NWST-001	Alaska and Hawaii Ferry	$3,702,406	
CA	E2006-NWST-010	Santa Barbara Coast Rail Track Improvement Project	980,100	
CA	E2006-NWST-003	ACE Gap Closure San Joaquin County	4,900,500	
CT	E2006-NWST-015	Stamford Urban Transitway	9,801,000	
DE	E2006-NWST-016	Northeast Corridor Commuter Rail Project	1,396,643	
FL	E2006-NWST-019	Ft. Lauderdale Downtown Rail Link	980,100	
FL	E2006-NWST-018	City of Miami Streetcar	1,960,200	
FL	E2006-NWST-020	Miami-Dade Transit County Metrorail Extension	9,801,000	
FL	E2006-NWST-017	Central Florida Commuter Rail System	2,427,245	
GA	E2006-NWST-021	Atlanta—Georgia 400 North Line Corridor Project	980,100	
IL	E2006-NWST-024	CTA Yellow Line	980,100	
IL	E2006-NWST-026	Ogden Avenue Transit Corridor/Circle Line	980,100	
MA	E2006-NWST-028	North Shore Corridor Blue Line Extension	1,960,200	
MA	E2006-NWST-030	Boston/Fitchburg Massachusetts Rail Corridor	1,960,200	
MD	E2006-NWST-032	Baltimore Red Line and Green Line	1,960,200	
MI	E2006-NWST-034	Detroit Center City Loop	3,920,400	
MI	E2006-NWST-033	Ann Arbor//Detroit Commuter Rail	4,900,500	
NC	E2006-NWST-039	Triangle Transit Authority Regional Rail System (Raleigh-Durham)	19,602,000	
NJ	E2006-NWST-041	Northern Branch Bergen County	2,450,250	
NJ	E2006-NWST-042	Northwest New Jersey-Northeast Pennsylvania Passenger Rail	9,801,000	
NM	E2006-NWST-044	Commuter Rail, Albuquerque to Santa Fe	490,050	d/
PA	E2006-NWST-051	Corridor One Regional Rail Project	1,470,150	
PA	E2006-NWST-053	Schuylkill Valley Metro	3,920,400	
RI	E2006-NWST-055	Rhode Island Integrated Commuter Rail Project	4,824,600	
VA	E2006-NWST-063	Gainesville-Haymarket VRE Service Extension	1,421,145	
VA	E2006-NWST-062	Dulles Corridor Rapid Transit Project, Virginia	29,403,000	
	Subtotal FY 2006 Unobligated Allocations		*$126,973,589*	

FEDERAL TRANSIT ADMINISTRATION

TABLE 14

Revised Prior Year Unobligated Section 5309 New Starts Allocations

State	Earmark ID	Project Location and Description	Unobligated Allocation
FY 2007 Unobligated Allocations			
AK/HI	D2007-NWST-002	Alaska and Hawaii Ferry	$7,500,000
CA	D2007-NWST-005	Mission Valley East	806,654
CA	D2007-NWST-006	Oceanside Escondido Rail Project	684,040
CO	D2007-NWST-009	West Corridor LRT	35,000,000
IL	D2007-NWST-024	Union-Pacific West Line Extension	1,255,978
CA	D2007-NWST-030	Oakland Airport Connector (Public-Private Partnership Pilot Program)	24,999,999
	Subtotal FY 2007 Unobligated Allocations		*$70,246,671*
	Total Unobligated Allocations		**$361,829,170**

a/ Funds have been extended through FY 2008 per letter from Secretary Mary Peters dated September 28, 2007.

b/ SEC. 171. Notwithstanding any other provision of law, $8,900,000 of the funds made available under the new fixed guideway systems category of the Capital Investment Grant account in Public Law 107-87 for the Honolulu, Hawaii, bus rapid transit project shall be made available to the City and County of Honolulu for replacement, rehabilitation, and purchase of buses and related equipment and the construction of bus-related facilities under 49 U.S.C. 5309 and shall remain available to the City and County of Honolulu for those purposes until expended: Provided that any remaining unobligated balance from said project in Public Law 107-87 shall be transferred for any eligible activity under Title 23 of the United States Code, and administered under that Title, for use on improvements to the Kapolei Interchange Complex and shall remain available until expended: Provided further, that funds made available in Public Law 108-10 for Hawaii: BRT Systems, Appurtenances and Facilities shall be generally available for bus and bus facilities by the City and County of Honolulu {Amount transferred $2,980,157}.

c/ SEC. 168. Notwithstanding any other provision of law, funds made available for the Las Vegas Resort Corridor Fixed Guideway Project under the Federal Transit Administration Capital Investment Grants Account in any previous Appropriations Act, including Public Laws 108-7, 108-199, 108-447, and any unexpended funds in Federal Transit Administration grant number NV-03-0019 may hereafter be made available until expended to the Regional Transportation Commission of Southern Nevada for bus rapid transit projects and bus and bus-related projects: *Provided,* That funds made available for a project in accordance with this section shall be administered under the terms and conditions set forth in 49 U.S.C. 5307, to the extent applicable.

d/ SEC. 166. Amounts provided for a high capacity fixed guideway light rail and mass transit project for the City of Albuquerque, New Mexico, In Public Laws 106-69, 106-346 and 107-87 shall be available for bus and bus facilities

SEC. 167. Any unobligated amounts made available for the Commuter Rail, Albuquerque to Santa Fe, New Mexico under the heading "Capital Investment Grants" under the heading "Federal Transit Administration" in title I of division A of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 (Public Law 109-115; 119 Stat. 2418) shall be made available for public transportation buses, equipment and facilities related to such buses,· and intermodal terminal in Albuquerque and Santa Fe, New Mexico, subject to the requirements under section 5309 of title 49, United States Code.

e/ SEC. 198. Notwithstanding any other provision of law, the funding made available for the Schuylkill Valley Metro project through the Department of Transportation Appropriations Acts for Federal Fiscal Years 2004 and 2005 shall remain available for that project during fiscal year 2008.

f/ The committee reports accompanying the Consolidated Appropriations Act, 2008, directs FTA to refrain from reallocating FY2005, 2004 and prior year funds allocated to the project.

FEDERAL TRANSIT ADMINISTRATION

TABLE 22

FY 2008 SECTION 5339 ALTERNATIVES ANALYSIS ALLOCATIONS

State	Earmark ID	Project Location and Description	Allocation
Arizona	E2008-ALTA-001	Mesa Extension Alternatives Analysis, Mesa	$196,000
Arizona	E2008-ALTA-002	METRO I-10 Extension Alternative Analysis	1,176,000
Arizona	E2008-ALTA-003	Tempe Extension Alternatives Analysis, Tempe	196,000
California	E2008-ALTA-004	Bus Rapid Transit Alternative Analysis, San Jose	245,000
California	E2008-ALTA-005	Red Car Trolley Engineering Study	98,000
Connecticut	E2008-ALTA-012	Southeastern Connecticut Bus Rapid Transit System	1,313,200
Florida	E2008-ALTA-013	Bus Rapid Transit Improvements, Broward County	686,000
Florida	E2008-ALTA-014	Downtown Orlando East-West Circulator System, Orlando	686,000
Florida	E2008-ALTA-015	Downtown Transit Circulator, Fort Lauderdale	656,600
Florida	E2008-ALTA-017	Miami-Dade County Metrorail Orange Line Expansion	1,372,000
Georgia	E2008-ALTA-018	I-285 Bus Rapid Transit Project, Atlanta	490,000
Georgia	E2008-ALTA-016	MARTA Clifton Corridor (Lindbergh-Emory)	735,000
Georgia	E2008-ALTA-006	Beltline Environment Impact, Atlanta	294,000
Illinois	E2008-ALTA-007	CTA Circle Line	3,841,600
Illinois	E2008-ALTA-008	CTA Orange Line Extension	490,000
Illinois	E2008-ALTA-009	CTA Red Line Extension	588,000
Illinois	E2008-ALTA-010	CTA Yellow Line Extension-Village of Skokie	588,000
Illinois	E2008-ALTA-011	Illinois Valley Commuter Rail, Ottawa	245,000
Iowa	E2008-ALTA-019	DART Alternative Analysis Design, Des Moines	245,000
Michigan	E2008-ALTA-020	The Rapid Feasibility Study	490,000
Missouri	E2008-ALTA-022	Light Rail Alternatives Analysis Study, Kansas City	1,837,500
New Jersey	E2008-ALTA-021	Northern Branch Rail Service Restoration	490,000
North Carolina	E2008-ALTA-023	Charlotte Rapid Transit Extension-Northeast Corridor LRT Project	2,695,000
Ohio	E2008-ALTA-024	West Shore Corridor Alternative Analysis	343,000
Oregon	E2008-ALTA-025	LTD Alternatives Analysis for Third EmX Corridor	245,000
Pennsylvania	E2008-ALTA-026	East West Corridor Rapid Transit, Allegheny County	980,000
Pennsylvania	E2008-ALTA-027	Northwest New Jersey/Northeast Pennsylvania Commuter Rail Service	1,313,200
Pennsylvania	E2008-ALTA-028	Philadelphia Navy Yard Transit Extension Study	392,000
Virginia	E2008-ALTA-029	Commuter Rail Station at Carmel Church	490,000
Virginia	E2008-ALTA-030	I-66 Bus Rapid Transit Study	980,000
Washington	E2008-ALTA-031	Spokane Streetcar Study, Spokane	294,000
	Total Allocation		**$24,691,100**

[FR Doc. 08–593 Filed 2–8–08; 8:45 am]
BILLING CODE 4910–57–C

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2008–0008 Notice 1]

NHTSA's Activities Under the United Nations Economic Commission for Europe 1998 Global Agreement: Glazing

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Request for comments.

SUMMARY: NHTSA is publishing this notice to inform the public that there may be a vote to adopt the Global Technical Regulation (GTR) on Glazing at the March 2008 session of the World Forum for Harmonization of Vehicle Regulations (WP.29). In anticipation of this vote, NHTSA is requesting comments on this GTR to inform its decision for the vote. Publication of this information is in accordance with NHTSA's Statement of Policy regarding Agency Policy Goals and Public Participation in the Implementation of the 1998 Global Agreement on Global Technical Regulations.

DATES: Written comments may be submitted to this agency by March 6, 2008.

ADDRESSES: You may submit comments [identified by DOT Docket No. NHTSA–2008–0008, Notice 1] by any of the following methods:

- *Federal eRulemaking Portal*: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail*: Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC, 20590–0001.
- *Hand Delivery or Courier*: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue S.E., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Telephone: 1–800–647–5527.
- *Fax:* 202–493–2251

Instructions: All submissions must include the agency name and docket number for this proposed collection of information. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and follow the online instructions, or visit the Docket Management Facility at the street address listed above.

FOR FURTHER INFORMATION CONTACT: Mr. Ezana Wondimneh, Division Chief, International Policy and Harmonization (NVS–133), National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC, 20590–0001; Phone (202) 366–0846, Fax (202) 493–2280.

SUPPLEMENTARY INFORMATION: At the March 2004 session of WP.29 the formal proposal to develop a GTR on safety glazing, sponsored by Germany, was adopted with a modification to restrict the scope of the GTR to glass-based safety glazing. An informal working group chaired by Germany was subsequently established to develop the GTR. In October 2004, NHTSA docketed the draft GTR proposed by Germany (69 FR 60460, 60462; October 8, 2004), but received no comments. At the November 2005 session of WP.29 AC.3 further agreed that the GTR would not include installation provisions and that the informal working group could consider possible approaches to including certification markings in the GTR. However, it was later decided by WP.29 that a separate informal working group would be tasked with examining the issue of markings for all GTRs. Therefore, the glazing GTR only specifies the required markings to identify the type of glazing material without reference to certification type markings. Contracting parties to the 1998 Agreement will be able to require additional markings for identification of manufacturer and the regulation(s) the glazing is manufactured to comply with.

On October 10, 2006, NHTSA published a new notice that described the progress made on the agency's GTR activities including the glazing GTR (docket number NHTSA–2003–14395). The notice included the draft GTR, provided discussions on several key issues, and requested public comments. A comment with regard to the GTR was submitted by Pilkington North America that sought to clarify an incorrect citing of the test procedures concerning light transmittance and optical distortion, which has since been addressed.

The latest draft of the GTR specifies performance requirements for various types of glazing (i.e., laminated and toughened glass) intended for installation in Category 1 and 2 vehicles as defined in Special Resolution No. 1. The requirements apply to glazing as an item of equipment, and do not include installation requirements for vehicles. Performance requirements for some of the materials vary depending on whether the material is intended for installation as a windscreen or a pane. The draft includes requirements and tests to ensure the mechanical strength, optical qualities and environmental resistance of glazing.

Four sets of tests and requirements for mechanical properties are under consideration in the GTR: a fragmentation test, a 227g steel ball impact test, a 2.26kg steel ball impact test and a 10kg headform impact test. Each of the first three of these tests was adopted from widely used procedures currently in effect, with small differences, in all three national regulations examined for this GTR (European, Japanese and U.S. safety regulations). The fragmentation test proposed in the draft GTR is based on the current European approach, except that it was modified to use two different impact forces depending on the design of glazing being evaluated. The 227g and 2.26kg steel ball impact tests are also very similar to the existing national regulations examined—with the exception of the drop height for the small ball test. Based upon analysis conducted by Japan, which determined that the force from a drop height of 2.0m replicated the force of a typical object that impacts a pane, it was decided that a drop height of 2.0m could be specified. The headform test (which is currently in the European and Japanese national regulations, but not in the U.S.) under consideration for the GTR specifies one drop height (1.5m), instead of retaining the two separate drop heights currently found in the European and Japanese regulations because the purpose of the second height drop was already addressed in other tests specified in the GTR. Also, the headform test is an optional requirement in the GTR. Each contracting party to the 1998 Agreement can decide whether or not to apply this provision in national/regional law.

Three types of optical qualities are addressed in the GTR: light transmission, optical distortion and double imaging. The minimum light transmittance level for glazing requisite

for the driver's forward field of vision is 70 percent, per U.S. and Japanese regulations, rather than 75 percent required in European regulations. This is supported through a cost-benefit analysis, which shows no perceptible difference in light transmission and savings in energy usage. The light transmission test procedure used in the GTR was adopted from the European and Japanese test procedures, because they are based on the driver's field of view and thus better approximate normal driving conditions. For the other optical quality tests, the main differences between the standards and regulations examined were not the requirements but just the test procedures. These differences were resolved by selecting the European and Japanese test procedures for the same reasons mentioned above.

The GTR also includes environmental resistance requirements related to temperature change, fire, chemical resistance, abrasion, radiation, high temperature and humidity. The first four of these were common to all the examined regulations. The remaining three requirements had minor differences, which the GTR resolved by selecting the best alternatives. For example, in the case of resistance to radiation, the major difference between the American and European approaches is that the former specifies 100 hours exposure, using a specified radiation source, while the later specifies 100 hours of exposure at 1400 W/m^2. Since the European procedure ensures a constant level of exposure and allows for alternative sources of UV radiation during testing, it was deemed more flexible and was thus selected for the GTR.

In July 2007, NHTSA received comments on the draft GTR from the Society of Automotive Engineers (SAE) Glazing Committee. In October, the agency made recommendations to the informal working group to implement some of the SAE comments into the GTR. The comments accepted in the GTR included editorial corrections, clarifications to Part A of the draft GTR (the technical rationale and justifications section), adding a definition for ''Uniformly toughened-glass'', and clarifying what would be considered a sharp edge for the fragmentation test. Several other points were not incorporated since they fell outside the scope of the GTR, were not relevant or already addressed in previous notices, or could not reasonably be pursued without conducting lengthy additional research and validation testing that is not supported by the majority of the Contracting Parties to the 1998 Agreement. SAE's comments can be found in the docket of this notice.

The informal working group submitted the draft GTR to the Working Party on General Safety Provisions (GRSG) for consideration at the October 2007 session. The October 2007 session of GRSG voted to recommend the GTR to WP.29. The GTR is expected to be voted on at the March 2008 session of WP.29. In anticipation of this vote, NHTSA requests comments on the draft GTR. The draft GTR that will be considered can be found in the docket for this notice.

Once the GTR is established through consensus voting at WP.29, NHTSA will initiate domestic rulemaking to amend its existing FMVSS to incorporate approved provisions of the GTR. This will allow for further opportunity to consider comments from interested parties through the usual rulemaking process. If NHTSA's rulemaking process leads it to either not adopt or to modify aspects of the GTR, the agency will seek to amend the GTR in accordance with established procedures under the 1998 Global Agreement and WP.29, as it recently did with the door lock GTR.

Issued on: February 5, 2008.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E8–2474 Filed 2–8–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

[TTB Ruling 2008–1]

Standards of Identity and the Use of Semi-generic Designations and Retsina on Certain European Wines Imported into the United States

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: General notice.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau issues this ruling to clarify the standard of identity that applies to certain European wines when they are imported into the United States.

DATES: This ruling is effective on January 24, 2008.

FOR FURTHER INFORMATION CONTACT: Lynn Gittes, Program Manager, International Trade Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Washington, DC 20220; telephone 202–927–8104.

SUPPLEMENTARY INFORMATION:

TTB Ruling 2008–1

Standards of Identity and the Use of Semi-generic Designations and Retsina on Certain European Wines Imported into the United States

27 CFR 4.21 Standards of Identity

Wines using one of the 17 specified designations listed in Annex II of the Agreement Between the United States of America and the European Community on Trade in Wine, which originate in the applicable European Union member State and which comply with the European Union standard for such wines, will meet the United States standard of identity or the trade understanding for such wine.

TTB RUL. 2008–1

The Alcohol and Tobacco Tax and Trade Bureau has been asked if the adoption of the Agreement Between the United States of America and the European Community on Trade in Wine (''the Agreement'') and the related statutory change regarding semi-generic designations and Retsina affect the standard of identity that applies to certain European wines when they are imported into the United States.

Background

On March 10, 2006, the United States and the European Community (EC) signed the Agreement in which the United States agreed to seek to change the legal status of 17 designations listed in Annex II of the Agreement in order to restrict their use solely to wine originating in the applicable European Union (EU) member State, except as provided for under a ''grandfather'' provision. These 17 designations are: Burgundy, Claret, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Retsina, Rhine Wine or Hock, Sauterne, Haut Sauterne, Sherry, and Tokay. The Agreement's ''grandfather'' provision allows persons or their successors in interest to continue to label non-EU wines with one of the 17 listed designations if that term is used only on labels for wine bearing the brand name, or the brand name and the fanciful name, if any, for which the applicable Certificate of Label Approval (COLA) or Certificate of Exemption from Label Approval was issued by the Secretary of the Treasury before March 10, 2006.

Legislation changing the legal status of the 17 designations in the Agreement was enacted by Congress and signed by the President on December 20, 2006, as section 422 of the Tax Relief and Health Care Act of 2006 (''the Act''), Public

Law 109–432, 120 Stat. 2922, 2972. As amended by the Act, section 5388(c) of the Internal Revenue Code of 1986 (26 U.S.C. 5388(c)) contains a provision regarding the use of the 17 designations listed in the Agreement. The provision states that, in the case of wine of the EC, the listed designations may be used only if the wine conforms to the standard of identity, if any, for such wine contained in the regulations issued under section 5388 (27 CFR 24.257 and, by reference, 27 CFR 4.21) or, if there is no such standard, to the trade understanding of such class and type. All other wines bearing the listed designations are subject to two additional requirements: (1) That the wine be marked with an appropriate appellation of origin disclosing the origin of the wine, and (2) that the person, or the person's successor in interest, using a listed designation hold a COLA or Certificate of Exemption from Label Approval issued by the Secretary of the Treasury before March 10, 2006, for a wine label bearing that designation and that brand name or brand name and fanciful name.

Held, that an EU wine product that bears one of the 17 designations listed in section 5388(c)(3)(C)(i) of the Internal Revenue Code of 1986 and that conforms to the EU standard for such wine complies with the United States standard of identity or the trade understanding for such wine. The recent amendment to 26 U.S.C. 5388(c) concerning semi-generic designations does not require such EU wine products imported into the United States to meet a new standard of identity.

Signed: January 24, 2008.

John J. Manfreda,

Administrator.

[FR Doc. E8–2392 Filed 2–8–08; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations of Individuals Pursuant to Executive Order 13448

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of three newly-designated individuals and four entities whose property and interests in property are blocked pursuant to Executive Order 13448 of October 18, 2007, ''Blocking Property and Prohibiting Certain Transactions Related to Burma.''

DATES: The designation by the Director of OFAC of three individuals and four entities identified in this notice, pursuant to Executive Orders 13448, is effective February 5, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW. (Treasury Annex), Washington, DC 20220, Tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

Information about these designations 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 October 18, 2007, the President signed Executive Order 13448 (the ''Order'') pursuant to, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701, *et. seq.*). In the Order, the President took additional steps with respect to, and expanded, the national emergency declared in Executive Order 13047 of May 20, 1997, to address the Government of Burma's continued repression of the democratic opposition. The President identified twelve individuals and entities as subject to the economic sanctions in the Annex to the Order.

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 within the possession or control of United States persons, of the persons listed in the Annex, as well as those persons determined by the Secretary of the Treasury, after consultation with the Secretary of State, to satisfy any of the criteria set forth in subparagraphs (b)(i)–(b)(vi) of Section 1. On February 5, 2008, the Director of OFAC exercised the Secretary of the Treasury's authority to designate, pursuant to one or more of the criteria set forth in Section 1, subparagraphs (b)(i)–(b)(vi) of the Order, the following three individuals and four entities, whose names have been added to the list of Specially Designated Nationals and whose property and interests in property are blocked pursuant to Executive Order 13448:

Individuals

1. MANN, AUNG THET (a.k.a. SHWE MANN KO KO); Burma; DOB 19 Jun 1977; c/o Ayer Shwe Wah Company Limited; c/o Htoo Group of Companies; c/o Htoo Trading Company Limited (individual) [BURMA]
2. THEIN, U KYAW; Burma; 503 Sembawang Rd., #02–29, 757707, Singapore; DOB 25 Oct 1947; citizen Burma; nationality Burma; National ID No. S2733659J (Singapore) issued 7 Jul 2005; c/o Air Bagan Holdings Pte. Ltd.; c/o Htoo Wood Products Pte. Ltd.; c/o Pavo Aircraft Leasing Pte. Ltd.; c/o Pavo Trading Pte. Ltd.; permanent resident Singapore (individual) [BURMA]
3. THIHA (a.k.a. THI HA); Burma; DOB 24 Jun 1960; c/o Htoo Group of Companies; c/o Htoo Trading Company Limited (individual) [BURMA]

Entities

1. AYER SHWE WAH COMPANY LIMITED (a.k.a. AYER SHWE WA; a.k.a AYE YAR SHWE WAH; a.k.a. AYEYA SHWE WAR COMPANY); 5 Pyay Road, Hlaing Township, Yangon, Burma [BURMA]
2. HTOO GROUP OF COMPANIES; 5 Pyay Road, Hlaing Township, Yangon, Burma [BURMA]
3. MYANMAR AVIA EXPORT COMPANY LIMITED (a.k.a. MYANMAR AVIA EXPORT) [BURMA]
4. PAVO AIRCRAFT LEASING PTE. LTD.; 3 Shenton Way, #24–02 Shenton House, 068805, Singapore [BURMA]

Dated: February 5, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–2425 Filed 2–8–08; 8:45 am]

BILLING CODE 4811–42–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations of Individuals Pursuant to Executive Order 13448

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of four newly-designated individuals whose property and interests in property are blocked pursuant to Executive Order 13448 of October 18, 2007, ''Blocking Property and Prohibiting Certain Transactions Related to Burma.''

DATES: The designation by the Director of OFAC of eleven individuals identified in this notice, pursuant to Executive Orders 13448, is effective February 5, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW. (Treasury Annex), Washington, DC 20220, Tel.: 202/622–2490

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

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

Background

On October 18, 2007, the President signed Executive Order 13448 (the ''Order'') pursuant to, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*). In the Order, the President took additional steps with respect to, and expanded, the national emergency declared in Executive Order 13047 of May 20, 1997, to address the Government of Burma's continued repression of the democratic opposition. The President identified twelve individuals and entities as subject to the economic sanctions in the Annex to the Order.

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 within the possession or control of United States persons, of the persons listed in the Annex, as well as those persons determined by the Secretary of the Treasury, after consultation with the Secretary of State, to satisfy any of the criteria set forth in subparagraphs (b)(i)–(b)(vi) of Section 1. On February 5, 2008, the Director of OFAC exercised the Secretary of the Treasury's authority to designate, pursuant to one or more of the criteria set forth in Section 1, subparagraphs (b)(i)–(b)(vi) of the Order, the following four individuals, whose names have been added to the list of Specially Designated Nationals and whose property and interests in property are blocked pursuant to Executive Order 13448:

1. KO, MYINT MYINT (a.k.a. DAW MYINT MYINT KO); Burma; DOB 11 Jan 1946; wife of Saw Tun (individual) [BURMA]
2. MYINT, TIN LIN (a.k.a. DAW TIN LIN MYINT); Burma; DOB 25 Jan 1947; wife of Ye Myint (individual) [BURMA]
3. SOE, MYINT MYINT (a.k.a. DAW MYINT MYINT SOE); Burma; DOB 15 Jan 1953; wife of Nyan Win (individual) [BURMA]
4. THET, KHIN LAY (a.k.a. DAW KHIN LAY THET); Burma; DOB 19 Jun 1947; wife of Thura Shwe Mann (individual) [BURMA]

Dated: February 5, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–2426 Filed 2–8–08; 8:45 am]

BILLING CODE 4811–42–P

DEPARTMENT OF THE TREASURY

United States Mint

Currently Approved Information Collection: Comment Request for Application for Commercial Product License and Application for Intellectual Property Use Forms

AGENCY: United States Mint.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury invites the general public and other Federal agencies to take this opportunity to comment on currently approved information collection 1525–0013, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the United States Mint, a bureau of the Department of the Treasury, is soliciting comments on the United States Mint Application for Commercial Product License and Application for Intellectual Property Use forms.

DATES: Written comments should be received on or before April 11, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvonne Pollard, Chief, Compliance Division, United States Mint, 801 9th Street, NW., 8th Floor, Washington, DC 20220; (202) 354–6784 (this is not a toll-free number); *YPollard@usmint.treas.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection package should be directed to Yvonne Pollard, Chief, Compliance Division, United States Mint, 801 9th Street, NW., 8th Floor, Washington, DC 20220; (202) 354–6784 (this is not a toll-free number); *YPollard@usmint.treas.gov*.

SUPPLEMENTARY INFORMATION:

Titles: Application for Commercial Product License and Applications for Intellectual Property Use.

OMB Number: 1525–0013.

Abstract: The two application forms allow individuals and entities to apply for permissions and licenses to use United States Mint owned or controlled intellectual property.

Current Actions: The United States Mint reviews and assesses permission requests and applications for United States Mint intellectual property licenses.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other-for-profit; not-for-profit institutions; State, Local, or Tribal Government; and individuals or households.

Estimated Number of Respondents: The estimated number of annual respondents is 135.

Estimated Total Annual Burden Hours: The estimated number of annual burden hours is 150.

Requests for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (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.

Dated: February 6, 2008.

Yvonne Pollard,

Chief, Compliance Division, United States Mint.

[FR Doc. E8–2456 Filed 2–8–08; 8:45 am]

BILLING CODE 4810–37–P

DEPARTMENT OF THE TREASURY

United States Mint

Revision to Currently Approved Information Collection: Comment Request for Customer Satisfaction and Opinion Surveys and Focus Group Interviews

AGENCY: United States Mint.

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 revisions to currently approved information collection 1525–0012, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the United States Mint, a bureau of the Department of the Treasury, is soliciting comments on the United States Mint customer satisfaction and opinion surveys and focus group interviews.

DATES: Written comments should be received on or before April 11, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvonne Pollard; Chief, Compliance Division; United States Mint; 801 9th Street, NW., 8th Floor; Washington, DC 20220; (202) 354–6784 (this is not a toll-free number); *YPollard@usmint.treas.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection package should be directed to Yvonne Pollard; Chief, Compliance Division; United States Mint; 801 9th Street, NW., 8th Floor; Washington, DC 20220; (202) 354–6784 (this is not a toll-free number); *YPollard@usmint.treas.gov*.

SUPPLEMENTARY INFORMATION:

Title: United States Mint customer satisfaction and opinion surveys and focus group interviews.

OMB Number: 1525–0012.

Abstract: The proposed customer satisfaction and opinion surveys and focus group interviews will allow the United States Mint to assess the acceptance of, potential demand for, and barriers to acceptance/increased demand for current and future products, and the needs and desires of customers for more efficient, economical services.

Current Actions: The United States Mint conducts surveys and focus group interviews to measure customer opinion and assess acceptance of, potential demand for and barriers to acceptance/increased demand for United States Mint products, and to determine the level of satisfaction of United States Mint customers and the public.

Type of Review: Revision of estimated annual respondents and estimated annual burden hours.

Affected Public: The affected public includes serious and casual numismatic collectors, dealers and persons in the numismatic business, and the general public.

Estimated Number of Respondents: The estimated number of annual respondents is 85,698.

Estimated Total Annual Burden Hours: The estimated number of annual burden hours is 20,271.

Requests 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.

Dated: February 6, 2008.

Yvonne Pollard,

Chief, Compliance Division, United States Mint.

[FR Doc. E8–2455 Filed 2–8–08; 8:45 am]

BILLING CODE 4810–37–P

Federal Register

Monday
February 11, 2008

Part II

Reader Aids

Cumulative List of Public Laws
110th Congress, First Session

CUMULATIVE LIST OF PUBLIC LAWS

This is the cumulative list of public laws for the 110th Congress, First Session. Other cumulative lists (1993–2007) are available online at *http://www.archives.gov/federal-register/laws/past/index.html.* Comments may be addressed to the Director, Office of the Federal Register, Washington, DC 20408 or send e-mail to info@nara.fedreg.gov.

The text of laws may be ordered in individual pamphlet form (referred to as ''slip laws'') from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–2470). The text will also be made available on the Internet from GPO Access at *http://www.gpoacess.gov/plaws/index.html.* Some laws may not yet be available online or for purchase.

Public Law	Title	Approved	121 Stat.
110–1	To redesignate the White Rocks National Recreation Area in the State of Vermont as the ''Robert T. Stafford White Rocks National Recreation Area''.	Jan. 17, 2007	3
110–2	House Page Board Revision Act of 2007	Feb. 2, 2007	4
110–3	To provide a new effective date for the applicability of certain provisions of law to Public Law 105-331.	Feb. 8, 2007	6
110–4	To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958 through July 31, 2007, and for other purposes.	Feb. 15, 2007	7
110–5	Making further continuing appropriations for the fiscal year 2007, and for other purposes	Feb. 15, 2007	8
110–6	Antitrust Modernization Commission Extension Act of 2007	Feb. 26, 2007	61
110–7	To designate the facility of the United States Postal Service located at 1300 North Frontage Road West in Vail, Colorado, as the ''Gerald R. Ford, Jr. Post Office Building''.	Mar. 7, 2007	62
110–8	To designate the facility of the United States Postal Service located at 152 North 5th Street in Laramie, Wyoming, as the ''Gale W. McGee Post Office''.	Mar. 7, 2007	63
110–9	To designate the facility of the United States Postal Service located at 1700 Main Street in Little Rock, Arkansas, as the ''Scipio A. Jones Post Office Building''.	Mar. 7, 2007	64
110–10	To designate the facility of the United States Postal Service located at 16150 Aviation Loop Drive in Brooksville, Florida, as the ''Sergeant Lea Robert Mills Brooksville Aviation Branch Post Office''.	Mar. 7, 2007	65
110–11	To designate the facility of the United States Postal Service located at 3903 South Congress Avenue in Austin, Texas, as the ''Sergeant Henry Ybarra III Post Office Building''.	Mar. 7, 2007	66
110–12	To designate the facility of the United States Postal Service located at 2633 11th Street in Rock Island, Illinois, as the ''Lane Evans Post Office Building''.	Mar. 15, 2007	67
110–13	To designate the United States courthouse located at 555 Independence Street in Cape Girardeau, Missouri, as the ''Rush Hudson Limbaugh, Sr. United States Courthouse''.	Mar. 21, 2007	68
110–14	To designate the United States courthouse at South Federal Place in Santa Fe, New Mexico, as the ''Santiago E. Campos United States Courthouse''.	Mar. 21, 2007	69
110–15	To designate the Federal building located at 400 Maryland Avenue Southwest in the District of Columbia as the ''Lyndon Baines Johnson Department of Education Building''.	Mar. 23, 2007	70
110–16	To provide for the construction, operation, and maintenance of an arterial road in St. Louis County, Missouri.	Mar. 28, 2007	71
110–17	NATO Freedom Consolidation Act of 2007	Apr. 9, 2007	73
110–18	National Breast and Cervical Cancer Early Detection Program Reauthorization Act of 2007	Apr. 20, 2007	80
110–19	Older Americans Reauthorization Technical Corrections Act	Apr. 23, 2007	84
110–20	To redesignate the Federal building located at 167 North Main Street in Memphis, Tennessee, as the ''Clifford Davis and Odell Horton Federal Building''.	May 2, 2007	86
110–21	To amend the Foreign Affairs Reform and Restructuring Act of 1998 to reauthorize the United States Advisory Commission on Public Diplomacy.	May 2, 2007	87
110–22	Animal Fighting Prohibition Enforcement Act of 2007	May 3, 2007	88
110–23	Trauma Care Systems Planning and Development Act of 2007	May 3, 2007	90
110–24	Judicial Disclosure Responsibility Act	May 3, 2007	100
110–25	To designate the Federal building and United States courthouse and customhouse located at 515 West First Street in Duluth, Minnesota, as the ''Gerald W. Heaney Federal Building and United States Courthouse and Customhouse''.	May 8, 2007	102
110–26	The American National Red Cross Governance Modernization Act of 2007	May 11, 2007	103
110–27	To designate the facility of the United States Postal Service located at 5757 Tilton Avenue in Riverside, California, as the ''Lieutenant Todd Jason Bryant Post Office''.	May 25, 2007	111
110–28	U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007.	May 25, 2007	112
110–29	To designate the facility of the United States Postal Service located at 60 Calle McKinley, West in Mayaguez, Puerto Rico, as the ''Miguel Angel García Méndez Post Office Building''.	June 1, 2007	219
110–30	To designate the facility of the United States Postal Service located at 500 West Eisenhower Street in Rio Grande City, Texas, as the ''Lino Perez, Jr. Post Office''.	June 1, 2007	220
110–31	To designate the facility of the United States Postal Service located at 4230 Maine Avenue in Baldwin Park, California, as the ''Atanacio Haro-Marin Post Office''.	June 1, 2007	221
110–32	To designate the facility of the United States Postal Service located at 320 South Lecanto Highway in Lecanto, Florida, as the ''Sergeant Dennis J. Flanagan Lecanto Post Office Building''.	June 1, 2007	222
110–33	To amend the District of Columbia Home Rule Act to conform the District charter to revisions made by the Council of the District of Columbia relating to public education.	June 1, 2007	223
110–34	Preserving United States Attorney Independence Act of 2007	June 14, 2007	224
110–35	Preservation Approval Process Improvement Act of 2007	June 15, 2007	225
110–36	To increase the number of Iraqi and Afghani translators and interpreters who may be admitted to the United States as special immigrants, and for other purposes.	June 15, 2007	227
110–37	Native American Home Ownership Opportunity Act of 2007	June 18, 2007	229
110–38	To provide that the Executive Director of the Inter-American Development Bank or the Alternate Executive Director of the Inter-American Development Bank may serve on the Board of Directors of the Inter-American Foundation.	June 21, 2007	230
110–39	To authorize the transfer of certain funds from the Senate Gift Shop Revolving Fund to the Senate Employee Child Care Center.	June 21, 2007	231

Public Law	Title	Approved	121 Stat.
110–40	To repeal certain sections of the Act of May 26, 1936, pertaining to the Virgin Islands	June 29, 2007	232
110–41	Army Specialist Joseph P. Micks Federal Flag Code Amendment Act of 2007	June 29, 2007	233
110–42	To extend the authorities of the Andean Trade Preference Act until February 29, 2008	June 30, 2007	235
110–43	To designate the facility of the United States Postal Service located at 127 East Locust Street in Fairbury, Illinois, as the ''Dr. Francis Townsend Post Office Building''.	July 3, 2007	237
110–44	First Higher Education Extension Act of 2007	July 3, 2007	238
110–45	To redesignate a Federal building in Albuquerque, New Mexico, as the ''Raymond G. Murphy Department of Veterans Affairs Medical Center''.	July 5, 2007	239
110–46	To designate a United States courthouse located in Fresno, California, as the ''Robert E. Coyle United States Courthouse''.	July 5, 2007	240
110–47	Grand Teton National Park Extension Act of 2007	July 13, 2007	241
110–48	To provide for the extension of transitional medical assistance (TMA) and the abstinence education program through the end of the fiscal year 2007, and for other purposes.	July 18, 2007	244
110–49	Foreign Investment and National Security Act of 2007	July 26, 2007	246
110–50	Passport Backlog Reduction Act of 2007	July 30, 2007	261
110–51	Second Higher Education Extension Act of 2007	July 31, 2007	263
110–52	Approving the renewal of import restrictions contained in the Burmese Freedom and Democracy Act of 2003, and for other purposes.	Aug. 1, 2007	264
110–53	Implementing Recommendations of the 9/11 Commission Act of 2007	Aug. 3, 2007	266
110–54	To amend title XVIII of the Social Security Act to provide an exception to the 60-day limit on Medicare reciprocal billing arrangements between two physicians during the period in which one of the physicians is ordered to active duty as a member of a reserve component of the Armed Forces.	Aug. 3, 2007	551
110–55	Protect America Act of 2007	Aug. 5, 2007	552
110–56	To authorize additional funds for emergency repairs and reconstruction of the Interstate I-35 bridge located in Minneapolis, Minnesota, that collapsed on August 1, 2007, to waive the $100,000,000 limitation on emergency relief funds for those emergency repairs and reconstruction, and for other purposes.	Aug. 6, 2007	558
110–57	To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958 through December 15, 2007, and for other purposes.	Aug. 8, 2007	560
110–58	To designate the facility of the United States Postal Service located at 6301 Highway 58 in Harrison, Tennessee, as the ''Claude Ramsey Post Office''.	Aug. 9, 2007	561
110–59	To designate the facility of the United States Postal Service located at 508 East Main Street in Seneca, South Carolina, as the ''S/Sgt Lewis G. Watkins Post Office Building''.	Aug. 9, 2007	562
110–60	To designate the facility of the United States Postal Service located at 118 Minner Avenue in Bakersfield, California, as the ''Buck Owens Post Office''.	Aug. 9, 2007	563
110–61	To designate the facility of the United States Postal Service located at 4551 East 52nd Street in Odessa, Texas, as the ''Staff Sergeant Marvin 'Rex' Young Post Office Building''.	Aug. 9, 2007	564
110–62	To designate the facility of the United States Postal Service located at 896 Pittsburgh Street in Springdale, Pennsylvania, as the ''Rachel Carson Post Office Building''.	Aug. 9, 2007	565
110–63	To designate the facility of the United States Postal Service located at 561 Kingsland Avenue in University City, Missouri, as the ''Harriett F. Woods Post Office Building''.	Aug. 9, 2007	566
110–64	To designate the facility of the United States Postal Service located at 601 Banyan Trail in Boca Raton, Florida, as the ''Leonard W. Herman Post Office''.	Aug. 9, 2007	567
110–65	To designate the facility of the United States Postal Service located at 11033 South State Street in Chicago, Illinois, as the ''Willye B. White Post Office Building''.	Aug. 9, 2007	568
110–66	To designate the facility of the United States Postal Service located at 20805 State Route 125 in Blue Creek, Ohio, as the ''George B. Lewis Post Office Building''.	Aug. 9, 2007	569
110–67	To designate the facility of the United States Postal Service located at 14536 State Route 136 in Cherry Fork, Ohio, as the ''Staff Sergeant Omer T. 'O.T.' Hawkins Post Office''.	Aug. 9, 2007	570
110–68	To designate the facility of the United States Postal Service located at 408 West 6th Street in Chelsea, Oklahoma, as the ''Clem Rogers McSpadden Post Office Building''.	Aug. 9, 2007	571
110–69	America COMPETES Act	Aug. 9, 2007	572
110–70	To designate the facility of the United States Postal Service located at 3916 Milgen Road in Columbus, Georgia, as the ''Frank G. Lumpkin, Jr. Post Office Building''.	Aug. 9, 2007	719
110–71	To designate the facility of the United States Postal Service located at 309 East Linn Street in Marshalltown, Iowa, as the ''Major Scott Nisely Post Office''.	Aug. 9, 2007	720
110–72	To designate the facility of the United States Postal Service located at 301 Boardwalk Drive in Fort Collins, Colorado, as the ''Dr. Karl E. Carson Post Office Building''.	Aug. 9, 2007	721
110–73	To designate the facility of the United States Postal Service located at 103 South Getty Street in Uvalde, Texas, as the ''Dolph Briscoe, Jr. Post Office Building''..	Aug. 9, 2007	722
110–74	To amend chapter 89 of title 5, United States Code, to make individuals employed by the Roosevelt Campobello International Park Commission eligible to obtain Federal health insurance.	Aug. 9, 2007	723
110–75	To authorize the Coquille Indian Tribe of the State of Oregon to convey land and interests in land owned by the Tribe.	Aug. 13, 2007	724
110–76	To authorize the Saginaw Chippewa Tribe of Indians of the State of Michigan to convey land and interests in lands owned by the Tribe.	Aug. 13, 2007	725
110–77	To improve the use of a grant of a parcel of land to the State of Idaho for use as an agricultural college, and for other purposes.	Aug. 13, 2007	726
110–78	To waive application of the Indian Self-Determination and Education Assistance Act to a specific parcel of real property transferred by the United States to 2 Indian tribes in the State of Oregon, and for other purposes.	Aug. 13, 2007	727
110–79	Granting the consent and approval of the Congress to an interstate forest fire protection compact.	Aug. 13, 2007	730
110–80	To amend the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, to strike a requirement relating to forage producers.	Aug. 13, 2007	734
110–81	Honest Leadership and Open Government Act of 2007	Sept. 14, 2007	735
110–82	Native American $1 Coin Act	Sept. 20, 2007	777
110–83	United States-Poland Parliamentary Youth Exchange Program Act of 2007	Sept. 20, 2007	781
110–84	College Cost Reduction and Access Act	Sept. 27, 2007	784
110–85	Food and Drug Administration Amendments Act of 2007	Sept. 27, 2007	823

Public Law	Title	Approved	121 Stat.
110–86	To provide authority to the Peace Corps to provide separation pay for host country resident personal services contractors of the Peace Corps.	Sept. 27, 2007	979
110–87	To designate the facility of the United States Postal Service located at 365 West 125th Street in New York, New York, as the ''Percy Sutton Post Office Building''.	Sept. 28, 2007	980
110–88	To designate a portion of Interstate Route 395 located in Baltimore, Maryland, as ''Cal Ripken Way''.	Sept. 28, 2007	981
110–89	To extend the trade adjustment assistance program under the Trade Act of 1974 for 3 months.	Sept. 28, 2007	982
110–90	TMA, Abstinence Education, and QI Programs Extension Act of 2007	Sept. 29, 2007	984
110–91	Increasing the statutory limit on the public debt	Sept. 29, 2007	988
110–92	Making continuing appropriations for the fiscal year 2008, and for other purposes	Sept. 29, 2007	989
110–93	To make permanent the waiver authority of the Secretary of Education with respect to student financial assistance during a war or other military operation or national emergency.	Sept. 30, 2007	999
110–94	Pesticide Registration Improvement Renewal Act	Oct. 9, 2007	1000
110–95	To award a congressional gold medal to Michael Ellis DeBakey, M.D.	Oct. 16, 2007	1008
110–96	International Emergency Economic Powers Enhancement Act	Oct. 16, 2007	1011
110–97	To extend the District of Columbia College Access Act of 1999	Oct. 24, 2007	1013
110–98	To designate the facility of the United States Postal Service located at 69 Montgomery Street in Jersey City, New Jersey, as the ''Frank J. Guarini Post Office Building''.	Oct. 24, 2007	1014
110–99	To designate the facility of the United States Postal Service located at 555 South 3rd Street Lobby in Memphis, Tennessee, as the ''Kenneth T. Whalum, Sr. Post Office Building''.	Oct. 24, 2007	1015
110–100	To designate the facility of the United States Postal Service located at 202 South Dumont Avenue in Woonsocket, South Dakota, as the ''Eleanor McGovern Post Office Building''.	Oct. 24, 2007	1016
110–101	To designate the facility of the United States Postal Service located at 44 North Main Street in Hughesville, Pennsylvania, as the ''Master Sergeant Sean Michael Thomas Post Office''.	Oct. 24, 2007	1017
110–102	To designate the facility of the United States Postal Service located at 3 Quaker Ridge Road in New Rochelle, New York, as the ''Robert Merrill Postal Station''.	Oct. 24, 2007	1018
110–103	To designate the facility of the United States Postal Service located at 326 South Main Street in Princeton, Illinois, as the ''Owen Lovejoy Princeton Post Office Building''.	Oct. 24, 2007	1019
110–104	To designate the facility of the United States Postal Service located at 954 Wheeling Avenue in Cambridge, Ohio, as the ''John Herschel Glenn, Jr. Post Office Building''.	Oct. 24, 2007	1020
110–105	To designate the facility of the United States Postal Service located at 805 Main Street in Ferdinand, Indiana, as the ''Staff Sergeant David L. Nord Post Office''.	Oct. 24, 2007	1021
110–106	To amend Public Law 106-348 to extend the authorization for establishing a memorial in the District of Columbia or its environs to honor veterans who became disabled while serving in the Armed Forces of the United States.	Oct. 25, 2007	1022
110–107	To designate the facility of the United States Postal Service located at Highway 49 South in Piney Woods, Mississippi, as the ''Laurence C. and Grace M. Jones Post Office Building''.	Oct. 26, 2007	1023
110–108	Internet Tax Freedom Act Amendments Act of 2007	Oct. 31, 2007	1024
110–109	Third Higher Education Extension Act of 2007	Oct. 31, 2007	1028
110–110	Joshua Omvig Veterans Suicide Prevention Act	Nov. 5, 2007	1031
110–111	Veterans' Compensation Cost-of-Living Adjustment Act of 2007	Nov. 5, 2007	1035
110–112	To designate the Department of Veterans Affairs Medical Center in Augusta, Georgia, as the ''Charlie Norwood Department of Veterans Affairs Medical Center''.	Nov. 8, 2007	1037
110–113	Procedural Fairness for September 11 Victims Act of 2007	Nov. 8, 2007	1039
110–114	Water Resources Development Act of 2007	Nov. 8, 2007	1041
110–115	To recognize the Navy UDT-SEAL Museum in Fort Pierce, Florida, as the official national museum of Navy SEALS and their predecessors.	Nov. 13, 2007	1293
110–116	Making appropriations for the Department of Defense for the fiscal year ending September 30, 2008, and for other purposes.	Nov. 13, 2007	1295
110–117	To designate the Department of Veterans Affairs Medical Center in Asheville, North Carolina, as the ''Charles George Department of Veterans Affairs Medical Center''.	Nov. 15, 2007	1345
110–118	To name the Department of Veterans Affairs medical facility in Iron Mountain, Michigan, as the ''Oscar G. Johnson Department of Veterans Affairs Medical Facility''.	Nov. 16, 2007	1346
110–119	Providing for the reappointment of Roger W. Sant as a citizen regent of the Board of Regents of the Smithsonian Institution.	Nov. 16, 2007	1347
110–120	To provide technical corrections to Public Law 109-116 (2 U.S.C. 2131a note) to extend the time period for the Joint Committee on the Library to enter into an agreement to obtain a statue of Rosa Parks, and for other purposes.	Nov. 19, 2007	1348
110–121	To designate the facility of the United States Postal Service located at 701 Loyola Avenue in New Orleans, Louisiana, as the ''Louisiana Armed Services Veterans Post Office''.	Nov. 30, 2007	1349
110–122	To designate the facility of the United States Postal Service located at 203 North Main Street in Vassar, Michigan, as the ''Corporal Christopher E. Esckelson Post Office Building''.	Nov. 30, 2007	1350
110–123	To designate the facility of the United States Postal Service located at 950 West Trenton Avenue in Morrisville, Pennsylvania, as the ''Nate DeTample Post Office Building''.	Nov. 30, 2007	1351
110–124	To designate the facility of the United States Postal Service located at 570 Broadway in Bayonne, New Jersey, as the ''Dennis P. Collins Post Office Building''.	Nov. 30, 2007	1352
110–125	To designate the facility of the United States Postal Service located at 216 East Main Street in Atwood, Indiana, as the ''Lance Corporal David K. Fribley Post Office''.	Nov. 30, 2007	1353
110–126	To designate the facility of the United States Postal Service located at 235 Mountain Road in Suffield, Connecticut, as the ''Corporal Stephen R. Bixler Post Office''.	Nov. 30, 2007	1354
110–127	To designate the facility of the United States Postal Service located at 200 North William Street in Goldsboro, North Carolina, as the ''Philip A. Baddour, Sr. Post Office''.	Nov. 30, 2007	1355
110–128	To designate the facility of the United States Postal Service located at 202 East Michigan Avenue in Marshall, Michigan, as the ''Michael W. Schragg Post Office Building''.	Nov. 30, 2007	1356
110–129	To designate the facility of the United States Postal Service located at 1430 South Highway 29 in Cantonment, Florida, as the ''Charles H. Hendrix Post Office Building''.	Nov. 30, 2007	1357
110–130	To designate the facility of the United States Postal Service located at 1400 Highway 41 North in Inverness, Florida, as the ''Chief Warrant Officer Aaron Weaver Post Office Building''.	Nov. 30, 2007	1358
110–131	To designate the facility of the United States Postal Service located at 4320 Blue Parkway in Kansas City, Missouri, as the ''Wallace S. Hartsfield Post Office Building''.	Nov. 30, 2007	1359
110–132	Multinational Species Conservation Funds Reauthorization Act of 2007	Dec. 6, 2007	1360
110–133	Asian Elephant Conservation Reauthorization Act of 2007	Dec. 6, 2007	1362

Public Law	Title	Approved	121 Stat.
110–134	Improving Head Start for School Readiness Act of 2007	Dec. 12, 2007	1363
110–135	Fair Treatment for Experienced Pilots Act	Dec. 13, 2007	1450
110–136	To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958 through May 23, 2008, and for other purposes.	Dec. 14, 2007	1453
110–137	Making further continuing appropriations for the fiscal year 2008, and for other purposes	Dec. 14, 2007	1454
110–138	United States-Peru Trade Promotion Agreement Implementation Act	Dec. 14, 2007	1455
110–139	To provide that the great hall of the Capitol Visitor Center shall be known as Emancipation Hall.	Dec. 18, 2007	1491
110–140	Energy Independence and Security Act of 2007	Dec. 19, 2007	1492
110–141	To exclude from gross income payments from the Hokie Spirit Memorial Fund to the victims of the tragic event at Virginia Polytechnic Institute & State University.	Dec. 19, 2007	1802
110–142	Mortgage Forgiveness Debt Relief Act of 2007	Dec. 20, 2007	1803
110–143	Methamphetamine Remediation Research Act of 2007	Dec. 21, 2007	1809
110–144	Charlie W. Norwood Living Organ Donation Act	Dec. 21, 2007	1813
110–145	To designate the Department of Veterans Affairs outpatient clinic in Green Bay, Wisconsin, as the ''Milo C. Huempfner Department of Veterans Affairs Outpatient Clinic''.	Dec. 21, 2007	1815
110–146	To designate the United States courthouse located at 301 North Miami Avenue, Miami, Florida, as the ''C. Clyde Atkins United States Courthouse''.	Dec. 21, 2007	1816
110–147	To amend section 5112(p)(1)(A) of title 31, United States Code, to allow an exception from the $1 coin dispensing capability requirement for certain vending machines.	Dec. 21, 2007	1817
110–148	To amend the Arizona Water Settlements Act to modify the requirements for the statement of findings.	Dec. 21, 2007	1818
110–149	Making further continuing appropriations for the fiscal year 2008, and for other purposes	Dec. 21, 2007	1819
110–150	To amend title 39, United States Code, to extend the authority of the United States Postal Service to issue a semipostal to raise funds for breast cancer research.	Dec. 21, 2007	1820
110–151	Genocide Accountability Act of 2007	Dec. 21, 2007	1821
110–152	To designate the facility of the United States Postal Service located at 175 South Monroe Street in Tiffin, Ohio, as the ''Paul E. Gillmor Post Office Building''.	Dec. 21, 2007	1823
110–153	To amend the Higher Education Act of 1965 to make technical corrections	Dec. 21, 2007	1824
110–154	To rename the National Institute of Child Health and Human Development as the Eunice Kennedy Shriver National Institute of Child Health and Human Development.	Dec. 21, 2007	1826
110–155	Providing for the reappointment of Patricia Q. Stonesifer as a citizen regent of the Board of Regents of the Smithsonian Institution.	Dec. 21, 2007	1829
110–156	To designate the Department of Veterans Affairs Outpatient Clinic in Tulsa, Oklahoma, as the ''Ernest Childers Department of Veterans Affairs Outpatient Clinic''.	Dec. 26, 2007	1830
110–157	Dr. James Allen Veteran Vision Equity Act of 2007	Dec. 26, 2007	1831
110–158	To designate the Federal building located at 210 Walnut Street in Des Moines, Iowa, as the ''Neal Smith Federal Building''.	Dec. 26, 2007	1837
110–159	To designate the Federal building and United States courthouse located at 100 East 8th Avenue in Pine Bluff, Arkansas, as the ''George Howard, Jr. Federal Building and United States Courthouse''.	Dec. 26, 2007	1838
110–160	Terrorism Risk Insurance Program Reauthorization Act of 2007	Dec. 26, 2007	1839
110–161	Consolidated Appropriations Act, 2008	Dec. 26, 2007	1844
110–162	To designate the facility of the United States Postal Service located at 744 West Oglethorpe Highway in Hinesville, Georgia, as the ''John Sidney 'Sid' Flowers Post Office Building''.	Dec. 26, 2007	2457
110–163	To designate the facility of the United States Postal Service located at 16731 Santa Ana Avenue in Fontana, California, as the ''Beatrice E. Watson Post Office Building''.	Dec. 26, 2007	2458
110–164	To amend the Congressional Accountability Act of 1995 to permit individuals who have served as employees of the Office of Compliance to serve as Executive Director, Deputy Executive Director, or General Counsel of the Office, and to permit individuals appointed to such positions to serve one additional term.	Dec. 26, 2007	2459
110–165	To designate the facility of the United States Postal Service located at 797 Sam Bass Road in Round Rock, Texas, as the ''Marine Corps Corporal Steven P. Gill Post Office Building''.	Dec. 26, 2007	2460
110–166	Tax Increase Prevention Act of 2007	Dec. 26, 2007	2461
110–167	To designate the facility of the United States Postal Service located at 567 West Nepessing Street in Lapeer, Michigan, as the ''Turrill Post Office Building''.	Dec. 26, 2007	2462
110–168	To authorize a major medical facility project to modernize inpatient wards at the Department of Veterans Affairs Medical Center in Atlanta, Georgia.	Dec. 26, 2007	2463
110–169	To designate the facility of the United States Postal Service located at 11 Central Street in Hillsborough, New Hampshire, as the ''Officer Jeremy Todd Charron Post Office''.	Dec. 26, 2007	2464
110–170	Chimp Haven is Home Act	Dec. 26, 2007	2465
110–171	Granting the consent of Congress to the International Emergency Management Assistance Memorandum of Understanding.	Dec. 26, 2007	2467
110–172	Tax Technical Corrections Act of 2007	Dec. 29, 2007	2473
110–173	Medicare, Medicaid, and SCHIP Extension Act of 2007	Dec. 29, 2007	2492
110–174	Sudan Accountability and Divestment Act of 2007	Dec. 31, 2007	2516
110–175	Openness Promotes Effectiveness in our National Government Act of 2007	Dec. 31, 2007	2524
110–176	To amend the Internal Revenue Code of 1986 to clarify the term of the Commissioner of Internal Revenue.	Jan. 4, 2008	2532
110–177	Court Security Improvement Act of 2007	Jan. 7, 2008	2534
110–178	U.S. Capitol Police and Library of Congress Police Merger Implementation Act of 2007	Jan. 7, 2008	2546
110–179	Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007	Jan. 7, 2008	2556
110–180	NICS Improvement Amendments Act of 2007	Jan. 8, 2008	2559

Federal Register

Monday,
February 11, 2008

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 226

Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 226

[Docket No. 071227892–7894–01]

RIN 0648–AW39

Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon

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

ACTION: Final rule.

SUMMARY: We are issuing a final determination to list the Oregon Coast coho salmon (*Oncorhynchus kisutch*) evolutionarily significant unit (ESU) as a threatened species under the Endangered Species Act (ESA). We are also issuing final protective regulations and a final critical habitat designation for the Oregon Coast coho ESU.

DATES: The listing determination, protective regulations, and designated critical habitat are effective on May 12, 2008. With respect to the protective regulations, the take prohibitions for the Oregon Coast coho ESU do not apply to research and enhancement activities specified in an application for a permit or approval under the protective regulations, provided that the application has been received by the Assistant Administrator for Fisheries (AA), NOAA, no later than June 10, 2008. This ''grace period'' for pending research and enhancement applications will remain in effect until the issuance or denial of authorization, or March 31, 2009, whichever occurs earliest.

ADDRESSES: NMFS, Protected Resources Division, 1201 NE Lloyd Boulevard, Suite 1100, Portland, Oregon 97232.

FOR FURTHER INFORMATION CONTACT: Scott Rumsey, NMFS, Northwest Region, Protected Resources Division, at (503) 872–2791, or Marta Nammack, NMFS, Office of Protected Resources, at (301) 713–1401. Reference materials regarding this determination are available upon request or on the Internet at *http://www.nwr.noaa.gov.*

SUPPLEMENTARY INFORMATION:

Previous Federal ESA Actions Related to Oregon Coast Coho

In 1995, we completed a comprehensive status review of West Coast coho salmon (Weitkamp *et al.*, 1995) that resulted in proposed listing determinations for three coho ESUs, including a proposal to list the Oregon Coast coho ESU as a threatened species (60 FR 38011; July 25, 1995). On October 31, 1996, we announced a 6-month extension of the final listing determination for the ESU, pursuant to section 4(b)(6)(B)(I) of the ESA, noting substantial disagreement regarding the sufficiency and accuracy of the available data relevant to the assessment of extinction risk and the evaluation of protective efforts (61 FR 56211). On May 6, 1997, we withdrew the proposal to list the Oregon Coast coho ESU as threatened, based in part on conservation measures contained in the Oregon Coastal Salmon Restoration Initiative (later renamed the Oregon Plan for Salmon and Watersheds; hereafter referred to as the Oregon Plan) and an April 23, 1997, Memorandum of Agreement (MOA) between NMFS and the State of Oregon which further defined Oregon's commitment to salmon conservation (62 FR 24588). We concluded that implementation of harvest and hatchery reforms, and habitat protection and restoration efforts under the Oregon Plan and the MOA substantially reduced the risk of extinction faced by the Oregon Coast coho ESU. On June 1, 1998, the U.S. District Court for the District of Oregon issued an opinion finding that our May 6, 1997, determination to not list Oregon Coast coho was arbitrary and capricious (*Oregon Natural Resources Council* v. *Daley,* 6 F. Supp. 2d 1139 (D. Or. 1998)). The Court vacated our determination to withdraw the proposed rule to list the Oregon Coast coho ESU and remanded the determination to NMFS for further consideration. On August 10, 1998, we issued a final rule listing the Oregon Coast coho ESU as threatened (63 FR 42587), basing the determination solely on the information and data contained in the 1995 status review (Weitkamp *et al.*, 1995) and the 1997 proposed rule.

In 2001 the U.S. District Court in Eugene, Oregon, set aside the 1998 threatened listing of the Oregon Coast coho ESU (*Alsea Valley Alliance* v. *Evans,* 161 F. Supp. 2d 1154, (D. Or. 2001)) (Alsea). In response to the *Alsea* ruling and several listing and delisting petitions, we announced that we would conduct an updated status review of 27 West Coast salmonid ESUs, including the Oregon Coast coho ESU (67 FR 6215, February 11, 2002; 67 FR 48601, July 25, 2002).

In 2003 we convened the Pacific Salmonid Biological Review Team (BRT) (an expert panel of scientists from several Federal agencies including NMFS, the U.S. Fish and Wildlife Service (FWS), and the U.S. Geological Survey (USGS)) to review the extinction risks of naturally spawning populations in the 27 ESUs under review, including the Oregon Coast coho ESU (Good *et al.*, 2005; NMFS, 2003a). In making its recommendation, the BRT used a process where each member of the BRT was given 10 votes to divide among three conclusions. Members were allowed to assign votes to more than one conclusion, allowing them to express their relative degree of confidence in particular conclusions. The three options were ''In Danger of Extinction,'' ''Likely to Become Endangered,'' and ''Not Warranted.'' Fifty-six percent of the votes supported the conclusion that naturally spawning Oregon coast coho were likely to become endangered in the foreseeable future, and 44 percent supported the conclusion that naturally spawning Oregon coast coho was ''Not Warranted'' (that is, not likely to become in danger of extinction in the foreseeable future). The BRT noted considerable uncertainty regarding the future viability of the ESU given the uncertainty in predicting future ocean conditions for coho survival, as well as uncertainty in whether current freshwater habitats are of sufficient quality and quantity to support the recent high abundance levels and sustain populations during future downturns in ocean conditions. Although the BRT couched its conclusion in terms of the statutory definition of a threatened species (that is, not in danger of extinction, but likely to become endangered in the foreseeable future), the BRT's conclusion did not constitute a recommendation to list the species. Our listing determination also considered the risks and benefits from artificial propagation programs included in the ESU, efforts being made to protect the species, and the five factors listed under section 4(a)(1) of the ESA.

On June 14, 2004, based primarily on the BRT voting results, we proposed to list the Oregon Coast coho ESU as a threatened species (69 FR 33102). However, the proposed listing recognized that further information would likely become available and that this information could affect the outcome of the final determination. In the proposed rule, we noted that Oregon was initiating a comprehensive assessment of the viability of the Oregon Coast coho ESU and of the adequacy of actions under the Oregon Plan for conserving Oregon Coast coho. As part of that proposed rule we proposed amendments to existing protective regulations issued under ESA section

4(d) (''4(d) regulations'') for all threatened West Coast salmon and steelhead (50 CFR 223.203). These amendments were needed to: (1) Provide flexibility in fisheries and hatchery management; and (2) simplify and clarify the existing regulations so that they may be more efficiently and effectively accessed and interpreted by all affected parties.

On December 14, 2004, we proposed designations of critical habitat for 13 ESUs of Pacific salmon and steelhead in the Pacific Northwest, including the Oregon Coast coho ESU (69 FR 74572). We proposed critical habitat in 72 of 80 occupied watersheds, contained in 13 subbasins, totaling approximately 6,665 stream miles along the Oregon Coast, south of the Columbia River and north of Cape Blanco (Oregon). The estimated economic impact of the areas proposed for critical habitat was approximately $15.7 million. Eight occupied watersheds were proposed for exclusion because the high benefits of exclusion (due to economic impacts) outweighed the low benefits of inclusion (due to the low inherent conservation value for the listed species). These excluded watersheds included approximately 134 stream miles and represented a 15 percent reduction (approximately $2.75 million) in the economic impact of the proposed designation. To assess economic impacts we measured the co-extensive impacts because, based on the existing record, we could not distinguish between the costs associated with the species' listing from the costs of separately designating critical habitat.

In January 2005 the State of Oregon released a draft Oregon Coastal Coho Assessment (Oregon's Draft Viability Assessment), which (1) evaluated the current viability of the Oregon Coast coho ESU, and (2) evaluated the certainty of implementation and effectiveness of the Oregon Plan measures in addressing the factors for decline of the Oregon Coast coho ESU. The latter evaluation was intended to satisfy the joint NMFS—FWS Policy on Evaluating Conservation Efforts (''PECE''; 68 FR 15100; March 28, 2003). Oregon's Draft Viability Assessment concluded that the Oregon Coast coho ESU is currently viable and that measures under the Oregon Plan have stopped, if not reversed, the deterioration of Oregon Coast coho habitats. The Draft Viability Assessment also concluded that it is highly likely that existing monitoring efforts would detect any significant future deterioration in the ESU's viability, or degradation of environmental condition, allowing a timely and appropriate response to conserve the ESU. On February 9, 2005, we published a notice of availability of Oregon's Draft Viability Assessment for public review and comment in the **Federal Register** (70 FR 6840) and noted that information presented in the draft and final assessments would be considered in making the final listing determination for the Oregon Coast coho ESU.

We forwarded the public comments we received on Oregon's Draft Viability Assessment, as well as our technical reviews, for Oregon's consideration in developing its final assessment. The public comments and our review highlighted areas of uncertainty or disagreement regarding the sufficiency and accuracy of Oregon's Draft Viability Assessment, including: the assumption that Oregon Coast coho populations are inherently resilient at low abundance, and that this compensatory response will prevent extinction during periods of low marine survival; the apparent de-emphasis of abundance as a useful indicator of extinction risk; assumptions regarding the duration and severity of future periods of unfavorable marine and freshwater conditions; the ability of monitoring and adaptive management efforts to detect population declines or habitat degradation, and to identify and implement necessary protective measures; and the ability of Oregon Plan measures to halt or reverse habitat degradation once detected.

On May 13, 2005, Oregon issued its final Oregon Coastal Coho Assessment (Oregon's Final Viability Assessment). Oregon's Final Viability Assessment included several changes intended to address concerns raised regarding the sufficiency and accuracy of the draft assessment. Oregon's Final Viability Assessment concluded that: (1) The Oregon Coast coho ESU is viable under current conditions, and should be sustainable through a future period of adverse environmental conditions (including a prolonged period of poor ocean productivity); (2) given the assessed viability of the ESU, the quality and quantity of habitat is necessarily sufficient to support a viable ESU; and (3) the integration of laws, adaptive management programs, and monitoring efforts under the Oregon Plan will maintain and improve environmental conditions and the viability of the ESU into the foreseeable future.

On June 28, 2005 (70 FR 37217), we announced a 6-month extension of the final listing determination for the Oregon Coast coho ESU, finding that ''there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination * * * for the purposes of soliciting additional data'' (section 4(b)(6)(B)(i) of the ESA). We announced a 30-day public comment period to solicit information regarding the validity of Oregon's Final Viability Assessment, particularly in light of the concerns raised with respect to Oregon's Draft Viability Assessment. In September 2005 we issued final critical habitat designations for 12 Pacific Northwest ESUs (70 FR 52685; September 2, 2005), but we did not issue a final critical habitat designation for Oregon Coast coho because it was only proposed for listing at that time.

On January 19, 2006, we issued a final determination that listing the Oregon Coast coho ESU under the ESA was not warranted (71 FR 3033). As part of this determination, we withdrew the proposed ESA section 4(d) regulations and critical habitat designation for the ESU. In reaching our determination not to list Oregon Coast coho, we found that the BRT's slight majority opinion that the ESU is ''likely to become endangered'' and the conclusion of the Oregon Final Viability Assessment that the ESU is viable represented competing reasonable inferences from the available scientific information and considerable associated uncertainty. The difference of opinion centered on whether the ESU was at risk because of the ''threatened destruction, modification, or curtailment of its habitat or range.'' We conducted an analysis of current habitat status and likely future habitat trends (NMFS, 2005a) and found that: (1) The sufficiency of current habitat conditions was unknown; and (2) likely future habitat trends were mixed (i.e., some habitat elements were likely to improve, some were likely to decline, others were likely to remain in their current condition). We concluded that there was insufficient evidence to support the conclusion that the ESU was more likely than not to become an endangered species in the foreseeable future throughout all or a significant portion of its range.

Our decision not to list the Oregon Coast coho ESU was challenged in *Trout Unlimited*. On October 9, 2007, the U.S. District Court for the District of Oregon invalidated our January 2006 decision not to list Oregon Coast coho (*Trout Unlimited* v. *Lohn, Civ. No. 06–01493 ST* (*D. Oreg., October 9, 2007*). The Court found that Oregon's Viability Assessment does not represent the best available science, and that we improperly considered it in reaching our final listing decision. The Court ordered us to issue a new final listing rule consistent with the ESA. This listing decision has been made in compliance with the Court's order.

ESA Statutory Provisions

Listing Determinations

The ESA defines an endangered species as one that is in danger of extinction throughout all or a significant portion of its range, and a threatened species as one that is likely to become endangered in the foreseeable future (sections 3(6) and 3(20), respectively). The statute requires us to determine whether any species is endangered or threatened because of any of five factors: the present or threatened destruction of its habitat, overexploitation, disease or predation, the inadequacy of existing regulatory mechanisms, or any other natural or manmade factors (section 4(a)(1)(A)–(E)). We are to make this determination based solely on the best available scientific information after conducting a review of the status of the species and taking into account any efforts being made by states or foreign governments to protect the species. The focus of our evaluation of these five factors is to evaluate whether and to what extent a given factor represents a threat to the future survival of the species. The focus of our consideration of protective efforts is to evaluate whether these efforts substantially have and will continue to address the identified threats and so ameliorate a species' risk of extinction. In making our listing determination, we must consider all factors that may affect the future viability of the species, including whether regulatory and conservation programs are inadequate and allow threats to the species to persist or worsen, or whether these programs are likely to mitigate threats to the species and reduce its extinction risk. The steps we follow in implementing this statutory scheme are to: review the status of the species, analyze the factors listed in section 4(a)(1) of the ESA to identify threats facing the species, assess whether certain protective efforts mitigate these threats, and make our best prediction about the species' future persistence.

As indicated above, the PECE provides direction for considering protective efforts identified in conservation agreements, conservation plans, management plans, or similar documents (developed by Federal agencies, state and local governments, tribal governments, businesses, organizations, and individuals) that have not yet been implemented, or have been implemented but have not yet demonstrated effectiveness. The policy articulates several criteria for evaluating the certainty of implementation and effectiveness of protective efforts to aid in determining whether a species warrants listing under the ESA. Evaluation of the certainty that an effort will be implemented includes whether: the necessary resources (e.g., funding and staffing) are available; the requisite agreements have been formalized such that the necessary authority and regulatory mechanisms are in place; there is a schedule for completion and evaluation of the stated objectives; and (for voluntary efforts) the necessary incentives are in place to ensure adequate participation. The evaluation of the certainty of an effort's effectiveness is made on the basis of whether the effort or plan: Establishes specific conservation objectives; identifies the necessary steps to reduce threats or factors for decline; includes quantifiable performance measures for the monitoring of compliance and effectiveness; incorporates the principles of adaptive management; and is likely to improve the species' viability at the time of the listing determination.

PECE also notes several important caveats. Satisfaction of the above mentioned criteria for implementation and effectiveness establishes a given protective effort as a candidate for consideration, but does not mean that an effort will ultimately change the risk assessment. The policy stresses that, just as listing determinations must be based on the viability of the species at the time of review, so they must be based on the state of protective efforts at the time of the listing determination. The PECE does not provide explicit guidance on how protective efforts affecting only a portion of a species' range may affect a listing determination, other than to say that such efforts will be evaluated in the context of other efforts being made and the species' overall viability.

Protective Regulations

ESA section 9(a) take and other prohibitions (16 U.S.C. 1538(a)(1)(B)) apply to all species listed as endangered. Hatchery stocks determined to be part of endangered ESUs are afforded all of the full section 9 protections. In the case of threatened species, ESA section 4(d) leaves it to the Secretary of Commerce's (Secretary) discretion to determine whether and to what extent regulatory requirements may be appropriate, by directing the Secretary to issue regulations determined to be necessary and advisable for the conservation of the species. We have flexibility under section 4(d) to tailor protective regulations based on the contributions of available conservation measures. The 4(d) regulations may prohibit, with respect to threatened species, some or all of the acts which section 9(a) of the ESA prohibits with respect to endangered species.

Critical Habitat

Section 3 of the ESA defines critical habitat as (1) specific areas within the geographical area occupied by the species at the time of listing, on which are found those physical or biological features that are essential to the conservation of the listed species and that may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by the species at the time of listing that are essential for the conservation of a listed species. In designating critical habitat our regulations direct us to focus on ''primary constituent elements,'' or PCEs, in identifying these physical or biological features. Section 4 of the ESA requires us to consider the economic impacts, impacts on national security, and other relevant impacts of specifying any particular area as critical habitat. We may exclude any area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless the failure to designate such an area will result in the extinction of the species.

At the time of a proposed listing determination, ESA section 4(a)(3) and our regulations require us to specify critical habitat to the maximum extent ''prudent and determinable.'' Critical habitat designation is not prudent if: (1) The species is threatened by taking or other human activity and the identification of critical habitat can be expected to increase such threat(s); or (2) critical habitat designation would not be beneficial to the species. Critical habitat is not determinable if: (1) Sufficient information is lacking to perform the required analyses of the impact of the designation; or (2) the biological needs of the species are not sufficiently well known to identify an area as critical habitat. In our proposed rule to designate specific areas as critical habitat (69 FR 74572; December 14, 2004), we determined that designating critical habitat for this species is prudent and determinable. The record continues to support this determination.

The ESA requires that a final regulation designating critical habitat be published concurrently with the final determination listing a species as threatened or endangered, unless: (1) It is essential to the conservation of such species that the species be listed promptly (e.g., in instances when a species is listed by emergency rule); or (2) critical habitat of such species is not

then determinable. Section 7(a)(2) of the ESA requires that each Federal agency shall, in consultation with, and with the assistance of, NMFS, ensure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of its designated critical habitat.

Summary of Public and Independent Review

Our regulations require that we allow a period of at least 60 days for the public to review and comment on a proposed rule to list, delist, or reclassify a species, or to designate or revise critical habitat. We may extend or reopen the comment period upon finding that there is good cause to do so by publishing notice in the **Federal Register**. We are required to hold at least one public hearing if any person so requests within 45 days of the publication of a proposed rule. Notice of the location and time of any hearings is published in the **Federal Register**.

A 1994 joint NMFS–FWS policy (Independent Review Policy) requires us to solicit independent expert review from at least three qualified specialists, concurrent with the public comment period following a proposed rule (59 FR 34270; July 1, 1994). In December 2004 the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review (Peer Review Bulletin), establishing minimum peer review standards, a transparent process for public disclosure, and opportunities for public input. The OMB Peer Review Bulletin, implemented under the Information Quality Act (Pub. L. 106–554), is intended to ensure the quality of agency information, analyses, and regulatory activities and provide for a more transparent review process.

Listing Determination and Protective Regulations

We solicited public comment on the proposed listing determination and ESA section 4(d) regulations for the Oregon Coast coho ESU for a total of 208 days (69 FR 33102, June 14, 2004; 69 FR 53031, August 31, 2004; 69 FR 61348, October 18, 2004; 70 FR 6840, February 9, 2005; 70 FR 37217, June 28, 2005). In addition, we held eight public hearings in the Pacific Northwest concerning the June 2004 West Coast salmon and steelhead proposed 4(d) regulations and proposed listing determinations, including the proposed determination for the Oregon Coast coho ESU (69 FR 53031, August 31, 2004; 69 FR 61348, October 18, 2004). In compliance with the 1994 Independent Review Policy we solicited technical review of the June 2004 proposed 4(d) regulations and listing determinations, including the proposed determination for the Oregon Coast coho ESU, from over 50 independent experts selected from the academic and scientific community, Native American tribal groups, Federal and state agencies, and the private sector. The individuals from whom we solicited review of the proposals and the underlying science were selected because of their demonstrated expertise in a variety of disciplines including: Artificial propagation; salmonid biology, taxonomy, and ecology; genetic and molecular techniques and analyses; population demography; quantitative methods of assessing extinction risk; fisheries management; local and regional habitat conditions and processes; and conducting scientific analyses in support of ESA listing determinations. The individuals solicited represent a broad spectrum of perspectives and expertise. The individuals solicited include those who have been critical of past agency actions in implementing the ESA for West Coast salmon and steelhead, as well as those who have been supportive of these actions. These individuals were not involved in producing the scientific information for our determinations and were not employed by the agency. We received comments from four of these experts. In addition to these solicited reviews, several independent scientific panels and academic societies provided technical review of the proposals and the supporting documentation. With respect to the Peer Review Bulletin's requirements for ''adequate [prior] peer review,'' we believe the independent expert review under the 1994 Independent Review Policy, and the comments received from several academic societies and expert advisory panels, collectively satisfy the Peer Review Bulletin's requirements (NMFS, 2005b).

In response to our requests for information and comments on the June 2004 proposed listing determinations, we received over 28,250 comments by fax, standard mail, and e-mail. The majority of the comments received were from interested individuals who submitted form letters or form e-mails that addressed general issues not specific to the Oregon Coast coho ESU. Comments were also submitted by state and tribal natural resource agencies, fishing groups, environmental organizations, home builder associations, academic and professional societies, expert advisory panels, farming groups, irrigation groups, and individuals with expertise in Pacific salmonids. The majority of commenters focused on the consideration of hatchery-origin fish in ESA listing determinations, with only a few comments specifically addressing the Oregon Coast coho ESU. We also received comments from 4 of the 50 independent experts from whom we had requested technical review of the scientific information underlying the June 2004 proposed listing determinations. Their comments did not specifically address the proposed determination for the Oregon Coast coho ESU. The reader is referred to the final hatchery listing policy (70 FR 37204; June 28, 2005) and the final listing determinations and ESA section 4(d) regulations for 16 salmon ESUs (70 FR 37160; June 28, 2005) for a summary and discussion of issues raised by the comments that were not specific to the Oregon Coast coho ESU. The comments addressing the proposed listing determination for the Oregon Coast coho ESU are summarized below. We did not receive any comments that addressed the proposed 4(d) regulations in the specific context of the Oregon Coast coho ESU.

Critical Habitat

We solicited public comment on the proposed critical habitat designation for Oregon Coast coho for a total of 105 days (69 FR 74578, December 14, 2004; 70 FR 6394; February 7, 2005). We also contacted the appropriate Federal, state, and local agencies, scientific organizations, and other interested parties and invited them to comment on the proposed rule. To facilitate public participation, we made the proposed rule available via the Internet as soon as it was signed by the AA of NMFS (approximately 2 weeks prior to actual publication). In addition, we held four public hearings in the Pacific Northwest between January 11, 2005, and January 25, 2005. We received 5,230 written comments (5,111 of these were ''form e-mails'' with nearly identical verbiage) during the comment period on the proposed rule. Eight comments addressed specifically, or in part, the proposed critical habitat designation for the Oregon Coast coho ESU.

In compliance with the Peer Review Bulletin, prior to publishing the proposed rule we submitted the initial biological assessments of our Critical Habitat Analytical Review Teams (CHARTs) to state and tribal comanagers and asked them to review those findings. These comanager reviews resulted in several changes to the CHARTs' preliminary assessments (for

example, revised fish distribution as well as conservation value ratings) and helped ensure that the CHARTs' revised findings incorporated the best available scientific data. Consistent with the 1994 Independent Review Policy, we later solicited technical review of the entire critical habitat proposal (including the underlying biological and economic reports) from 45 independent experts selected from the academic and scientific community, Native American tribal groups, Federal and state agencies, and the private sector. We also solicited opinions from three individuals with economics expertise to review the draft economics analysis supporting the proposed rule. All three of the economics reviewers and three of the biological reviewers submitted written opinions on our proposal. We have determined that the independent expert review and comments received regarding the science involved in this rulemaking constitute adequate prior review under section II.2 of the OMB Peer Review Bulletin (NMFS, 2005c) and satisfy the 1994 Independent Review Policy.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for all 13 ESUs addressed in the proposed rule. The reader is referred to the final critical habitat designations for 12 Pacific Northwest ESUs (70 FR 52685; September 2, 2005) for a summary and discussion of general issues, or issues specific to other ESUs. The comments addressing the proposed critical habitat designation for the Oregon Coast coho ESU are summarized below.

Comments Specific to Oregon Coast Coho

Below we address the comments received that directly pertain to: (1) The listing determination for the Oregon Coast coho ESU, and (2) the designation of critical habitat for the Oregon Coast coho ESU. (Copies of the full text of comments received are available upon request, see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT,** above.)

Comments Regarding the Listing Determination

Comment 1: The Oregon Department of Fish and Wildlife (ODFW) expressed concern regarding the proposed inclusion of the North Fork Nehalem River coho hatchery program in the Oregon Coast coho ESU. ODFW explained that the hatchery program propagates two different stocks: The North Fork Nehalem River hatchery coho stock (ODFW stock #32) and the Fishhawk Lake hatchery coho stock (ODFW stock #99). ODFW noted that both stocks, although founded using local natural-origin fish, are presently managed as isolated broodstocks. Although the level of divergence between these hatchery stocks and the local wild populations is not known, ODFW noted that our hatchery reviews (NMFS, 2003b, 2004a, 2004b) acknowledged that the level of divergence may be substantial. ODFW recommended that both the North Fork Nehalem River and Fishhawk Lake hatchery stocks be excluded from the ESU.

ODFW also noted that the recently founded Calapooya Creek (Umpqua River basin, Oregon) hatchery coho stock was not included in our hatchery reviews. The Calapooya Creek program was a small, short-term (in operation from 2001–2003), research hatchery program conducted to evaluate the use of hatchery-reared fish in the supplementation of a wild coho population. The program is no longer releasing fish, and had adults returning through 2006. ODFW suggested that, had we included this stock in our initial evaluations, the progeny expected to return through 2006 would have been considered as part of the Oregon Coast coho ESU.

Response: We agree with ODFW's comments that the North Fork Nehalem River and Fishhawk Lake stocks propagated by the Nehalem hatchery coho program are substantially reproductively isolated from the local natural populations, and diverged substantially from the evolutionary legacy of the ESU. Moreover, since our 2006 final determination these two programs have been discontinued, with the last adults returning in 2007 (NMFS, 2007a). We conclude that the North Fork Nehalem River and Fishhawk Lake hatchery coho stocks are not part of the Oregon Coast coho ESU.

We did not include the Calapooya Creek coho hatchery stock in our hatchery reviews as the program is no longer collecting fish for broodstock or releasing smolts. We agree with ODFW that returns from Calapooya Creek hatchery stock, having been derived from local natural-origin fish, likely were no more than moderately diverged from the local natural populations. However, given that the program has been terminated, and 2006 was the last year of returns, the Calapooya Creek hatchery stock will not be considered part of the Oregon Coast coho ESU.

At the time of the 2004 proposed rule and our January 2006 final determination not to list the ESU, Cow Creek (ODFW stock #37), the North Umpqua River (ODFW stock #18), the Coos Basin (ODFW stock #37), and the Coquille River (ODFW stock #44) hatchery coho programs were considered part of the Oregon Coast coho ESU. The latter three of these programs have been discontinued since our 2006 final determination (NMFS, 2007a). The last year of returns for these programs is 2007. Given that the North Umpqua River, Coos Basin, and Coquille River hatchery programs have been terminated, and this winter (2007) is the last year of returns, these stocks will not be considered part of the Oregon Coast coho ESU.

Comment 2: A comment submitted by the Pacific Rivers Council (PRC) included a July 2003 report investigating the potential benefits of a modeled conservation hatchery program in supplementing Oregon Coast coho (Oosterhout and Huntington, 2003). PRC asserted that the report supports their position that hatchery fish should be considered as only a threat to wild salmonid populations, and that any potential short-term benefits of artificial propagation are outweighed by the long-term damaging genetic and ecological effects on wild populations. The Oosterhout and Huntington (2003) report modeled an ''idealized conservation hatchery'' program and evaluated the success of supplementation efforts under different scenarios of habitat quality and marine survival. The authors conclude from their modeling study that supplementation, even under optimized model assumptions, poses long-term ecological and genetic risks, and any short-term gains in salmon abundance are temporary.

Response: The use of artificial propagation represents a broad spectrum of hatchery practices and facilities, as well as a variety of ecological settings into which hatchery-origin fish are released. For this reason it is essential to assess hatchery programs on a case-by-case basis. Our assessment of the benefits, risks, and uncertainties of artificial propagation concluded that the specific hatchery programs considered to be part of the Oregon Coast coho ESU collectively do not substantially reduce the extinction risk of the ESU in-total (NMFS, 2004b). We noted that these hatchery programs likely contribute to an increased abundance of total natural spawners in the short term, although their contribution to the productivity of the supplemented populations is unknown. Our assessment is consistent with the findings of Oosterhout and Huntington (2003). The findings of scientific studies, such as the subject study on simulated conservation hatchery

programs and their impacts on natural coho populations, inform our consideration of the benefits and risks to be expected from artificial propagation. However, it would be inappropriate to rely on theoretical conclusions about the effectiveness of hatchery programs while ignoring program-specific information regarding broodstock origin, hatchery practices, and performance of hatchery- and natural-origin fish.

Comment 3: Douglas County Board of Commissioners (Oregon) submitted a report (Cramer *et al.*, 2004) that concludes that NMFS' earlier viability analyses overstate the risks to Oregon Coast coho populations, and that the 2003 BRT's findings warrant reconsideration. The Cramer *et al.* (2004) report asserts that previous viability assessments failed to adequately consider connectivity among spawner aggregations, underestimated juvenile over-winter survival in smaller stream reaches, and underestimated coho population stability. The report asserts that sharp reductions in ocean harvest rates since 1994, declining influence of hatchery-origin fish, and improved monitoring and evaluation under the Oregon Plan confer a very low risk of extinction even if future marine survival rates are low and remain low.

Response: The Cramer *et al.* (2004) report does not present any substantial new information, other than including an additional year of abundance data that was not available to the BRT. The report emphasizes selective aspects of the available data including: reduction of threats by changes in fishery and harvest management; and improved biological status evidenced by increasing spawning escapements and successful juvenile rearing throughout the ESU. These observations and analyses were fully considered in the BRT's review (Good *et al.*, 2005; NMFS, 2003a). The Cramer *et al.* (2004) report does not, by itself, add to our consideration of the BRT's findings.

Comment 4: Several commenters felt that effective regulatory controls and monitoring programs are in place to ensure that harvest and hatchery practices no longer threaten the ESU.

Response: Many noteworthy and important regulatory changes have been made that adequately address historically harmful practices. Changes in ocean and freshwater fisheries management have resulted in sharp reductions in fishing mortality in Oregon Coast coho populations, and likely have contributed to recent population increases. It is unlikely that those harvest controls will weaken in the future, in light of Federal management of ocean fisheries. Reforms in hatchery management practices have limited the potential for adverse ecological interactions between hatchery-origin and natural fish, and have markedly reduced risks to the genetic diversity and reproductive fitness for the majority of naturally spawned populations in the ESU. It is also unlikely those reforms will be weakened in the future.

Comment 5: One commenter was critical of the Oregon Forest Practices Act, and argued that it is inadequate to prevent the future degradation of riparian habitats, particularly on private non-industrial forestlands. The commenter noted that the Forest Practices Act applies only to the commercial harvest of trees, and that non-commercial land owners may cut riparian trees without restriction if they do not sell the wood. The commenter noted that this unregulated practice is particularly evident in areas with increased rural residential development along streambanks.

Other commenters doubted whether regulations, restoration programs, and other protective efforts would improve habitat conditions in the foreseeable future. One commenter noted that there is an insufficient data record to evaluate the success of protective efforts aimed at restoring riparian habitats, particularly in increasing the recruitment of large woody debris. Several other commenters doubted whether forest management under the Oregon Plan has resulted, or will result, in an increased amount of large-diameter trees (important for the recruitment of large woody debris in coho rearing areas). The commenters argued that the shorter rotations being implemented on private industrial forest lands reduce the size of trees delivered to streams in landslides, and thus may result in diminished stream complexity in important coho rearing habitats.

Response: Our review suggests that there are likely to be improvements in some aspects of habitat condition, declines in others, and a continuation of current conditions in still others (NMFS, 2005a). For example, the Northwest Forest Plan instituted riparian habitat buffers and other measures on Federal lands that improved many of the historical forestry practices that led to the loss and degradation of riparian habitats. Development and implementation of Total Maximum Daily Loads under the Federal Clean Water Act are likely to result in improved water quality. Restoration efforts have treated approximately seven percent of the stream miles within the range of the ESU over the last 7 years with the intent of restoring stream complexity and riparian habitats and improving water quality, though it is unclear how much restoration is likely to occur in the future, given funding uncertainties.

Forest practices on state and private land include some improvements over historically harmful practices, such as the establishment of riparian management areas under revisions to Oregon forest practice rules in the 1990s. However, there are also offsetting practices that are expected to degrade habitat conditions and complexity, such as shorter harvest rotations, road construction, and logging on unstable slopes and along debris flow paths (NMFS, 2005a).

For agricultural lands, riparian management is governed by agricultural water quality management plans under Oregon Senate Bill 1010, as well as by subsequently developed riparian rules which synthesize elements of individual Senate Bill 1010 plans for a given basin. These agricultural plans and rules do not specify the vegetation composition or size of the riparian areas to be established. The lack of specificity of these agricultural plans makes the enforcement and effectiveness of these plans uncertain (NMFS, 2005a). Any modest improvements in riparian vegetation on agricultural lands under current rules that might be expected may be offset by habitat declines resulting from urban and rural development (NMFS, 2005a). On balance, habitat conditions on agricultural lands are not likely to show significant improvement or decline.

Future urbanization and development within the range of the ESU is projected at approximately 20 percent population growth, representing slightly more than 30,000 people over the next 40 years (NMFS, 2005a). Most of this development is expected to be concentrated in lowland areas with high intrinsic potential for rearing coho. Current urban or rural growth boundaries encompass approximately nine percent of high intrinsic potential riparian habitat areas, so future urbanization and development activities could have significant implications for some coho populations. The degree of potential impacts on coho habitat (both positive and negative) is highly uncertain and depends largely on the spatial distribution of future urbanization and development activities, their proximity to riparian areas, and the kinds of development activities undertaken and the land management practices used.

Comment 6: Several commenters expressed concern that inadequate funding has limited the ability of many

Oregon agencies to monitor non-permitted habitat-affecting activities, effectively enforce regulations, and ensure proper reporting of permitted activities. The commenters felt that these inadequacies should be considered evidence of uncertainty that some as yet, unproven elements under the Oregon Plan will be implemented.

Response: The commenters are correct that the availability of necessary funding and staffing resources is an important consideration in evaluating how likely it is that a given protective effort will be implemented. Our review has noted that funding declines have led to the loss of staff at the Oregon Department of Environmental Quality, Department of Forestry, and ODFW (NMFS, 2005a). The reduced funding has slowed the completion of Total Maximum Daily Load water quality standards, and reduced the ability to monitor water quality, habitat structure and complexity, and fish populations.

Comments Regarding the Designation of Critical Habitat

Comment 7: One Federal commenter provided information recommending changes to designated stream reaches in several watersheds due to errors in interpreting existing salmon distribution maps, recent field surveys, and the location of impassible barriers. This commenter also questioned the inclusion of Jackson and Josephine counties as within the range of areas designated as critical habitat for Oregon Coast coho salmon.

Response: In light of the specific comments received, we have reviewed all the data regarding habitat areas occupied by coho salmon and the location of impassible barriers. This review included discussions with local ODFW biologists familiar with the areas in question. The majority of suggested revisions were found to be warranted, and, as a result, we have updated the endpoints delineating areas occupied by coho salmon, including those designated as critical habitat, in ten watersheds (see ''*Summary of Changes from the Proposed Critical Habitat Designation*''). We have also removed Josephine and Jackson counties from the relevant critical habitat table in our regulations. These counties overlap slightly with upland areas in watersheds occupied by Oregon Coast coho salmon, but they do not contain stream reaches designated as critical habitat for this ESU.

Comment 8: Two commenters questioned the ''medium'' conservation-value rating assigned by the CHART to the habitat area for Devils Lake coho. These areas are within a larger Devils Lake/Moolack Frontal watershed. The commenters cited recent genetic data establishing that coho from Rock Creek/Devils Lake are genetically distinct from other populations in the ESU. The commenters believed that the coho in Devils Lake possess a unique and distinct genetic heritage warranting a ''high'' conservation value rating.

Response: The CHART considered these comments along with recent population identification work (Lawson *et al.*, 2007) and genetic analyses by Johnson and Banks (2007). The team maintained that the Devils Lake/Moolack Frontal watershed (which contains Devils Lake) was still of medium conservation value, noting that Devil's Lake coho are one of ten small and dependent populations in this watershed and appear to be most closely related to coho in the nearby Siletz River. The team acknowledged that Devils Lake was the most productive of these ten populations but that the overall watershed did not warrant a high conservation value relative to other adjacent watersheds with more extensive habitat areas and functionally independent populations (e.g., the Siletz River and Yaquina River watersheds). Regardless, Devils Lake and all other habitat areas in the Devils Lake/Moolack Frontal watershed are designated as critical habitat for Oregon Coast coho salmon.

Comment 9: One tribal government expressed support of the proposed exclusion of Indian lands from the area eligible for critical habitat designation. The tribe agreed with our proposal that designating Indian lands as critical habitat would adversely impact tribal partnerships with us and limit the benefits that result from collaboration. Additionally, the tribe felt that the proposal to not designate Indian lands as critical habitat appropriately acknowledges tribal sovereignty and authority in managing natural resources on their lands.

Response: This final rule maintains the exclusion of Indian lands for the reasons described in the *Exclusions Based on Impacts to Tribes* section below.

Comment 10: Several commenters argued that the conservation benefits provided by certain conservation measures on non-Federal lands provide sufficient protections so that there would be minimal benefit of designating the affected areas as critical habitat. One commenter felt that existing forest protections under the Oregon Forest Protection Act and associated best management practices adequately protect the PCEs found on private and state forest lands in the State of Oregon. Another commenter felt that protections under the Oregon Plan have demonstrated conservation benefits that warrant the exclusion of affected areas from designation as critical habitat. Another commenter felt that existing regulatory and other mechanisms under these conservation measures are inadequate to protect the ESU and its habitats. The commenter argued that it is essential to designate critical habitat in these areas where existing regulatory mechanisms do not prevent or alter certain activities that would adversely modify habitat.

Response: The comments imply that if an area is covered by a management plan, it either does not meet the ESA section 3(5)(a) definition of critical habitat or it must be excluded from critical habitat under ESA section 4(b)(2). Neither assertion is correct.

Section 3(5)(a) of the ESA defines critical habitat as occupied areas containing physical or biological features that are (1) essential to the conservation of the species and (2) which may require special management considerations or protections. Consistent with the statute, in identifying areas meeting the definition of critical habitat for this ESU, we identified the physical or biological features essential to the conservation of the ESU, identified the occupied areas where these features are present, and then determined whether these features in each area may require special management considerations and protections. The bases for these conclusions are described further below and in a separate report (NMFS, 2007b).

Section 4(b)(2) of the ESA gives the Secretary discretion to exclude areas from critical habitat if he determines that benefits of exclusion outweigh the benefits of designation. Exercising the discretion to exclude an area from critical habitat requires evidence of a benefit of exclusion. Section 4(b)(2) and the supporting legislative history make clear that the consideration and weight given to impacts are within the Secretary's (H.R. 95–1625) discretion and that exclusion is not required even when the benefits of exclusion outweigh the benefits of designation. In other critical habitat designations for Pacific salmon and steelhead, the Secretary excluded areas from critical habitat on private lands covered by habitat conservation plans because there was evidence in the record that exclusion would enhance the relationship between the landowner and the agency. That improved relationship was expected to result in improved implementation of the plan and incentives for the development of other

plans, increasing conservation benefits for fish (70 FR 52630; September 2, 2005). Regarding private and state lands subject to Oregon's forest practice laws, there is no conservation agreement in place between landowners and NMFS, nor any evidence in the record supporting a conclusion that conservation actions of landowners subject to these laws would improve as a result of exclusion. The same is true for lands generally covered by the Oregon Plan. Based on our review of available information, we found there were insufficient data and analysis to conclude that there is a benefit of exclusion. Absent evidence of a benefit of exclusion, we could not conclude that the benefits of exclusion outweigh the benefits of inclusion.

Comment 11: Two Federal commenters felt that all Federal lands merited exclusion from designation as critical habitat. They contended that conservation benefits under PACFISH, the Northwest Forest Plan, and National Forest Land and Resource Management Plans (LRMPs) provide necessary protection and special management that eliminates the need to designate habitats on Federal lands as critical. These commenters contended that designating critical habitat on these Federal lands was unnecessarily duplicative of existing ESA section 7 consultation processes, inefficient (e.g., citing costs of re-initiating consultation), while offering no additional conservation benefit to the listed species. They believed that excluding Federal lands would be consistent with our exclusion of military lands that are subject to Integrated Natural Resource Management Plans, which they felt contain similar provisions for the protection and restoration of listed species.

Response: ESA section 4(b)(2) provides the Secretary with discretion to exclude areas from the designation of critical habitat if the Secretary determines that the benefits of exclusion outweigh the benefits of designation, and the Secretary finds that exclusion of the area will not result in extinction of the species. In the proposed rule, and the reports supporting it, we explained the policies that guided us and provided supporting analysis for a number of proposed exclusions. We also noted a number of additional potential exclusions, including those associated with the Oregon Coast coho salmon due to conservation measures within the Northwest Forest Plan on Federal lands, explaining that we were considering them because the Secretary of the Interior had recently made similar exclusions in designating critical habitat for the bull trout. In the final rule designating critical habitat for 12 Pacific Northwest ESUs (70 FR 52630; September 2, 2005), we considered extensive comments supporting and opposing the exclusion of Federal lands, as well as comments concerning alternative approaches for assessing the benefits of exclusion versus inclusion of lands as critical habitat. That final rule also stated the following with regard to the potential exclusion of Federal lands and alternative approaches to designation:

> We will continue to study this issue and alternative approaches in future rulemakings designating critical habitat. In particular, we intend to analyze the planning and management framework for each of the ownership categories proposed for consideration for exclusion. In each case, we envision that the planning and management framework would be evaluated against a set of criteria, which could include at least some or all of the following:
>
> 1. Whether the land manager has specific written policies that create a commitment to protection or appropriate management of the physical or biological features essential to long-term conservation of ESA-listed salmon and steelhead.
> 2. Whether the land manager has geographically specific goals for protection or appropriate management of the physical or biological features essential to long-term conservation of ESA-listed salmon and steelhead.
> 3. Whether the land manager has guidance for land management activities designed to achieve goals for protection or appropriate management of the physical or biological features essential to long-term conservation of ESA-listed salmon and steelhead.
> 4. Whether the land manager has an effective monitoring system to evaluate progress toward goals for protection or appropriate management of the physical or biological features essential to long-term conservation of ESA-listed salmon and steelhead.
> 5. Whether the land manager has a management framework that will adjust ongoing management to respond to monitoring results and/or external review and validation of progress toward goals for protection or appropriate management of the physical or biological features essential to long-term conservation of ESA-listed salmon and steelhead.
> 6. Whether the land manager has effective arrangements in place for periodic and timely communications with NOAA on the effectiveness of the planning and management framework in reaching mutually agreed goals for protection or appropriate management of the physical or biological features essential to long-term conservation of ESA-listed salmon and steelhead.

NMFS has continued dialogue with the Federal land management agencies since that time. Although we have not yet developed the type of information that would allow us to exclude Federal lands at this time, we will work with the land management agencies to develop the information and consider exclusion of Federal lands, as well as alternative approaches to designation, where the analysis provides appropriate support. We anticipate that further analyses using principles such as those above can result in additional data to inform the ESA Section 4(b)(2) analysis regarding possible exclusion of Federal lands from critical habitat designations.

Comment 12: One commenter and a peer reviewer expressed concern that the economic analysis failed to consider the full range of economic benefits of salmon habitat conservation and, therefore, provided a distorted picture of the economic consequences of designating versus excluding eligible habitat areas. The commenter expressed concern that the economic impact of not designating particular areas would impede recovery efforts, and this cost should be considered in the economic analysis. The commenter cited the lack of consideration in the economic analysis of the potential benefits of critical habitat designation to: (1) Other aquatic and riparian species; (2) water quality; (3) recreation; and (4) increased recreational, commercial, and tribal harvest opportunities that would be available with recovery.

Response: As described in the economic analysis (NMFS, 2007c) and ESA section 4(b)(2) report (NMFS, 2007d), we did not have information available at the scale of this designation that would allow us to quantify the benefits of designation in terms of increased fisheries. Such an estimate would have required us to estimate the additional number of fish likely to be produced as a result of the designation, and would have required us to determine how to allocate the economic benefit from those additional fish to a particular watershed. Instead, we considered the ''benefits of designation'' in terms of conservation value ratings for each particular area (see ''Methods and Criteria Used to Designate Critical Habitat'' section below). We also lacked information to quantify and include in the economic analysis the economic benefit that might result from such things as improved water quality or flood control, or improved condition of other species.

Moreover, we did not have information at the scale of this designation that would allow us to consider the relative ranking of these types of benefits on the ''benefits of designation'' side of the ESA section 4(b)(2) balancing process. Our primary focus was to determine, consider, and balance the benefits of designating these

areas to the conservation of the listed species. Given the uncertainties involved in quantifying or even ranking these ancillary types of benefits, we did not include them in our analysis.

Final Species Determination

The Oregon Coast coho ESU includes all naturally spawned populations of coho salmon in Oregon coastal streams south of the Columbia River and north of Cape Blanco (63 FR 42587; August 10, 1998). One hatchery stock is considered part of the ESU: The Cow Creek (ODFW stock # 37) hatchery coho stock.

On June 14, 2004, we proposed that five artificial propagation programs should be considered part of the ESU (69 FR 33102), including the North Fork Nehalem River (ODFW stock # 32), the North Umpqua River (ODFW stock # 18), Coos Basin (ODFW stock # 37), and the Coquille River (ODFW stock # 44) coho hatchery programs. Informed by our analysis of the comments received from ODFW, and other recently available information (see Comment 1 and response, above), we conclude that these four hatchery programs are not part of the Oregon Coast coho ESU.

Assessment of the Species' Status

The steps we follow in making a listing determination are to: Review the status of the species, analyze the factors listed in section 4(a)(1) of the ESA to identify threats facing the species, assess whether certain protective efforts mitigate these threats, and predict the species' future persistence. Below we summarize the information we evaluated in reviewing the status of the Oregon Coast coho ESU. We considered the information included in the record for our January 2006 determination in a manner consistent with the Court's ruling in *Trout Unlimited*. We also considered additional status information that was readily available since our January 2006 decision, to determine if this new information is consistent with our conclusion based on the January 2006 (as the Court has ordered us to consider it).

We begin a typical listing determination for a salmon ESU by gathering the most recent available and relevant biological information and appointing a panel of Federal scientists (the BRT) familiar with the biology and population dynamics of salmon. This panel reviews the status information, considers and discusses various possible interpretations of the information, and prepares a written report containing its recommendations as well as the basis for them. In addition, the documents underlying the BRT's conclusions are made available to the decision maker for consideration. Typically, the BRT's review takes about 3–6 months to complete.

At the same time, regulatory staff gather updated information about the status and trends for other related factors, including the potential contributions (both positive and negative) from hatchery programs, the condition of the habitat, and the expected implementation and effectiveness of conservation efforts. This information is considered together with the BRT's recommendations in forming a final determination and preparing a written explanation of that determination.

While the above steps were conducted for Oregon Coast coho prior to the issuance of the 2004 proposed rule, the court order in *Trout Unlimited* requiring a final determination and the time allowed for making that final determination do not permit us to follow our typical practice anew for Oregon Coast coho. The available record contains a BRT recommendation and report made in 2003, based on status information through 2002. The information in the record about the condition of the habitat and the effectiveness of conservation efforts is also mostly data collected prior to 2003. We have also considered draft reports of the Technical Recovery Team for the Oregon Coast. These draft reports are directed primarily at the population structure of and recovery criteria for the Oregon Coast coho ESU, rather than the determination required for a listing decision.

Quantitative information available to us for this determination also includes numerical information on the abundance of Oregon Coast coho through 2006, preliminary spawner survey information for 2007, and estimates of the ocean survival for coho through 2006. Comparison of the abundance of the naturally-produced coho with the marine survival index suggests the possibility that much of the variability in coho numbers over the last decade or so may be due to fluctuations in the availability of food in the near-shore ocean (NMFS, 2007k). In addition, there is some indication that juvenile survival is limited by the supply of nutrients from the carcasses of spawning adult coho (Bilby *et al.*, 2001). It is possible that existing freshwater habitat is adequate to support a viable ESU, and that the fluctuations observed in Oregon Coast coho populations are partially driven by the supply of carcasses. The 2003 BRT did not explicitly consider the relationship between coho abundance and marine food availability, or the relationship between juvenile survival and the supply of carcasses. Our current record lacks the information and analyses necessary to assess the present status of freshwater habitat conditions and functional processes in the ESU. Oregon has aggressively implemented habitat conservation efforts, yet we lack the data necessary to resolve the benefits realized from these efforts by coho populations given the considerable variability in other environmental processes. In short, the recently available abundance information is not necessarily indicative of degraded freshwater habitat conditions, nor is it convincingly suggestive of a declining long-term trend for the ESU. Given the opportunity for further scientific review, it is possible that an improved understanding of the roles marine conditions and stream-nutrient supply play in determining coho population dynamics, might require revision of this determination. In summary, if we had been permitted to consider all the scientific information in the record, and if we had been allowed more time to do a complete scientific review of new information in a manner consistent with our typically thorough and comprehensive analytical processes, there is a reasonable possibility that we would have reached a different final listing determination.

Consideration of Information in the January 2006 Record

Biological Review Team Findings—The 2003 BRT considered data available through 2002. The abundance and productivity of Oregon Coast coho since the previous status review (NMFS, 1997a) represented some of the best and worst years on record. Yearly adult returns for the Oregon Coast coho ESU were in excess of 160,000 natural spawners in 2001 and 2002, far exceeding the abundance observed for the past several decades. These encouraging increases in spawner abundance in 2000–2002 were preceded, however, by three consecutive brood years (the 1994–1996 brood years returning in 1997–1999, respectively) exhibiting recruitment failure (recruitment failure is when a given year class of natural spawners fails to replace itself when its offspring return to the spawning grounds 3 years later). These 3 years of recruitment failure were the only such instances observed thus far in the entire 55-year abundance time series for Oregon Coast coho salmon (although comprehensive population-level survey data have only been available since 1980). The encouraging 2000–2002 increases in

natural spawner abundance occurred in many populations in the northern portion of the ESU, populations that were the most depressed at the time of the last review (NMFS, 1997a). Although encouraged by the increase in spawner abundance in 2000–2002, the BRT noted that the long-term trends in ESU productivity were still negative due to the low abundances observed during the 1990s.

The majority of the BRT felt that the recent increases in coho returns were most likely attributable to favorable ocean conditions and reduced harvest rates. The BRT was uncertain as to whether such favorable marine conditions would continue into the future. Despite the likely benefits to spawner abundance levels gained by the dramatic reduction of harvest rates on Oregon Coast coho populations (PFMC, 1998), harvest cannot be significantly further reduced in the future to compensate for declining productivity due to other factors. The BRT was concerned that if the long-term decline in productivity reflected deteriorating conditions in freshwater habitat, this ESU could face very serious risks of local extirpations if ocean conditions reverted back to poor productivity conditions. Approximately 30 percent of the ESU has suffered habitat fragmentation by culverts and thermal barriers, generating concerns about ESU spatial structure. Additionally, the lack of response to favorable ocean conditions for some populations in smaller streams and the different patterns between north and south coast populations may indicate compromised connectivity among populations. The degradation of many lake habitats and the resultant impacts on several lake populations in the Oregon Coast coho ESU also pose risks to ESU diversity. The BRT noted that hatchery closures, reductions in the number of hatchery smolt releases, and improved marking rates of hatchery fish have significantly reduced risks to diversity associated with artificial propagation.

The BRT found high risk to the ESU's productivity, and comparatively lower risk to the ESU's abundance, spatial structure, and diversity. Informed by this risk assessment, a slight majority of the BRT concluded that the Oregon Coast coho ESU was ''likely to become endangered within the foreseeable future.'' However, a substantial minority of the BRT concluded that the ESU was ''not in danger of extinction or likely to become endangered within the foreseeable future.'' The minority believed that the large number of spawners in 2001–2002 and a high projected abundance for 2003 suggested that this ESU was not ''in danger of extinction'' or ''likely to become endangered within the foreseeable future.'' Furthermore, the minority believed that recent strong returns following 3 years of recruitment failure demonstrated that populations in this ESU are resilient.

Consideration of Artificial Propagation—Our review of the five hatchery programs that were proposed to be listed as part of the ESU concluded that they collectively do not substantially reduce the extinction risk of the ESU (NMFS, 2003a, 2004a, 2004b; see proposed rule for a more detailed explanation of this assessment, 69 FR 33102; June 14, 2004). Our final determination that the North Umpqua River, Coos Basin, Coquille River, North Fork Nehalem River, and Fishhawk Lake coho hatchery programs are not part of the ESU does not alter our previous conclusion that artificial propagation does not contribute appreciably to the viability of the ESU.

In *Trout Unlimited* v. *Lohn* (Civ. No. 06–0483–JCC (W. D. Wash., June 13, 2006), the U.S. District Court for the Western District of Washington set aside our 2005 Hatchery Listing Policy, finding that the Policy's consideration of both natural and hatchery fish in ESA listing determinations departs from the ESA's central purpose to promote and conserve naturally self-sustaining populations. Although the extinction risk assessment in the 2006 record evaluated the status of the ESU in-total (including both within-ESU natural and hatchery fish), we found that consideration of artificial propagation does not reduce the risk of extinction of the ESU. Therefore, the above described assessment of extinction risk does not require revision in light of the ruling in the above case.

Preliminary Results of Oregon Coast Coho Recovery Planning—NMFS' Technical Recovery Team (TRT) for the Oregon and Northern California Coast is charged with describing the historical population structure, developing biological recovery criteria with which to evaluate the status of an ESU relative to recovery, and identifying those factors limiting or impeding recovery. Prior to our 2006 determination not to list the Oregon Coast coho ESU, the TRT provided a preliminary report on its progress in developing these products for the Oregon Coast coho ESU (NMFS, 2005d). The TRT's preliminary report underscored the uncertainty associated with assessing the future status of the ESU. The TRT stated that ''at this time our evaluation indicates, with a moderate degree of uncertainty, that the ESU is persistent'' (the TRT defines a ''persistent'' ESU as one that is able to persist (i.e., not go extinct) over a 100-year period without artificial support, relating the term to ''the simple risk of extinction, which is the primary determination of endangered status under the ESA''). The TRT further stated that ''our evaluation of biological viability based on current and recent past conditions shows a high degree of uncertainty with respect to the statement that the ESU is sustainable'' (the TRT defines a ''sustainable'' ESU as ''one that, in addition to being persistent, is able to maintain its genetic legacy and long-term adaptive potential for the foreseeable future * * * so that risk of extinction will not increase in the future,'' relating the term to ''threatened status under the ESA'').

Biological Implications of Ocean-Climate Conditions—In an August 12, 2005, memorandum, NMFS' Northwest Fisheries Science Center (NWFSC) summarized the most recent information available on West Coast ocean conditions, described observations of impacts on marine communities, and offered predictions of the implications of recent ocean conditions on West Coast salmon stocks, including the Oregon Coast coho ESU (NMFS, 2005e). The memorandum described recent observations of anomalous ocean conditions that may portend lower returns of coho salmon for the fall of 2005 and the next several years. The memorandum noted that indices of ocean-climate variation are suggestive of a regime shift in ocean-climate conditions that in the past have been associated with warmer water temperature, poor primary productivity, and generally less favorable conditions for coho marine survival. The recent in-situ observations confirm delayed coastal upwelling, anomalously warm sea surface temperatures, altered zooplankton community structure, and low survey abundances of juvenile salmon, possibly indicating low marine survival. Strong upwelling occurred in mid-July 2005 resulting in cooler sea surface temperatures, increased primary productivity, and generally more favorable conditions for salmon survival. It was unclear whether this delayed onset of coastal upwelling would compensate for earlier unfavorable conditions which occurred during critical life-history stages for coho salmon. The memorandum noted that model projections indicate that fish populations that prey on juvenile coho salmon may be reduced, possibly compensating somewhat for unfavorable marine survival conditions for coho returns in 2006. The memorandum

concluded that the NWFSC was relatively confident that the negative biological implications of recent ocean conditions for the Oregon Coast coho ESU would be dramatic over the next few years.

Conclusions Regarding the Status of the Oregon Coast Coho ESU

We conclude, after considering the above information contained in the record of our January 2006 determination (in a manner consistent with the Court's order), that the Oregon Coast coho ESU is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range. This finding is based, in part, on the BRT's slight majority conclusion that the ESU is ''likely to become endangered in the foreseeable future.'' The TRT's subsequent preliminary assessment of ESU viability (NMFS, 2005d) was consistent with the BRT's assessment, finding a high degree of uncertainty whether the ESU is sustainable for the foreseeable future. Although returns in 2001 and 2002 were extremely encouraging, there remained concern whether future ocean conditions would favor such high levels of recruitment. The NWFSC's August 2005 memorandum describing the implications of recent ocean-climate conditions (NMFS, 2005e) did not assuage this concern, concluding that recent ocean conditions portended unfavorable marine survival conditions for Oregon Coast coho in the near term.

Consideration of New Information Since the January 2006 Determination

The ESA requires that listing determinations be made solely on the basis of the best scientific and commercial data available. To that end, we also considered new status and trend information made available since the 2003 BRT report, and since our January 2006 ''not warranted'' determination to ensure that our present listing determination for the Oregon Coast coho ESU has considered the best information available. We evaluated these new data to determine whether they supported our risk assessment based on the information contained in the January 2006 record alone.

Since the BRT convened in January 2003, the total abundance of natural spawners in the Oregon Coast coho ESU has declined each year (i.e., 2003–2006). The abundance of total natural spawners in 2006 (111,025 spawners) was approximately 43 percent of the recent peak abundance in 2002 (255,372 spawners). In 2003, ESU-level productivity (evaluated in terms of the number of spawning recruits resulting from spawners 3 years earlier) was above replacement (approximately 3.2 recruits per spawner). ESU-level productivity was essentially at replacement in 2004 (approximately 0.99 recruits per spawner), but below replacement in 2005 and 2006. The productivity observed in 2006 (approximately 0.49 recruits per spawner) is the lowest observed since 1991. From 2003–2006 harvest rates remained low, averaging approximately 12 percent of the total run. Marine survival from 2003–2006 (estimated in terms of the number of returning hatchery adults resulting from the number of hatchery smolts released 2 years earlier) was generally at or above the average during 1990–2006. The decline in ESU productivity from 2003–2006, while marine survival conditions were generally favorable, suggests that factors other than ocean conditions are responsible for the decline.

In August 2007, the Oregon and Northern California Coast TRT released a draft report entitled ''Biological Recovery Criteria for the Oregon Coast coho Salmon Evolutionarily Significant Unit'' (Wainwright *et al.*, 2007). This draft report presents biological criteria for assessing the ESU's progress toward recovery, and also applies these criteria in assessing the current biological status of the ESU. The TRT considered the population data available through 2004. This draft report thus represents a more recent assessment of the ESU's status relative to the 2003 BRT's review. The results of the recent draft report are consistent with the TRT's preliminary progress report described above (NMFS, 2005d), finding that there is low to moderate certainty that the ESU is sustainable for the foreseeable future. The recent draft report considered the population data available through 2004, and thus does not reflect the declining abundance and productivity observed in 2005 and 2006.

Preliminary spawner survey data for 2007 (the average peak number of spawners per mile observed during random coho spawning surveys in 41 streams) suggest that the 2007–2008 return of Oregon Coast coho is either (1) much reduced from abundance levels in 2006, or (2) exhibiting delayed run timing from previous years. As of December 13, 2007, the average peak number of spawners per mile was below 2006 levels in 38 of 41 surveyed streams (ODFW, 2007). It is possible that the timing of peak spawner abundance is delayed relative to previous years, and that increased spawner abundance in late December 2007 and January 2008 will compensate for the low levels observed thus far in the 2007–2008 spawning season.

Our review of the above new abundance and productivity information and the TRT's 2007 draft report does not indicate that the status of the Oregon Coast coho ESU has improved since the 2003 BRT report. The recent 5-year geometric mean abundance (2002–2006) of approximately 152,960 total natural spawners remains well above that of a decade ago (approximately 52,845 from 1992–1996). However, the decline in productivity from 2003 to 2006, despite generally favorable marine survival conditions and low harvest rates, is of concern.

After reviewing the scientific and commercial information available in the record concerning the status of the Oregon Coast Coho (in a manner consistent with the Court's order) and adding to the record the Draft 2007 TRT report, 2003–2006 abundance and marine survival information, and preliminary spawner survey information for 2007, we conclude that this information requires a conclusion that the ESU is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range. The recent declines in the ESU's abundance and productivity are not necessarily indicative of a substantial degradation of the ESU's status. Similar interannual variability in abundance and productivity has been observed previously for the Oregon Coast coho ESU, and similar variability is expected to occur in the future. The principal inquiry in determining if the ESU warrants listing is whether present habitat conditions are sufficient to support a viable ESU, and whether future freshwater habitat conditions are expected to degrade. The present and future status of freshwater habitat for the Oregon Coast coho ESU remains uncertain. As noted above, we believe that if we had been permitted to consider all the scientific information in the record, and if we had been allowed more time for a complete scientific review of new information in a manner consistent with our typically thorough and comprehensive analytical processes, there is a reasonable possibility that we would have reached a different final listing determination.

Final Listing Determination

Consideration of ESA Section 4(a)(1) Factors

Section 4(a)(1) of the ESA and NMFS' implementing regulations (50 CFR part 424) requires us to add a species to the

List of Endangered and Threatened Species if it is endangered or threatened because of any one or a combination of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence. We have previously detailed the impacts of various factors contributing to the decline of Pacific salmonids as part of our prior listing determinations for 27 ESUs, as well as in supporting technical reports (e.g., NMFS, 1997b, ''Coastal coho habitat factors for decline and protective efforts in Oregon;'' NMFS, 1997c, ''Factors Contributing to the Decline of Chinook Salmon—An Addendum to the 1996 West Coast Steelhead Factors for Decline Report;'' NMFS, 1996a, ''Factors for Decline—A Supplement to the Notice of Determination for West Coast Steelhead Under the Endangered Species Act''). Our prior listing determinations and technical reports concluded that all of the factors identified in section 4(a)(1) of the ESA have played a role in the decline of West Coast salmon and steelhead. In our 1998 threatened listing determination for the Oregon Coast coho ESU (63 FR 42588; August 10, 1998), we concluded that the decline of Oregon Coast coho populations is the result of several longstanding, human-induced factors (e.g., habitat degradation, water diversions, harvest, and artificial propagation) that exacerbate the adverse effects of natural environmental variability (e.g., floods, drought, and poor ocean conditions). The following discussion briefly summarizes our findings regarding the threats currently facing the Oregon Coast coho ESU. While these threats are treated in general terms, it is important to underscore that impacts from certain threats are more acute for some populations in the ESU.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

In many Oregon coastal streams, past human activities (e.g., logging, agriculture, gravel mining, urbanization) have resulted in impediments to fish passage, degradation of stream complexity, increased sedimentation, reduced water quality and quantity, loss and degradation of riparian habitats, and loss and degradation of lowland, estuarine, and wetland coho rearing habitats. The relevant issues are whether current habitat conditions are adequate to support the ESU's persistence (that is, whether the species is endangered or threatened because of present destruction, modification, or curtailment of its habitat or range) and whether habitat conditions are likely to worsen in the future (that is, whether the species is endangered or threatened because of threatened destruction, modification, or curtailment of its habitat or range). Regarding the first issue, the 2003 BRT noted uncertainty about the adequacy of current habitat conditions, and this uncertainty contributed to the slight majority finding that the ESU was likely to become an endangered species within the foreseeable future.

Regarding the second issue, the threat of future habitat declines, the 2003 BRT noted that ''if the long-term decline in productivity [of the Oregon Coast coho ESU] reflects deteriorating conditions in freshwater habitat, this ESU could face very serious risks of local extinction during the next cycle of poor ocean conditions.'' The BRT thus identified potential future habitat declines as a potential concern. As part of our January 2006 determination we evaluated the likely future trend of various habitat elements and the likely impact of future population growth (NMFS, 2005a). With respect to population growth and urbanization, we found that approximately 3.4 percent of ''high intrinsic potential'' habitat areas for coho (e.g., lowland stream reaches particularly important to juvenile coho rearing and overwintering survival) are within currently designated urban growth areas, suggesting that future human population growth may not represent a significant threat to the ESU (NMFS, 2005a). With respect to lowland and upland habitat areas under various types of land use and ownership, we found that some areas are likely to improve, some are likely to decline, and others are likely to remain in their current condition. Overall, there is a high level of uncertainty associated with projections of future habitat conditions due to underlying economic and sociopolitical factors influencing forest harvest and restoration rates, urban conversion of agricultural and forest lands, and the enforcement and implementation of land-use plans and regulations. Based on our analysis, we found that there is insufficient evidence to conclude that the Oregon Coast coho ESU was more likely than not to become an endangered species because of the ''threatened destruction, modification, or curtailment of its habitat or range.'' It remains uncertain whether future freshwater habitat conditions will be adequate to support a viable coho ESU, particularly during periods of unfavorable ocean conditions and poor marine survival.

B. Overutilization for Commercial, Recreational, Scientific or Educational Purposes

Harvest rates on Oregon Coast coho populations ranged between 60 and 90 percent between the 1960s and 1980s (Good *et al.*, 2005). Modest harvest restrictions were imposed in the late 1980s, but harvest rates remained high until most directed coho salmon harvest was prohibited in 1994. These restrictive harvest regulations, developed concurrently with the Oregon Plan and subsequently revised, have imposed conservative restrictions on directed and incidental fishery mortality, and appropriately consider marine survival conditions and the biological status of naturally produced coho populations. Under these revised regulations, harvest rates are stipulated to be between 0 and 8 percent during critically low spawner abundance, and may increase to a maximum exploitation rate of 45 percent under high survival and abundance conditions (Oregon, 2005). Empirical data over the last 10 years show that harvest mortality for Oregon Coast coho has been maintained below 15 percent since the adoption of the revised regulations (Oregon, 2005). We agree with the 2003 BRT's finding that overutilization has been effectively addressed for Oregon Coast coho populations.

C. Disease or Predation

Past species introductions and habitat modifications have resulted in increased non-native predator populations, notably in coastal lake habitats. Predation by increased populations of marine mammals (principally sea lions) may influence salmon abundance in some local populations when other prey species are absent and where physical conditions lead to the concentration of adults and juveniles (e.g., Cooper and Johnson, 1992). However, the extent to which marine mammal predation threatens the persistence of Oregon coast coho populations is unknown.

Infectious disease is one of many factors that can influence adult and juvenile salmon survival. Salmonids are exposed to numerous bacterial, protozoan, viral, and parasitic organisms in spawning and rearing areas, hatcheries, migratory routes, and the marine environment. Specific diseases such as bacterial kidney disease, ceratomyxosis, columnaris, furunculosis, infectious hematopoietic

necrosis virus, redmouth and black spot disease, erythrocytic inclusion body syndrome, and whirling disease, among others, are present and known to affect West Coast salmonids (Rucker *et al.*, 1953; Wood, 1979; Leek, 1987; Foott *et al.*, 1994; Gould and Wedemeyer, undated). In general, very little current or historical information exists to quantify trends over time in infection levels and disease mortality rates. However, studies have shown that naturally spawned fish tend to be less susceptible to pathogens than hatchery-reared fish (Buchanon *et al.*, 1983; Sanders *et al.*, 1992). Native salmon populations have co-evolved with specific communities of these organisms, but the widespread use of artificial propagation has introduced exotic organisms not historically present in a particular watershed. Habitat conditions such as low water flows and high temperatures can exacerbate susceptibility to infectious diseases.

Aggressive hatchery reform efforts implemented by the State of Oregon have reduced the magnitude and distribution of hatchery fish releases in the ESU, and, consequently, the interactions between hatchery- and natural-origin fish and the potential transmission of infectious diseases. Additionally, regulations controlling hatchery effluent discharges into streams have reduced the potential of pathogens being released into coho habitats.

D. The Inadequacy of Existing Regulatory Mechanisms

Existing regulations governing coho harvest have dramatically improved the ESU's likelihood of persistence. These regulations are unlikely to be weakened in the future. Of the wide range of land uses and other activities affecting salmon habitat, however, some are more amenable to regulation than others. In the range of Oregon Coast coho, the regulation of some activities and land uses will alter past harmful practices, resulting in habitat improvements; the regulation of other activities is inadequate to alter past harmful practices, resulting in habitat conditions continuing in their present state; and the regulation of still other activities and land uses will lead to further degradation (NMFS, 2005a).

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Natural variability in ocean and freshwater conditions has at different times exacerbated or mitigated the effects on Oregon Coast coho populations of habitat limiting factors. There is considerable uncertainty in predicting ocean-climate conditions into the foreseeable future and their biological impacts on the Oregon Coast coho ESU. Variability in ocean-climate conditions is expected, and coho productivity and abundance are similarly expected to fluctuate in response to this natural environmental variability. It is unknown whether unfavorable ocean conditions will predominate in the foreseeable future.

Prior to the 1990s, coho hatchery programs along the Oregon coast posed substantial risks to the survival, reproductive fitness, and diversity of natural populations. High numbers of hatchery coho were released in most of the basins in the ESU, most programs propagated non-native broodstocks, and naturally spawning hatchery-origin strays were common in most natural production areas. Oregon's aggressive hatchery reform efforts have resulted in substantial reductions of this threat. Hatchery coho are released in less than half of the populations in the ESU, and the magnitude of releases has declined from a peak of 35 million smolts in 1981, to approximately 800,000 in 2005. Hatchery programs are currently constrained to releasing no more than 200,000 smolts in any basin. The reduction in the number of hatchery fish released has reduced the potential for competition with, and predation on, natural coho. The proportion of hatchery-origin fish in natural spawning areas has been reduced to below 10 percent in all but two populations in the ESU. All hatchery coho releases in the ESU are now marked, affording improved monitoring and assessment of the co-existing naturally produced coho populations. Broodstock management practices have been modified to minimize the potential for hatchery-origin fish to pose risks to the genetic diversity of local natural populations. We conclude the ESU is not in danger of extinction or likely to become endangered in the foreseeable future because of hatchery practices.

Efforts Being Made To Protect the Species

Section 4(b)(1)(A) of the ESA requires the Secretary to make listing determinations solely on the basis of the best scientific and commercial data available after taking into account efforts being made to protect a species. In making listing determinations we first assess the species' level of extinction risk, identify factors that threaten its continued existence, and assess existing efforts being made to protect the species to determine if those measures ameliorate the risks it faces. The reader is referred to the June 14, 2004, proposed rule for a summary of efforts, including those under the Oregon Plan, being made to protect Oregon Coast coho populations (69 FR 33102, at 33142). Harvest reductions and improvements in hatchery management are noteworthy in that they have been fully implemented and their effectiveness is manifested in the improved status of Oregon Coast coho populations. The benefits of these accomplishments in hatchery and harvest management under the Oregon Plan, however, were fully considered in the 2003 BRT's assessment of ESU extinction risk. In our June, 14, 2004, proposed listing for the Oregon Coast coho ESU (69 FR 33102), we evaluated all other relevant protective efforts and determined that they did not substantially alter our finding that the ESU is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Since our January 2006 determination, the State of Oregon released a draft Coho Conservation Plan for Oregon Coast coho. The draft Conservation Plan culminated a 2-year development process including significant input and involvement from local stakeholders. The draft conservation plan establishes ambitious conservation goals and is an important step in describing limiting factors and threats, identifying specific conservation actions to address these factors and threats, and designing a robust research and monitoring program to evaluate the effectiveness of conservation actions that contribute to rebuilding the Oregon Coast coho ESU. As reflected in the comments that we provided on the draft Conservation Plan (NMFS, 2007e), the plan lacks the necessary detail, specificity, and commitment of resources to provide sufficient certainty of implementation and effectiveness to alter our assessment that the ESU is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Final Listing Determination

The ESA defines an endangered species as any species in danger of extinction throughout all or a significant portion of its range, and a threatened species as any species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Section 4(b)(1) of the ESA requires that the listing determination be based solely on the best scientific and commercial data available, after conducting a review of the status of the species and taking into

account those efforts, if any, being made to protect such species.

The information included in the record of our January 2006 determination (as the Court has ordered us to consider it) indicates that the Oregon Coast coho ESU is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. New abundance and productivity data do not suggest that the ESU's biological status has improved since our January 2006 determination. Efforts being made to protect the species, at present, do not provide sufficient certainty of implementation or effectiveness to mitigate the assessed level of extinction risk. Therefore, we conclude that the Oregon Coast coho ESU warrants listing under the ESA as a threatened species.

Prohibitions and Protective Regulations

On June 28, 2005, as part of the final listing determinations for 16 ESUs of West Coast salmon, we amended and streamlined the previously promulgated ESA section 4(d) regulations for threatened salmon and steelhead (70 FR 37160). We finalized an amendment to provide the necessary flexibility to ensure that fisheries and artificial propagation programs are managed consistently with the conservation needs of threatened salmon and steelhead. Under this change the section 4(d) protections apply to natural and hatchery fish with an intact adipose fin, but not to listed hatchery fish that have had their adipose fin removed prior to release into the wild. Additionally, we made several simplifying and clarifying changes to the 4(d) regulations, including updating an expired limit (section 223.203(b)(2)), providing a temporary exemption for ongoing research and enhancement activities, and applying the same set of 14 limits to all threatened salmon and steelhead.

Description of Protective Regulations Being Afforded Oregon Coast Coho

Consistent with the June 2005 amended ESA section 4(d) regulations, this final rule applies the ESA section 9(a)(1) take and other prohibitions (subject to the ''limits'' discussed below) to unmarked members of the Oregon Coast coho ESU with an intact adipose fin. (The clipping of adipose fins in juvenile hatchery fish just prior to release into the natural environment is a commonly employed method for the marking of hatchery production). We believe this approach provides needed flexibility to appropriately manage the artificial propagation and directed take of threatened salmon and steelhead for the conservation and recovery of the listed species.

The June 2005 amended ESA section 4(d) regulations simplified the previously promulgated 4(d) rules by applying the same set of 14 ''limits'' to all threatened salmon and steelhead. These limits allow us to exempt certain activities from the take prohibitions, provided that the applicable programs and regulations meet specific conditions to adequately protect the listed species. In this final rule we are applying this same set of 14 limits to the Oregon Coast coho ESU. Comprehensive descriptions of each 4(d) limit are contained in ''A Citizen's Guide to the 4(d) Rule'' (available on the Internet at *http://www.nwr.noaa.gov*), and in previously published **Federal Register** notices (65 FR 42422, July 10, 2000; 65 FR 42485, July 10, 2000; 69 FR 33102; June 14, 2004; 70 FR 37160, June 28, 2005). These ''limits'' include: activities conducted in accordance with ESA section 10 incidental take authorization (50 CFR 223.203(b)(1)); scientific or artificial propagation activities with pending permit applications at the time of rulemaking (§ 223.203(b)(2)); emergency actions related to injured, stranded, or dead salmonids (§ 223.203(b)(3)); fishery management activities (§ 223.203(b)(4)); hatchery and genetic management programs (§ 223.203(b)(5)); activities in compliance with joint tribal/state plans developed within *United States (U.S.)* v. *Washington* or *U.S.* v. *Oregon* (§ 223.203(b)(6)); scientific research activities permitted or conducted by the states (§ 223.203(b)(7)); state, local, and private habitat restoration activities (§ 223.203(b)(8)); properly screened water diversion devices (§ 223.203(b)(9)); routine road maintenance activities (§ 223.203(b)(10)); certain park pest management activities (§ 223.203(b)(11)); certain municipal, residential, commercial, and industrial development and redevelopment activities (§ 223.203(b)(12)); management activities on state and private lands within the State of Washington (§ 223.203(b)(13)); and activities undertaken consistent with an approved tribal resource management plan (§ 223.204).

Limit § 223.203(b)(2) exempts scientific or artificial propagation activities with pending applications for ESA section 4(d) approval. The limit was amended as part of the June 28, 2005, final rule to temporarily exempt such activities from the take prohibitions during a ''grace period,'' provided that a complete application for 4(d) approval was received within a specified period from the notice's publication (70 FR 37160). The limit was again modified in February 2006 when the 4(d) regulations were extended to the Upper Columbia River steelhead DPS (71 FR 5178; February 1, 2006). The deadlines associated with this exemption have expired. Consistent with the 2004 proposed rule to list Oregon Coast coho and extend 4(d) regulations to the ESU (69 FR 33102; June 14, 2004), we believe it is necessary and advisable for the conservation and recovery of Oregon Coast coho to allow research and enhancement activities to continue uninterrupted while we process the necessary permits and approvals. Provided we receive a complete application by June 10, 2008, the take prohibitions will not apply to research and enhancement activities which affect Oregon Coast coho until the application is rejected as insufficient, a permit or 4(d) approval is issued, or until March 31, 2009, whichever occurs earliest. The length of this ''grace period'' is necessary because we process applications for 4(d) approval annually.

Other Protective ESA Provisions

Section 7(a)(4) of the ESA requires that Federal agencies confer with NMFS on any actions likely to jeopardize the continued existence of a species proposed for listing and on actions likely to result in the destruction or adverse modification of proposed critical habitat. For listed species, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or conduct are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a proposed Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with NMFS or the FWS, as appropriate. Examples of Federal actions likely to affect salmon include authorized land management activities of the USFS and the BLM, as well as operation of hydroelectric and storage projects of the Bureau of Reclamation (BOR) and the U.S. Army Corps of Engineers (USACE). Such activities include timber sales and harvest, permitting livestock grazing, hydroelectric power generation, and flood control. Federal actions, including the USACE section 404 permitting activities under the Clean Water Act, USACE permitting activities under the River and Harbors Act, Federal Energy Regulatory Commission (FERC) licenses for non-Federal development and operation of hydropower, and Federal

salmon hatcheries, may also require consultation.

Sections 10(a)(1)(A) and 10(a)(1)(B) of the ESA provide NMFS with authority to grant exceptions to the ESA's ''take'' prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) conducting research that involves a directed take of listed species. A directed take refers to the intentional take of listed species. We have issued section 10(a)(1)(A) research/enhancement permits for currently listed ESUs for a number of activities, including trapping and tagging, electroshocking to determine population presence and abundance, removal of fish from irrigation ditches, and collection of adult fish for artificial propagation programs. Section 10(a)(1)(B) incidental take permits may be issued to non-Federal entities performing activities which may incidentally take listed species. The types of activities potentially requiring a section 10(a)(1)(B) incidental take permit include the operation and release of artificially propagated fish by state or privately operated and funded hatcheries, state or academic research that may incidentally take listed species, the implementation of state fishing regulations, logging, road building, grazing, and diverting water into private lands.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

NMFS and the FWS published in the **Federal Register** on July 1, 1994 (59 FR 34272), a policy that NMFS shall identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of this listing on proposed and ongoing activities within the species' range. At the time of the final rule, we must identify to the extent known specific activities that will not be considered likely to result in violation of section 9, as well as activities that will be considered likely to result in violation. We believe that, based on the best available information, the following actions will not result in a violation of section 9:

1. Possession of fish from the Oregon Coast coho ESU that are acquired lawfully by permit issued by NMFS pursuant to section 10 of the ESA, or by the terms of an incidental take statement issued pursuant to section 7 of the ESA; or

2. Federally funded or approved projects that involve activities such as silviculture, grazing, mining, road construction, dam construction and operation, discharge of fill material, stream channelization or diversion for which section 7 consultation has been completed, and when activities are conducted in accordance with any terms and conditions provided by NMFS in an incidental take statement accompanying a biological opinion.

There are many activities that we believe could potentially take salmon by harming them. ''Harm'' is defined by our regulations as ''an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering'' (50 CFR 222.102 (harm)). Activities that may harm the Oregon Coast coho ESU resulting in a violation of the section 9 take and other prohibitions, include, but are not limited to:

1. Land-use activities that degrade habitats for the Oregon Coast coho ESU (e.g., logging, grazing, farming, urban development, road construction in riparian areas and areas susceptible to mass wasting and surface erosion);

2. Destruction/alteration of the habitats for the Oregon Coast coho ESU, such as removal of large woody debris and ''sinker logs'' or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, gravel mining, or altering stream channels or surface or ground water flow;

3. Discharges or dumping of toxic chemicals or other pollutants (e.g., sewage, oil, gasoline) into waters or riparian areas supporting the Oregon Coast coho ESU;

4. Violation of discharge permits;

5. Application of pesticides affecting water quality or riparian areas for the Oregon Coast coho ESU;

6. Interstate and foreign commerce of fish from the Oregon Coast coho ESU and import/export of fish from the Oregon Coast coho ESU without a threatened or endangered species permit;

7. Collecting or handling of fish from the Oregon Coast coho ESU. Permits to conduct these activities are available for purposes of scientific research or to enhance the conservation or survival of the species; and

8. Introduction of non-native species likely to prey on fish from the Oregon Coast coho ESU or displace them from their habitat.

These lists are not exhaustive. They are intended to provide some examples of the types of activities that might or might not be considered by NMFS as constituting a take of fish in the Oregon Coast coho ESU under the ESA and its regulations. Questions regarding whether specific activities would constitute a violation of the section 9 take and other prohibitions, and general inquiries regarding prohibitions and permits, should be directed to NMFS (see **ADDRESSES**).

Designating Critical Habitat

Methods and Criteria Used to Designate Critical Habitat

The following paragraphs and sections describe the relevant definitions and guidance found in the ESA and our implementing regulations, and the key methods and criteria we used to designate critical habitat after incorporating, as appropriate, comments and information received on the proposed rule.

Section 4 of the ESA (16 U.S.C. 1533(b)(2) and our regulations at 50 CFR 424.12(a) require that we designate critical habitat, and make revisions thereto, ''on the basis of the best scientific data available.'' Section 3 of the ESA (16 U.S.C. 1532(5)) defines critical habitat as ''(i) the specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species.'' Section 3 of the ESA (16 U.S.C. 1532(3)) also defines the terms ''conserve,'' ''conserving,'' and ''conservation'' to mean ''to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.''

Pursuant to our regulations, when identifying physical or biological features essential to conservation, we consider the following requirements of the species: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, or rearing of offspring;

and, generally, (5) habitats that are protected from disturbance or are representative of the historical geographical and ecological distributions of the species (see 50 CFR 424.12(b)). In addition to these factors, we also focus on the more specific primary constituent elements (PCEs) within the occupied areas that are essential to the conservation of the species. The regulations identify PCEs as including, but not limited to: ''roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.'' For an area containing PCEs to meet the definition of critical habitat, we must conclude that the PCEs in that area ''may require special management considerations or protection.'' Our regulations define special management considerations or protection as ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.'' Both the ESA and our regulations, in recognition of the divergent biological needs of species, establish criteria that are species specific rather than a ''one size fits all'' approach.

Our regulations state that, ''[t]he Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species' (50 CFR 424.12(e)). Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Section 4 of the ESA (16 U.S.C. 1533(b)(2)) requires that, before designating critical habitat, we consider the economic impacts, impacts on national security, and other relevant impacts of specifying any particular area as critical habitat, and the Secretary may exclude any area from critical habitat if the benefits of exclusion outweigh the benefits of designation, unless excluding an area from critical habitat will result in the extinction of the species. This exercise of discretion must be based upon the best scientific and commercial data. Once critical habitat for a salmon or steelhead ESU is designated, section 7(a)(2) of the ESA requires that each Federal agency, in consultation with and with the assistance of NMFS, ensure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat.

Identifying the Geographical Area Occupied by the Species and Specific Areas Within the Geographical Area

In past critical habitat designations, we had concluded that the limited availability of species distribution data prevented mapping salmonid critical habitat at a scale finer than occupied river basins (65 FR 7764; February 16, 2000). Therefore, the 2000 designations defined the ''geographical area occupied by the species, at the time of listing'' as all accessible river reaches within the current range of the listed species.

In the 2004 proposed rule to designate critical habitat for 13 ESUs of Pacific salmon and steelhead (69 FR 74572; December 14, 2004) we described in greater detail that, since the previous designations in 2000, we can now be more precise about the ''geographical area occupied by the species'' because Federal, state, and tribal fishery biologists have made progress documenting and mapping actual species distribution at the level of stream reaches. Moreover, much of the available data can now be accessed and analyzed using Geographic Information System (GIS) software to produce consistent and fine-scale maps (NMFS, 2007b; StreamNet, 2005). The current maps document fish presence by identifying occupied stream reaches where the species has been observed. It also identifies stream reaches where the species is presumed to occur based on the professional judgment of biologists familiar with the watershed (although in some cases there are streams classified as occupied based on professional judgment when in fact the species has been observed but the GIS data have not been updated). We made use of these finer-scale data for the final critical habitat designations for 12 Pacific Northwest ESUs (70 FR 52630; September 2, 2005), as well as for the current critical habitat designation. We believe that this approach enables a more accurate delineation of the ''geographical area occupied by the species'' referred to in the ESA definition of critical habitat. We received some comments on this approach, some in support and some against it (see comments in final critical habitat designations for 12 Pacific Northwest ESUs, 70 FR 52630, September 2, 2005). However, none of the latter comments described a specific methodology that would yield a better approach than what we used.

We are now also able to identify ''specific areas'' (ESA section 3(5)(a)) and ''particular areas'' (ESA section 4(b)(2)) at a finer scale than in 2000. Since 2000, various Federal agencies have mapped fifth field hydrologic units (referred to as ''HUC5s'' or ''watersheds'') throughout the Pacific Northwest using USGS mapping conventions (Seaber *et al.*, 1986). This information is now generally available via the internet (NMFS, 2007b), and we have expanded our GIS resources to use these data. As in the 2000 designations (in which we used larger fourth field hydrologic units), we used the HUC5s to organize critical habitat information systematically and at a scale that is applicable to the spatial distribution of salmon. Organizing information at this scale is especially relevant to salmonids, since their innate homing ability allows them to return to the watersheds where they were born. Such site fidelity results in spatial aggregations of salmonid populations that generally correspond to the area encompassed by subbasins or HUC5 watersheds (Washington Department of Fisheries *et al.*, 1992; Kostow, 1995; McElhany *et al.*, 2000). As noted above regarding our use of finer scale data, none of the comments received provided us with a specific alternative methodology that would yield a better approach than the watershed-scale approach we adopted.

The USGS maps watershed units as polygons, bounding a drainage area from ridge-top to ridge-top, encompassing streams, riparian areas and uplands. Within the boundaries of any watershed, there are stream reaches not occupied by the species. Land areas within the HUC5 boundaries are also generally not ''occupied'' by the species (though certain areas such as flood plains or side channels may be occupied at some times of some years). We used the watershed boundaries as a basis for aggregating occupied stream reaches, for purposes of delineating ''specific'' areas at a scale that often corresponds well to salmonid population structure and ecological processes. Although we are designating only the streams and not the entire watershed, our documents frequently refer to the ''specific areas'' as ''watersheds'' because that is the term often used as a convenient shorthand. We also refer to the stream reaches as ''habitat areas.'' Each watershed was reviewed by the CHART to verify occupation, PCEs, and special management considerations (see ''Critical Habitat Analytical Review Team'' section below).

The watershed-scale aggregation of stream reaches also allowed us to analyze the impacts of designating a ''particular area,'' as required by ESA section 4(b)(2). As a result of watershed

processes, many activities occurring in riparian or upland areas and in non-fish-bearing streams may affect the physical or biological features essential to conservation in the occupied stream reaches. The watershed boundary thus describes an area in which Federal activities have the potential to affect critical habitat (Spence *et al.*, 1996). Using watershed boundaries for the economic analysis ensured that all potential economic impacts were considered. Section 3(5) defines critical habitat in terms of ''specific areas,'' and section 4(b)(2) requires the agency to consider certain factors before designating ''particular areas.'' In the case of West Coast salmon and steelhead, the biology of the species, the characteristics of their habitat, the nature of the impacts, and the limited information currently available at finer geographic scales made it appropriate to consider ''specific areas'' and ''particular areas'' as the same unit for purposes of economic exclusions.

Occupied estuarine and marine areas were also considered in the context of defining ''specific areas.'' In our proposed rule (69 FR 74572; December 14, 2004) we noted that estuarine areas are crucial for juvenile salmonids, given their multiple functions as areas for rearing/feeding, freshwater-saltwater acclimation, and migration (Simenstad *et al.*, 1982; Marriott *et al.*, 2002). Within the geographic range of the Oregon Coast coho ESU all estuaries fall within the boundaries of a HUC5 and so were assessed along with upstream freshwater habitats within the watershed. In all occupied estuarine areas we were able to identify physical or biological features essential to the conservation of the species, and that may require special management considerations or protection. For those estuarine areas designated as critical habitat we are again delineating them in similar terms to our past designations, as being defined by a line connecting the furthest land points at the estuary mouth.

In previous designations of salmonid critical habitat we did not designate offshore marine areas (with the exception of deep waters in Puget Sound (65 FR 7764, February 16, 2000; 70 FR 52630, September 2, 2005). In the Pacific Ocean, we concluded that there may be essential habitat features, but we could not identify any special management considerations or protection associated with them as required under section 3(5)(A)(I) of the ESA (65 FR 7776; February 16, 2000). Since that time we have carefully considered the best available scientific information, and related agency actions, such as the designation of Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act. We believe that forage species are a feature in the Pacific Ocean that are essential for salmon conservation and that may require special management considerations or protection, at least for those forage species that are a target of human harvest. However, because salmonids are opportunistic feeders we could not identify ''specific areas'' beyond the nearshore marine zone where these or other essential features are found within this vast geographic area occupied by salmon and steelhead. In contrast to estuarine and nearshore areas, we conclude that it is not possible to identify ''specific areas'' in the Pacific Ocean that contain essential features for salmonids, and, therefore, we are not designating critical habitat in offshore marine areas. We requested comment on this issue in our proposed rule but did not receive comments or information that would change our conclusion (70 FR 52630, September 2, 2005).

Primary Constituent Elements

In determining what areas are critical habitat, agency regulations at 50 CFR 424.12(b) require that we ''consider those physical or biological features that are essential to the conservation of a given species * * *, including space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species.'' The regulations further direct us to ''focus on the principal biological or physical constituent elements * * * that are essential to the conservation of the species,'' and specify that the ''known primary constituent elements shall be listed with the critical habitat description.'' The regulations identify PCEs as including, but not limited to: ''roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.''

NMFS biologists developed a list of PCEs that are essential to the species' conservation and based on the unique life history of salmon and steelhead and their biological needs (Hart, 1973; Beauchamp *et al.*, 1983; Laufle *et al.*, 1986; Pauley *et al.*, 1986, 1988, and 1989; Groot and Margolis, 1991; Spence *et al.*, 1996). Guiding the identification of PCEs was a decision matrix we developed for use in ESA section 7 consultations (NMFS, 1996b) which describes general parameters and characteristics of most of the essential features under consideration in this critical habitat designation. We identified these PCEs and requested comment on them in the advance notice of proposed rulemaking (ANPR)(68 FR 55931; September 29, 2003) and proposed rule (69 FR 74636; December 14, 2005) but did not receive information to support changing them. These PCEs include sites essential to support one or more life stages of the ESU (sites for spawning, rearing, migration and foraging). These sites in turn contain physical or biological features essential to the conservation of the ESU (for example, spawning gravels, water quality and quantity, side channels, forage species). The specific PCEs include:

1. Freshwater spawning sites with water quantity and quality conditions and substrate supporting spawning, incubation, and larval development. These features are essential to conservation because without them the species cannot successfully spawn and produce offspring.

2. Freshwater rearing sites with water quantity and floodplain connectivity to form and maintain physical habitat conditions and support juvenile growth and mobility; water quality and forage supporting juvenile development; and natural cover such as shade, submerged and overhanging large wood, log jams and beaver dams, aquatic vegetation, large rocks and boulders, side channels, and undercut banks. These features are essential to conservation because without them juveniles cannot access and use the areas needed to forage, grow, and develop behaviors (e.g., predator avoidance, competition) that help ensure their survival.

3. Freshwater migration corridors free of obstruction with water quantity and quality conditions and natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, side channels, and undercut banks supporting juvenile and adult mobility and survival. These features are essential to conservation because without them juveniles cannot use the variety of habitats that allow them to avoid high flows, avoid predators, successfully compete, begin the behavioral and physiological changes needed for life in the ocean, and reach the ocean in a timely manner. Similarly, these features are essential for adults because they allow fish in a non-feeding condition to successfully swim

upstream, avoid predators, and reach spawning areas on limited energy stores.

4. Estuarine areas free of obstruction with water quality, water quantity, and salinity conditions supporting juvenile and adult physiological transitions between fresh- and saltwater; natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, and side channels; and juvenile and adult forage, including aquatic invertebrates and fishes, supporting growth and maturation. These features are essential to conservation because without them juveniles cannot reach the ocean in a timely manner and use the variety of habitats that allow them to avoid predators, compete successfully, and complete the behavioral and physiological changes needed for life in the ocean. Similarly, these features are essential to the conservation of adults because they provide a final source of abundant forage that will provide the energy stores needed to make the physiological transition to fresh water, migrate upstream, avoid predators, and develop to maturity upon reaching spawning areas.

5. Nearshore marine areas free of obstruction with water quality and quantity conditions and forage, including aquatic invertebrates and fishes, supporting growth and maturation; and natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, and side channels. As in the case with freshwater migration corridors and estuarine areas, nearshore marine features are essential to conservation because without them juveniles cannot successfully transition from natal streams to offshore marine areas. We have focused our designation on nearshore areas in Puget Sound because of its unique and relatively sheltered fjord-like setting (as opposed to the more open coastlines of Washington and Oregon).

6. Offshore marine areas with water quality conditions and forage, including aquatic invertebrates and fishes, supporting growth and maturation. These features are essential for conservation because without them juveniles cannot forage and grow to adulthood. However, for the reasons stated previously in this document, it is difficult to identify specific areas containing this PCE as well as human activities that may affect the PCE condition in those areas. Therefore, we have not designated any specific areas based on this PCE but instead have identified it because it is essential to the species' conservation, and specific offshore areas may be identified in the future (in which case any revision to this designation would be subject to separate rulemaking).

The occupied habitat areas designated in this final rule contain PCEs required to support the biological processes for Oregon Coast coho using the habitat. The CHART verified this for each watershed/nearshore zone by relying on the best available scientific data (including species distribution maps, watershed analyses, and habitat surveys) during its review of occupied areas and resultant assessment of area conservation values (NMFS, 2007b). The contribution of the PCEs varies by site and biological function such that the quality of the elements may vary within a range of acceptable conditions. The CHART took this variation into account when it assessed the conservation value of an area.

Special Management Considerations or Protections

An occupied area meets the definition of critical habitat only if it contains physical and biological features that ''may require special management considerations or protection.'' Agency regulations at 50 CFR 424.02(j) define ''special management considerations or protection'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.''

As part of the biological assessment described below under ''Critical Habitat Analytical Review Team,'' a team of biologists examined each habitat area to determine whether the physical or biological features may require special management consideration. These determinations are identified for each area in the final CHART report for the Oregon Coast coho ESU (NMFS, 2007b). Consistent with the final critical habitat designations for 12 Pacific Northwest ESUs (70 FR 52630; September 2, 2005), the CHART identified a variety of activities that threaten the physical and biological features essential to listed salmon and steelhead (see review by Spence *et al.*, 1996), including: (1) Forestry; (2) grazing; (3) agriculture; (4) road building/maintenance; (5) channel modifications/diking; (6) urbanization; (7) sand and gravel mining; (8) mineral mining; (9) dams; (10) irrigation impoundments and withdrawals; (11) river, estuary, and ocean traffic; (12) wetland loss/removal; (13) beaver removal; and (14) exotic/invasive species introductions. In addition to these, the harvest of salmonid prey species (e.g., forage fishes such as herring, anchovy, and sardines) may present another potential habitat-related management activity (Pacific Fishery Management Council, 1999).

Unoccupied Areas

ESA section 3(5)(A)(ii) defines critical habitat to include ''specific areas outside the geographical area occupied'' if the areas are determined by the Secretary to be ''essential for the conservation of the species.'' NMFS regulations at 50 CFR 424.12(e) emphasize that we ''shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' For the Oregon Coast coho ESU we are not designating unoccupied areas at this time. The CHART did not identify any unoccupied areas that may be essential for the conservation of the Oregon Coast coho ESU. Thus, we are not designating any unoccupied areas at this time. Any future designation of unoccupied areas would be based on the required determination that such area is essential for the conservation of the ESU and would be subject to separate rulemaking with the opportunity for notice and comment.

Lateral Extent of Critical Habitat

In past designations we have described the lateral extent of critical habitat in various ways, ranging from fixed distances to ''functional'' zones defined by important riparian functions (65 FR 7764; February 16, 2000). Both approaches presented difficulties, and this was highlighted in several comments (most of which requested that we focus on aquatic areas only) received in response to the ANPR (68 FR 55926; September 29, 2003). Designating a set riparian zone width will (in some places) accurately reflect the distance from the stream on which PCEs might be found, but in other cases may over- or understate the distance. Designating a functional buffer avoids that problem, but makes it difficult for Federal agencies to know in advance what areas are critical habitat. To address these issues we have defined the lateral extent of designated critical habitat as the width of the stream channel defined by the ordinary high-water line as defined by the USACE in 33 CFR 329.11. This approach is consistent with the specific mapping requirements described in agency regulations at 50 CFR 424.12(c)). In areas for which ordinary high-water has not been defined pursuant to 33 CFR 329.11, the width of the stream channel shall be defined by its bankfull elevation. Bankfull elevation is the level at which water begins to leave the channel and move into the floodplain

(Rosgen, 1996) and is reached at a discharge which generally has a recurrence interval of 1 to 2 years on the annual flood series (Leopold *et al.*, 1992). Such an interval is commensurate with the juvenile freshwater life phases of coho salmon. Therefore, it is reasonable to conclude that for an occupied stream reach this lateral extent is regularly ''occupied.'' Moreover, the bankfull elevation can be readily discerned for a variety of stream reaches and stream types using recognizable water lines (e.g., marks on rocks) or vegetation boundaries (Rosgen, 1996).

As underscored in previous critical habitat designations, the quality of aquatic habitat within stream channels is intrinsically related to the adjacent riparian zones and floodplain, to surrounding wetlands and uplands, and to non-fish-bearing streams above occupied stream reaches. Human activities that occur outside the stream can modify or destroy physical and biological features of the stream. In addition, human activities that occur within and adjacent to reaches upstream (e.g., road failures) or downstream (e.g., culverts and dams) of designated stream reaches can also have demonstrable effects on physical and biological features of designated reaches.

In the relatively few cases where we are designating lake habitats (e.g., Devils, Siltcoos, Tahkenitch, Sand, and Tenmile lakes), we believe that the lateral extent may best be defined as the perimeter of the water body as displayed on standard 1:24,000 scale topographic maps or the elevation of ordinary high water, whichever is greater. In estuarine areas we believe that extreme high water is the best descriptor of lateral extent. As noted above for stream habitat areas, human activities that occur outside the area inundated by extreme or ordinary high water can modify or destroy physical and biological features of the estuarine habitat areas, and Federal agencies must be aware of these important habitat linkages as well.

Critical Habitat Analytical Review Team

To assist in the designation of critical habitat, we convened a CHART for the Oregon Coast domain. The CHART consisted of eight Federal biologists and habitat specialists from NMFS, USFS, and BLM, with demonstrated expertise regarding salmonid habitat and related protective efforts within the domain. The CHART was tasked with assessing biological information pertaining to areas under consideration for designation as critical habitat. The CHART also reconvened to review the public comments and any new information regarding the ESU and its habitat. Its work and determinations are documented in a final CHART report (NMFS, 2007b).

The CHART examined each habitat area within a watershed to determine whether the stream reaches or lakes occupied by the Oregon Coast coho contain the physical or biological features essential to conservation. As noted previously, the CHART also relied on its experience conducting ESA section 7 consultations and existing management plans and protective measures to determine whether these features may require special management considerations or protection. In addition to occupied areas, the definition of critical habitat also includes unoccupied areas if we determine the area is essential for conservation. Accordingly, the CHART was next asked whether there were any unoccupied areas within the historical range of the ESU that may be essential for conservation. The CHART did not identify any such unoccupied areas.

The CHART was next asked to determine the relative conservation value of each area for each ESU. The CHART scored each habitat area based on several factors related to the quantity and quality of the physical and biological features. It next considered each area in relation to other areas and with respect to the population occupying that area. Based on a consideration of the raw scores for each area, and a consideration of that area's contribution in relation to other areas and in relation to the overall population structure of the ESU, the CHART rated each habitat area as having a ''high,'' ''medium,'' or ''low'' conservation value. The preliminary CHART ratings were reviewed by several state and tribal comanagers in advance of the proposed rule, and the CHART made needed changes prior to that rule. State and tribal comanagers also evaluated our proposed rule (69 FR 74572; December 14, 2004) and provided comments and new information which were also reviewed and incorporated as needed by the CHART in the preparation of this final designation.

The rating of habitat areas as having a high, medium, or low conservation value provided information useful to inform the Secretary's exercise of discretion in determining whether the benefits of exclusion outweigh the benefits of designation (i.e., ESA section 4(b)(2)). The higher the conservation value for an area, the greater the likely benefit of the ESA section 7 protections. We recognized that the ''benefit of designation'' would also depend on the likelihood of a consultation occurring and the improvements in species' conservation that may result from changes to proposed Federal actions. To address this concern, we asked the CHART to develop a profile for a ''low leverage'' watershed—that is, a watershed where it was unlikely there would be a section 7 consultation, or where a section 7 consultation, if it did occur, would yield few conservation benefits. For watersheds not meeting the ''low leverage'' profile, we considered their conservation rating to be a fair assessment of the benefit of designation. For watersheds meeting the ''low leverage'' profile, we considered the benefit of designation to be an increment lower than the conservation rating. For example, a watershed with a ''high'' conservation value but ''low leverage'' was considered to have a ''medium'' benefit of designation, and so forth (NMFS, 2007b).

As discussed earlier, the scale chosen for the ''specific area'' referred to in section 3(5)(a) was a watershed, as delineated by USGS methodology. There were some complications with this delineation that required us to adapt the CHARTs' approach for some areas. In particular, a large stream or river might serve as a rearing and migration corridor to and from many watersheds, yet be embedded itself in a watershed. In any given watershed through which it passes, the stream may have a few or several tributaries. For rearing/migration corridors embedded in a watershed, the CHART was asked to rate the conservation value of the watershed based on the tributary habitat. We assigned the rearing/migration corridor the rating of the highest-rated watershed for which it served as a rearing/migration corridor. The reason for this treatment of migration corridors is the role they play in the salmon's life cycle. Salmon are anadromous—born in fresh water, migrating to salt water to feed and grow, and returning to fresh water to spawn. Without a rearing/migration corridor to and from the sea, salmon cannot complete their life cycle. It would be illogical to consider a spawning and rearing area as having a particular conservation value and not consider the associated rearing/migration corridor as having a similar conservation value.

Application of ESA Section 4(b)(2) (16 U.S.C. 1533(b)(2))

The foregoing discussion describes those areas that are eligible for designation as critical habitat—the specific areas that fall within the ESA section 3(5)(A) definition of critical habitat. However, specific areas eligible

for designation are not automatically designated as critical habitat. Section 4(b)(2) of the ESA requires the Secretary to first consider the economic impact, impact on national security, and any other relevant impact of designation. The Secretary has the discretion to exclude an area from designation if he determines the benefits of exclusion (that is, avoiding the impact that would result from designation) outweigh the benefits of designation based upon best scientific and commercial data. The Secretary may not exclude an area from designation if exclusion will result in the extinction of the species. Because the authority to exclude is discretionary, exclusion is not required for any areas. In this rulemaking, the Secretary has applied his statutory discretion to exclude areas from critical habitat for several different reasons (NMFS, 2007d).

In this exercise of discretion, the first issue we must address is the scope of impacts relevant to the ESA section 4(b)(2) evaluation. We proposed new critical habitat designations for 13 Pacific Northwest ESUs, including the Oregon Coast coho ESU (69 FR 74572; December 14, 2004), because the previous designations were vacated following a Court ruling that we had inadequately considered the economic impacts of designating critical habitat. (*National Association of Homebuilders* v. *Evans*, 2002 WL 1205743 No. 00–CV–2799 (D.D.C.) (NAHB)). The *NAHB* court had agreed with the reasoning of the Court of Appeals for the Tenth Circuit in *New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). In that decision, the Tenth Circuit stated ''[t]he statutory language is plain in requiring some kind of consideration of economic impact in the critical habitat designation phase.'' The court concluded that, given the FWS' failure to distinguish between ''adverse modification'' and ''jeopardy'' in its 4(b)(2) analysis, the FWS must analyze the full impacts of critical habitat designation, regardless of whether those impacts are coextensive with other impacts (such as the impact of the jeopardy requirement).

In redesignating critical habitat for the 13 Pacific Northwest ESUs, we followed the Tenth Circuit Court's directive regarding the statutory requirement to consider the economic impact of designation. Areas designated as critical habitat are subject to ESA section 7 requirements, which provide that Federal agencies ensure that their actions are not likely to destroy or adversely modify critical habitat. To evaluate the economic impact of critical habitat we first examined our voluminous section 7 consultation record for Oregon Coast coho as well as other ESUs of salmon and steelhead. (For thoroughness, we examined the consultation record for other ESUs to see if it provided information relevant to Oregon Coast coho.) That record includes consultations on habitat-modifying Federal actions both where critical habitat has been designated and where it has not. We could not discern a distinction between the impacts of applying the jeopardy provision versus the adverse modification provision in occupied critical habitat. Given our inability to detect a measurable difference between the impacts of applying these two provisions, the only reasonable alternative seemed to be to follow the recommendation of the Tenth Circuit, approved by the *NAHB* court—to measure the coextensive impacts; that is, measure the entire impact of applying the adverse modification provision of section 7, regardless of whether the jeopardy provision alone would result in the identical impact.

The Tenth Circuit's opinion only addressed ESA section 4(b)(2)'s requirement that economic impacts be considered. The court did not address how ''other relevant impacts'' were to be considered, nor did it address the benefits of designation. Because section 4(b)(2) requires a consideration of other relevant impacts of designation, and the benefits of designation, and because our record did not support a distinction between impacts resulting from application of the adverse modification provision versus the jeopardy provision, we are uniformly considering coextensive impacts and coextensive benefits, without attempting to distinguish the benefit of a critical habitat consultation from the benefit that would otherwise result from a jeopardy consultation that would occur even if critical habitat were not designated. To do otherwise would distort the balancing test contemplated by section 4(b)(2).

The principal benefit of designating critical habitat is that Federal activities that may affect such habitat are subject to consultation pursuant to section 7 of the ESA. Such consultation requires every Federal agency to ensure that any action it authorizes, funds or carries out is not likely to result in the destruction or adverse modification of critical habitat. This complements the section 7 provision that Federal agencies ensure that their actions are not likely to jeopardize the continued existence of a listed species. Another benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area and thereby focus and contribute to conservation efforts by clearly delineating areas of high conservation value for certain species. It is unknown to what extent this process actually occurs for Oregon Coast coho, and what the actual benefit is to Oregon Coast coho, as there are also concerns, noted above, that a critical habitat designation may discourage such conservation efforts.

The balancing test in ESA section 4(b)(2) contemplates weighing benefits that are not directly comparable—the benefit associated with species conservation balanced against the economic benefit, benefit to national security, or other relevant benefit that results if an area is excluded from designation. Section 4(b)(2) does not specify a method for the weighing process. Agencies are frequently required to balance benefits of regulations against impacts; Executive Order (E.O.) 12866 established this requirement for Federal agency regulations. Ideally such a balancing would involve first translating the benefits and impacts into a common metric. Executive branch guidance from the OMB suggests that benefits should first be monetized (i.e., converted into dollars). Benefits that cannot be monetized should be quantified (for example, numbers of fish saved). Where benefits can neither be monetized nor quantified, agencies are to describe the expected benefits (OMB, 2003).

It may be possible to monetize benefits of critical habitat designation for a threatened or endangered species in terms of willingness-to-pay (OMB, 2003). However, we are not aware of any available data that would support such an analysis for salmon. In addition, ESA section 4(b)(2) requires analysis of impacts other than economic impacts that are equally difficult to monetize, such as benefits to national security of excluding areas from critical habitat. In the case of salmon designations, impacts to Northwest tribes are an ''other relevant impact'' that also may be difficult to monetize.

An alternative approach, approved by OMB (OMB, 2003), is to conduct a cost-effectiveness analysis. A cost-effectiveness analysis ideally first involves quantifying benefits, for example, percent reduction in extinction risk, percent increase in productivity, or increase in numbers of fish. Given the state of the science, it would be difficult to quantify reliably the benefits of including particular areas in the critical habitat designation. Although it is difficult to monetize or quantify benefits of critical habitat

designation, it is possible to differentiate among habitat areas based on their relative contribution to conservation. For example, habitat areas can be rated as having a high, medium, or low conservation value. The qualitative ordinal evaluations can then be combined with estimates of the economic costs of critical habitat designation in a framework that arguably moves the designation to a more efficient outcome. Individual habitat areas are assessed using both their biological evaluation and economic cost, so that areas with high conservation value and lower economic cost might be considered to have a higher priority for designation, while areas with a low conservation value and higher economic cost might have a higher priority for exclusion. While this approach can provide useful information to the decision-maker, there is no rigid formula through which this information translates into exclusion decisions. Every geographical area containing habitat eligible for designation is different, with a unique set of ''relevant impacts'' that may be considered in the exclusion process. Regardless of the analytical approach, ESA section 4(b)(2) makes clear that what weight the agency gives various impacts and benefits, and whether the agency excludes areas from the designation, is discretionary.

Exclusions Based on Impacts to Tribes

A broad array of activities on Indian lands may trigger section 7 consultation under the ESA. For this analysis, we considered what those activities may be and what the likely effect would be on conservation of the Oregon Coast coho ESU if the activities were not subject to section 7 consultation. (We realize that the activities in question would still be subject to section 7 consultation and to the requirement that Federal agencies not jeopardize species' continued existence. However, as described above, because we cannot discern a difference in the application of the jeopardy and adverse modification requirements in our consultations for Oregon coast coho, we are considering coextensive impacts and coextensive benefits.) To determine the benefit of designation, we considered the number of stream miles within Indian lands, whether those stream miles were located in high, medium, or low conservation value areas, and the number of expected section 7 consultations in those areas (NMFS, 2007f).

There are several benefits to excluding Indian lands. The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Pursuant to these authorities, Indian lands are recognized as unique and have been retained by Indian Tribes or have been set aside for tribal use. These lands are managed by Indian Tribes in accordance with tribal goals and objectives within the framework of applicable treaties and laws.

In addition to the distinctive trust relationship, for salmon and steelhead in the Northwest, there is a unique partnership between the Federal Government and Indian tribes regarding salmon management. Two of the four tribes with land in Oregon coast coho critical habitat are active participants in local watershed restoration and management aimed at coho conservation (NMFS, 2007f).

The benefits of excluding Indian lands from designation include: (1) The furtherance of established national policies, our Federal trust obligations, and our deference to the tribes in management of natural resources on their lands; (2) the maintenance of effective long-term working relationships to promote the conservation of Oregon coast coho; and (3) continued respect for tribal sovereignty over management of natural resources on Indian lands through established tribal natural resource programs. Regarding benefits of designation, many actions on Indian lands involve the Bureau of Indian Affairs (BIA), triggering a section 7 consultation. This means the benefit of designating Indian land is potentially high. However, coho habitat on Indian lands represents a tiny proportion of overall habitat—2.7 stream miles (4.35 km) out of a total of 6,652. Accordingly, we find the benefits of promoting tribal sovereignty and the trust responsibility outweigh the benefits of applying ESA section 7 to Federal activities on these 2.7 miles (4.35 km) of coho habitat (NMFS, 2007f).

The Indian lands specifically excluded from critical habitat are those defined in the Secretarial Order, including: (1) Lands held in trust by the United States for the benefit of any Indian tribe; (2) land held in trust by the United States for any Indian Tribe or individual subject to restrictions by the United States against alienation; (3) fee lands, either within or outside the reservation boundaries, owned by the tribal government; and (4) fee lands within the reservation boundaries owned by individual Indians. We have determined that these exclusions, together with the other exclusions described in this rule, will not result in extinction of the species (NMFS, 2007d).

Exclusions Based on Economic Impacts

Our assessment of economic impact generated considerable interest from commenters on the ANPR (68 FR 55926; September 29, 2003) and the proposed rule (69 FR 74572; December 14, 2004). Based on new information and comments received on the proposed rule we have updated our estimates of economic impacts of designating each of the particular areas found to meet the definition of critical habitat (NMFS, 2007d). This report is available from NMFS (see **ADDRESSES**).

The first step in the overall economic analysis was to identify existing legal and regulatory constraints on economic activity that are independent of critical habitat designation, such as Clean Water Act (CWA) requirements. Coextensive impacts of the ESA section 7 requirement to avoid jeopardy were not considered part of the baseline.

Next, from the consultation record, we identified Federal activities that might affect habitat and that might result in an ESA section 7 consultation. (We did not consider Federal actions, such as the approval of a fishery, that might affect the species directly but not affect its habitat.) We identified ten types of activities including: Hydropower dams; non-hydropower dams and other water supply structures; Federal lands management, including grazing (considered separately); transportation projects; utility line projects; instream activities, including dredging (considered separately); activities permitted under the Environmental Protection Agency's (EPA's) National Pollution Discharge Elimination System; sand and gravel mining; residential and commercial development; and agricultural pesticide applications. Based on our consultation record and other available information, we determined the modifications each type of activity was likely to undergo as a result of section 7 consultation (regardless of whether the modification might be required by the jeopardy or the adverse modification provision). We developed an expected direct cost for each type of action and projected the

likely occurrence of each type of project in each watershed, using existing spatial databases (e.g., the USACE 404(d) permit database). Finally, we aggregated the costs from the various types of actions and estimated an annual impact, taking into account the probability of consultation occurring and the likely rate of occurrence of that project type.

This analysis allowed us to estimate the coextensive economic impact of designating each ''particular area'' (that is, each habitat area, or aggregated occupied stream reaches in a watershed). Expected annual economic impacts in the Oregon Coast coho ESU ranged from zero to $869,861 per habitat area, with a median of $222,419. Where a watershed included both tributaries and a migration corridor that served other watersheds, we estimated the separate impacts of designating the tributaries and the migration corridor. We did this by identifying those categories of activities most likely to affect tributaries and those most likely to affect larger migration corridors.

Because of the methods we selected and the data limitations, portions of our analysis both under- and over-estimate the coextensive economic impact of ESA section 7 requirements. For example, we lacked complete data on the likely impact on flows at non-Federal hydropower projects, which would increase economic impacts. Also, we did not have information about potential changes in irrigation flows associated with section 7 consultation. These impacts would increase the estimate of coextensive costs. On the other hand, we estimated an impact on all activities occurring within the geographic boundaries of a watershed, even though in some cases activities would be far removed from occupied stream reaches and so might not require modification (or even consultation). In addition, we were unable to document significant costs of critical habitat designation that occur outside the section 7 consultation process, including costs resulting from state or local regulatory burdens imposed on developers and landowners as a result of a Federal critical habitat designation.

In determining whether the economic benefit of excluding a habitat area might outweigh the benefit of designation to the species, we took into account many data limitations, including those described above. The ESA requires that we make critical habitat designations within a short time frame ''with such data as may be available'' at the time. Moreover, the approach we adopted accommodated many of these data limitations by considering the relative benefits of designation and exclusion, giving priority to excluding habitat areas with a relatively lower benefit of designation and a relatively higher economic impact (NMFS, 2007d).

The circumstances of the Oregon Coast coho ESU are well suited to this approach. Coho salmon is a wide-ranging species that occupies numerous habitat areas with thousands of stream miles. Not all occupied areas, however, are of equal importance to conserving the ESU. Within the currently occupied range there are areas that support highly productive populations, areas that support less productive populations, and areas that support production in only some years. Some populations within the ESU may be more important to long-term conservation of the ESU than other populations. Therefore, in many cases it may be possible to construct different scenarios for achieving conservation. Different scenarios might have more or less certainty of achieving conservation, and more or less economic impact.

Our first step in constructing an exclusion scenario was to identify all areas we would consider for an economic exclusion, based on dollar thresholds. The next step was to examine whether any of the areas eligible for exclusion make an important contribution to conservation, in the context of the areas that remained (that is, those areas not identified as eligible for exclusion). We did not consider habitat areas for exclusion if they had a high conservation value rating. Based on the rating process used by the CHART we judged that all of the high value areas make an important contribution to conservation.

In developing criteria for the first step, we chose dollar thresholds that we anticipated would lead most directly to a more cost-effective scenario. We considered for exclusion low value habitat areas with an economic impact greater than $91,556 and medium value habitat areas with an economic impact greater than $323,138. These criteria we selected for identifying habitat areas as eligible for exclusion do not represent an objective determination that, for example, a given low value area is worth a certain dollar amount and no more. The statute directs us to balance dissimilar values under a statutorily-limited time frame. The statute emphasizes the discretionary nature of the section 4(b)(2) balancing task. Moreover, while our approach follows the Tenth Circuit's direction to consider coextensive economic impacts, we nevertheless must acknowledge that not all of the costs will be avoided by exclusion from designation. Finally, the cost estimates developed by our economic analysis do not have obvious break points that would lead to a logical division between ''high,'' ''medium,'' and ''low'' costs. Given these factors, a judgment that any particular dollar threshold is objectively ''right,'' would be neither necessary nor possible. Rather, what economic impact is ''high,'' and therefore might outweigh the benefit of designating a medium or low conservation value habitat area, is a matter of agency discretion and policy.

In the second step of the process, we asked the CHART whether any of the habitat areas eligible for exclusion make an important contribution to conservation. The CHART considered this question in the context of all of the areas eligible for exclusion as well as the information they had developed in providing the initial conservation ratings. The following section describes the results of applying the two-step process to the Oregon Coast coho ESU. The results are discussed in greater detail in a separate report that is available for public review and comment (NMFS, 2007d). We have determined that the exclusions, together with the other exclusions described in this rule (i.e., Indian lands), will not result in extinction of the species (NMFS, 2007d).

Summary of Changes From the Proposed Critical Habitat Designation

We evaluated the comments and new information received on the proposed rule to ensure that they represented the best scientific data available and made a number of general types of changes to the critical habitat designations, including:

(1) We revised habitat maps and related biological assessments based on a final CHART assessment (NMFS, 2007b) of information provided by commenters, peer reviewers, and agency biologists (including CHART members). We also evaluated watersheds to determine how well the conservation value rating corresponded to the benefit of designation, in particular the likelihood of an ESA section 7 consultation occurring in that area and whether the consultation would yield conservation benefits if it was likely to occur.

(2) We revised our economic analysis based on information provided by commenters and peer reviewers as well as our own efforts as referenced in the proposed rule and described in the final economic analysis (NMFS, 2007c). Major changes included assessing new impacts associated with pesticide consultations, revising Federal land management costs to take into account wilderness areas, and modifying the

analysis of Federal grazing land impacts to more accurately reflect the likely geographic extent of ESA section 7 implementation. We also documented the economic costs of changes in flow regimes for some hydropower projects. To account for inflationary changes in the economic impacts, we adjusted the cost estimates based on changes in a producer price index over the period 2005 to 2007 (NMFS 2007c).

(3) We conducted a new ESA section 4(b)(2) analysis based on economic impacts to take into account the above revisions. This resulted in the final exclusion of many of the same watersheds proposed for exclusion. It also resulted in some areas originally proposed for exclusion not being excluded. The analysis is described further in the 4(b)(2) report (NMFS, 2007d).

(4) In the regulations, we've removed reference to ''units'' to avoid possible confusion with the concept of ''recovery units'' as described in our section 7 handbook.

The following section summarizes the changes to the proposed critical habitat rule. These changes are also reflected in final agency reports pertaining to the biological, economic, and policy assessments supporting these designations (NMFS, 2007b; NMFS, 2007c; and NMFS, 2007d). We conclude that these changes are warranted based on new information and analyses that constitute the best scientific data available.

Description of Specific Changes

The CHART elevated the conservation value rating for five watersheds within the Umpqua River basin. The changes were made as a result of recent population identification work (Lawson *et al.*, 2007) that further subdivides this basin into four (versus two) independent populations. We made several changes to the delineation of occupied habitat areas based on comments and field surveys indicating that our original coho distribution maps/data were in error. As a result of revised economic data for this ESU and our final 4(b)(2) assessment, we are no longer excluding habitat areas in three watersheds that were previously proposed for designation. We have also removed Josephine and Jackson counties from the relevant critical habitat table in our regulations. These counties overlap slightly with upland areas in watersheds occupied by Oregon Coast coho salmon, but they do not contain stream reaches designated as critical habitat for this ESU. Table 1 summarizes the changes made for specific watersheds in the range of this ESU.

TABLE 1.—CHANGES TO CRITICAL HABITAT DESIGNATION FOR OREGON COAST COHO

Subbasin	Watershed code	Watershed name	Changes from proposed rule
NEHALEM	1710020206	Lower Nehalem River/Cook Creek.	Added 1.3 miles (2.1 km) of occupied habitat areas.
WILSON/TRASK/NESTUCCA	1710020302	Nestucca River	Added 4.2 miles (6.8 km) of occupied habitat areas and removed 3 miles (4.8 km) of unoccupied stream reaches.
NORTH UMPQUA	1710030106	Boulder Creek	No longer excluded from designation.
NORTH UMPQUA	1710030110	Rock Creek/North Umpqua River.	Added 1.8 miles (2.9 km) of occupied habitat areas.
SOUTH UMPQUA	1710030202	Jackson Creek	Elevated HUC5 conservation value from Low to Medium. No longer excluded from designation.
SOUTH UMPQUA	1710030204	Elk Creek/South Umpqua	Elevated HUC5 conservation value from Low to Medium. No longer excluded from designation.
SOUTH UMPQUA	1710030205	South Umpqua River	Removed 2 miles (3.2 km) of unoccupied stream reaches.
SOUTH UMPQUA	1710030207	Middle Cow Creek	Elevated HUC5 conservation value from Medium to High.
SOUTH UMPQUA	1710030209	Lower Cow Creek	Removed 3 miles (4.8 km) of unoccupied stream reaches.
SOUTH UMPQUA	1710030211	Myrtle Creek	Elevated HUC5 conservation value from Medium to High.
UMPQUA	1710030301	Upper Umpqua River	Removed 2 miles (3.2 km) of unoccupied stream reaches.
UMPQUA	1710030303	Elk Creek	Removed 1 mile (1.6 km) of unoccupied stream reaches and elevated HUC5 conservation value from Medium to High.
UMPQUA	1710030304	Middle Umpqua River	Removed 1.5 mile (2.4 km) of unoccupied stream reaches.
UMPQUA	1710030305	Lake Creek	Removed 5.3 mile (8.5 km) of unoccupied stream reaches.
COQUILLE	1710030504	East Fork Coquille	Removed 1.5 mile (2.4 km) of unoccupied stream reaches.

Final Critical Habitat Designation

We are designating approximately 6,568 stream miles (10,570 km) and 15 square miles (38.8 sq km) of lake habitat within the geographical area presently occupied by the Oregon Coast coho ESU (see Table 2). The Oregon Coast coho ESU is the only listed species in this domain, so the areas designated as critical habitat do not overlap with critical habitat areas designated for other listed ESUs.

TABLE 2.—APPROXIMATE QUANTITY OF HABITAT AND OWNERSHIP WITHIN WATERSHEDS CONTAINING HABITAT AREAS DESIGNATED AS CRITICAL HABITAT FOR THE EVOLUTIONARILY SIGNIFICANT UNIT OF OREGON COAST COHO SALMON (ONCORHYNCHUS KISUTCH)

Streams mi (km)	Lakes sq mi (sq km)	Nearshore marine mi (km)	Land ownership type (percent)			
			Federal	Tribal	State	Private
6,568 (10,570)	15 (38.8)	n/a	32.9	<0.1	9.1	58.0

The areas designated, summarized below, are all occupied and contain physical and biological features essential to the conservation of the species and that may require special management considerations or protection. No unoccupied areas were identified that are considered essential for the conservation of the species. There are 80 watersheds within the range of this ESU. Eight watersheds received a low conservation value rating, 27 received a medium rating, and 45 received a high rating to the ESU (NMFS, 2007b). As a result of the balancing process for economic impacts described above, the Secretary is excluding from the designation the five watersheds listed in Table 3. Of the habitat areas eligible for designation, approximately 84 stream miles (135 km) or 1.3 percent are being excluded because the economic benefits of exclusion outweigh the benefits of designation. Total potential estimated economic impact, with no exclusions, would be $22.2 million. The exclusions identified in Table 3 would reduce the total estimated economic impact to $20.1 million (NMFS, 2007d).

TABLE 3.—HABITAT AREAS WITHIN THE GEOGRAPHICAL RANGE OF THE EVOLUTIONARILY SIGNIFICANT UNIT OF OREGON COAST COHO SALMON (ONCORHYNCHUS KISUTCH) AND EXCLUDED FROM CRITICAL HABITAT

Subbasin	Watershed code	Watershed name	Area proposed for exclusion
North Fork Umpqua River subbasin	1710030108	Steamboat Creek	Entire watershed.
North Fork Umpqua River subbasin	1710030109	Canton Creek	Entire watershed.
South Fork Umpqua River subbasin	1710030201	Upper South Umpqua River	Entire watershed.
Umpqua River subbasin	1710030305	Lake Creek	Entire watershed.
Coquille River subbasin	1710030501	Coquille South Fork, Lower	Entire watershed.

Effects of Critical Habitat Designation

ESA Section 7 Consultation

Section 7(a) of the ESA requires Federal agencies, including NMFS, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this provision of the ESA are codified at 50 CFR 402.

If a species is listed or critical habitat is designated, ESA section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, we would review actions to determine if they would destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we will also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that we believe would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect these ESUs or their critical habitat will require ESA section 7 consultation. Activities on private or state lands requiring a permit from a Federal agency, such as a permit from the USACE under section 404 of the CWA, a section 10(a)(1)(B) permit from NMFS, or some other Federal action, including funding (e.g., Federal Highway Administration (FHA) or Federal Emergency Management Agency (FEMA) funding), will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not Federally funded, authorized, or permitted do not require section 7 consultation.

Activities Affected by Critical Habitat Designation

Section 4(b)(8) of the ESA requires that we evaluate briefly and describe, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, require that an ESA section 7 consultation be conducted. Generally these include water and land management actions of Federal agencies (e.g., USFS, BLM, USACE, BOR, the FHA, the National Resource Conservation Service (NRCS), National Park Service (NPS), BIA, and FERC) and related or similar actions of other Federally regulated projects and lands, including livestock grazing allotments by the USFS and BLM; hydropower sites licensed by the FERC; dams built or operated by the USACE or BOR; timber sales and other vegetation management activities conducted by the USFS, BLM, and BIA; irrigation diversions authorized by the USFS and BLM; road building and maintenance activities authorized by the FHA, USFS, BLM, NPS, and BIA; and mining and road building/maintenance activities authorized by the states of Washington, Oregon, and Idaho. Other actions of concern include dredge and fill, mining, diking, and bank stabilization activities authorized or conducted by the USACE, habitat modifications authorized by the FEMA, and approval of water quality standards and pesticide labeling and use restrictions administered by the EPA.

The Federal agencies that will most likely be affected by this critical habitat designation include the USFS, BLM, BOR, USACE, FHA, NRCS, NPS, BIA, FEMA, EPA, and the FERC. This designation will provide these agencies, private entities, and the public with clear notification of critical habitat designated for listed salmonids and the boundaries of the habitat. This designation will also assist these agencies and others in evaluating the potential effects of their activities on listed salmon and their critical habitat and in determining if ESA section 7 consultation with NMFS is needed.

As noted above, numerous private entities also may be affected by this critical habitat designation because of the direct and indirect linkages to an array of Federal actions, including Federal projects, permits, and funding. For example, private entities may harvest timber or graze livestock on Federal land or have special use permits to convey water or build access roads across Federal land; they may require Federal permits to armor stream banks, construct irrigation withdrawal facilities, or build or repair docks; they may obtain water from Federally funded and operated irrigation projects; or they may apply pesticides that are only available with Federal agency approval. These activities will need to be analyzed with respect to their potential to destroy or adversely modify critical habitat. In some cases, proposed activities may require modifications that may result in decreases in activities such as timber harvest and livestock and crop production. The transportation and utilities sectors may need to modify the placement of culverts, bridges, and utility conveyances (e.g., water, sewer and power lines) to avoid barriers to fish migration. Developments occurring in or near salmon streams (e.g., marinas, residential, or industrial facilities) that require Federal authorization or funding may need to be altered or built in a manner that ensures that critical habitat is not destroyed or adversely modified as a result of the construction, or subsequent operation, of the facility. These are just a few examples of potential impacts, but it is clear that the effects will encompass numerous sectors of private and public activities. If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact NMFS (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

Classification

Administrative Procedure Act

The proposed listing determination, proposed protective regulations, and proposed critical habitat designation addressing 27 ESUs generated substantial public interest. In addition to comments received during 12 public hearings, we received 33,480 written comments. Many of the comments addressing the critical habitat designation expressed concerns about how the rule would be implemented. Our experience in implementing previous listing determinations, protective regulations, and critical habitat designations suggests that neither the Administrative Procedure Act (APA) and ESA implementing regulations' minimum of a 30-day delay in effective date, nor the 60-day delay in effective date required by the Congressional Review Act for a ''major rule,'' are sufficient for this final rule. In order to provide for efficient administration of the rule once effective, we are providing a 90-day delay in effective date. As a result this rule will be effective on May 12, 2008. This will allow us the necessary time to provide for outreach to and interaction with the public, to minimize confusion and educate the public about activities that may be affected by the rule, and to work with Federal agencies and applicants to provide for an orderly implementation of the rule.

National Environmental Policy Act (NEPA)

ESA listing decisions are exempt from the requirement to prepare an environmental assessment or environmental impact statement under the NEPA. See NOAA Administrative Order 216–6.03(e)(1) and *Pacific Legal Foundation* v. *Andrus,* 657 F.2d 825 (6th Cir. 1981). Thus, we have determined that the final listing determination for Oregon Coast coho described in this notice is exempt from the requirements of the NEPA. Similarly, we have determined that we need not prepare environmental analyses for critical habitat designations made pursuant to the ESA. See *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996).

We conducted Environmental Assessments (EAs) under the NEPA analyzing the ESA section 4(d) regulations promulgated in 2000 for Pacific salmonids (65 FR at 42422 and 42481; July 10, 2000) and the amendments to the 4(d) regulations promulgated in 2005 (70 FR 37160; June 28, 2005). Both EAs analyzed the protective regulations for the Oregon Coast coho ESU which are being finalized in this notice. We solicited comment on the EAs as part of the proposed rules, as well as during a subsequent comment period following formal notice in the **Federal Register** of the availability of the draft EAs for review. We have reviewed new information available since the 2000 and 2005 analyses and determined that none of the new information would change the earlier analyses, nor would it change our conclusion that adoption of the 4(d) rule will have no significant impacts on the human environment (NMFS, 2007g).

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). For the proposed designation of critical habitat for 13 ESUs, including Oregon coast coho, we published an Initial Regulatory Flexibility Act Analysis for public comment. We received comments specific to some of the ESUs, but not to Oregon Coast coho. We received one general comment, stating that our analysis should include more references. We have prepared a final regulatory flexibility analysis for the designation of critical habitat, which is available upon request (see **ADDRESSES**) and which includes additional references. This analysis estimates that the number of regulated small entities potentially affected by the final critical habitat designation for the Oregon Coast coho salmon ESU is 920, and the estimated coextensive costs of section 7 consultation incurred by small entities is $5,072,840. As described in the analysis, we considered various alternatives for designating critical habitat for this ESU. We considered and rejected the alternative of not designating critical habitat for the ESU because such an approach did not meet the legal requirements of the ESA. We also examined and rejected an alternative in which all the eligible habitat areas in the ESU are designated (i.e., no areas are excluded) because many of the areas considered to have a low conservation value also had relatively high economic impacts that might be mitigated by excluding those

areas from designation. A third alternative we examined and rejected would exclude all habitat areas with a low or medium conservation value. While this alternative furthers the goal of reducing economic impacts, we could not make a determination that the benefits of excluding all habitat areas with low and medium conservation value outweighed the benefits of designation. Moreover, for some habitat areas the incremental economic benefit from excluding that area is relatively small. Therefore, after considering these alternatives in the context of the section 4(b)(2) process of weighing benefits of exclusion against benefits of designation, we determined that the current approach to designation (i.e., designating some but not all areas with low or medium conservation value) provides an appropriate balance of conservation and economic mitigation and that excluding the areas identified in this rulemaking would not result in extinction of the ESU. It is estimated that small entities will save $281,687 in compliance costs due to the exclusions made in the final designation.

ESA section 4(d) regulations for Oregon Coast coho were originally proposed on December 30, 1999 (64 FR 73479). The rule adopted here is substantially the same as that proposed in 1999. At that time we published an Initial Regulatory Flexibility Act analysis, which considered four alternative approaches to protective regulations. We concluded that there were no legally viable alternative to the one we proposed in 1999 that would have less impact on small entities and still fulfill agency obligations to protect listed salmonids. We received five public comments on the Initial Regulatory Flexibility Act analysis and the economic impacts of the proposed 4(d) rule. When the rule was adopted in 2000, we completed a Final Regulatory Flexibility Act analysis, which responded to public comments, and reached the same conclusion as the initial analysis. The 2000 4(d) regulations for Oregon Coast coho were invalidated when the underlying listing was vacated in 2001. In 2004 when we proposed to again list Oregon Coast coho, we also proposed to reinstate the 4(d) regulations. We did not conduct a new Regulatory Flexibility Act analysis at that time because there were no new issues to consider.

In preparing the final ESA section 4(d) regulations adopted here, we determined it was advisable to update our Regulatory Flexibility Act analysis, to ensure that we were considering current information. Our updated analysis led us to again conclude that among the available alternative approaches, the one adopted here minimizes economic costs, disruptions, and burdens, for the reasons expressed in the 2000 analysis (attached to NMFS, 2007i) and summarized at 65 FR 42422, 42473 (July 10, 2000). The economic assessment and analysis (NMFS, 2007i) are available upon request (see **ADDRESSES**).

Paperwork Reduction Act (PRA)

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

This final rule does not contain a collection-of-information requirement for purposes of the PRA.

Regulatory Planning and Review—E.O. 12866

We prepared a Regulatory Impact Review in 2000 when the ESA section 4(d) regulations were initially adopted and concluded that among the alternative regulatory approaches, the proposed 4(d) rule would maximize net benefits and minimize costs, within the constraints of the ESA. We have reviewed that analysis and new information available since the analysis was initially prepared, including OMB Circular A–4 (2003). We have determined that none of the new information would change the earlier analysis or conclusion (NMFS, 2007i).

The critical habitat component of this notice is a significant rule and has been reviewed by the OMB. As noted above, we have prepared several reports to support the exclusion process under section 4(b)(2) of the ESA. The economic costs of the critical habitat designations are described in our economic report (NMFS, 2007c). The benefits of the designations are described in the CHART report (NMFS, 2007b) and the 4(b)(2) report (NMFS, 2007d). The CHART report uses a biologically-based ranking system for gauging the benefits of applying section 7 of the ESA to particular watersheds. Because data are not available to monetize these benefits, we have adopted a framework that implicitly evaluates the benefits and costs based on a biological metric as outlined in the section 4(b)(2) report (NMFS, 2007b). This approach is consistent with the spirit of OMB's Circular A–4 in that it attempts to assess the benefits and costs even when limitations in data may not allow quantification or monetization. By taking this approach, we seek to designate sufficient critical habitat to meet the biological goal of the ESA while imposing the least burden on society, as called for by E.O. 12866.

The annual total coextensive economic impact of the critical habitat designations is approximately $15.7 million (in contrast to a $18.4 million annual economic impact from designating *all* eligible areas considered in the 4(b)(2) process for this ESU). This amount includes impacts that are coextensive with the implementation of the jeopardy requirement of section 7 (NMFS, 2007c).

We did not estimate the economic impacts associated solely with the listing of Oregon Coast coho ESU under the ESA.

E.O. 13084—Consultation and Coordination With Indian Tribal Governments

E.O. 13084 requires that, if we issue a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, we must consult with those governments or the Federal Government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. The final listing determination and protective regulations included in this rule do not impose substantial direct compliance costs on the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to the listing and protective regulations components of this final rule. Nonetheless, we intend to inform potentially affected tribal governments and to solicit their input and coordinate on future management actions.

The Departments of Commerce and Interior Secretarial Order ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997) provides that the Services * * * ''shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species.'' Pursuant to the Secretarial Order and in response to written and oral comments provided by various tribes in Washington, Oregon, and Idaho, we met and corresponded with many of the affected tribes concerning the inclusion of Indian lands in final critical habitat designations. These

discussions resulted in significant clarifications regarding the tribes' general position to exclude their lands, as well as specific issues regarding our interpretation of Indian lands under the Secretarial Order.

As described above (see Exclusions Based on Impacts to Tribes) and in our assessment of Indian lands associated with this final rulemaking (NMFS, 2007f), we have determined that Indian lands should be excluded from the final critical habitat designations for the Oregon Coast coho ESU. The Indian lands specifically excluded from critical habitat are those defined in the Secretarial Order, including: (1) Lands held in trust by the United States for the benefit of any Indian tribe; (2) land held in trust by the United States for any Indian Tribe or individual subject to restrictions by the United States against alienation; (3) fee lands, either within or outside the reservation boundaries, owned by the tribal government; and (4) fee lands within the reservation boundaries owned by individual Indians. We have determined that these exclusions, together with the other exclusions described in this final rule, will not result in extinction of the species (NMFS, 2007d).

E.O. 13211

On May 18, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule may be a significant regulatory action under E.O. 12866. We have determined, however, that the energy effects of the regulatory action are unlikely to exceed the energy impact thresholds identified in E.O. 13211.

The available data do not allow us to separate precisely these incremental impacts from the impacts of all conservation measures on energy production and costs. There is historical evidence, however, that the ESA section 7 jeopardy standard alone is capable of imposing all of these costs (NMFS, 2007j). While this evidence is indirect, it is sufficient to draw the conclusion that the designation of critical habitat for this one ESU does not significantly affect energy supply, distribution, or use.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(a) This final rule listing Oregon Coast coho and designating critical habitat will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon state, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the state, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement). ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

ESA listing and the designation of critical habitat do not impose a legally binding duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not jeopardize the continued existence of the species or destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the listing or designation of critical habitat, the legally binding duty to avoid jeopardy and the destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would the listing or critical habitat shift the costs of the large entitlement programs listed above to state governments.

(b) The ESA section 4(d) regulations prohibit any person from taking a listed member of the Oregon Coast coho ESU, except under certain circumstances. This prohibition applies to state and local government actions as well as private individuals. The 4(d) regulations prohibit certain activities, but do not impose an ''enforceable duty'' with associated costs to implement. As such, the 4(d) regulations are not considered an unfunded mandate for the purposes of the Unfunded Mandates Reform Act.

Takings

The final threatened listing determination is a non-discretionary action and therefore is not subject to the requirements of E.O. 12630. In accordance with E.O. 12630, this final rule does not have significant takings implications. Under E.O. 12630, ''Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that *substantially affect its value or use,* may constitute a taking of property'' [emphasis added]. Neither the critical habitat designation nor 4(d) regulations can be expected to substantially affect the value or use of property. A takings implication assessment is not required.

The designation of critical habitat confers the ESA section 7 protection against ''the destruction or adverse modification of [critical] habitat.'' The designation of critical habitat in this rule affects only Federal agency actions, and will not increase or decrease the current restrictions on private property concerning take of salmon. While it is possible that real estate market values may temporarily decline following designation, due to the perception that critical habitat designation may impose additional regulatory burdens on land use, our experience is that such impacts do not occur or are short lived (NMFS, 2007d). Owners of areas that are included in the designated critical habitat will continue to have the opportunity to use their property in ways consistent with the survival of listed salmon. Therefore, the designation of critical habitat does not substantially affect the value or use of private property, and does not constitute a taking.

The adoption of ESA section 4(d) regulations includes a prohibition against ''take'' of a listed species (the definition of ''take'' is to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.''). The take prohibition applies to any person subject to the jurisdiction of the United States, and may be perceived as affecting the value or use of property. However, the 4(d) regulations do not substantially affect the value or use of property for the following reasons. First, private property is already subject to state and local land-use regulations. Second, any action on private property authorized, funded, or carried out by a Federal agency that may take listed species is already subject to the section 7 ''no jeopardy'' protection by virtue of the listing determination. Third, our experience with Pacific salmonid 4(d) regulation since 1997 is that any declines in property value are either in perception only or short lived. Land owners quickly realize that the 4(d) regulations do not impose restrictions in addition to pre-existing land-use laws and the listing itself, or they conduct actions on their property in ways consistent with the survival of listed salmon by availing themselves to the exceptions provided under the 4(d) limits.

E.O. 13132—Federalism

E.O. 13132 requires agencies to take into account any Federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this final rule. In fact, the adopted ESA section 4(d) regulations provide mechanisms by which NMFS, in the form of limits to take prohibitions, may defer to state and local governments where they provide adequate protections for threatened salmonids.

With respect to the designation of critical habitat, this final rule does not have significant federalism effects. In keeping with Department of Commerce policies, we requested information from, and coordinated development of, this critical habitat designation with appropriate state resource agencies in the State of Oregon. The designation may have some benefit to the State and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the PCEs of the habitat essential to the conservation of the species are specifically identified. While making these clarifications does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

One commenter asserted that we failed to properly conduct and provide a Civil Justice Reform analysis pursuant to E.O. 12988. The Department of Commerce has determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the E.O. We are designating critical habitat in accordance with the provisions of the ESA. This final rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of the Oregon Coast coho ESU.

References

A list of the referenced materials is available on the Internet at *http://www.nwr.noaa.gov*, or upon request (see **ADDRESSES** section above).

List of Subjects in 50 CFR Parts 223 and 226

Endangered and threatened species, Exports, Reporting and recordkeeping requirements.

Dated: February 1, 2008.

Samuel Rauch, III,

Deputy Assistant Administrator for Regulations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR parts 223 and 226 are amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543.

■ 2. In § 223.102, the table heading is revised and paragraph (c)(24) of the table is added to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

Species [1]		Where listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
*	*	* * *	*	*
(c) * * *				
(24) Oregon Coast Coho.	*Oncorhynchus kisutch*	U.S.A., OR, all naturally spawned populations of coho salmon in Oregon coastal streams south of the Columbia River and north of Cape Blanco, including the Cow Creek (ODFW stock #37) coho hatchery program.	73 FR [*Insert FR page number where the document begins*]; 2/11/08.	73 FR [*Insert FR page number where the document begins*]; 2/11/08.
*	*	* * *	*	*

■ 3. In § 223.203, paragraph (b)(2) is revised to read as follows:

§ 223.203 Anadromous fish.

* * * * *

(b) * * *

(2) The prohibitions of paragraph (a) of this section relating to Oregon Coast coho salmon, listed in § 223.102(a)(24), do not apply to activities specified in an application for a permit for scientific purposes or to enhance the conservation or survival of the species, provided that the application has been received by the Assistant Administrator for Fisheries, NOAA (AA), no later than June 10, 2008. The prohibitions of this section apply to these activities upon the Assistant Administrator's rejection of the application as insufficient, upon

issuance or denial of a permit, or March 31, 2009, whichever occurs earliest.

* * * * *

PART 226—DESIGNATED CRITICAL HABITAT

■ 4. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 5. In § 226.212, the section's heading and introductory text are revised and paragraphs (a)(13) and (u) are added to read as follows:

§ 226.212 Critical habitat for 13 Evolutionarily Significant Units (ESUs) of salmon and steelhead (Oncorhynchus spp.) in Washington, Oregon and Idaho.

Critical habitat is designated in the following states and counties for the following ESUs as described in paragraph (a) of this section, and as further described in paragraphs (b) through (g) of this section. The textual descriptions of critical habitat for each ESU are included in paragraphs (i) through (u) of this section, and these descriptions are the definitive source for determining the critical habitat boundaries. General location maps are provided at the end of each ESU description (paragraphs (i) through (u) of this section) and are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(a) * * *

ESU	State—Counties
* * * * * * *	
(13) Oregon Coast coho salmon	*OR*—Benton, Clatsop, Columbia, Coos, Curry, Douglas, Lane, Oregon Lincoln, Polk, Tillamook, Washington, and Yamhill.

* * * * *

(u) Oregon Coast Coho Salmon (*Oncorhynchus kisutch*). Critical habitat is designated to include the areas defined in the following subbasins:

(1) Necanicum Subbasin 17100201—*Necanicum River Watershed 1710020101.* Outlet(s) = Arch Cape Creek (Lat 45.8035, Long −123.9656); Asbury Creek (45.815, −123.9624); Ecola Creek (45.8959, −123.9649); Necanicum River (46.0113, −123.9264); Short Sand Creek (45.7595, −123.9641) upstream to endpoint(s) in: Arch Cape Creek (45.8044, −123.9404); Asbury Creek (45.8150, −123.9584); Beerman Creek (45.9557, −123.8749); Bergsvik Creek (45.8704, −123.7650); Brandis Creek (45.8894, −123.8529); Charlie Creek (45.9164, −123.7606); Circle Creek (45.9248, −123.9436); Circle Creek Trib A (45.9335, −123.9457); North Fork Ecola Creek (45.8705, −123.9070); West Fork Ecola Creek (45.8565, −123.9424); Grindy Creek (45.9179, −123.7390); Hawley Creek (45.9259, −123.8864); Joe Creek (45.8747, −123.7503); Johnson Creek (45.8885, −123.8816); Klootchie Creek (45.9450, −123.8413); Klootchie Creek Trib A (45.9250, −123.8447); Lindsley Creek (45.9198, −123.8339); Little Humbug Creek (45.9235, −123.7653); Little Joe Creek (45.8781, −123.7852); Little Muddy Creek (45.9551, −123.9559); Mail Creek (45.8887, −123.8655); Meyer Creek (45.9279, −123.9135); Mill Creek (46.0245, −123.8905); Mill Creek Trib 1 (46.0142, −123.8967); Neacoxie Creek (46.0245, −123.9157); Neawanna Creek (45.9810, −123.8809); Necanicum River (45.9197, −123.7106); North Fork Necanicum River (45.9308, −123.7986); North Fork Necanicum River Trib A (45.9398, −123.8109); South Fork Necanicum River (45.8760, −123.8122); Shangrila Creek (45.9706, −123.8778); Short Sand Creek (45.7763, −123.9406); Thompson Creek (46.0108, −123.8951); Tolovana Creek (45.8581, −123.9370); Unnamed (45.8648, −123.9371); Unnamed (45.8821, −123.9318); Unnamed (45.8881, −123.7436); Unnamed (45.8883, −123.9366); Unnamed (45.8906, −123.7460); Unnamed (45.8912, −123.9433); Unnamed (45.8950, −123.8715); Unnamed (45.9026, −123.9540); Unnamed (45.9046, −123.9578); Unnamed (45.9050, −123.9585); Unnamed (45.9143, −123.8656); Unnamed (45.9161, −123.9000); Unnamed (45.9210, −123.8668); Unnamed (45.9273, −123.8499); Unnamed (45.9292, −123.8900); Unnamed (45.9443, −123.9038); Unnamed (45.9850, −123.8999); Unnamed (46.0018, −123.8998); Volmer Creek (45.9049, −123.9139); Warner Creek (45.8887, −123.7801); Williamson Creek (45.9522, −123.9060).

(2) Nehalem Subbasin 17100202—(i) *Upper Nehalem River Watershed 1710020201.* Outlet(s) = Nehalem River (Lat 45.9019, Long −123.1442) upstream to endpoint(s) in: Bear Creek (45.7781, −123.4252); Bear Creek (45.8556, −123.2205); Beaver Creek (45.7624, −123.2073); Beaver Creek Trib A (45.8071, −123.2143); Beaver Creek Trib B (45.7711, −123.2318); Carlson Creek (45.7173, −123.3425); Castor Creek (45.7103, −123.2698); Cedar Creek (45.8528, −123.2928); Clear Creek, Lower North Fork (45.8229, −123.3111); Clear Creek (45.8239, −123.3531); Coal Creek Trib B (45.8149, −123.1174); Coal Creek (45.7978, −123.1293); Coon Creek (45.8211, −123.1446); Dell Creek (45.7919, −123.1559); Derby Creek (45.7225, −123.3857); Dog Creek (45.8957, −123.0741); Elk Creek (45.8256, −123.1290); Fall Creek (45.8626, −123.3247); Ginger Creek (45.8520, −123.3511); Ivy Creek (45.8938, −123.3160); Jim George Creek (45.8009, −123.1041); Kenusky Creek (45.8859, −123.0422); Kist Creek (45.7826, −123.2507); Lousignont Creek (45.7424, −123.3722); Lousignont Creek, North Fork (45.7463, −123.3576); Martin Creek (45.8474, −123.4025); Maynard Creek (45.8556, −123.3038); Military Creek (45.8233, −123.4812); Nehalem River (45.7269, −123.4159); Nehalem River, East Fork (45.8324, −123.0502); Olson Creek (45.8129, −123.3853); Pebble Creek (45.7661, −123.1357); Pebble Creek, West Fork (45.7664, −123.1899); Robinson Creek (45.7363, −123.2512); Rock Creek (45.8135, −123.5201); Rock Creek, North Fork (45.8616, −123.4560); Rock Creek, South Fork (45.7598, −123.4249); Rock Creek Trib C (45.7957, −123.4882); South Fork Rock Creek Trib A (45.7753, −123.4586); South Fork Nehalem River (45.7073, −123.4017); Selder Creek (45.8975, −123.3806); South Fork Clear Creek (45.8141, −123.3484); South Prong Clear Creek (45.7832, −123.2975); Step Creek (45.6824, −123.3348); Swamp Creek (45.8217, −123.2004); Unnamed (45.7270, −123.3419); Unnamed (45.8095, −123.0908); Unnamed (45.7558, −123.2630); Unnamed (45.7938, −123.3847); Unnamed (45.7943, −123.4059); Unnamed (45.8197, −123.0679); Unnamed (45.8477, −123.0734); Unnamed (45.8817, −123.1266); Unnamed (45.8890, −123.3817); Unnamed (45.9019, −123.1346); Weed Creek (45.8707, −123.4049); Wolf Creek,

South Fork (45.7989, −123.4028); Wolf Creek (45.7768, −123.3556).

(ii) *Middle Nehalem River Watershed 1710020202.* Outlet(s) = Nehalem River (Lat 45.9838, Long −123.4214) upstream to endpoint(s) in: Adams Creek (46.0263, −123.2869); Archibald Creek (45.9218, −123.0829); Beaver Creek (46.0554, −123.2985); Boxler Creek (46.0486, −123.3521); Calvin Creek (45.9514, −123.2976); Cedar Creek (45.9752, −123.1143); Cook Creek (45.9212, −123.1087); Cow Creek (46.0500, −123.4326); Crooked Creek (45.9043, −123.2689); Deep Creek (45.9461, −123.3719); Deep Creek Trib A (45.9127, −123.3794); Deep Creek Trib B (45.9314, −123.3809); Deer Creek (45.9033, −123.3142); Eastman Creek (46.0100, −123.2262); Fall Creek (45.9438, −123.2012); Fishhawk Creek (46.0596, −123.3857); Fishhawk Creek, North Fork (46.0907, −123.3675); Fishhawk Creek, Trib C (46.0808, −123.3692); Ford Creek (46.0570, −123.2872); Gus Creek (45.9828, −123.1453); Johnson Creek (46.0021, −123.2133); Lane Creek (45.9448, −123.3253); Little Deer Creek (45.9378, −123.2780); Lousignont Creek (46.0342, −123.4186); Lundgren Creek (46.0240, −123.2092); McCoon Creek (46.0665, −123.3043); Messing Creek (46.0339, −123.2260); Nehalem River (45.9019, −123.1442); Northrup Creek (46.0672, −123.4377); Oak Ranch Creek (45.9085, −123.0834); Sager Creek (45.9388, −123.4020); Unnamed (45.9039, −123.2044); Unnamed (45.9067, −123.0595); Unnamed (45.9488, −123.2220); Unnamed (45.9629, −123.3845); Unnamed (45.9999, −123.1732); Unnamed (46.0088, −123.4508); Unnamed (46.0208, −123.4588); Unnamed (46.0236, −123.2381); Unnamed (46.0308, −123.3135); Unnamed (46.0325, −123.4650); Unnamed (46.0390, −123.3648); Unnamed (46.0776, −123.3274); Unnamed (46.0792, −123.3409); Unnamed (46.0345, −123.2956); Warner Creek (46.0312, −123.3817); Wrong Way Creek (46.0789, −123.3142).

(iii) *Lower Nehalem River Watershed 1710020203.* Outlet(s) = Nehalem River (Lat 45.7507, Long −123.6530) upstream to endpoint(s) in: Alder Creek (45.9069, −123.5907); Beaver Creek (45.8949, −123.6764); Big Creek (45.8655, −123.6476); Bull Heifer Creek (45.9908, −123.5322); Buster Creek (45.9306, −123.4165); Cedar Creek (45.8931, −123.6029); Cow Creek (45.8587, −123.5206); Crawford Creek (45.9699, −123.4725); Cronin Creek, Middle Fork (45.7719, −123.5747); Cronin Creek, North Fork (45.7795, −123.6064); Cronin Creek, South Fork (45.7456, −123.5596); Destruction Creek (45.8750, −123.6571); East Humbug Creek (45.9454, −123.6358); Fishhawk Creek (45.9666, −123.5895); Fishhawk Creek (46.0224, −123.5374); George Creek (45.8461, −123.6226); George Creek (45.9118, −123.5766); Gilmore Creek (45.9609, −123.5372); Hamilton Creek (46.0034, −123.5881); Klines Creek (45.8703, −123.4908); Larsen Creek (45.8757, −123.5847); Little Fishhawk Creek (45.9256, −123.5501); Little Rock Creek (45.8886, −123.4558); McClure Creek (45.8560, −123.6227); Moores Creek (45.8801, −123.5178); Nehalem River (45.9838, −123.4214); Quartz Creek (45.8414, −123.5184); Spruce Run Creek (45.8103, −123.6028); Squaw Creek (45.9814, −123.4529); Stanley Creek (45.8861, −123.4352); Strum Creek (45.9321, −123.4275); Trailover Creek (46.0129, −123.4976); Unnamed (45.8083, −123.6280); Unnamed (45.8682, −123.6168); Unnamed (45.9078, −123.6630); Unnamed (45.9207, −123.4534); Unnamed (45.9405, −123.6338); Unnamed (45.9725, −123.5544); West Humbug Creek (45.9402, −123.6726); Walker Creek (45.9266, −123.4423); Walker Creek (46.0391, −123.5142); West Brook (45.9757, −123.4638).

(iv) *Salmonberry River Watershed 1710020204.* Outlet(s) = Salmonberry River (Lat 45.7507, Long −123.6530) upstream to endpoint(s) in: Pennoyer Creek (45.7190, −123.4366); Salmonberry River (45.7248, −123.4436); Salmonberry River, North Fork (45.7181, −123.5204); Wolf Creek (45.6956, −123.4485).

(v) *North Fork of Nehalem River Watershed 1710020205.* Outlet(s) = Nehalem River, North Fork (Lat 45.7317, Long −123.8765) upstream to endpoint(s) in: Acey Creek (45.7823, −123.8292); Anderson Creek (45.7643, −123.9073); Big Rackheap Creek (45.7546, −123.8145); Boykin Creek (45.8030, −123.8595); Buchanan Creek (45.8270, −123.7901); Coal Creek (45.7897, −123.8676); Coal Creek, West Fork (45.7753, −123.8871); Cougar Creek (45.8064, −123.8090); Fall Creek (45.7842, −123.8547); Fall Creek (45.8226, −123.7054); Gods Valley Creek (45.7689, −123.7793); Grassy Lake Creek (45.7988, −123.8193); Gravel Creek (45.7361, −123.8126); Henderson Creek (45.7932, −123.8548); Jack Horner Creek (45.8531, −123.7837); Lost Creek (45.7909, −123.7195); Nehalem River, Little North Fork (45.9101, −123.6972); Nehalem River, North Fork (45.8623, −123.7463); Nehalem River, North Fork, Trib R (45.8287, −123.6625); Nehalem River, North Fork, Trib T (45.8492, −123.6796); Rackheap Creek (45.7677, −123.8008); Sally Creek (45.8294, −123.7468); Soapstone Creek (45.8498, −123.7469); Soapstone Creek, Trib A (45.8591, −123.7616); Sweethome Creek (45.7699, −123.6616); Unnamed (45.7457, −123.8490); Unnamed (45.7716, −123.7691); Unnamed (45.7730, −123.7789); Unnamed (45.7736, −123.7607); Unnamed (45.7738, −123.7534); Unnamed (45.7780, −123.7434); Unnamed (45.7784, −123.7742); Unnamed (45.7794, −123.7315); Unnamed (45.7824, −123.7396); Unnamed (45.7833, −123.7680); Unnamed (45.7841, −123.7299); Unnamed (45.7858, −123.7660); Unnamed (45.7898, −123.7424); Unnamed (45.7946, −123.7365); Unnamed (45.7966, −123.7953); Unnamed (45.8008, −123.7349); Unnamed (45.8193, −123.7436); Unnamed (45.8322, −123.7789); Unnamed (45.8359, −123.7766); Unnamed (45.8569, −123.7235); Unnamed (45.8629, −123.7347); Unnamed (45.8662, −123.7444); Unnamed (45.8962, −123.7189).

(vi) *Lower Nehalem River/Cook Creek Watershed 1710020206.* Outlet(s) = Nehalem River (Lat 45.6577, Long −123.9355) upstream to endpoint(s) in: Alder Creek (45.7286, −123.9091); Anderson Creek (45.6711, −123.7470); Bastard Creek (45.7667, −123.6943); Bob's Creek (45.7444, −123.9038); Cook Creek (45.6939, −123.6146); Cook Creek, East Fork (45.6705, −123.6440); Daniels Creek (45.6716, −123.8606); Dry Creek (45.6449, −123.8507); Dry Creek (45.6985, −123.7422); East Foley Creek (45.6621, −123.8068); Fall Creek (45.7489, −123.7778); Foley Creek (45.6436, −123.8933); Gallagher Slough (45.7140, −123.8657); Hanson Creek (45.6611, −123.7179); Harliss Creek (45.6851, −123.7249); Helloff Creek (45.7545, −123.7603); Hoevett Creek (45.6894, −123.6276); Jetty Creek (45.6615, −123.9103); Lost Creek (45.7216, −123.7164); Neahkahnie Creek (45.7197, −123.9247); Nehalem River (45.7507, −123.6530); Peterson Creek (45.6975, −123.8098); Piatt Canyon (45.6844, −123.6983); Roy Creek (45.7174, −123.8038); Snark Creek (45.7559, −123.6713); Unnamed (45.6336, −123.8549); Unnamed (45.6454, −123.8663); Unnamed (45.6483, −123.8605); Unnamed (45.6814, −123.8786); Unnamed (45.7231, −123.9016).

(3) Wilson/Trask/Nestucca Subbasin 17100203—(i) *Little Nestucca River Watershed 1710020301.* Outlet(s) = Little Nestucca River (Lat 45.1827, Long −123.9543) upstream to endpoint(s) in: Austin Creek (45.1080, −123.8748);

Austin Creek, West Fork (45.1074, −123.8894); Baxter Creek (45.1149, −123.7705); Bear Creek (45.1310, −123.8500); Bowers Creek (45.1393, −123.9198); Cedar Creek (45.0971, −123.8094); Fall Creek (45.1474, −123.8767); Hiack Creek (45.0759, −123.8042); Kautz Creek (45.0776, −123.8317); Kellow Creek (45.1271, −123.9072); Little Nestucca River (45.0730, −123.7825); Little Nestucca River, South Fork (45.0754, −123.8393); Louie Creek (45.1277, −123.7869); McKnight Creek (45.1124, −123.8363); Small Creek (45.1151, −123.8227); Sourgrass Creek (45.0917, −123.7623); Sourgrass Creek, Trib A (45.1109, −123.7664); Squaw Creek (45.1169, −123.8938); Stillwell Creek (45.0919, −123.8141); Unnamed (45.1169, −123.7974).

(ii) *Nestucca River Watershed 1710020302.* Outlet(s) = Nestucca Bay (Lat 45.1607, Long −123.9678) upstream to endpoint(s) in: Alder Creek (45.1436, −123.7998); Alder Creek (45.2436, −123.7364); Bays Creek (45.3197, −123.7240); Bear Creek (45.3188, −123.6022); Bear Creek (45.3345, −123.7898); Beulah Creek (45.2074, −123.6747); Bible Creek (45.2331, −123.5868); Boulder Creek (45.2530, −123.7525); Buck Creek (45.1455, −123.7734); Cedar Creek (45.3288, −123.4531); Clarence Creek (45.2649, −123.6395); Clear Creek (45.1725, −123.8660); Crazy Creek (45.1636, −123.7595); Dahl Fork (45.2306, −123.7076); East Beaver Creek (45.3579, −123.6877); East Creek (45.3134, −123.6348); Elk Creek (45.3134, −123.5645); Elk Creek, Trib A (45.2926, −123.5381); Elk Creek, Trib B (45.2981, −123.5471); Fan Creek (45.2975, −123.4994); Farmer Creek (45.2593, −123.9074); Foland Creek (45.2508, −123.7890); Foland Creek, West Fork (45.2519, −123.8025); George Creek (45.2329, −123.8291); Ginger Creek (45.3283, −123.4680); Hartney Creek (45.2192, −123.8632); Horn Creek (45.2556, −123.9212); Lawrence Creek (45.1861, −123.7852); Limestone Creek (45.2472, −123.7169); Mina Creek (45.2444, −123.6197); Moon Creek (45.3293, −123.6762); North Beaver Creek (45.3497, −123.8961); Nestucca River (45.3093, −123.4077); Niagara Creek (45.1898, −123.6637); Pheasant Creek (45.2121, −123.6366); Pollard Creek (45.1951, −123.7958); Powder Creek (45.2305, −123.6974); Saling Creek (45.2691, −123.8474); Sanders Creek (45.2254, −123.8959); Slick Rock Creek (45.2683, −123.6106); Swab Creek (45.2889, −123.7656); Testament Creek (45.2513, −123.5488); Three Rivers (45.1785, −123.7557); Tiger Creek (45.3405, −123.8029); Tiger Creek, Trib A (45.3346, −123.8547); Tony Creek (45.2575, −123.7735); Turpy Creek (45.2537, −123.7620); Unnamed (45.1924, −123.8202); Unnamed (45.2290, −123.9398); Unnamed (45.3018, −123.4636); Unnamed (45.3102, −123.6628); Unnamed (45.3148, −123.6616); Unnamed (45.3158, −123.8679); Unnamed (45.3292, −123.8872); Walker Creek (45.2914, −123.4207); West Beaver Creek (45.3109, −123.8840); West Creek (45.2899, −123.8514); Wildcat Creek (45.3164, −123.8187); Wolfe Creek (45.3113, −123.7658); Woods Creek (45.1691, −123.8070).

(iii) *Tillamook River Watershed 1710020303.* Outlet(s) = Tillamook River (Lat 45.4682, Long −123.8802) upstream to endpoint(s) in: Bear Creek (45.4213, −123.8885); Beaver Creek (45.4032, −123.8861); Bewley Creek (45.3637, −123.8965); Esther Creek (45.4464, −123.9017); Fawcett Creek (45.3824, −123.7210); Joe Creek (45.3754, −123.8257); Killam Creek (45.4087, −123.7276); Mills Creek (45.3461, −123.7915); Munson Creek (45.3626, −123.7681); Simmons Creek (45.3605, −123.7364); Sutton Creek (45.4049, −123.8568); Tillamook River (45.3595, −123.9115); Tomlinson Creek (45.4587, −123.8868); Unnamed (45.3660, −123.8313); Unnamed (45.3602, −123.8466); Unnamed (45.3654, −123.9050); Unnamed (45.3987, −123.7105); Unnamed (45.4083, −123.8160); Unnamed (45.4478, −123.8670); Unnamed (45.3950, −123.7348).

(iv) *Trask River Watershed 1710020304.* Outlet(s) = Trask River (Lat 45.4682, Long −123.8802) upstream to endpoint(s) in: Bales Creek (45.3712, −123.5786); Bark Shanty Creek (45.4232, −123.5550); Bear Creek (45.4192, −123.7408); Bill Creek (45.3713, −123.6386); Blue Bus Creek (45.4148, −123.5949); Boundry Creek (45.3493, −123.5470); Clear Creek #1 (45.4638, −123.5571); Clear Creek #2 (45.5025, −123.4683); Cruiser Creek (45.4201, −123.4753); Dougherty Slough (45.4684, −123.7888); East Fork of South Fork Trask River (45.3563, −123.4752); Edwards Creek (45.3832, −123.6676); Elkhorn Creek, Trib C (45.4080, −123.4440); Elkhorn Creek (45.3928, −123.4709); Gold Creek (45.4326, −123.7218); Green Creek (45.4510, −123.7361); Hatchery Creek (45.4485, −123.6623); Headquarters Camp Creek (45.3317, −123.5072); Hoquarten Slough (45.4597, −123.8480); Joyce Creek (45.3881, −123.6386); Michael Creek (45.4799, −123.5119); Mill Creek (45.4100, −123.7450); Miller Creek (45.3582, −123.5666); Pigeon Creek (45.3910, −123.5656); Rawe Creek (45.4395, −123.6351); Rock Creek (45.3515, −123.5074); Samson Creek (45.4662, −123.6439); Scotch Creek (45.4015, −123.5873); Steampot Creek (45.3875, −123.5425); Stretch Creek (45.3483, −123.5382); Summit Creek (45.3481, −123.6054); Summit Creek, South Fork (45.3473, −123.6145); Trask River, North Fork, Middle Fork (45.4472, −123.3945); Trask River, North Fork, North Fork (45.5275, −123.4177); Trask River, South Fork (45.3538, −123.6445); Trib A (45.3766, −123.5191); Trib B (45.3776, −123.4988); Unnamed (45.3639, −123.6054); Unnamed (45.4105, −123.7741); Unnamed (45.4201, −123.6320); Unnamed (45.4220, −123.7654).

(v) *Wilson River Watershed 1710020305.* Outlet(s) = Wilson River (Lat 45.4816, Long −123.8708) upstream to endpoint(s) in: Beaver Creek (45.4894, −123.7933); Ben Smith Creek (45.5772, −123.5072); Cedar Creek (45.5869, −123.6228); Cedar Creek, North Fork (45.6066, −123.6151); Deo Creek (45.6000, −123.3716); Drift Creek (45.6466, −123.3944); Elk Creek (45.6550, −123.4620); Elk Creek, West Fork (45.6208, −123.4717); Elliott Creek (45.5997, −123.3925); Fall Creek (45.4936, −123.5616); Fox Creek (45.5102, −123.5869); Hatchery Creek (45.4835, −123.7074); Hughey Creek (45.4540, −123.7526); Idiot Creek (45.6252, −123.4296); Jones Creek (45.6028, −123.5702); Jordan Creek (45.5610, −123.4557); Jordan Creek, South Fork (45.5099, −123.5279); Kansas Creek (45.4861, −123.6434); Morris Creek (45.6457, −123.5409); Tuffy Creek (45.5787, −123.4702); Unnamed (45.4809, −123.8362); Unnamed (45.5758, −123.5226); Unnamed (45.5942, −123.4259); Unnamed (45.6002, −123.5939); Unnamed (45.6151, −123.4385); White Creek (45.5181, −123.7223); Wilson River, Devil's Lake Fork (45.6008, −123.3301); Wilson River, North Fork (45.6679, −123.5138); Wilson River, North Fork, Little (45.5283, −123.6771); Wilson River, North Fork, West Fork (45.6330, −123.5879); Wilson River, North Fork, West Fork, North Fork (45.6495, −123.5779); Wilson River, South Fork (45.5567, −123.3965); Wolf Creek (45.5683, −123.6129).

(vi) *Kilchis River Watershed 1710020306.* Outlet(s) = Kilchis River (Lat 45.4927, Long −123.8615) upstream to endpoint(s) in: Clear Creek (45.5000, −123.7647); Coal Creek (45.5004, −123.8085); Company Creek (45.5892, −123.7370); French Creek (45.6318, −123.6926); Kilchis River,

Little South Fork (45.5668, −123.7178); Kilchis River, North Fork (45.6044, −123.6504); Kilchis River, South Fork (45.5875, −123.6944); Mapes Creek (45.5229, −123.8382); Murphy Creek (45.5320, −123.8341); Myrtle Creek (45.5296, −123.8156); Sam Downs Creek (45.5533, −123.7144); Schroeder Creek (45.6469, −123.7064); Unnamed (45.5625, −123.7593).

(vii) *Miami River Watershed 1710020307.* Outlet(s) = Miami River (Lat 45.5597, Long −123.8904) upstream to endpoint(s) in: Diamond Creek (45.6158, −123.8184); Hobson Creek (45.5738, −123.8970); Illingsworth Creek (45.5547, −123.8693); Miami River (45.6362, −123.7533); Miami River, Trib S (45.6182, −123.8004); Miami River, Trib T (45.6546, −123.7463); Minich Creek (45.5869, −123.8936); Moss Creek (45.5628, −123.8319); Peterson Creek (45.6123, −123.8996); Prouty Creek (45.6304, −123.8435); Stuart Creek (45.6042, −123.8442); Unnamed (45.6317, −123.7906); Unnamed (45.6341, −123.7900); Waldron Creek (45.5856, −123.8483).

(viii) *Tillamook Bay Watershed 1710020308.* Outlet(s) = Tillamook Bay (Lat 45.5600, Long −123.9366) upstream to endpoint(s) in: Douthy Creek (45.5277, −123.8570); Electric Creek (45.5579, −123.8925); Hall Slough (45.4736, −123.8637); Jacoby Creek (45.5297, −123.8665); Kilchis River (45.4927, −123.8615); Larson Creek (45.5366, −123.8849); Miami River (45.5597, −123.8904); Patterson Creek (45.5359, −123.8732); Tillamook Bay (45.4682, −123.8802); Vaughn Creek (45.5170, −123.8516); Wilson River (45.4816, −123.8708).

(ix) *Spring Creek/Sand Lake/Neskowin Creek Frontal Watershed 1710020309.* Outlet(s) = Crescent Lake (45.6360, −123.9405); Neskowin Creek (45.1001, −123.9859); Netarts Bay (45.4339, −123.9512); Rover Creek (45.3290, −123.9670); Sand Creek (45.2748, −123.9589); Watesco Creek (45.5892, −123.9477) upstream to endpoint(s) in: Andy Creek (45.2905, −123.8744); Butte Creek (45.1159, −123.9360); Crescent Lake (45.6320, −123.9376); Davis Creek (45.3220, −123.9254); Fall Creek (45.0669, −123.9679); Hawk Creek (45.1104, −123.9436); Jackson Creek (45.3568, −123.9611); Jewel Creek (45.2865, −123.8905); Jim Creek (45.0896, −123.9224); Lewis Creek (45.0835, −123.8979); Meadow Creek (45.0823, −123.9824); Neskowin Creek (45.0574, −123.8812); Prospect Creek (45.0858, −123.9321); Reneke Creek (45.2594, −123.9434); Rover Creek (45.3284, −123.9438); Sand Creek (45.3448, −123.9156); Sloan Creek (45.0718, −123.8998); Watesco Creek (45.5909, −123.9353); Whiskey Creek (45.3839, −123.9193).

(4) Siletz/Yaquina Subbasin 17100204–(i) *Upper Yaquina River Watershed 1710020401.* Outlet(s) = Yaquina River (Lat 44.6219, Long −123.8741) upstream to endpoint(s) in: Bales Creek (44.6893, −123.7503); Bales Creek, East Fork (44.6927, −123.7363); Bales Creek, East Fork, Trib A (44.6827, −123.7257); Bales Creek (44.6610, −123.8749); Bones Creek (44.6647, −123.6762); Bryant Creek (44.6746, −123.7139); Buckhorn Creek (44.6676, −123.6677); Buttermilk Creek (44.6338, −123.6827); Buttermilk Creek, Trib A (44.6518, −123.7173); Carlisle Creek (44.6451, −123.8847); Cline Creek (44.6084, −123.6844); Cook Creek (44.6909, −123.8583); Crystal Creek (44.6500, −123.8132); Davis Creek (44.6500, −123.6587); Eddy Creek (44.6388, −123.7951); Felton Creek (44.6626, −123.6502); Haxel Creek (44.6781, −123.8046); Hayes Creek (44.6749, −123.7749); Humphrey Creek (44.6697, −123.6329); Klamath Creek (44.6927, −123.8431); Little Elk Creek (44.6234, −123.6628); Little Elk Creek,Trib A (44.6196, −123.7583); Little Yaquina River (44.6822, −123.6123); Lytle Creek (44.6440, −123.5979); Miller Creek (44.6055, −123.7030); Oglesby Creek (44.6421, −123.7271); Oglesby Creek, Trib A (44.6368, −123.7100); Peterson Creek (44.6559, −123.7868); Randall Creek (44.6721, −123.6570); Salmon Creek (44.6087, −123.7379); Simpson Creek (44.6775, −123.8780); Sloop Creek (44.6654, −123.8595); Spilde Creek (44.6636, −123.5856); Stony Creek (44.6753, −123.7020); Thornton Creek (44.6923, −123.8208); Trapp Creek (44.6455, −123.8307); Twentythree Creek (44.6887, −123.8751); Unnamed (44.6074, −123.6738); Unnamed (44.6076, −123.7067); Unnamed (44.6077, −123.6633); Unnamed (44.6123, −123.6646); Unnamed (44.6188, −123.7237); Unnamed (44.6202, −123.7201); Unnamed (44.6367, −123.7444); Unnamed (44.6415, −123.6237); Unnamed (44.6472, −123.7793); Unnamed (44.6493, −123.6789); Unnamed (44.6707, −123.7908); Unnamed (44.6715, −123.6907); Unnamed (44.6881, −123.6089); Unnamed (44.6908, −123.7298); Wakefield Creek (44.6336, −123.6963); Yaquina River (44.6894, −123.5907); Young Creek (44.6372, −123.6027).

(ii) *Big Elk Creek Watershed 1710020402.* Outlet(s) = Elk Creek (Lat 44.6219, Long −123.8741) upstream to endpoint(s) in: Adams Creek (44.5206, −123.6349); Baker Creek (44.5230, −123.6346); Bear Creek (44.5966, −123.8299); Beaver Creek (44.6040, −123.7999); Beaverdam Creek (44.5083, −123.6337); Bevens Creek (44.5635, −123.7371); Bull Creek (44.5408, −123.8162); Bull Creek (44.5431, −123.8142); Bull Creek, Trib A (44.5359, −123.8276); Cougar Creek (44.5070, −123.6482); Cougar Creek (44.5861, −123.7563); Deer Creek (44.6020, −123.7667); Devils Well Creek (44.6324, −123.8438); Dixon Creek (44.6041, −123.8659); Elk Creek (44.5075, −123.6022); Feagles Creek (44.4880, −123.7180); Feagles Creek, Trib B (44.5079, −123.6909); Feagles Creek, West Fork (44.5083, −123.7117); Grant Creek (44.5010, −123.7363); Harve Creek (44.5725, −123.8025); Jackass Creek (44.5443, −123.7790); Johnson Creek (44.5466, −123.6336); Lake Creek (44.5587, −123.6826); Leverage Creek (44.5536, −123.6343); Little Creek (44.5548, −123.6980); Little Wolf Creek (44.5590, −123.7165); Peterson Creek (44.5576, −123.6450); Rail Creek (44.5135, −123.6639); Spout Creek (44.5824, −123.6561); Sugarbowl Creek (44.5301, −123.5995); Unnamed (44.5048, −123.7566); Unnamed (44.5085, −123.6309); Unnamed (44.5108, −123.6249); Unnamed (44.5144, −123.6554); Unnamed (44.5204, −123.6148); Unnamed (44.5231, −123.6714); Unnamed (44.5256, −123.6804); Unnamed (44.5325, −123.7244); Unnamed (44.5332, −123.7211); Unnamed (44.5361, −123.7139); Unnamed (44.5370, −123.7643); Unnamed (44.5376, −123.6176); Unnamed (44.5410, −123.8213); Unnamed (44.5504, −123.8290); Unnamed (44.5530, −123.8282); Unnamed (44.5618, −123.8431); Unnamed (44.5687, −123.8563); Unnamed (44.5718, −123.7256); Unnamed (44.5734, −123.6696); Unnamed (44.5737, −123.6566); Unnamed (44.5771, −123.7027); Unnamed (44.5821, −123.8123); Unnamed (44.5840, −123.6678); Unnamed (44.5906, −123.7871); Unnamed (44.5990, −123.7808); Unnamed (44.5865, −123.8521); Wolf Creek (44.5873, −123.6939); Wolf Creek, Trib A (44.5862, −123.7188); Wolf Creek, Trib B (44.5847, −123.7062).

(iii) *Lower Yaquina River Watershed 1710020403.* Outlet(s) = Yaquina River (Lat 44.6098, Long −124.0818) upstream to endpoint(s) in: Abbey Creek (44.6330, −123.8881); Babcock Creek (44.5873, −123.9221); Beaver Creek (44.6717, −123.9799); Blue Creek (44.6141, −123.9936); Boone Slough,

Trib A (44.6134, – 123.9769); Depot Creek, Little (44.6935, – 123.9482); Depot Creek, Trib A (44.6837, – 123.9420); Drake Creek (44.6974, – 123.9690); East Fork Mill Creek (44.5691, – 123.8834); Flesher Slough (44.5668, – 123.9803); King Slough (44.5944, – 124.0323); Little Beaver Creek (44.6531, – 123.9728); McCaffery Slough (44.5659, – 124.0180); Mill Creek (44.5550, – 123.9064); Mill Creek, Trib A (44.5828, – 123.8750); Montgomery Creek (44.5796, – 123.9286); Nute Slough (44.6075, – 123.9660); Olalla Creek (44.6810, – 123.8972); Olalla Creek, Trib A (44.6511, – 123.9034); Parker Slough (44.5889, – 124.0119); Unnamed (44.5471, – 123.9557); Unnamed (44.5485, – 123.9308); Unnamed (44.5520, – 123.9433); Unnamed (44.5528, – 123.9695); Unnamed (44.5552, – 123.9294); Unnamed (44.5619, – 123.9348); Unnamed (44.5662, – 123.8905); Unnamed (44.5827, – 123.9456); Unnamed (44.5877, – 123.8850); Unnamed (44.6444, – 123.9059); Unnamed (44.6457, – 123.9996); Unnamed (44.6530, – 123.9914); Unnamed (44.6581, – 123.8947); Unnamed (44.6727 – 123.8942); Unnamed (44.6831, – 123.9940); West Olalla Creek (44.6812, – 123.9299); West Olalla Creek, Trib A (44.6649, – 123.9204); Wessel Creek (44.6988, – 123.9863); Wright Creek (44.5506, – 123.9250); Wright Creek, Trib A (44.5658, – 123.9422); Yaquina River (44.6219, – 123.8741).

(iv) *Middle Siletz River Watershed 1710020405*. Outlet(s) = Siletz River (Lat 44.7375, Long – 123.7917) upstream to endpoint(s) in: Buck Creek, East Fork (44.8410, – 123.7970); Buck Creek, South Fork (44.8233, – 123.8095); Buck Creek, West Fork (44.8352, – 123.8084); Cerine Creek (44.7478, – 123.7198); Deer Creek (44.8245, – 123.7268); Deer Creek, Trib A (44.8178, – 123.7397); Elk Creek (44.8704, – 123.7668); Fourth of July Creek (44.8203, – 123.6810); Gunn Creek (44.7816, – 123.7679); Holman River (44.8412, – 123.7707); Mill Creek, North Fork (44.7769, – 123.7361); Mill Creek, South Fork (44.7554, – 123.7276); Palmer Creek (44.7936, – 123.8344); Siletz River (44.8629, – 123.7323); Sunshine Creek (44.7977, – 123.6963); Unnamed (44.7691, – 123.7851); Unnamed (44.7747, – 123.7740); Unnamed (44.7749, – 123.7662); Unnamed (44.8118, – 123.6926); Unnamed (44.8188, – 123.6995); Unnamed (44.8312, – 123.6983); Unnamed (44.8583, – 123.7573); Whiskey Creek (44.8123, – 123.6937).

(v) *Rock Creek/Siletz River Watershed 1710020406*. Outlet(s) = Rock Creek (Lat 44.7375, Long – 123.7917) upstream to endpoint(s) in: Beaver Creek (44.7288, – 123.6773); Big Rock Creek (44.7636, – 123.6969); Brush Creek (44.6829, – 123.6582); Cedar Creek (44.7366, – 123.6586); Fisher Creek (44.7149, – 123.6359); Little Rock Creek (44.7164, – 123.6155); Little Steere Creek (44.7219, – 123.6368); Rock Creek, Trib A (44.7414, – 123.7508); Steere Creek (44.7336, – 123.6313); Unnamed (44.7175, – 123.6496); William Creek (44.7391, – 123.7277).

(vi) *Lower Siletz River Watershed 1710020407*. Outlet(s) = Siletz Bay (Lat 44.9269, Long – 124.0218) upstream to endpoint(s) in: Anderson Creek (44.9311, – 123.9508); Bear Creek (44.8682, – 123.8891); Bentilla Creek (44.7745, – 123.8555); Butterfield Creek (44.8587, – 123.9993); Cedar Creek (44.8653, – 123.8488); Cedar Creek, Trib D (44.8606, – 123.8696); Coon Creek (44.7959, – 123.8468); Dewey Creek (44.7255, – 123.9724); Drift Creek (44.9385, – 123.8211); Erickson Creek (44.9629, – 123.9490); Euchre Creek (44.8023, – 123.8687); Fowler Creek (44.9271, – 123.8440); Gordey Creek (44.9114, – 123.9724); Hough Creek (44.8052, – 123.8991); Jaybird Creek (44.7640, – 123.9733); Long Prairie Creek (44.6970, – 123.7499); Long Tom Creek (44.7037, – 123.8533); Mann Creek (44.6987, – 123.8025); Mill Creek (44.6949, – 123.8967); Miller Creek (44.7487, – 123.9733); North Creek (44.9279, – 123.8908); North Roy Creek (44.7916, – 123.9897); Ojalla Creek (44.7489, – 123.9427); Quarry Creek (44.8989, – 123.9360); Reed Creek (44.8020, – 123.8835); Reed Creek (44.8475, – 123.9267); Roots Creek (44.8300, – 123.9351); South Roy Creek (44.7773, – 123.9847); Sam Creek (44.7086, – 123.7312); Sampson Creek (44.9089, – 123.8173); Savage Creek (44.8021, – 123.8608); Scare Creek (44.8246, – 123.9954); Schooner Creek, North Fork (44.9661, – 123.8793); Schooner Creek, South Fork (44.9401, – 123.8689); Scott Creek (44.7414, – 123.8268); Sijota Creek (44.8883, – 124.0257); Siletz River (44.7375, – 123.7917); Skunk Creek (44.8780, – 123.9073); Smith Creek (44.9294, – 123.8056); Stemple Creek (44.8405, – 123.9492); Tangerman Creek (44.7278, – 123.8944); Thayer Creek (44.7023, – 123.8256); Thompson Creek (44.7520, – 123.8893); Unnamed (44.7003, – 123.7669); Unnamed (44.8904, – 123.8034); Unnamed (44.8927, – 123.8400); Unnamed (44.7034, – 123.7754); Unnamed (44.7145, – 123.8423); Unnamed (44.7410, – 123.8800); Unnamed (44.7925, – 123.9212); Unnamed (44.8396, – 123.8896); Unnamed (44.9035, – 123.8635); Unnamed (44.9240, – 123.7913); West Fork Mill Creek (44.7119, – 123.9703); Wildcat Creek (44.8915, – 123.8842).

(vii) *Salmon River/Siletz/Yaquina Bay Watershed 1710020408*. Outlet(s) = Salmon River (Lat 45.0474, Long – 124.0031) upstream to endpoint(s) in: Alder Brook (45.0318, – 123.8428); Bear Creek (44.9785, – 123.8580); Boulder Creek (45.0428, – 123.7817); Calkins Creek (45.0508, – 123.9615); Crowley Creek (45.0540, – 123.9819); Curl Creek (45.0150, – 123.9198); Deer Creek (45.0196, – 123.8091); Frazer Creek (45.0096, – 123.9576); Gardner Creek (45.0352, – 123.9024); Indian Creek (45.0495, – 123.8010); Little Salmon River (45.0546, – 123.7473); McMullen Creek (44.9829, – 123.8682); Panther Creek (45.0208, – 123.8878); Panther Creek, North Fork (45.0305, – 123.8910); Prairie Creek (45.0535, – 123.8129); Rowdy Creek (45.0182, – 123.9751); Salmon River (45.0269, – 123.7224); Slick Rock Creek (44.9903, – 123.8158); Sulphur Creek (45.0403, – 123.8216); Telephone Creek (45.0467, – 123.9348); Toketa Creek (45.0482, – 123.9088); Trout Creek (44.9693, – 123.8337); Unnamed (44.9912, – 123.8789); Unnamed (45.0370, – 123.7333); Unnamed (45.0433, – 123.7650); Widow Creek (45.0373, – 123.8530); Widow Creek, West Fork (45.0320, – 123.8643); Willis Creek (45.0059, – 123.9391).

(viii) *Devils Lake/Moolack Frontal Watershed 1710020409*. Outlet(s) = Big Creek (Lat 44.6590, Long – 124.0571); Coal Creek (44.7074, – 124.0615); D River (44.9684, – 124.0172); Fogarty Creek (44.8395, – 124.0520); Moolack Creek (44.7033, – 124.0622); North Depoe Bay Creek (44.8098, – 124.0617); Schoolhouse Creek (44.8734, – 124.0401); Spencer Creek (44.7292, – 124.0582); Wade Creek (44.7159, – 124.0600) upstream to endpoint(s) in: Big Creek (44.6558, – 124.0427); Coal Creek (44.7047, – 124.0099); Devils Lake (44.9997, – 123.9773); Fogarty Creek (44.8563, – 124.0153); Jeffries Creek (44.6425, – 124.0315); Moolack Creek (44.6931, – 124.0150); North Depoe Bay Creek (44.8157, – 124.0510); Rock Creek (44.9869, – 123.9317); South Depoe Bay Creek (44.7939, – 124.0126); Salmon Creek (44.8460, – 124.0164); Schoolhouse Creek (44.8634, – 124.0151); South Fork Spencer Creek (44.7323, – 123.9974); Spencer Creek, North Fork (44.7453, – 124.0276); Unnamed (44.8290, – 124.0318); Unnamed (44.9544, – 123.9867); Unnamed (44.9666, – 123.9731); Unnamed

(44.9774, −123.9706); Wade Creek (44.7166, −124.0057).

(5) Alsea Subbasin 17100205—(i) *Upper Alsea River Watershed 1710020501.* Outlet(s) = Alsea River, South Fork (Lat 44.3767, Long −123.6024) upstream to endpoint(s) in: Alder Creek (44.4573, −123.5188); Alsea River, South Fork (44.3261, −123.4891); Baker Creek (44.4329, −123.5522); Banton Creek (44.3317, −123.6020); Brown Creek (44.3151, −123.6250); Bummer Creek (44.3020, −123.5765); Cabin Creek (44.4431, −123.5328); Crooked Creek (44.4579, −123.5099); Dubuque Creek (44.3436, −123.5527); Ernest Creek (44.4234, −123.5275); Hayden Creek (44.4062, −123.5815); Honey Grove Creek (44.3874, −123.5078); North Fork Alsea River (44.4527, −123.6102); Parker Creek (44.4702, −123.5978); Peak Creek (44.3358, −123.4933); Record Creek (44.3254, −123.6331); Seeley Creek (44.4051, −123.5177); Swamp Creek (44.3007, −123.6108); Tobe Creek (44.3273, −123.5719); Trout Creek (44.3684, −123.5163); Unnamed (44.3108, −123.6225); Unnamed (44.3698, −123.5670); Unnamed (44.4574, −123.5001); Unnamed (44.3708, −123.5740); Unnamed (44.3713, −123.5656); Unnamed (44.3788, −123.5528); Unnamed (44.4270, −123.5492); Unnamed (44.4518, −123.6236); Yew Creek (44.4581, −123.5373); Zahn Creek (44.4381, −123.5425).

(ii) *Five Rivers/Lobster Creek Watershed 1710020502.* Outlet(s) = Five Rivers (Lat 44.3584, Long −123.8279) upstream to endpoint(s) in: Alder Creek (44.2947, −123.8105); Bear Creek (44.2824, −123.9123); Bear Creek (44.3588, −123.7930); Bear Creek (44.2589, −123.6647); Briar Creek (44.3184, −123.6602); Buck Creek (44.2428, −123.8989); Camp Creek (44.2685, −123.7552); Cascade Creek (44.3193, −123.9073); Cascade Creek, North Fork (44.3299, −123.8932); Cedar Creek (44.2732, −123.7753); Cherry Creek (44.3061, −123.8140); Coal Creek (44.2881, −123.6484); Cook Creek (44.2777, −123.6445); Cougar Creek (44.2723, −123.8678); Crab Creek (44.2458, −123.8750); Crazy Creek (44.2955, −123.7927); Crooked Creek (44.3154, −123.7986); Elk Creek (44.3432, −123.7969); Fendall Creek (44.2764, −123.7890); Five Rivers (44.2080, −123.8025); Green River (44.2286, −123.8751); Green River, East Fork (44.2255, −123.8143); Jasper Creek (44.2777, −123.7326); Little Lobster Creek (44.2961, −123.6266); Lobster Creek, East Fork (44.2552, −123.5897); Lobster Creek, South Fork (44.2326, −123.6060); Lobster Creek (44.2237, −123.6195); Lord Creek (44.2411, −123.7631); Martha Creek (44.2822, −123.6781); Meadow Creek (44.2925, −123.6591); Phillips Creek (44.3398, −123.7613); Preacher Creek (44.2482, −123.7440); Prindel Creek (44.2346, −123.7849); Ryan Creek (44.2576, −123.7971); Summers Creek (44.2589, −123.7627); Swamp Creek (44.3274, −123.8407); Unnamed (44.2845, −123.7007); Unnamed (44.2129, −123.7919); Unnamed (44.2262, −123.7982); Unnamed (44.2290, −123.8559); Unnamed (44.2327, −123.8344); Unnamed (44.2356, −123.8178); Unnamed (44.2447, −123.6460); Unnamed (44.2500, −123.8074); Unnamed (44.2511, −123.9011); Unnamed (44.2551, −123.8733); Unnamed (44.2614, −123.8652); Unnamed (44.2625, −123.8635); Unnamed (44.2694, −123.8180); Unnamed (44.2695, −123.7429); Unnamed (44.2696, −123.8497); Unnamed (44.2752, −123.7616); Unnamed (44.2760, −123.7121); Unnamed (44.2775, −123.8895); Unnamed (44.2802, −123.7097); Unnamed (44.2802, −123.8608); Unnamed (44.2823, −123.7900); Unnamed (44.2853, −123.7537); Unnamed (44.2895, −123.9083); Unnamed (44.2940, −123.7358); Unnamed (44.2954, −123.7602); Unnamed (44.2995, −123.7760); Unnamed (44.3024, −123.9064); Unnamed (44.3066, −123.8838); Unnamed (44.3070, −123.8280); Unnamed (44.3129, −123.7763); Unnamed (44.3214, −123.8161); Unnamed (44.3237, −123.9020); Unnamed (44.3252, −123.7382); Unnamed (44.3289, −123.8354); Unnamed (44.3336, −123.7431); Unnamed (44.3346, −123.7721); Wilkinson Creek (44.3296, −123.7249); Wilson Creek (44.3085, −123.8990).

(iii) *Drift Creek Watershed 1710020503.* Outlet(s) = Drift Creek (Lat 44.4157, Long −124.0043) upstream to endpoint(s) in: Boulder Creek (44.4434, −123.8705); Bush Creek (44.5315, −123.8631); Cape Horn Creek (44.5153, −123.7844); Cedar Creek (44.4742, −123.9699); Cougar Creek (44.4405, −123.9144); Deer Creek (44.5514, −123.8778); Drift Creek (44.4688, −123.7859); Ellen Creek (44.4415, −123.9413); Flynn Creek (44.5498, −123.8520); Gold Creek (44.4778, −123.8802); Gopher Creek (44.5217, −123.7787); Horse Creek (44.5347, −123.9072); Lyndon Creek (44.4395, −123.9801); Needle Branch (44.5154, −123.8537); Nettle Creek (44.4940, −123.7845); Slickrock Creek (44.4757, −123.9007); Trout Creek (44.4965, −123.9113); Trout Creek, East Fork (44.4705, −123.9290); Unnamed (44.4995, −123.8488); Unnamed (44.4386, −123.9200); Unnamed (44.4409, −123.8738); Unnamed (44.4832, −123.9570); Unnamed (44.4868, −123.9340); Unnamed (44.4872, −123.9518); Unnamed (44.4875, −123.9460); Unnamed (44.4911, −123.9227); Unnamed (44.5187, −123.7996); Unnamed (44.5260, −123.7848); Unnamed (44.5263, −123.8868); Unnamed (44.5326, −123.8453); Unnamed (44.5387, −123.8440); Unnamed (44.5488, −123.8694); Unnamed (44.4624, −123.8216).

(iv) *Lower Alsea River Watershed 1710020504.* Outlet(s) = Alsea River (Lat 44.4165, Long −124.0829) upstream to endpoint(s) in: Alsea River (44.3767, −123.6024); Arnold Creek (44.3922, −123.9503); Barclay Creek (44.4055, −123.8659); Bear Creek (44.3729, −123.9623); Bear Creek (44.3843, −123.7704); Beaty Creek (44.4044, −123.6043); Benner Creek (44.3543, −123.7447); Brush Creek (44.3826, −123.8537); Bull Run Creek (44.4745, −123.7439); Canal Creek (44.3322, −123.9460); Canal Creek, East Fork (44.3454, −123.9161); Carns Canyon (44.4027, −123.7550); Cedar Creek (44.3875, −123.7946); Cove Creek (44.4403, −123.7107); Cow Creek (44.3620, −123.7510); Darkey Creek (44.3910, −123.9927; Digger Creek (44.3906, −123.6890); Fall Creek (44.4527, −123.6864); Fall Creek (44.4661, −123.6933); George Creek (44.3556, −123.8603); Grass Creek (44.3577, −123.8798); Hatchery Creek (44.3952, −123.7269); Hatchery Creek (44.4121, −123.8734); Hoover Creek (44.3618, −123.8583); Lake Creek (44.3345, −123.8725); Lint Creek (44.3850, −124.0490); Maltby Creek (44.3833, −123.6770); Meadow Fork (44.3764, −123.8879); Mill Creek (44.4046, −123.6436); Minotti Creek (44.3750, −123.7718); Nye Creek (44.4326, −123.7648); Oxstable Creek (44.3912, −123.9603); Phillips Creek (44.3803, −123.7780); Red Creek (44.3722, −123.9162); Risley Creek (44.4097, −123.9380); Schoolhouse Creek (44.3897, −123.6545); Scott Creek, East Fork (44.4252, −123.7897); Scott Creek, West Fork (44.4212, −123.8225); Skinner Creek (44.3585, −123.9374); Skunk Creek (44.3998, −123.6912); Slide Creek (44.3986, −123.8419); Starr Creek (44.4477, −124.0130); Sudan Creek (44.3817, −123.9717); Sulmon Creek (44.3285, −123.7008); Sulmon Creek, North Fork (44.3421, −123.6374); Sulmon Creek, South Fork (44.3339, −123.6709); Swede Fork

(44.3852, −124.0295); Unnamed (44.3319, −123.9318); Unnamed (44.3356, −123.9464); Unnamed (44.3393, −123.9360); Unnamed (44.3413, −123.9294); Unnamed (44.3490, −123.9058); Unnamed (44.3548, −123.6574); Unnamed (44.3592, −123.6363); Unnamed (44.3597, −123.9042); Unnamed (44.3598, −123.6563); Unnamed (44.3598, −123.6562); Unnamed (44.3600, −123.6514); Unnamed (44.3656, −123.9085); Unnamed (44.3680, −123.9629); Unnamed (44.3794, −123.8268); Unnamed (44.3800, −123.9134); Unnamed (44.3814, −123.7650); Unnamed (44.3822, −124.0555); Unnamed (44.3823, −124.0451); Unnamed (44.3989, −123.6050); Unnamed (44.4051, −124.0527); Unnamed (44.4166, −123.8149); Unnamed (44.4537, −123.7247); Walker Creek (44.4583, −124.0271); Weist Creek (44.3967, −124.0256); West Creek (44.3588, −123.9493).

(v) *Beaver Creek/Waldport Bay Watershed 1710020505.* Outlet(s) = Beaver Creek (Lat 44.5233, Long −124.0734); Deer Creek (44.5076, −124.0807); Thiel Creek (44.5646, −124.0709) upstream to endpoint(s) in: Beaver Creek, North Fork, Trib G (44.5369, −123.9195); Beaver Creek, South Fork (44.4816, −123.9853); Beaver Creek, South Fork, Trib A (44.4644, −124.0332); Bowers Creek (44.5312, −124.0117); Bunnel Creek (44.5178, −124.0265); Deer Creek (44.5057, −124.0721); Elkhorn Creek (44.5013, −123.9572); Elkhorn Creek (44.4976, −123.9685); Lewis Creek (44.5326, −123.9532); North Fork Beaver Creek (44.5149, −123.8988); Oliver Creek (44.4660, −124.0471); Peterson Creek (44.5419, −123.9738); Pumphouse Creek (44.5278, −124.0569); Simpson Creek (44.5255, −124.0390); Thiel Creek (44.5408, −124.0254); Tracy Creek (44.5411, −124.0500); Unnamed (44.4956, −123.9751); Unnamed (44.5189, −124.0638); Unnamed (44.5225, −123.9313); Unnamed (44.5256, −123.9399); Unnamed (44.5435, −124.0221); Unnamed (44.5461, −124.0311); Unnamed (44.5472, −124.0591); Unnamed (44.5482, −124.0249); Unnamed (44.5519, −124.0279); Unnamed (44.5592, −124.0531); Worth Creek (44.5013, −124.0207).

(vi) *Yachats River Watershed 1710020506.* Outlet(s) = Yachats River (Lat 44.3081, Long −124.1070) upstream to endpoint(s) in: Axtell Creek (44.3084, −123.9915); Beamer Creek (44.3142, −124.0124); Bend Creek (44.2826, −124.0077); Carson Creek (44.3160, −124.0030); Dawson Creek (44.2892, −124.0133); Depew Creek (44.3395, −123.9631); Earley Creek (44.3510, −123.9885); Fish Creek (44.3259, −123.9592); Glines Creek (44.3436, −123.9756); Grass Creek (44.2673, −123.9109); Helms Creek (44.2777, −123.9954); Keller Creek (44.2601, −123.9485); Little Beamer Creek (44.2993, −124.0213); Reedy Creek (44.3083, −124.0460); South Beamer Creek (44.2852, −124.0325); Stump Creek (44.2566, −123.9624); Unnamed (44.2596, −123.9279); Unnamed (44.2657, −123.9585); Unnamed (44.2660, −123.9183); Unnamed (44.2684, −123.9711); Unnamed (44.2837, −123.9268); Unnamed (44.2956, −123.9316); Unnamed (44.3005, −123.9324); Unnamed (44.3163, −123.9428); Unnamed (44.3186, −123.9568); Unnamed (44.3259, −123.9578); Unnamed (44.3431, −123.9711); West Fork Williamson Creek (44.3230, −124.0008); Williamson Creek (44.3300, −124.0026); Yachats River (44.2468, −123.9329); Yachats River, North Fork (44.3467, −123.9972); Yachats River, School Fork (44.3145, −123.9341).

(vii) *Cummins Creek/Tenmile Creek/Mercer Lake Frontal Watershed 1710020507.* Outlet(s) = Berry Creek (Lat 44.0949, Long −124.1221); Big Creek (44.1767, −124.1148); Bob Creek (44.2448, −124.1118); Cape Creek (44.1336, −124.1211); Cummins Creek (44.2660, −124.1075); Rock Creek (44.1833, −124.1149); Sutton Creek (44.0605, −124.1269); Tenmile Creek (44.2245, −124.1083) upstream to endpoint(s) in: Bailey Creek (44.1037, −124.0530); Berry Creek (44.0998, −124.0885); Big Creek (44.1866, −123.9781); Big Creek, South Fork (44.1692, −123.9688); Big Creek, Trib A (44.1601, −124.0231); Bob Creek (44.2346, −124.0235); Cape Creek (44.1351, −124.0174); Cape Creek, North Fork (44.1458, −124.0489); Cummins Creek (44.2557, −124.0104); Fryingpan Creek (44.1723, −124.0401); Levage Creek (44.0745, −124.0588); Little Cummins Creek (44.2614, −124.0851); McKinney Creek (44.2187, −123.9985); Mercer Creek (44.0712, −124.0796); Mill Creek (44.2106, −124.0747); Quarry Creek (44.0881, −124.1124); Rath Creek (44.0747, −124.0901); Rock Creek (44.1882, −124.0310); Tenmile Creek (44.2143, −123.9351); Tenmile Creek, South Fork (44.2095, −123.9607); Unnamed (44.1771, −124.0908); Unnamed (44.0606, −124.0805); Unnamed (44.0624, −124.0552); Unnamed (44.0658, −124.0802); Unnamed (44.0690, −124.0490); Unnamed (44.0748, −124.0478); Unnamed (44.0814, −124.0464); Unnamed (44.0958, −124.0559); Unnamed (44.1283, −124.0242); Unnamed (44.1352, −124.0941); Unnamed (44.1712, −124.0558); Unnamed (44.1715, −124.0636); Unnamed (44.2011, −123.9634); Unnamed (44.2048, −123.9971); Unnamed (44.2146, −124.0358); Unnamed (44.2185, −124.0270); Unnamed (44.2209, −123.9368); Wapiti Creek (44.1216, −124.0448); Wildcat Creek (44.2339, −123.9632).

(viii) *Big Creek/Vingie Creek Watershed 1710020508.* Outlet(s) = Big Creek (Lat 44.3742, Long −124.0896) upstream to endpoint(s) in: Big Creek (44.3564, −124.0613); Dicks Fork Big Creek (44.3627, −124.0389); Reynolds Creek (44.3768, −124.0740); South Fork Big Creek (44.3388, −124.0597); Unnamed (44.3643, −124.0355); Unnamed (44.3662, −124.0573); Unnamed (44.3686, −124.0683).

(6) Siuslaw Subbasin 17100206—(i) *Upper Siuslaw River Watershed 1710020601.* Outlet(s) = Siuslaw River (Lat 44.0033, Long −123.6545) upstream to endpoint(s) in: Bear Creek (43.8482, −123.5172); Bear Creek, Trib A (43.8496, −123.5059); Bierce Creek (43.8750, −123.5559); Big Canyon Creek (43.9474, −123.6582); Bottle Creek (43.8791, −123.3871); Bounds Creek (43.9733, −123.7108); Buck Creek, Trib B (43.8198, −123.3913); Buck Creek, Trib E (43.8152, −123.4248); Burntwood Creek (43.9230, −123.5342); Cabin Creek (43.8970, −123.6754); Camp Creek (43.9154, −123.4904); Canyon Creek (43.9780, −123.6096); Clay Creek (43.8766, −123.5721); Collins Creek (43.8913, −123.6047); Conger Creek (43.8968, −123.4524); Doe Creek (43.8957, −123.3558); Doe Hollow Creek (43.8487, −123.4603); Dogwood Creek (43.8958, −123.3811); Douglas Creek (43.8705, −123.2836); Edris Creek (43.9224, −123.5531); Esmond Creek (43.8618, −123.5772); Esmond Creek, Trib 1 (43.9303, −123.6518); Esmond Creek, Trib A (43.8815, −123.6646); Farman Creek (43.8761, −123.2562); Fawn Creek (43.8743, −123.2992); Fawn Creek (43.9436, −123.6088); Fryingpan Creek (43.8329, −123.4241); Fryingpan Creek (43.8422, −123.4318); Gardner Creek (43.8024, −123.2582); Haight Creek (43.8406, −123.4862); Haskins Creek (43.8785, −123.5851); Hawley Creek (43.8599, −123.1558); Hawley Creek, North Fork (43.8717, −123.1751); Holland Creek (43.8775, −123.4156); Jeans Creek (43.8616, −123.4714); Johnson Creek (43.8822, −123.5332); Kelly Creek (43.8338, −123.1739); Kline Creek (43.9034, −123.6635); Leopold Creek (43.9199, −123.6890); Leopold

Creek, Trib A (43.9283, −123.6630); Letz Creek, Trib B (43.7900, −123.3248); Lick Creek (43.8366, −123.2695); Little Siuslaw Creek (43.8048, −123.3412); Lucas Creek (43.8202, −123.2233); Luyne Creek (43.9155, −123.5068); Luyne Creek, Trib A (43.9179, −123.5208); Michaels Creek (43.8624, −123.5417); Mill Creek (43.9028, −123.6228); Norris Creek (43.8434, −123.2006); North Creek (43.9223, −123.5752); North Fork Siuslaw River (43.8513, −123.2302); Oxbow Creek (43.8384, −123.5433); Oxbow Creek, Trib C (43.8492, −123.5465); Pheasant Creek (43.9120, −123.4247); Pheasant Creek, Trib 2 (43.9115, −123.4411); Pugh Creek (43.9480, −123.5940); Russell Creek (43.8813, −123.3425); Russell Creek, Trib A (43.8619, −123.3498); Sandy Creek (43.7684, −123.2441); Sandy Creek, Trib B (43.7826, −123.2538); Shaw Creek (43.8817, −123.3289); Siuslaw River, East Trib (43.8723, −123.5378); Siuslaw River, North Fork, Upper Trib (43.8483, −123.2275); Smith Creek (43.8045, −123.3665); South Fork Siuslaw River (43.7831, −123.1569); Trail Creek (43.9142, −123.6241); Tucker Creek (43.8159, −123.1604); Unnamed (43.7796, −123.2019); Unnamed (43.7810, −123.2818); Unnamed (43.8278, −123.2610); Unnamed (43.8519, −123.2773); Unnamed (43.8559, −123.5520); Unnamed (43.8670, −123.6022); Unnamed (43.8876, −123.5194); Unnamed (43.8902, −123.5609); Unnamed (43.8963, −123.4171); Unnamed (43.8968, −123.4731); Unnamed (43.8992, −123.4033); Unnamed (43.9006, −123.4637); Unnamed (43.9030, −123.6434); Unnamed (43.9492, −123.6924); Unnamed (43.9519, −123.6886); Unnamed (43.9784, −123.6815); Unnamed (43.9656, −123.7145); Whittaker Creek (43.9490, −123.7004); Whittaker Creek, Trib B (43.9545, −123.7121).

(ii) *Wolf Creek Watershed 1710020602.* Outlet(s) = Wolf Creek (Lat 43.9548, Long −123.6205) upstream to endpoint(s) in: Bill Lewis Creek (43.9357, −123.5708); Cabin Creek (43.9226, −123.4081); Eames Creek (43.9790, −123.4352); Eames Creek, Trib C (43.9506, −123.4371); Elkhorn Creek (43.9513, −123.3934); Fish Creek (43.9238, −123.3872); Gall Creek (43.9865, −123.5187); Gall Creek, Trib 1 (43.9850, −123.5285); Grenshaw Creek (43.9676, −123.4645); Lick Creek (43.9407, −123.5796); Oat Creek, Trib A (43.9566, −123.5052); Oat Creek, Trib C (43.9618, −123.4902); Oat Creek (43.9780, −123.4761); Panther Creek (43.9529, −123.3744); Pittenger Creek (43.9713, −123.5434); Saleratus Creek (43.9796, −123.5675); Saleratus Creek, Trib A (43.9776, −123.5797); Swamp Creek (43.9777, −123.4197); Swing Log Creek (43.9351, −123.3339); Unnamed (43.9035, −123.3358); Unnamed (43.9343, −123.3648); Unnamed (43.9617, −123.4507); Unnamed (43.9668, −123.6041); Unnamed (43.9693, −123.4846); Van Curen Creek (43.9364, −123.5520); Wolf Creek (43.9101, −123.3234).

(iii) *Wildcat Creek Watershed 1710020603.* Outlet(s) = Wildcat Creek (Lat 44.0033, Long −123.6545) upstream to endpoint(s) in: Bulmer Creek (44.0099, −123.5206); Cattle Creek (44.0099, −123.5475); Fish Creek (44.0470, −123.5383); Fowler Creek (43.9877, −123.5918); Haynes Creek (44.1000, −123.5578); Kirk Creek (44.0282, −123.6270); Knapp Creek (44.1006, −123.5801); Miller Creek (44.0767, −123.6034); Pataha Creek (43.9914, −123.5361); Potato Patch Creek (43.9936, −123.5812); Salt Creek (44.0386, −123.5021); Shady Creek (44.0647, −123.5838); Shultz Creek (44.0220, −123.6320); Unnamed (43.9890, −123.5468); Unnamed (44.0210, −123.4805); Unnamed (44.0233, −123.4996); Unnamed (44.0242, −123.4796); Unnamed (44.0253, −123.4963); Unnamed (44.0283, −123.5311); Unnamed (44.0305, −123.5275); Unnamed (44.0479, −123.6199); Unnamed (44.0604, −123.5624); Unnamed (44.0674, −123.6075); Unnamed (44.0720, −123.5590); Unnamed (44.0839, −123.5777); Unnamed (44.0858, −123.5787); Unnamed (44.0860, −123.5741); Unnamed (44.0865, −123.5935); Unnamed (44.0945, −123.5838); Unnamed (44.0959, −123.5902); Walker Creek (44.0469, −123.6312); Walker Creek, Trib C (44.0418, −123.6048); Wildcat Creek (43.9892, −123.4308); Wildcat Creek, Trib ZH (43.9924, −123.4975); Wildcat Creek, Trib ZI (44.0055, −123.4681).

(iv) *Lake Creek Watershed 1710020604.* Outlet(s) = Lake Creek (Lat 44.0556, Long −123.7968) upstream to endpoint(s) in: Chappell Creek (44.1158, −123.6921); Conrad Creek (44.1883, −123.4918); Druggs Creek (44.1996, −123.5926); Fish Creek (44.1679, −123.5149); Green Creek (44.1389, −123.7930); Greenleaf Creek (44.1766, −123.6391); Hula Creek (44.1202, −123.7087); Johnson Creek (44.1037, −123.7327); Lake Creek (44.2618, −123.5148); Lamb Creek (44.1401, −123.5991); Leaver Creek (44.0754, −123.6285); Leibo Canyon (44.2439, −123.4648); Little Lake Creek (44.1655, −123.6004); McVey Creek (44.0889, −123.6875); Nelson Creek (44.1229, −123.5558); North Fork Fish Creek (44.1535, −123.5437); Pontius Creek (44.1911, −123.5909); Pope Creek (44.2118, −123.5319); Post Creek (44.1828, −123.5259); Stakely Canyon (44.2153, −123.4690); Steinhauer Creek (44.1276, −123.6594); Swamp Creek (44.2150, −123.5687); Swartz Creek (44.2304, −123.4461); Target Canyon (44.2318, −123.4557); Unnamed (44.1048, −123.6540); Unnamed (44.1176, −123.5846); Unnamed (44.1355, −123.5473); Unnamed (44.1355, −123.6125); Unnamed (44.1382, −123.5539); Unnamed (44.1464, −123.5843); Unnamed (44.1659, −123.5658); Unnamed (44.1725, −123.5981); Unnamed (44.1750, −123.5914); Unnamed (44.1770, −123.5697); Unnamed (44.1782, −123.5419); Unnamed (44.1798, −123.5834); Unnamed (44.1847, −123.5862); Unnamed (44.2042, −123.5700); Unnamed (44.2143, −123.5873); Unnamed (44.2258, −123.4493); Unnamed (44.2269, −123.5478); Unnamed (44.2328, −123.5285); Unnamed (44.2403, −123.5358); Unnamed (44.2431, −123.5105); Unnamed (44.2437, −123.5739); Unnamed (44.2461, −123.5180); Unnamed (44.2484, −123.5501); Unnamed (44.2500, −123.5691); Unnamed (44.2573, −123.4736); Unnamed (44.2670, −123.4840); Wheeler Creek (44.1232, −123.6778).

(v) *Deadwood Creek Watershed 1710020605.* Outlet(s) = Deadwood Creek (Lat 44.0949, Long −123.7594) upstream to endpoint(s) in: Alpha Creek (44.1679, −123.6951); Bear Creek (44.1685, −123.6627); Bear Creek, South Fork (44.1467, −123.6743); Buck Creek (44.2003, −123.6683); Deadwood Creek (44.2580, −123.6885); Deadwood Creek, West Fork (44.1946, −123.8023); Deer Creek (44.1655, −123.7229); Failor Creek (44.1597, −123.8003); Fawn Creek (44.2356, −123.7244); Karlstrom Creek (44.1776, −123.7133); Misery Creek (44.1758, −123.7950); North Fork Panther Creek (44.2346, −123.7362); Panther Creek (44.2273, −123.7558); Raleigh Creek (44.1354, −123.6926); Rock Creek (44.1812, −123.6683); Schwartz Creek (44.1306, −123.7258); Unnamed (44.2011, −123.7273); Unnamed (44.1806, −123.7693); Unnamed (44.1845, −123.6824); Unnamed (44.1918, −123.7521); Unnamed (44.1968, −123.7664); Unnamed (44.2094, −123.6674); Unnamed (44.2149, −123.7639); Unnamed (44.2451, −123.6705);

Unnamed (44.2487, −123.7137); Unnamed (44.2500, −123.6933).

(vi) *Indian Creek/Lake Creek Watershed 1710020606.* Outlet(s) = Indian Creek (Lat 44.0808, Long −123.7891) upstream to endpoint(s) in: Cremo Creek (44.1424, −123.8144); Elk Creek (44.1253, −123.8821); Gibson Creek (44.1548, −123.8132); Herman Creek (44.2089, −123.8220); Indian Creek (44.2086, −123.9171); Indian Creek, North Fork (44.2204, −123.9016); Indian Creek, West Fork (44.2014, −123.9075); Long Creek (44.1395, −123.8800); Maria Creek (44.1954, −123.9219); Pyle Creek (44.1792, −123.8623); Rogers Creek (44.1851, −123.9397); Smoot Creek (44.1562, −123.8449); Taylor Creek (44.1864, −123.8115); Unnamed (44.1643, −123.8993); Unnamed (44.1727, −123.8154); Unnamed (44.1795, −123.9180); Unnamed (44.1868, −123.9002); Unnamed (44.1905, −123.8633); Unnamed (44.1967, −123.8872); Unnamed (44.2088, −123.8381); Unnamed (44.2146, −123.8528); Unnamed (44.2176, −123.8462); Unnamed (44.2267, −123.8912); Velvet Creek (44.1295, −123.8087).

(vii) *North Fork Siuslaw River Watershed 1710020607.* Outlet(s) = North Fork Siuslaw River (Lat 43.9719, Long −124.0783) upstream to endpoint(s) in: Billie Creek (44.0971, −124.0362); Cataract Creek (44.0854, −123.9497); Cedar Creek (44.1534, −123.9045); Condon Creek (44.1138, −123.9984); Coon Creek (44.0864, −124.0318); Deer Creek (44.1297, −123.9475); Drew Creek (44.1239, −123.9801); Drew Creek (44.1113, −123.9854); Elma Creek (44.1803, −123.9434); Hanson Creek (44.0776, −123.9328); Haring Creek (44.0307, −124.0462); Lawrence Creek (44.1710, −123.9504); Lindsley Creek (44.0389, −124.0591); McLeod Creek (44.1050, −123.8805); Morris Creek (44.0711, −124.0308); Porter Creek (44.1490, −123.9641); Russell Creek (44.0680, −123.9848); Sam Creek (44.1751, −123.9527); Slover Creek (44.0213, −124.0531); South Russell Creek (44.0515, −123.9840); Taylor Creek (44.1279, −123.9052); Uncle Creek (44.1080, −124.0174); Unnamed (43.9900, −124.0784); Unnamed (43.9907, −124.0759); Unnamed (43.9953, −124.0514); Unnamed (43.9958, −124.0623); Unnamed (43.9999, −124.0694); Unnamed (44.0018, −124.0596); Unnamed (44.0050, −124.0556); Unnamed (44.0106, −124.0650); Unnamed (44.0135, −124.0609); Unnamed (44.0166, −124.0371); Unnamed (44.0194, −124.0631); Unnamed (44.0211, −124.0663); Unnamed (44.0258, −124.0594); Unnamed (44.0304, −124.0129); Unnamed (44.0327, −124.0670); Unnamed (44.0337, −124.0070); Unnamed (44.0342, −124.0056); Unnamed (44.0370, −124.0391); Unnamed (44.0419, −124.0013); Unnamed (44.0441, −124.0321); Unnamed (44.0579, −124.0077); Unnamed (44.0886, −124.0192); Unnamed (44.0892, −123.9925); Unnamed (44.0941, −123.9131); Unnamed (44.0976, −124.0033); Unnamed (44.1046, −123.9032); Unnamed (44.1476, −123.8959); Unnamed (44.1586, −123.9150); West Branch North Fork Siuslaw River (44.1616, −123.9616); Wilhelm Creek (44.1408, −123.9774).

(viii) *Lower Siuslaw River Watershed 1710020608.* Outlet(s) = Siuslaw River (Lat 44.0160, Long −124.1327) upstream to endpoint(s) in: Barber Creek (44.0294, −123.7598); Beech Creek (44.0588, −123.6980); Berkshire Creek (44.0508, −123.8890); Bernhardt Creek (43.9655, −123.9532); Brush Creek (44.0432, −123.7798); Brush Creek, East Fork (44.0414, −123.7782); Cedar Creek (43.9696, −123.9304); Cleveland Creek (44.0773, −123.8343); Demming Creek (43.9643, −124.0313); Dinner Creek (44.0108, −123.8069); Divide Creek (44.0516, −123.9421); Duncan Inlet (44.0081, −123.9921); Hadsall Creek (43.9846, −123.8221); Hadsall Creek, Trib D (43.9868, −123.8500); Hadsall Creek, Trib E (43.9812, −123.8359); Hanson Creek (44.0364, −123.9628); Hoffman Creek (43.9808, −123.9412); Hollenbeck Creek (44.0321, −123.8672); Hood Creek (43.9996, −123.7995); Karnowsky Creek (43.9847, −123.9658); Knowles Creek (43.9492, −123.7315); Knowles Creek, Trib L (43.9717, −123.7830); Lawson Creek, Trib B (43.9612, −123.9659); Meadow Creek (44.0311, −123.6490); Munsel Creek (44.0277, −124.0788); Old Man Creek (44.0543, −123.8022); Pat Creek (44.0659, −123.7245); Patterson Creek (43.9984, −124.0234); Rice Creek (44.0075, −123.8519); Rock Creek (44.0169, −123.6512); South Fork Waite Creek (43.9929, −123.7105); San Antone Creek (44.0564, −123.6515); Shoemaker Creek (44.0669, −123.8977); Shutte Creek (43.9939, −124.0339); Siuslaw River (44.0033, −123.6545); Skunk Hollow (43.9830, −124.0626); Smith Creek (44.0393, −123.6674); Spencer Creek (44.0676, −123.8809); Sulphur Creek (43.9822, −123.8015); Sweet Creek (43.9463, −123.9016); Sweet Creek, Trib A (44.0047, −123.8907); Sweet Creek, Trib D (43.9860, −123.8811); Thompson Creek (44.0974, −123.8615); Turner Creek (44.0096, −123.7607); Unnamed (43.9301, −124.0434); Unnamed (43.9596, −124.0337); Unnamed (43.9303, −124.0487); Unnamed (43.9340, −124.0529); Unnamed (43.9367, −124.0632); Unnamed (43.9374, −124.0442); Unnamed (43.9481, −124.0530); Unnamed (43.9501, −124.0622); Unnamed (43.9507, −124.0533); Unnamed (43.9571, −124.0658); Unnamed (43.9576, −124.0491); Unnamed (43.9587, −124.0988); Unnamed (43.9601, −124.0927); Unnamed (43.9615, −124.0527); Unnamed (43.9618, −124.0875); Unnamed (43.9624, −123.7499); Unnamed (43.9662, −123.7639); Unnamed (43.9664, −123.9252); Unnamed (43.9718, −124.0389; Unnamed (43.9720, −124.0075); Unnamed (43.9751, −124.0090); Unnamed (43.9784, −124.0191); Unnamed (43.9796, −123.9150); Unnamed (43.9852, −123.9802); Unnamed (43.9878, −123.9845); Unnamed (43.9915, −123.9732); Unnamed (43.9938, −123.9930); Unnamed (43.9942, −123.8547); Unnamed (43.9943, −123.9891); Unnamed (43.9954, −124.1185); Unnamed (43.9956, −123.7074); Unnamed (43.9995, −123.9825); Unnamed (44.0023, −123.7317); Unnamed (44.0210, −123.7874); Unnamed (44.0240, −123.8989); Unnamed (44.0366, −123.7363); Unnamed (44.0506, −123.9068); Waite Creek (43.9886, −123.7220); Walker Creek (44.0566, −123.9129); Wilson Creek (44.0716, −123.8792).

(7) Siltcoos Subbasin 17100207—(i) *Waohink River/Siltcoos River/ Tahkenitch Lake Frontal Watershed 1710020701.* Outlet(s) = Siltcoos River (Lat 43.8766, Long −124.1548); Tahkenitch Creek (43.8013, −124.1689) upstream to endpoint(s) in: Alder Creek (43.8967, −124.0114); Bear Creek (43.9198, −123.9293); Bear Creek Trib (43.9030, −123.9881); Bear Creek, South Fork (43.9017, −123.9555); Bell Creek (43.8541, −123.9718); Billy Moore Creek (43.8876, −123.9604); Carle Creek (43.9015, −124.0210); Carter Creek (43.9457, −124.0123); Dismal Swamp (43.8098, −124.0871); Elbow Lake Creek (43.7886, −124.1490); Fiddle Creek (43.9132, −123.9164); Fivemile Creek (43.8297, −123.9776); Grant Creek (43.9373, −124.0278); Harry Creek (43.8544, −124.0220); Henderson Canyon (43.8648, −123.9654); Henderson Creek (43.9427, −123.9704); John Sims Creek (43.8262, −124.0792); King Creek (43.8804, −124.0300); Lane Creek (43.8437, −124.0765); Leitel Creek

(43.8181, −124.0200); Mallard Creek (43.7775, −124.0852); Maple Creek (43.9314, −123.9316); Maple Creek, North Prong (43.9483, −123.9510); Miles Canyon (43.8643, −124.0097); Miller Creek (43.9265, −124.0663); Mills Creek (43.8966, −124.0397); Morris Creek (43.8625, −123.9541); Perkins Creek (43.8257, −124.0448); Rider Creek (43.9210, −123.9700); Roache Creek (43.9087, −124.0049); Schrum Creek (43.9194, −124.0492); Schultz Creek (43.9245, −123.9371); Stokes Creek (43.9161, −123.9984); Tenmile Creek (43.9419, −123.9447); Unnamed (43.8928, −124.0461); Unnamed (43.7726, −124.1021); Unnamed (43.7741, −124.1313); Unnamed (43.7756, −124.1363); Unnamed (43.7824, −124.1342); Unnamed (43.7829, −124.0852); Unnamed (43.7837, −124.0812); Unnamed (43.7849, −124.0734); Unnamed (43.7862, −124.0711); Unnamed (43.7865, −124.1107); Unnamed (43.7892, −124.1163); Unnamed (43.7897, −124.0608); Unnamed (43.7946, −124.0477); Unnamed (43.7964, −124.0643); Unnamed (43.8015, −124.0450); Unnamed (43.8078, −124.0340); Unnamed (43.8095, −124.1362); Unnamed (43.8112, −124.0608); Unnamed (43.8152, −124.0981); Unnamed (43.8153, −124.1314); Unnamed (43.8172, −124.0752); Unnamed (43.8231, −124.0853); Unnamed (43.8321, −124.0128); Unnamed (43.8322, −124.0069); Unnamed (43.8323, −124.1016); Unnamed (43.8330, −124.0217); Unnamed (43.8361, −124.1209); Unnamed (43.8400, −123.9802); Unnamed (43.8407, −124.1051); Unnamed (43.8489, −124.0634); Unnamed (43.8500, −123.9852); Unnamed (43.8504, −124.1248); Unnamed (43.8504, −124.0024); Unnamed (43.8507, −124.0511); Unnamed (43.8589, −124.1231); Unnamed (43.8596, −124.0438); Unnamed (43.8605, −124.1211); Unnamed (43.8669, −124.0717); Unnamed (43.8670, −124.0327); Unnamed (43.8707, −124.0689); Unnamed (43.8802, −124.0605); Unnamed (43.8862, −124.0570); Unnamed (43.8913, −123.9380); Unnamed (43.8919, −124.0771); Unnamed (43.8976, −124.0725); Unnamed (43.9032, −124.0651); Unnamed (43.9045, −124.0548); Unnamed (43.9057, −124.0606); Unnamed (43.9065, −124.0656); Unnamed (43.9105, −124.0453); Unnamed (43.9106, −124.0203); Unnamed (43.9202, −124.0786); Unnamed (43.9209, −124.0734); Unnamed (43.9237, −124.0155); Unnamed (43.9249, −124.0074); Unnamed (43.9274, −124.0759); Unnamed (43.9275, −124.0308); Unnamed (43.9360, −124.0892); Unnamed (43.9365, −124.0297); Unnamed (43.9424, −124.0981); Unnamed (43.9438, −124.0929); Unnamed (43.9453, −124.0752); Unnamed (43.9518, −123.9953).

(8) North Fork Umpqua Subbasin 17100301—(i) *Boulder Creek Watershed 1710030106.* Outlet(s) = Boulder Creek (Lat 43.3036, Long −122.5272) upstream to endpoint(s) in: Boulder Creek (Lat 43.3138, Long −122.5247)

(ii) *Middle North Umpqua Watershed 1710030107.* Outlet(s) = North Umpqua River (Lat 43.3322, Long −123.0025) upstream to endpoint(s) in: Calf Creek (43.2852, −122.6229); Copeland Creek (43.2853, −122.5325); Deception Creek (43.2766, −122.5850); Dry Creek (43.2967, −122.6016); Honey Creek (43.3181, −122.9414); Limpy Creek (43.3020, −122.6795); North Umpqua River (43.3027, −122.4938); Panther Creek (43.3019, −122.6801); Steamboat Creek (43.3491, −122.7281); Susan Creek (43.3044, −122.9058); Williams Creek (43.3431, −122.7724).

(iii) *Rock Creek/North Umpqua River Watershed 1710030110.* Outlet(s) = Rock Creek (Lat 43.3322, Long −123.0025) upstream to endpoint(s) in: Conley Creek (43.3594, −122.9663); Harrington Creek (43.4151, −122.9550); Kelly Creek (43.3592, −122.9912); McComas Creek (43.3536, −122.9923); Miller Creek (43.3864, −122.9371); Rock Creek (43.4247, −122.9055); Rock Creek, East Fork (43.3807, −122.8270); Rock Creek, East Fork, North Fork (43.4147, −122.8512); Shoup Creek (43.3882, −122.9674); Unnamed (43.3507, −122.9741); Woodstock Creek (43.3905, −122.9258).

(iv) *Little River Watershed 1710030111.* Outlet(s) = Little River (Lat 43.2978, Long −123.1012) upstream to endpoint(s) in: Buck Peak Creek (43.1762, −123.0479); Buckhorn Creek (43.2592, −123.1072); Cavitt Creek (43.1464, −122.9758); Copperhead Creek (43.1626, −123.0595); Emile Creek (43.2544, −122.8849); Evarts Creek (43.2087, −123.0133); Jim Creek (43.2257, −123.0592); Little River (43.2065, −122.8231); McKay Creek (43.2092, −123.0356); Tuttle Creek (43.1440, −122.9813); White Rock Creek (43.1540, −123.0379); Wolf Creek (43.2179, −122.9461).

(v) *Lower North Umpqua River Watershed 1710030112.* Outlet(s) = North Umpqua River (Lat 43.2682, Long −123.4448) upstream to endpoint(s) in: Bradley Creek (43.3350, −123.1025); Clover Creek (43.2490, −123.2604); Cooper Creek (43.3420, −123.1650); Cooper Creek (43.3797, −123.2807); Dixon Creek (43.2770, −123.2911); French Creek (43.3349, −123.0801); Huntley Creek (43.3363, −123.1340); North Umpqua River (43.3322, −123.0025); Oak Creek (43.2839, −123.2063); Short Creek (43.3204, −123.3315); Sutherlin Creek (43.3677, −123.2114); Unnamed (43.3285, −123.2016).

(9) South Fork Umpqua Subbasin 17100302—(i) *Jackson Creek Watershed 1710030202.* Outlet(s) = Jackson Creek (Lat 42.9695, Long −122.8795) upstream to endpoint(s) in: Beaver Creek (Lat 42.9084, Long −122.7924); Jackson Creek (Lat 42.9965, Long −122.6459); Ralph Creek (Lat 42.9744, Long −122.6976); Squaw Creek (Lat 42.9684, Long −122.6913);Tallow Creek (Lat 42.98814, Long −122.6965); Whiskey Creek (Lat 42.9593, Long −122.7262); Winters Creek (Lat 42.9380, Long −122.8271).

(ii) *Middle South Umpqua River Watershed 1710030203.* Outlet(s) = South Umpqua River (Lat 42.9272, Long −122.9504) upstream to endpoint(s) in: Boulder Creek (43.1056, −122.7379); Budd Creek (43.0506, −122.8185); Deadman Creek (43.0049, −122.8967); Dompier Creek (42.9553, −122.9166); Dumont Creek (43.0719, −122.8224); Francis Creek (43.0202, −122.8231); South Umpqua River (43.0481, −122.6998); Sam Creek (43.0037, −122.8412); Slick Creek (43.0986, −122.7867).

(iii) Elk Creek/South Umpqua Watershed 1710030204. Outlet(s) = Elk Creek (Lat 42.9272, Long −122.9504) upstream to endpoint(s) in: Brownie Creek (Lat 42.8304, Long −122.8746); Callahan Creek (Lat 42.8778, Long −122.9609); Camp Creek (Lat 42.8667, Long −122.8958); Dixon Creek (Lat 42.8931, Long −122.9152); Drew Creek (Lat 42.8682, Long −122.9358); Flat Creek (Lat 42.8294, Long −122.8250); Joe Hall Creek (Lat 42.8756, Long −122.8202); Tom Creek (Lat 42.8389, Long −122.8959).

(iv) *South Umpqua River Watershed 1710030205.* Outlet(s) = South Umpqua River (Lat 42.9476, Long −123.3368) upstream to endpoint(s) in: Alder Creek (42.9109, −123.2991); Canyon Creek (42.8798, −123.2410); Canyon Creek, West Fork (42.8757, −123.2734); Canyon Creek, West Fork, Trib A (42.8834, −123.2947); Coffee Creek (42.9416, −122.9993); Comer Brook (42.9082, −123.2908); Days Creek (43.0539, −123.0012); Days Creek, Trib 1 (43.0351, −123.0532); Doe Hollow (42.9805, −123.0812); Fate Creek (42.9943, −123.1028); Green Gulch (43.0040, −123.1276); Hatchet Creek

(42.9251, −122.9757); Jordan Creek (42.9224, −123.3086); Lavadoure Creek (42.9545, −123.1049); Lick Creek (42.9213, −123.0261); May Creek (43.0153, −123.0725); Morgan Creek (42.9635, −123.2409); O'Shea Creek (42.9256, −123.2486); Perdue Creek (43.0038, −123.1192); Poole Creek (42.9321, −123.1106); Poole Creek, East Fork (42.9147, −123.0956); South Umpqua River (42.9272, −122.9504); Shively Creek (42.8888, −123.1635); Shively Creek, East Fork (42.8793, −123.1194); Small Creek (42.9631, −123.2519); St. John Creek (42.9598, −123.0514); Stinger Gulch Creek (42.9950, −123.1851); Stouts Creek, East Fork (42.9090, −123.0424); Stouts Creek, West Fork (42.8531, −123.0167); Sweat Creek (42.9293, −123.1899); Wood Creek (43.0048, −123.1486).

(v) *Middle Cow Creek Watershed 1710030207.* Outlet(s) = Cow Creek (Lat 42.8114, Long −123.5947) upstream to endpoint(s) in: Bear Creek (42.8045, −123.3635); Booth Gulch (42.7804, −123.2282); Bull Run Creek (42.7555, −123.2366); Clear Creek (42.8218, −123.2610); Cow Creek (42.8487, −123.1780); Dads Creek (42.7650, −123.5401); East Fork Whitehorse Creek (42.7925, −123.1448); Fortune Branch (42.8051, −123.2971); Hogum Creek (42.7574, −123.1853); Lawson Creek (42.7896, −123.3752); Little Bull Run Creek (42.7532, −123.2479); McCullough Creek (42.7951, −123.4421); Mynatt Creek (42.8034, −123.2828); Panther Creek (42.7409, −123.4990); Perkins Creek (42.7331, −123.4997); Quines Creek (42.7278, −123.2396); Rattlesnake Creek (42.7106, −123.4774); Riffle Creek (42.7575, −123.6260); Section Creek (42.7300, −123.4373); Skull Creek (42.7527, −123.5779); Starveout Creek (42.7541, −123.1953); Stevens Creek (42.7255, −123.4835); Susan Creek (42.8035, −123.5762); Swamp Creek (42.7616, −123.3518); Tennessee Gulch (42.7265, −123.2591); Totten Creek (42.7448, −123.4610); Unnamed (42.7964, −123.4200); Unnamed (42.8101, −123.3150); Whitehorse Creek (42.7772, −123.1532); Wildcat Creek (42.7738, −123.2378); Windy Creek (42.8221, −123.3296); Wood Creek (42.8141, −123.4111); Woodford Creek (42.7458, −123.3180).

(vi) *West Fork Cow Creek Watershed 1710030208.* Outlet(s) = West Fork Cow Creek (Lat 42.8118, Long −123.6006) upstream to endpoint(s) in: Bear Creek (42.7662, −123.6741); Bobby Creek (42.8199, −123.7196); Elk Valley Creek (42.8681, −123.7133); Elk Valley Creek, East Fork (42.8698, −123.6812); Goat Trail Creek (42.8002, −123.6828); Gold Mountain Creek (42.8639, −123.7787); No Sweat Creek (42.8024, −123.7081); Panther Creek (42.8596, −123.7506); Slaughter Pen Creek (42.8224, −123.6565); Sweat Creek (42.8018, −123.6995); Walker Creek (42.8228, −123.7614); Wallace Creek (42.8311, −123.7696); West Fork Cow Creek (42.8329, −123.7733).

(vii) *Lower Cow Creek Watershed 1710030209.* Outlet(s) = Cow Creek (Lat 42.9476, Long −123.3368) upstream to endpoint(s) in: Ash Creek (42.9052, −123.3385); Boulder Creek (42.8607, −123.5494); Brush Creek (42.8526, −123.4369); Buck Creek (42.8093, −123.4979); Buck Creek (42.9347, −123.5163); Cattle Creek (42.8751, −123.5374); Cedar Gulch (42.8457, −123.5038); Council Creek (42.8929, −123.4366); Cow Creek (42.8114, −123.5947); Darby Creek (42.8553, −123.6123); Doe Creek (42.9333, −123.5057); Gravel Creek (42.8596, −123.4598); Iron Mountain Creek (42.9035, −123.5175); Island Creek (42.8957, −123.4749); Jerry Creek (42.9517, −123.4009); Little Dads Creek (42.8902, −123.5655); Martin Creek (42.8080, −123.4763); Middle Creek, South Fork (42.8298, −123.3870); Panther Creek (42.8417, −123.4492); Peavine Creek (42.8275, −123.4610); Russell Creek (42.9094, −123.3797); Salt Creek (42.9462, −123.4830); Shoestring Creek (42.9221, −123.3613); Smith Creek (42.8489, −123.4765); Smith Creek (42.9236, −123.5482); Table Creek (42.9114, −123.5695); Union Creek (42.8769, −123.5853); Unnamed (42.8891, −123.4080).

(viii) *Middle South Umpqua River Watershed 1710030210.* Outlet(s) = South Umpqua River (Lat 43.1172, Long −123.4273) upstream to endpoint(s) in: Adams Creek (43.0724, −123.4776); Barrett Creek (43.0145, −123.4451); Clark Brook (43.0980, −123.2897); East Willis Creek (43.0151, −123.3845); Judd Creek (42.9852, −123.4060); Kent Creek (43.0490, −123.4792); Lane Creek (42.9704, −123.4001); Porter Creek (43.0444, −123.4597); Rice Creek (43.0181, −123.4779); Richardson Creek (43.0766, −123.2881); South Umpqua River (42.9476, −123.3368); Squaw Creek (43.0815, −123.4688); Van Dine Creek (43.0326, −123.3473); West Willis Creek (43.0172, −123.4355).

(ix) *Myrtle Creek Watershed 1710030211.* Outlet(s) = North Myrtle Creek (Lat 43.0231, Long −123.2951) upstream to endpoint(s) in: Ben Branch Creek (43.0544, −123.1618); Big Lick (43.0778, −123.2175); Bilger Creek (43.1118, −123.2372); Buck Fork Creek (43.1415, −123.0831); Cedar Hollow (43.0096, −123.2297); Frozen Creek (43.1089, −123.1929); Frozen Creek, Left Fork (43.1157, −123.2306); Harrison Young Brook (43.0610, −123.2850); Lally Creek (43.0890, −123.0597); Lee Creek (43.1333, −123.1477); Letitia Creek (43.0710, −123.0907); Little Lick (43.0492, −123.2234); Long Wiley Creek (43.0584, −123.1067); Louis Creek (43.1165, −123.0783); North Myrtle Creek (43.1486, −123.1219); Riser Creek (43.1276, −123.0703); Rock Creek (43.0729, −123.2620); South Myrtle Creek (43.0850, −123.0103); School Hollow (43.0563, −123.1753); Short Wiley Creek (43.0589, −123.1158); Slide Creek (43.1110, −123.1078); Unnamed (43.1138, −123.1721); Weaver Creek (43.1102, −123.0576).

(x) *Ollala Creek/Lookingglass Watershed 1710030212.* Outlet(s) = Lookingglass Creek (Lat 43.1172, Long −123.4273) upstream to endpoint(s) in: Archambeau Creek (43.2070, −123.5329); Bear Creek (43.1233, −123.6382); Berry Creek (43.0404, −123.5543); Bushnell Creek (43.0183, −123.5289); Byron Creek, East Fork (43.0192, −123.4939); Byron Creek, North Fork (43.0326, −123.4792); Coarse Gold Creek (43.0291, −123.5742); Flournoy Creek (43.2227, −123.5560); Little Muley Creek (43.0950, −123.6247); Lookingglass Creek (43.1597, −123.6015); McNabb Creek (43.0545, −123.4984); Muns Creek (43.0880, −123.6333); Olalla Creek (42.9695, −123.5914); Perron Creek (43.0960, −123.4904); Porter Creek (43.1381, −123.5569); Sheilds Creek (43.0640, −123.6189); Tenmile Creek (43.1482, −123.6537); Tenmile Creek, North Fork (43.1260, −123.6069); Thompson Creek (42.9860, −123.5140); Willingham Creek (42.9600, −123.5814).

(xi) *Lower South Umpqua River Watershed 1710030213.* Outlet(s) = South Umpqua River (Lat 43.2682, Long −123.4448) upstream to endpoint(s) in: Callahan Creek (43.2291, −123.5355); Damotta Brook (43.2030, −123.2987); Deer Creek, North Fork (43.2166, −123.1437); Deer Creek, South Fork (43.1875, −123.1722); Deer Creek, South Fork, Trib 1 (43.1576, −123.2393); Deer Creek, South Fork, Middle Fork (43.1625, −123.1413); Doerner Creek (43.2370, −123.5153); Elgarose Creek (43.2747, −123.5105); Marsters Creek (43.1584, −123.4489); Melton Creek (43.1294, −123.2173); Roberts Creek (43.1124, −123.2831); South Umpqua River (43.1172, −123.4273); Stockel Creek (43.2205, −123.4392); Tucker Creek (43.1238, −123.2378); Unnamed (43.2184, −123.1709); Willow Creek (43.2543, −123.5143).

(10) Umpqua Subbasin 17100303(i) *Upper Umpqua River Watershed 1710030301.* Outlet(s) = Umpqua River

(Lat 43.6329, Long −123.5662) upstream to endpoint(s) in: Bear Creek (43.3202, −123.6118); Bear Creek (43.5436, −123.4481); Bottle Creek (43.4060, −123.5043); Brads Creek (43.5852, −123.4651); Camp Creek (43.2969, −123.5361); Case Knife Creek (43.4288, −123.6665); Cedar Creek (43.5360, −123.5969); Cougar Creek (43.3524, −123.6166); Doe Creek (43.5311, −123.4259); Fitzpatrick Creek (43.5819, −123.6308); Galagher Canyon (43.4708, −123.4394); Heddin Creek (43.5909, −123.6466); Hubbard Creek (43.2526, −123.5544); Leonard Creek (43.4448, −123.5402); Little Canyon Creek (43.4554, −123.4560); Little Wolf Creek (43.4232, −123.6633); Little Wolf Creek, Trib D (43.4052, −123.6477); Lost Creek (43.4355, −123.4902); Martin Creek (43.5539, −123.4633); McGee Creek (43.5125, −123.5632); Mehl Creek (43.5491, −123.6541); Mill Creek (43.3178, −123.5095); Miner Creek (43.4518, −123.6764); Panther Canyon (43.5541, −123.3484); Porter Creek (43.4348, −123.5530); Rader Creek (43.5203, −123.6517); Rader Creek, Trib A (43.4912, −123.5726); Umpqua River (43.2682, −123.4448); Unnamed (43.5781, −123.6170); Unnamed (43.5630, −123.6080); Unnamed (43.4011, −123.6474); Unnamed (43.4119, −123.6172); Unnamed (43.4212, −123.6398); Unnamed (43.4640, −123.6734); Unnamed (43.4940, −123.6166); Unnamed (43.5765, −123.4710); Waggoner Creek (43.5282, −123.6072); Whiskey Camp Creek (43.4587, −123.6755); Williams Creek (43.5952, −123.5222); Wolf Creek (43.4707, −123.6655).

(ii) *Calapooya Creek Watershed 1710030302.* Outlet(s) = Calapooya Creek (Lat 43.3658, Long −123.4674) upstream to endpoint(s) in: Bachelor Creek (43.5480, −123.2062); Banks Creek (43.3631, −123.1755); Beaty Creek (43.4406, −123.0392); Boyd Creek (43.4957, −123.1573); Brome Creek (43.4016, −123.0490); Burke Creek (43.3987, −123.4463); Buzzard Roost Creek (43.4584, −123.0990); Cabin Creek (43.5421, −123.3294); Calapooya Creek, North Fork (43.4867, −123.0280); Coon Creek (43.4218, −123.4349); Coon Creek (43.5245, −123.0429); Dodge Canyon Creek (43.4362, −123.4420); Driver Valley Creek (43.4327, −123.1960); Field Creek (43.4043, −123.0917); Gassy Creek (43.3862, −123.1133); Gilbreath Creek (43.4218, −123.0931); Gossett Creek (43.4970, −123.1045); Haney Creek (43.4763, −123.1086); Hinkle Creek (43.4230, −123.0382); Hog Creek (43.4767, −123.2516); Jeffers Creek (43.4522, −123.1047); Long Valley Creek (43.4474, −123.1460); Middle Fork South Fork Calapooya Creek (43.4772, −122.9952); Markam Creek (43.3751, −123.1479); Marsh Creek (43.5223, −123.3348); Mill Creek (43.4927, −123.1315); Norton Creek (43.5046, −123.3736); Pine Tree Creek (43.4179, −123.0688); Pollock Creek (43.5326, −123.2685); Salt Creek (43.5161, −123.2504); Salt Lick Creek (43.4510, −123.1168); Slide Creek (43.3926, −123.0919); Timothy Creek (43.4862, −123.0896); Unnamed (43.4469, −123.4268); Unnamed (43.4481, −123.4283); Unnamed (43.4483, −123.4134); Unnamed (43.4658, −122.9899); Unnamed (43.4707, −122.9896); Unnamed (43.4908, −123.0703); Unnamed (43.5173, −123.0564); Wheeler Canyon (43.4840, −123.3631); White Creek (43.4637, −123.0451); Williams Creek (43.4703, −123.4096).

(iii) *Elk Creek Watershed 1710030303.* Outlet(s) = Elk Creek (Lat 43.6329, Long −123.5662) upstream to endpoint(s) in: Adams Creek (43.5860, −123.2202); Allen Creek (43.6375, −123.3731); Andrews Creek (43.5837, −123.3920); Asker Creek (43.6290, −123.2668); Bear Creek (43.6195, −123.3703); Bear Creek (43.7119, −123.1757); Bennet Creek (43.6158, −123.1558); Big Tom Folley Creek (43.7293, −123.4053); Big Tom Folley Creek, North Fork (43.7393, −123.4917); Big Tom Folley Creek, Trib A (43.7231, −123.4465); Billy Creek, East Fork (43.5880, −123.3263); Billy Creek, South Fork (43.5725, −123.3603); Blue Hole Creek (43.5677, −123.4405); Brush Creek (43.5662, −123.4140); Buck Creek (43.6981, −123.1818); Cowan Creek (43.5915, −123.2615); Cox Creek (43.6356, −123.1794); Curtis Creek (43.6839, −123.1734); Dodge Canyon (43.6225, −123.2509); Elk Creek (43.5097, −123.1620); Ellenburg Creek (43.7378, −123.3296); Fitch Creek (43.6986, −123.3152); Five Point Canyon (43.5707, −123.3526); Flagler Creek (43.5729, −123.3382); Green Creek (43.6851, −123.4688); Green Ridge Creek (43.5920, −123.3958); Halo Creek (43.5990, −123.2658); Hancock Creek (43.6314, −123.5188); Hanlon Creek (43.6190, −123.2785); Hardscrabble Creek (43.7111, −123.3517); Huntington Creek (43.5882, −123.2808); Jack Creek (43.7071, −123.3819); Johnny Creek (43.7083, −123.3972); Johnson Creek (43.6830, −123.2715); Lancaster Creek (43.6442, −123.4361); Lane Creek (43.5483, −123.1221); Lees Creek (43.6610, −123.1888); Little Sand Creek (43.7655, −123.2778); Little Tom Folley Creek (43.6959, −123.5393); McClintock Creek (43.6664, −123.2703); Parker Creek (43.6823, −123.4178); Pass Creek (43.7527, −123.1528); Pheasant Creek (43.7758, −123.2099); Rock Creek (43.7759, −123.2730); Saddle Butte Creek (43.7214, −123.5219); Salt Creek (43.6796, −123.2213); Sand Creek (43.7709, −123.2912); Shingle Mill Creek (43.5314, −123.1308); Simpson Creek (43.6629, −123.2553); Smith Creek (43.6851, −123.3179); Squaw Creek (43.6010, −123.4284); Taylor Creek (43.7642, −123.2712); Thief Creek (43.6527, −123.1459); Thistleburn Creek (43.6313, −123.4332); Unnamed (43.5851, −123.3101); Walker Creek (43.5922, −123.1707); Ward Creek (43.7486, −123.2023); Wehmeyer Creek (43.6823, −123.2404); Wilson Creek (43.5699, −123.2681); Wise Creek (43.6679, −123.2772); Yoncalla Creek (43.5563, −123.2833).

(iv) *Middle Umpqua River Watershed 1710030304.* Outlet(s) = Umpqua River (Lat 43.6556, Long −123.8752) upstream to endpoint(s) in: Burchard Creek (43.6680, −123.7520); Butler Creek (43.6325, −123.6867); Cedar Creek (43.7027, −123.6451); House Creek (43.7107, −123.6378); Little Mill Creek (43.6729, −123.8252); Little Paradise Creek (43.6981, −123.5630); Paradise Creek (43.7301, −123.5738); Patterson Creek (43.7076, −123.6977); Purdy Creek (43.6895, −123.7712); Sawyer Creek (43.6027, −123.6717); Scott Creek (43.6885, −123.6966); Umpqua River (43.6329, −123.5662); Unnamed (43.6011, −123.7084); Unnamed (43.5998, −123.6803); Unnamed (43.6143, −123.6674); Unnamed (43.6453, −123.7619); Unnamed (43.6461, −123.8064); Unnamed (43.6923, −123.7534); Unnamed (43.7068, −123.6109); Unnamed (43.7084, −123.7156); Unnamed (43.7098, −123.6300); Unnamed (43.7274, −123.6026); Weatherly Creek (43.7205, −123.6680); Wells Creek (43.6859, −123.7946).

(v) *Upper Smith River Watershed 1710030306.* Outlet(s) = Smith River (Lat 43.7968, Long −123.7565) upstream to endpoint(s) in: Amberson Creek (43.7787, −123.4944); Argue Creek (43.7656, −123.6959); Beaver Creek (43.7865, −123.6949); Beaver Creek (43.8081, −123.4041); Big Creek (43.7372, −123.7112); Blackwell Creek (43.8145, −123.7460); Blind Creek (43.7518, −123.6551); Bum Creek (43.8044, −123.5802); Carpenter Creek (43.7947, −123.7258); Clabber Creek (43.7919, −123.5878); Clearwater Creek (43.8138, −123.7375); Cleghorn Creek (43.7508, −123.4997); Clevenger Creek (43.7826, −123.4087); Coldwater Creek (43.8316, −123.7232); Deer Creek (43.8109, −123.5362); Devils Club Creek

(43.7916, −123.6148); Elk Creek (43.8004, −123.4347); Halfway Creek (43.7412, −123.5112); Hall Creek (43.7732, −123.3836); Haney Creek (43.8355, −123.5006); Hardenbrook Creek (43.7943, −123.5660); Hefty Creek (43.7881, −123.3954); Herb Creek (43.8661, −123.6782); Jeff Creek (43.8079, −123.6033); Marsh Creek (43.7831, −123.6185); Mosetown Creek (43.7326, −123.6613); Mosetown Creek, East Fork (43.7185, −123.6433); North Sister Creek (43.8492, −123.5771); Panther Creek (43.8295, −123.4464); Pearl Creek (43.8263, −123.5350); Peterson Creek (43.7575, −123.3947); Plank Creek (43.7635, −123.3980); Redford Creek (43.7878, −123.3520); Rock Creek (43.7733, −123.6222); Russell Creek (43.8538, −123.6971); South Sister Creek (43.8366, −123.5611); Salmonberry Creek (43.8085, −123.4482); Scare Creek (43.7631, −123.7260); Sleezer Creek (43.7535, −123.3711); Slideout Creek (43.7831, −123.5685); Smith River, Little South Fork (43.7392, −123.4583); Smith River, South Fork (43.7345, −123.3843); Smith River (43.7529, −123.3310); Spring Creek (43.7570, −123.3276); Summit Creek (43.7985, −123.3487); Sweden Creek (43.8618, −123.6468); Tip Davis Creek (43.7739, −123.3301); Twin Sister Creek (43.8348, −123.7168); Unnamed (43.7234, −123.6308); Unnamed (43.7397, −123.6984); Unnamed (43.7433, −123.4673); Unnamed (43.7492, −123.6911); Unnamed (43.7495, −123.5832); Unnamed (43.7527, −123.5210); Unnamed (43.7533, −123.7046); Unnamed (43.7541, −123.4805); Unnamed (43.7708, −123.4819); Unnamed (43.7726, −123.5039); Unnamed (43.7748, −123.6044); Unnamed (43.7775, −123.6927); Unnamed (43.7830, −123.5900); Unnamed (43.7921, −123.6335); Unnamed (43.7955, −123.7013); Unnamed (43.7993, −123.6171); Unnamed (43.8020, −123.6739); Unnamed (43.8034, −123.6959); Unnamed (43.8133, −123.5893); Unnamed (43.8197, −123.4827); Unnamed (43.8263, −123.5810); Unnamed (43.8360, −123.6951); Unnamed (43.8519, −123.5910); Unnamed (43.8535, −123.6357); Unnamed (43.8541, −123.6155); Unnamed (43.8585, −123.6867); Upper Johnson Creek (43.7509, −123.5426); West Fork Halfway Creek (43.7421, −123.6119); Yellow Creek (43.8193, −123.5545).

(vi) *Lower Smith River Watershed 1710030307.* Outlet(s) = Smith River (Lat 43.7115, Long −124.0807) upstream to endpoint(s) in: Bear Creek (43.8087, −123.8202); Beaver Creek (43.8983, −123.7559); Black Creek (43.7544, −123.9967); Brainard Creek (43.7448, −124.0105); Buck Creek (43.7719, −123.7823); Cassady Creek (43.7578, −123.9744); Cedar Creek (43.8541, −123.8562); Chapman Creek (43.8181, −123.9380); Coon Creek (43.8495, −123.7857); Crane Creek (43.8592, −123.7739); Edmonds Creek (43.8257, −123.9000); Eslick Creek (43.8153, −123.9894); Eslick Creek, East Fork (43.8082, −123.9583); Franz Creek (43.7542, −124.1006); Frarey Creek (43.7683, −124.0615); Georgia Creek (43.8373, −123.8911); Gold Creek (43.9002, −123.7470); Harlan Creek (43.8635, −123.9319); Holden Creek (43.7901, −124.0178); Hudson Slough (43.7725, −124.0736); Johnson Creek (43.8291, −123.9582); Johnson Creek (43.8480, −123.8209); Joyce Creek (43.7892, −124.0356); Joyce Creek, West Fork (43.7708, −124.0457); Kentucky Creek (43.9313, −123.8153); Middle Fork of North Fork Smith River (43.8780, −123.7687); Moore Creek (43.8523, −123.8931); Moore Creek (43.8661, −123.7558); Murphy Creek (43.7449, −123.9527); Noel Creek (43.7989, −124.0109); Otter Creek (43.7216, −123.9626); Otter Creek, North Fork (43.7348, −123.9597); Paxton Creek (43.8847, −123.9004); Peach Creek (43.8963, −123.8599); Perkins Creek (43.7362, −123.9151); Railroad Creek (43.8086, −123.8998); Smith River, West Fork (43.9102, −123.7073); Smith River (43.7968, −123.7565); Spencer Creek (43.8429, −123.8321); Spencer Creek, West Fork (43.8321, −123.8685); Sulphur Creek (43.8512, −123.9422); Unnamed (43.7031, −123.7463); Unnamed (43.7106, −123.7666); Unnamed (43.7203, −123.7601); Unnamed (43.7267, −123.7396); Unnamed (43.7286, −123.7798); Unnamed (43.7322, −124.0585); Unnamed (43.7325, −123.7337); Unnamed (43.7470, −123.7416); Unnamed (43.7470, −123.7711); Unnamed (43.7569, −124.0844); Unnamed (43.7606, −124.0853); Unnamed (43.7623, −124.0753); Unnamed (43.7669, −124.0766); Unnamed (43.7734, −124.0674); Unnamed (43.7855, −124.0076); Unnamed (43.7877, −123.9936); Unnamed (43.8129, −123.9743); Unnamed (43.8212, −123.8777); Unnamed (43.8258, −123.8192); Unnamed (43.8375, −123.9631); Unnamed (43.8424, −123.7925); Unnamed (43.8437, −123.7989); Unnamed (43.8601, −123.7630); Unnamed (43.8603, −123.8155); Unnamed (43.8655, −123.8489); Unnamed (43.8661, −123.9136); Unnamed (43.8688, −123.7994); Unnamed (43.8831, −123.8534); Unnamed (43.8883, −123.7157); Unnamed (43.8906, −123.7759); Unnamed (43.8916, −123.8765); Unnamed (43.8922, −123.8144); Unnamed (43.8953, −123.8772); Unnamed (43.8980, −123.7865); Unnamed (43.8997, −123.7993); Unnamed (43.8998, −123.7197); Unnamed (43.9015, −123.8386); Unnamed (43.9015, −123.8949); Unnamed (43.9023, −123.8241); Unnamed (43.9048, −123.8316); Unnamed (43.9075, −123.7208); Unnamed (43.9079, −123.8263); Vincent Creek (43.7035, −123.7882); Wassen Creek (43.7419, −123.8905); West Branch North Fork Smith River (43.9113, −123.8958).

(vii) *Lower Umpqua River Watershed 1710030308.* Outlet(s) = Umpqua River (Lat 43.6696, Long −124.2025) upstream to endpoint(s) in: Alder Creek (43.6310, −124.0483); Bear Creek (43.7053, −123.9529); Butler Creek (43.7157, −124.0059); Charlotte Creek (43.6320, −123.9307); Dean Creek (43.6214, −123.9740); Dry Creek (43.6369, −124.0595); Franklin Creek (43.6850, −123.8659); Hakki Creek (43.6711, −124.0161); Indian Charlie Creek (43.6611, −123.9404); Johnson Creek (43.6711, −123.9760); Koepke Slough (43.6909, −124.0294); Little Franklin Creek (43.6853, −123.8863); Luder Creek (43.6423, −123.9046); Miller Creek (43.6528, −124.0140); Oar Creek (43.6620, −124.0289); Providence Creek (43.7083, −124.1289); Scholfield Creek (43.6253, −124.0112); Umpqua River (43.6556, −123.8752); Unnamed (43.6359, −123.9572); Unnamed (43.6805, −124.1146); Unnamed (43.6904, −124.0506); Unnamed (43.6940, −124.0340); Unnamed (43.7069, −123.9824); Unnamed (43.7242, −123.9369); Winchester Creek (43.6657, −124.1247); Wind Creek, South Fork (43.6346, −124.0897).

(11) Coos Subbasin 17100304—(i) *South Fork Coos Watershed 1710030401.* Outlet(s) = South Fork Coos (Lat 43.3905, Long −123.9634) upstream to endpoint(s) in: Beaver Slide Creek (43.2728, −123.8472); Bottom Creek (43.3751, −123.7065); Bottom Creek, North Fork (43.3896, −123.7264); Buck Creek (43.2476, −123.8023); Burnt Creek (43.2567, −123.7834); Cedar Creek (43.3388, −123.6303); Cedar Creek, Trib E (43.3423, −123.6749); Cedar Creek, Trib F (43.3330, −123.6523); Coal Creek (43.3426, −123.8685); Eight River Creek (43.2638, −123.8568); Fall Creek (43.2535, −123.7106); Fall Creek (43.4106, −123.7512); Fivemile Creek

(43.2341, −123.6307); Gods Thumb Creek (43.3440, −123.7013); Gooseberry Creek (43.2452, −123.7081); Hatcher Creek (43.3021, −123.8370); Hog Ranch Creek (43.2754, −123.8125); Lake Creek (43.2971, −123.6354); Little Cow Creek (43.1886, −123.6133); Lost Creek (43.2325, −123.5769); Lost Creek, Trib A (43.2224, −123.5961); Mink Creek (43.3068, −123.8515); Panther Creek (43.2593, −123.6401); Shotgun Creek (43.2920, −123.7623); Susan Creek (43.2720, −123.7654); Tioga Creek (43.2110, −123.7786); Unnamed (43.2209, −123.7789); Unnamed (43.2305, −123.8360); Unnamed (43.2364, −123.7818); Unnamed (43.2548, −123.8569); Unnamed (43.2713, −123.8320); Unnamed (43.2902, −123.6662); Unnamed (43.3168, −123.6491); Unnamed (43.3692, −123.8320); Unnamed (43.3698, −123.8321); Unnamed (43.3806, −123.8327); Unnamed (43.3846, −123.8058); Unnamed (43.3887, −123.7927); Unnamed (43.3651, −123.7073); Wilson Creek (43.2083, −123.6691).

(ii) *Millicoma River Watershed 1710030402*. Outlet(s) = West Fork Millicoma River (Lat 43.4242, Long −124.0288) upstream to endpoint(s) in: Bealah Creek (43.4271, −123.8445); Buck Creek (43.5659, −123.9765); Cougar Creek (43.5983, −123.8788); Crane Creek (43.5545, −123.9287); Dagget Creek (43.4862, −124.0557); Darius Creek (43.4741, −123.9407); Deer Creek (43.6207, −123.9616); Deer Creek, Trib A (43.6100, −123.9761); Deer Creek, Trib B (43.6191, −123.9482); Devils Elbow Creek (43.4439, −124.0608); East Fork Millicoma River (43.4204, −123.8330); Elk Creek (43.5441, −123.9175); Fish Creek (43.6015, −123.8968); Fox Creek (43.4189, −123.9459); Glenn Creek (43.4799, −123.9325); Hidden Creek (43.5646, −123.9235); Hodges Creek (43.4348, −123.9889); Joes Creek (43.5838, −123.9787); Kelly Creek (43.5948, −123.9036); Knife Creek (43.6163, −123.9310); Little Matson Creek (43.4375, −123.8890); Marlow Creek (43.4779, −123.9815); Matson Creek (43.4489, −123.9191); Otter Creek (43.5935, −123.9729); Panther Creek (43.5619, −123.9038); Rainy Creek (43.4293, −124.0400); Rodine Creek (43.4434, −123.9789); Schumacher Creek (43.4842, −124.0380); Totten Creek (43.4869, −124.0457); Trout Creek (43.5398, −123.9814); Unnamed (43.4686, −124.0143); Unnamed (43.5156, −123.9366); Unnamed (43.5396, −123.9373); Unnamed (43.5450, −123.9305); West Fork Millicoma River (43.5617, −123.8788).

(iii) *Lakeside Frontal Watershed 1710030403*. Outlet(s) = Tenmile Creek (43.5618, −124.2308) upstream to endpoint(s) in: Adams Creek (43.5382, −124.1081); Alder Creek (43.6012, −124.0272); Alder Gulch (43.5892, −124.0665); Benson Creek (43.5813, −124.0086); Big Creek (43.6085, −124.0128); Blacks Creek (43.6365, −124.1188); Clear Creek (43.6040, −124.1871); Hatchery Creek (43.5275, −124.0761); Johnson Creek (43.5410, −124.0018); Murphy Creek (43.6243, −124.0534); Noble Creek (43.5897, −124.0347); Parker Creek (43.6471, −124.1246); Roberts Creek (43.5557, −124.0264); Saunders Creek (43.5417, −124.2136); Shutter Creek (43.5252, −124.1398); Swamp Creek (43.5550, −124.1948); Unnamed (43.5203, −124.0294); Unnamed (43.6302, −124.1460); Unnamed (43.6353, −124.1411); Unnamed (43.6369, −124.1515); Unnamed (43.6466, −124.1511); Unnamed (43.5081, −124.0382); Unnamed (43.6353, −124.16770; Wilkins Creek (43.6304, −124.0819); Winter Creek (43.6533, −124.1333).

(iv) *Coos Bay Watershed 1710030404*. Outlet(s) = Big Creek (Lat 43.3326, Long −124.3739); Coos Bay (43.3544, −124.3384) upstream to endpoint(s) in: Bear Creek (43.5048, −124.1059); Bessey Creek (43.3844, −124.0253); Big Creek (43.2834, −124.3374), Big Creek (43.3980, −123.9396); Big Creek, Trib A (43.2999, −124.3711); Big Creek, Trib B (43.2854, −124.3570); Blossom Gulch (43.3598, −124.2410); Boatman Gulch (43.3445, −124.2483); Boone Creek (43.2864, −124.1762); Cardwell Creek (43.2793, −124.1277); Catching Creek (43.2513, −124.1586); Coalbank Creek (43.3154, −124.2503); Coos Bay (43.3566, −124.1592); Daniels Creek (43.3038, −124.0725); Davis Creek (43.2610, −124.2633); Day Creek (43.3129, −124.2888); Deton Creek (43.4249, −124.0771); Echo Creek (43.3797, −124.1529); Elliot Creek (43.3037, −124.2670); Farley Creek (43.3146, −124.3415); Ferry Creek (43.2628, −124.1728); Goat Creek (43.2700, −124.2109); Haywood Creek (43.3067, −124.3419); Hendrickson Creek (43.3907, −124.0594); Isthmus Slough (43.2622, −124.2049); Joe Ney Slough (43.3382, −124.2958); John B Creek (43.2607, −124.2814); Johnson Creek (43.4043, −124.1389); Kentuck Creek (43.4556, −124.0894); Larson Creek (43.4930, −124.0764); Laxstrom Gulch (43.3372, −124.1350); Lillian Creek (43.3550, −124.1330); Mart Davis Creek (43.3911, −124.0927); Matson Creek (43.3011, −124.1161); McKnight Creek (43.3841, −123.9991); Mettman Creek (43.4574, −124.1293); Millicoma River (43.4242, −124.0288); Monkey Ranch Gulch (43.3392, −124.1458); Morgan Creek (43.3460, −124.0318); North Slough (43.5032, −124.1408); Noble Creek (43.2387, −124.1665); Packard Creek (43.4058, −124.0211); Palouse Creek (43.5123, −124.0667); Panther Creek (43.2733, −124.1222); Pony Slough (43.4078, −124.2307); Rogers Creek (43.3831, −124.0370); Ross Slough (43.3027, −124.1781); Salmon Creek (43.3618, −123.9816); Seaman Creek (43.3634, −124.0111); Seelander Creek (43.2872, −124.1176); Shinglehouse Slough (43.3154, −124.2225); Smith Creek (43.3579, −124.1051); Snedden Creek (43.3372, −124.2177); Southport Slough (43.2981, −124.2194); Stock Slough (43.3277, −124.1195); Storey Creek (43.3238, −124.2969); Sullivan Creek (43.4718, −124.0872); Talbott Creek (43.2839, −124.2954); Theodore Johnson Creek (43.2756, −124.3457); Unnamed (43.5200, −124.1812); Unnamed (43.2274, −124.3236); Unnamed (43.2607, −124.2984); Unnamed (43.2772, −124.3246); Unnamed (43.2776, −124.3148); Unnamed (43.2832, −124.1532); Unnamed (43.2888, −124.1962); Unnamed (43.2893, −124.3406); Unnamed (43.2894, −124.2034); Unnamed (43.2914, −124.2917); Unnamed (43.2942, −124.1027); Unnamed (43.2984, −124.2847); Unnamed (43.3001, −124.3022); Unnamed (43.3034, −124.2001); Unnamed (43.3051, −124.2031); Unnamed (43.3062, −124.2030); Unnamed (43.3066, −124.3674); Unnamed (43.3094, −124.1947); Unnamed (43.3129, −124.1208); Unnamed (43.3149, −124.1347); Unnamed (43.3149, −124.1358); Unnamed (43.3149, −124.1358); Unnamed (43.3169, −124.0638); Unnamed (43.3224, −124.2390); Unnamed (43.3356, −124.1542); Unnamed (43.3356, −124.1526); Unnamed (43.3357, −124.1510); Unnamed (43.3357, −124.1534); Unnamed (43.3368, −124.1509); Unnamed (43.3430, −124.2352); Unnamed (43.3571, −124.2372); Unnamed (43.3643, −124.0474); Unnamed (43.3741, −124.0577); Unnamed (43.4126, −124.0599); Unnamed (43.4203, −123.9824); Unnamed (43.4314, −124.0998); Unnamed (43.4516, −124.1023); Unnamed (43.4521, −124.1110); Unnamed (43.5345, −124.1946); Vogel Creek (43.3511, −124.1206); Wasson Creek (43.2688, −124.3368); Willanch Creek (43.4233, −124.1061); Willanch Creek,

Trib A (43.4032, −124.1169); Wilson Creek (43.2652, −124.1281); Winchester Creek (43.2145, −124.3116); Winchester Creek, Trib E (43.2463, −124.3067); Woodruff Creek (43.4206, −123.9746); Wren Smith Creek (43.3131, −124.0649).

(12) Coquille Subbasin 17100305—(i) *Middle Fork Coquille Watershed 1710030502*. Outlet(s) = Middle Fork Coquille River (Lat 43.0340, Long −124.1161) upstream to endpoint(s) in: Anderson Creek (43.0087, −123.9445); Axe Creek (43.0516, −123.9468); Bear Creek (43.0657, −123.9284); Belieu Creek (43.0293, −123.9470); Big Creek (43.0991, −123.8983); Brownson Creek (43.0879, −123.9583); Endicott Creek (43.0401, −124.0710); Fall Creek (43.0514, −123.9910); Indian Creek (43.0203, −124.0842); Little Rock Creek (42.9913, −123.8335); McMullen Creek (43.0220, −124.0366); Middle Fork Coquille River (42.9701, −123.7621); Myrtle Creek (42.9642, −124.0170); Rasler Creek (42.9518, −123.9643); Rock Creek (42.9200, −123.9073); Rock Creek (43.0029, −123.8440); Salmon Creek (43.0075, −124.0273); Sandy Creek (43.0796, −123.8517); Sandy Creek, Trib F (43.0526, −123.8736); Sheilds Creek (42.9184, −123.9219); Slater Creek (42.9358, −123.7958); Slide Creek (42.9957, −123.9040); Smith Creek (43.0566, −124.0337); Swamp Creek (43.0934, −123.9000); Unnamed (43.0016, −123.9550); Unnamed (43.0681, −123.9812); Unnamed (43.0810, −123.9892).

(ii) *Middle Main Coquille Watershed 1710030503*. Outlet(s) = South Fork Coquille River (Lat 43.0805, Long −124.1405) upstream to endpoint(s) in: Baker Creek (42.8913, −124.1297); Beaver Creek (42.9429, −124.0783); Catching Creek, Middle Fork (42.9913, −124.2331); Catching Creek, South Fork (42.9587, −124.2348); Coquille River, South Fork (42.8778, −124.0743); Cove Creek (43.0437, −124.2088); Dement Creek (42.9422, −124.2086); Gettys Creek (43.0028, −124.1988); Grants Creek (42.9730, −124.1041); Horse Hollow (43.0382, −124.1984); Knight Creek (43.0022, −124.2663); Koontz Creek (43.0111, −124.2505); Long Tom Creek (42.9342, −124.0992); Matheny Creek (43.0495, −124.1892); Mill Creek (42.9777, −124.1663); Rhoda Creek (43.0007, −124.1032); Roberts Creek (42.9748, −124.2385); Rowland Creek (42.9045, −124.1845); Russell Creek (42.9495, −124.1611); Unnamed (42.9684, −124.1033); Ward Creek (43.0429, −); 124.2358); Warner Creek (43.0196, −124.1187); Wildcat Creek (43.0277, −124.2225); Wolf Creek (43.0136, −124.2318); Woodward Creek (42.9023, −124.0658).

(iii) *East Fork Coquille Watershed 1710030504*. Outlet(s) = East Fork Coquille River (Lat 43.1065, Long −124.0761) upstream to endpoint(s) in: Bills Creek (43.1709, −123.9244); China Creek (43.1736, −123.9086); East Fork Coquille River (43.1476, −123.8936); Elk Creek (43.1312, −123.9621); Hantz Creek (43.1832, −123.9713); South Fork Elk Creek (43.1212, −123.9200); Steel Creek (43.1810, −123.9354); Unnamed (43.0908, −124.0361); Unnamed (43.0925, −124.0495); Unnamed (43.0976, −123.9705); Unnamed (43.1006, −124.0052); Unnamed (43.1071, −123.9163); Unnamed (43.1655, −123.9078); Unnamed (43.1725, −123.9881); Weekly Creek (43.0944, −124.0271); Yankee Run (43.1517, −124.0483); Yankee Run, Trib C (43.1626, −124.0162).

(iv) *North Fork Coquille Watershed 1710030505*. Outlet(s) = North Fork Coquille River (Lat 43.0805, Long −124.1405) upstream to endpoint(s) in: Alder Creek (43.2771, −123.9207); Blair Creek (43.1944, −124.1121); Cherry Creek, North Fork (43.2192, −123.9124); Cherry Creek, South Fork (43.2154, −123.9353); Coak Creek (43.2270, −124.0324); Coquille River, Little North Fork (43.2988, −123.9410); Coquille River, North Fork (43.2974, −123.8791); Coquille River, North Fork, Trib E (43.1881, −124.0764); Coquille River, North Fork, Trib I (43.2932, −123.8920); Coquille River, North Fork, Trib Y (43.3428, −123.9678); Evans Creek (43.2868, −124.0561); Fruin Creek (43.3016, −123.9198); Garage Creek (43.1508, −124.1020); Giles Creek (43.3129, −124.0337); Honcho Creek (43.2628, −123.8954); Hudson Creek (43.2755, −123.9604); Jerusalem Creek (43.1844, −124.0539); Johns Creek (43.0760, −124.0498); Little Cherry Creek (43.2007, −123.9594); Llewellyn Creek (43.1034,124.1063); Llewellyn Creek, Trib A (43.0969, −124.0995); Lost Creek (43.1768, −124.1047); Lost Creek (43.2451, −123.9745); Mast Creek (43.2264, −124.0207); Middle Creek (43.2332, −123.8726); Moon Creek (43.2902, −123.9493); Moon Creek, Trib A (43.2976, −123.9837); Moon Creek, Trib A–1 (43.2944, −123.9753); Neely Creek (43.2960, −124.0380); Park Creek (43.2508, −123.8661); Park Creek, Trib B (43.2702, −123.8782); Schoolhouse Creek (43.1637, −124.0949); Steele Creek (43.2203, −124.1018); Steinnon Creek (43.2534, −124.1076); Unnamed (43.1305, −124.0759); Unnamed (43.2047, −124.0314); Unnamed (43.2127, −124.1101); Unnamed (43.2165, −123.9144); Unnamed (43.2439, −123.9275); Unnamed (43.2444, −124.0868); Unnamed (43.2530, −124.0848); Unnamed (43.2582, −124.0794); Unnamed (43.2584, −123.8846); Unnamed (43.2625, −124.0474); Unnamed (43.2655, −123.9269); Unnamed (43.2676, −124.0367); Vaughns Creek (43.2378, −123.9106); Whitley Creek (43.2899, −124.0115); Wimer Creek (43.1303, −124.0640); Wood Creek (43.1392, −124.1274); Wood Creek, North Fork (43.1454, −124.1211).

(v) *Lower Coquille Watershed 1710030506*. Outlet(s) = Coquille River (Lat 43.1237, Long −124.4261) upstream to endpoint(s) in: Alder Creek (43.1385, −124.2697); Bear Creek (43.0411, −124.2893); Beaver Creek (43.2249, −124.1923); Beaver Creek (43.2525, −124.2456); Beaver Slough, Trib A (43.2154, −124.2731); Bill Creek (43.0256, −124.3126); Budd Creek (43.2011, −124.1921); Calloway Creek (43.2060, −124.1684); Cawfield Creek (43.1839, −124.1372); China Creek (43.2170, −124.2076); Cold Creek (43.2038, −124.1419); Coquille River (43.0805, −124.1405); Coquille River, Trib A (43.2032, −124.2930); Cunningham Creek (43.2349, −124.1378); Dutch John Ravine (43.1744, −124.1781); Dye Creek (43.2274, −124.1569); Fahys Creek (43.1676, −124.3861); Fat Elk Creek (43.1373, −124.2560); Ferry Creek (43.1150, −124.3831); Fishtrap Creek (43.0841, −124.2544); Glen Aiken Creek (43.1482, −124.1497); Grady Creek (43.1032, −124.1381); Gray Creek (43.1222, −124.1286); Hall Creek (43.0583, −124.2516); Hall Creek, Trib A (43.0842, −124.1745); Harlin Creek (43.1326, −124.1633); Hatchet Slough, Trib A (43.1638, −124.3065); Hatchet Slough (43.1879, −124.3003); Lampa Creek (43.0531, −124.2665); Little Bear Creek (43.0407, −124.2783); Little Fishtrap Creek (43.1201, −124.2290); Lowe Creek (43.1401, −124.3232); Mack Creek (43.0604, −124.3306); Monroe Creek (43.0705, −124.2905); Offield Creek (43.1587, −124.3273); Pulaski Creek (43.1398, −124.2184); Randleman Creek (43.0818, −124.3039); Rich Creek (43.0576, −124.2067); Rink Creek (43.1764, −124.1369); Rock Robinson Creek (43.0860, −124.2306); Rollan Creek (43.1266, −124.2563); Sevenmile Creek (43.2157, −124.3350); Sevenmile Creek, Trib A (43.1853, −124.3187); Sevenmile Creek, Trib C (43.2081, −124.3340); Unnamed (43.1084, −124.2727); Unnamed 43.1731, −124.1852); Unnamed (43.1924, −124.1378); Unnamed (43.1997, −124.3346); Unnamed (43.2281, −124.2190); Unnamed

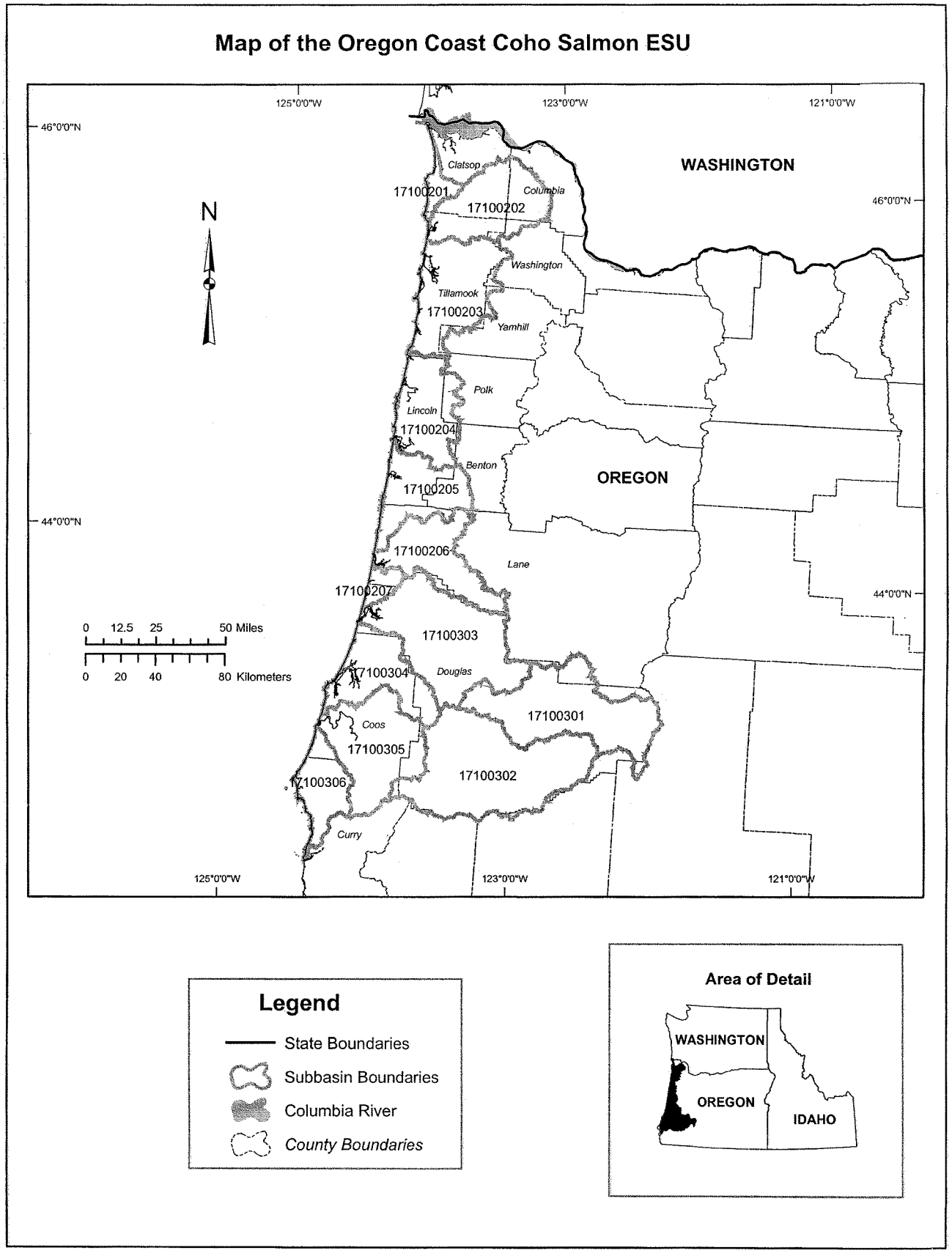
(43.2424, − 124.2737); Waddington Creek (43.1105, − 124.2915).

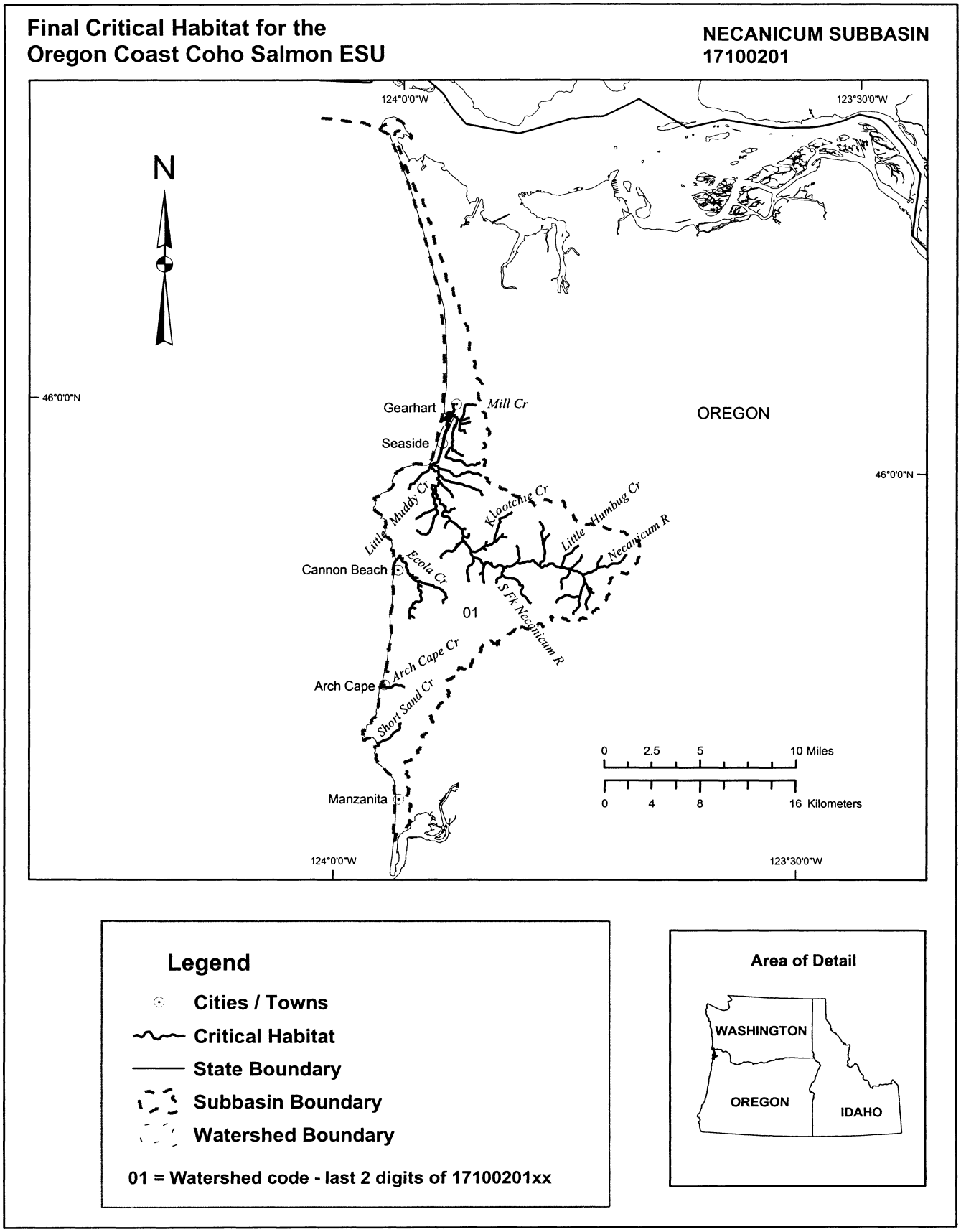
(13) Sixes Subbasin 17100306'(i) *Sixes River Watershed 1710030603*. Outlet(s) = Sixes River (Lat 42.8543, Long − 124.5427) upstream to endpoint(s) in: Beaver Creek (42.7867, − 124.4373); Carlton Creek (42.8594, − 124.2382); Cold Creek (42.7824, − 124.2070); Crystal Creek (42.8404, − 124.4501); Dry Creek (42.7673, − 124.3726); Edson Creek (42.8253, − 124.3782); Hays Creek (42.8455, − 124.1796); Little Dry Creek (42.8002, − 124.3838); Murphy Canyon (42.8516, − 124.1541); Sixes River (42.8232, − 124.1704); Sixes River, Middle Fork (42.7651, − 124.1782); Sixes River, North Fork (42.8878, − 124.2320); South Fork Sixes River (42.8028, − 124.3022); Sugar Creek (42.8217, − 124.2035); Unnamed (42.8189, − 124.3567); Unnamed (42.7952, − 124.3918); Unnamed (42.8276, − 124.4629).

(ii) *New River Frontal Watershed 1710030604*. Outlet(s) = New River (Lat 43.0007, Long − 124.4557); Twomile Creek (43.0440, − 124.4415) upstream to endpoint(s) in: Bethel Creek (42.9519, − 124.3954); Boulder Creek (42.8574, − 124.5050); Butte Creek (42.9458, − 124.4096); Conner Creek (42.9814, − 124.4215); Davis Creek (42.9657, − 124.3968); Floras Creek (42.9127, − 124.3963); Fourmile Creek (42.9887, − 124.3077); Fourmile Creek, South Fork (42.9642, − 124.3734); Langlois Creek (42.9238, − 124.4570); Little Creek (43.0030, − 124.3562); Long Creek (42.9828, − 124.3770); Lower Twomile Creek (43.0223, − 124.4080); Morton Creek (42.9437, − 124.4234); New River (42.8563, − 124.4602); North Fourmile Creek (42.9900, − 124.3176); Redibough Creek (43.0251, − 124.3659); South Twomile Creek (43.0047, − 124.3672); Spring Creek (43.0183, − 124.4299); Twomile Creek (43.0100, − 124.3291); Unnamed (43.0209, − 124.3386); Unnamed (43.0350, − 124.3506); Unnamed (43.0378, − 124.3481); Unnamed (43.0409, − 124.3544); Unnamed (42.8714, − 124.4586); Unnamed (42.9029, − 124.4222); Unnamed (42.9031, − 124.4581); Unnamed (42.9294, − 124.4421); Unnamed (42.9347, − 124.4559); Unnamed (42.9737, − 124.3363); Unnamed (42.9800, − 124.3432); Unnamed (43.0058, − 124.4066); Willow Creek (42.8880, − 124.4505).

(14) Maps of critical habitat for the Oregon Coast coho salmon ESU follow:

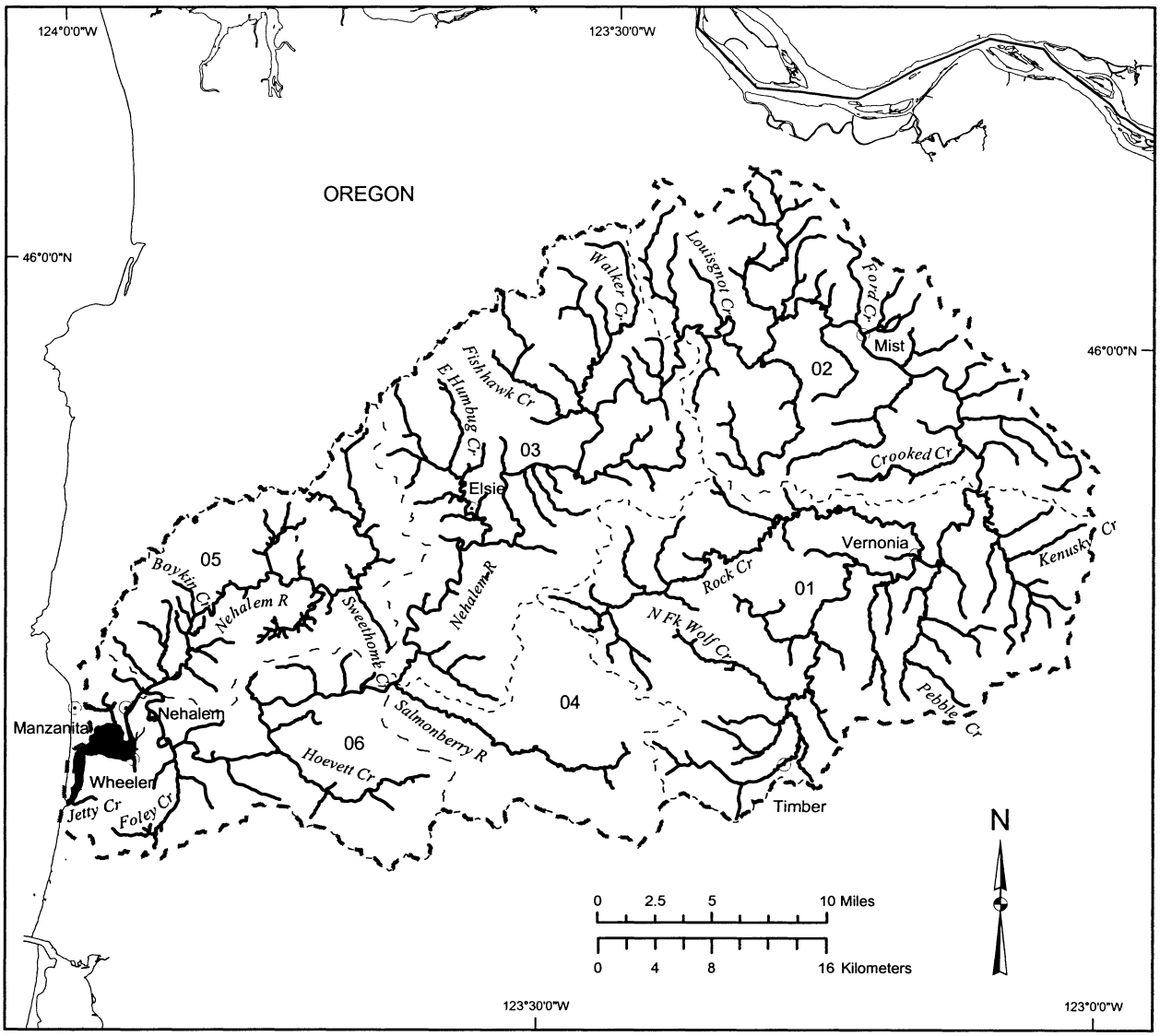
BILLING CODE 3510–22–P


Map of the Oregon Coast Coho Salmon ESU
125°0'0"W
123°0'0"W
121°0'0"W
46°0'0"N
44°0'0"N
N
WASHINGTON
OREGON
Clatsop
Columbia
Washington
Tillamook
Yamhill
Polk
Lincoln
Benton
Lane
Douglas
Coos
Curry
17100201
17100202
17100203
17100204
17100205
17100206
17100207
17100303
17100304
17100301
17100305
17100302
17100306
0 12.5 25 50 Miles
0 20 40 80 Kilometers
Legend
State Boundaries
Subbasin Boundaries
Columbia River
County Boundaries
Area of Detail
WASHINGTON
OREGON
IDAHO


Final Critical Habitat for the
Oregon Coast Coho Salmon ESU
NECANICUM SUBBASIN
17100201
124°0'0"W
123°30'0"W
N
46°0'0"N
Gearhart
Mill Cr
Seaside
OREGON
Little Muddy Cr
Klootchie Cr
Little Humbug Cr
Necanicum R
Cannon Beach
Ecola Cr
S Fk Necanicum R
01
Arch Cape Cr
Arch Cape
Short Sand Cr
Manzanita
0 2.5 5 10 Miles
0 4 8 16 Kilometers
Legend
Cities / Towns
Critical Habitat
State Boundary
Subbasin Boundary
Watershed Boundary
01 = Watershed code - last 2 digits of 17100201xx
Area of Detail
WASHINGTON
OREGON
IDAHO

Final Critical Habitat for the Oregon Coast Coho Salmon ESU

NEHALEM SUBBASIN 17100202

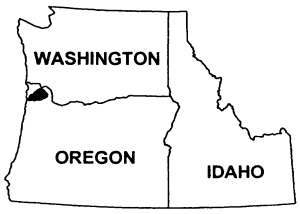


Legend

- Cities / Towns
- Critical Habitat
- State Boundary
- Subbasin Boundary
- Watershed Boundaries

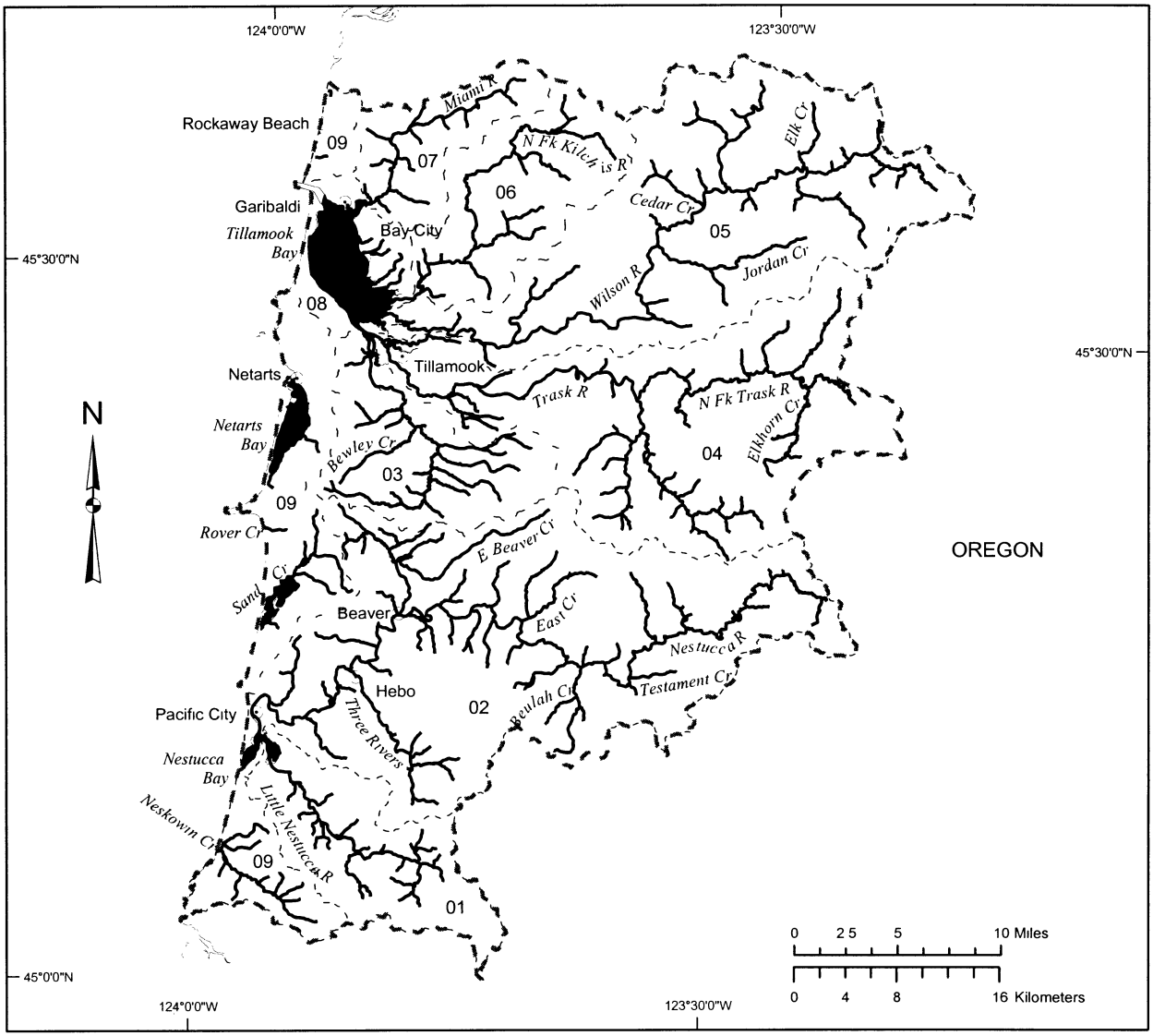
01 - 06 = Watershed code - last 2 digits of 17100202xx

Area of Detail



Final Critical Habitat for the Oregon Coast Coho Salmon ESU

WILSON - TRASK - NESTUCCA SUBBASIN 17100203

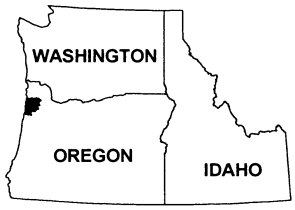


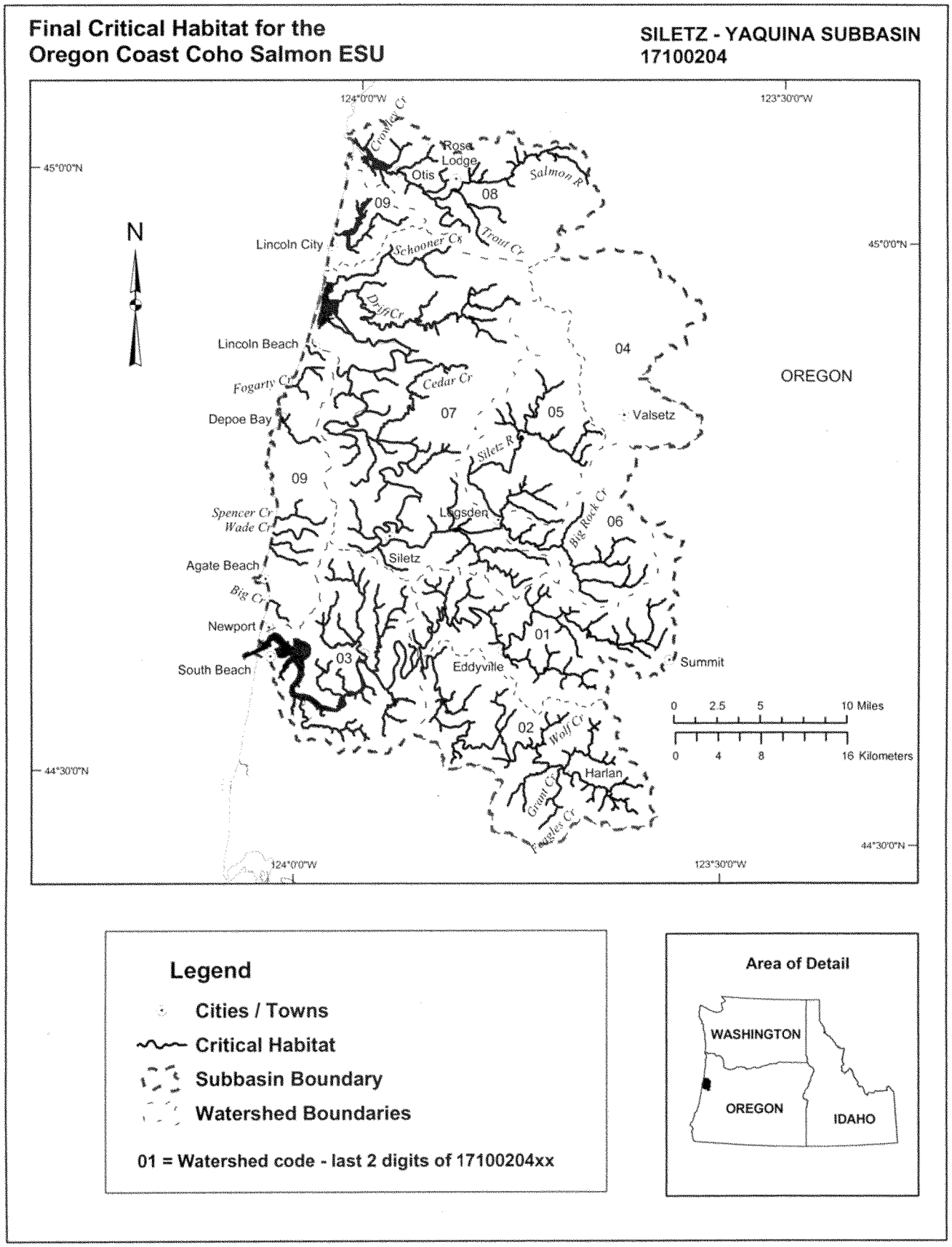
Legend

- Cities / Towns
- Critical Habitat
- Subbasin Boundary
- Watershed Boundaries

01 - 09 = Watershed code - last 2 digits of 17100203xx

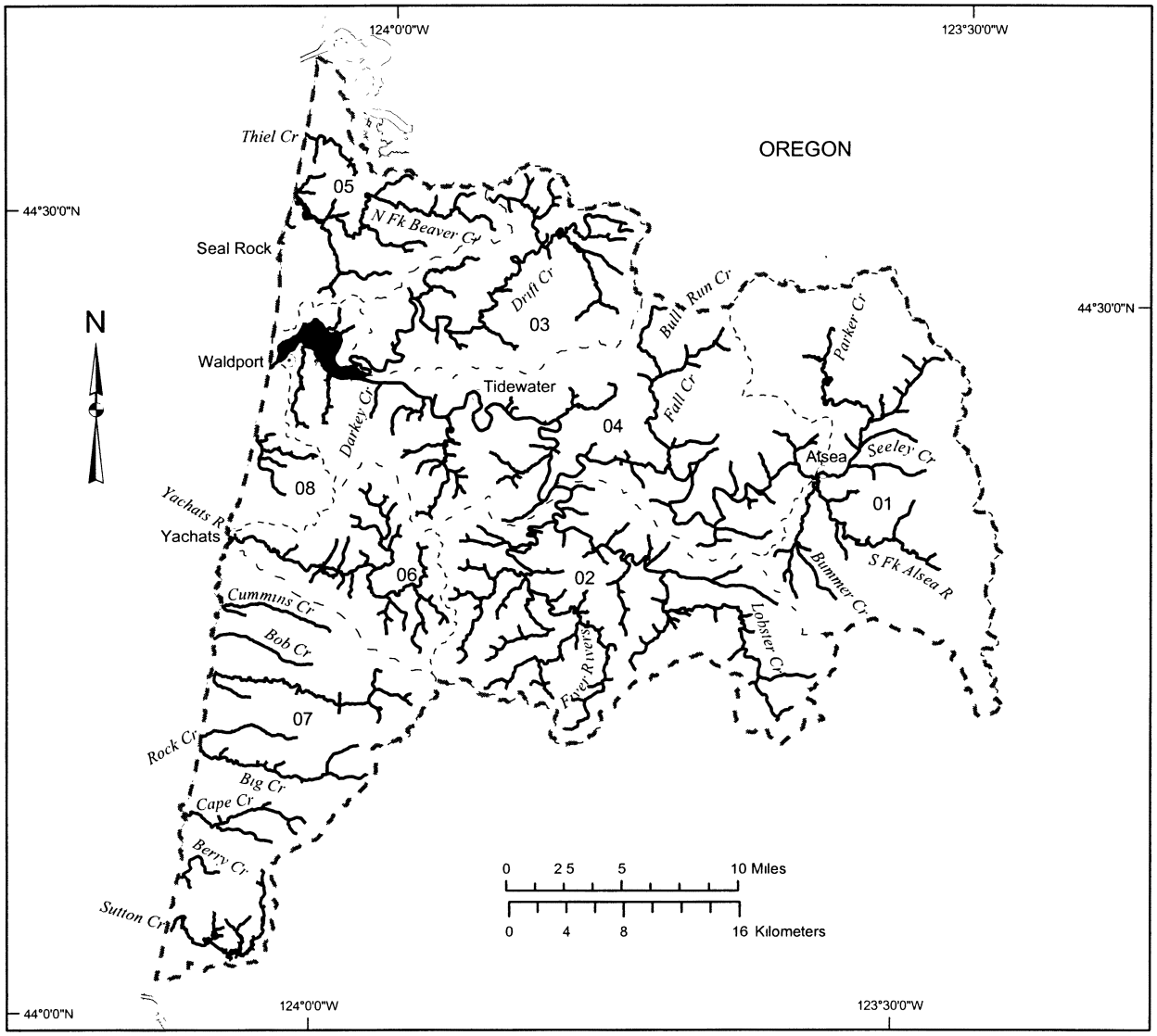
Area of Detail




Final Critical Habitat for the
Oregon Coast Coho Salmon ESU
SILETZ - YAQUINA SUBBASIN
17100204
124°0'0"W
123°30'0"W
45°0'0"N
44°30'0"N
N
Crowley Cr
Rose Lodge
Otis
Salmon R
09
08
Lincoln City
Schooner Cr
Trout Cr
Drift Cr
Lincoln Beach
04
OREGON
Fogarty Cr
Cedar Cr
Depoe Bay
07
05
Valsetz
Siletz R
09
Spencer Cr
Wade Cr
Logsden
Big Rock Cr
06
Agate Beach
Siletz
Big Cr
Newport
01
South Beach
03
Eddyville
Summit
0 2.5 5 10 Miles
0 4 8 16 Kilometers
02
Wolf Cr
Harlan
Grant Cr
Eagles Cr
Legend
Cities / Towns
Critical Habitat
Subbasin Boundary
Watershed Boundaries
01 = Watershed code - last 2 digits of 17100204xx
Area of Detail
WASHINGTON
OREGON
IDAHO

Final Critical Habitat for the Oregon Coast Coho Salmon ESU

ALSEA SUBBASIN 17100205

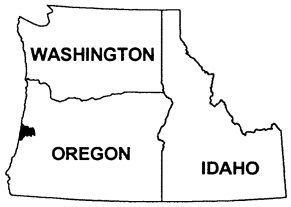


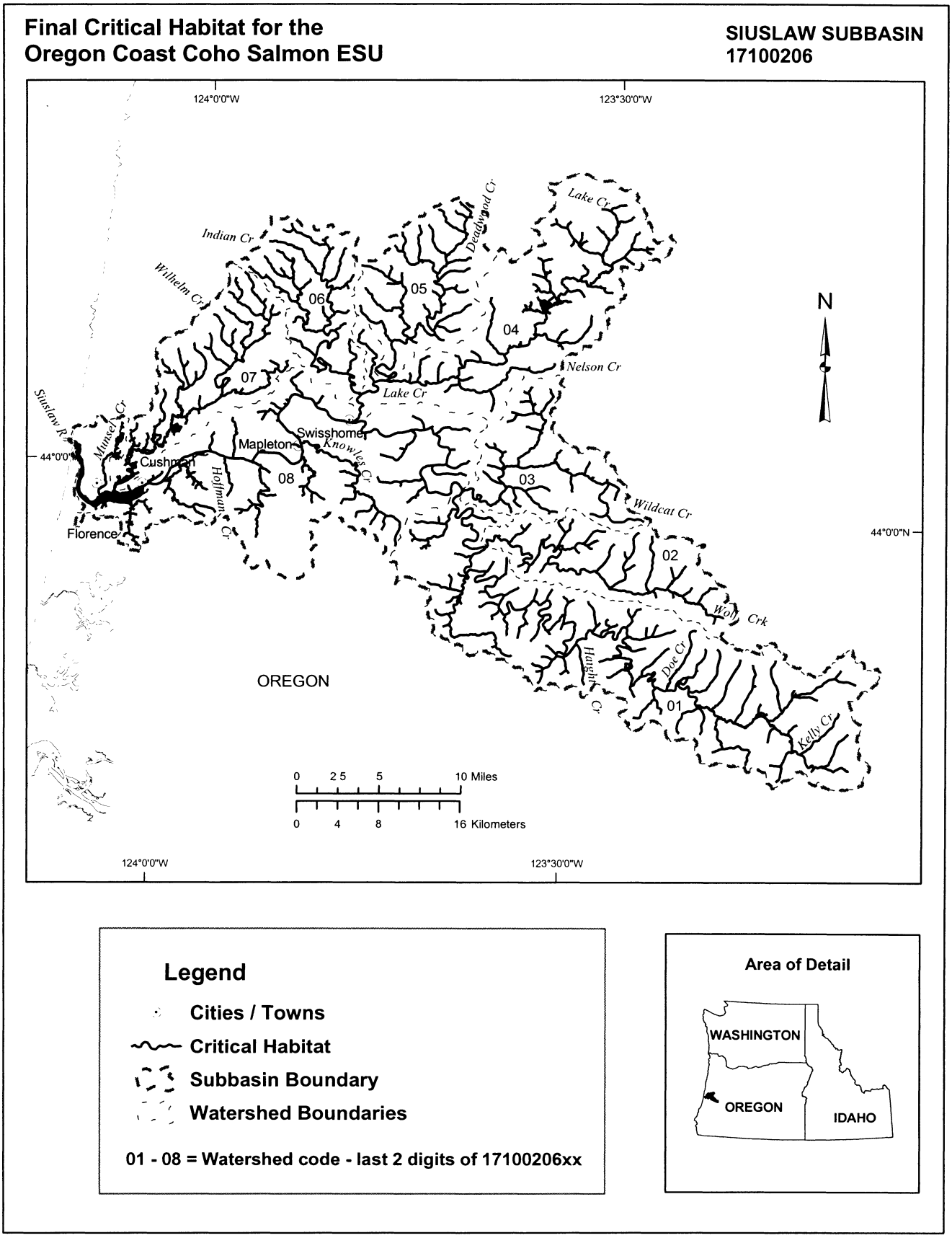
Legend

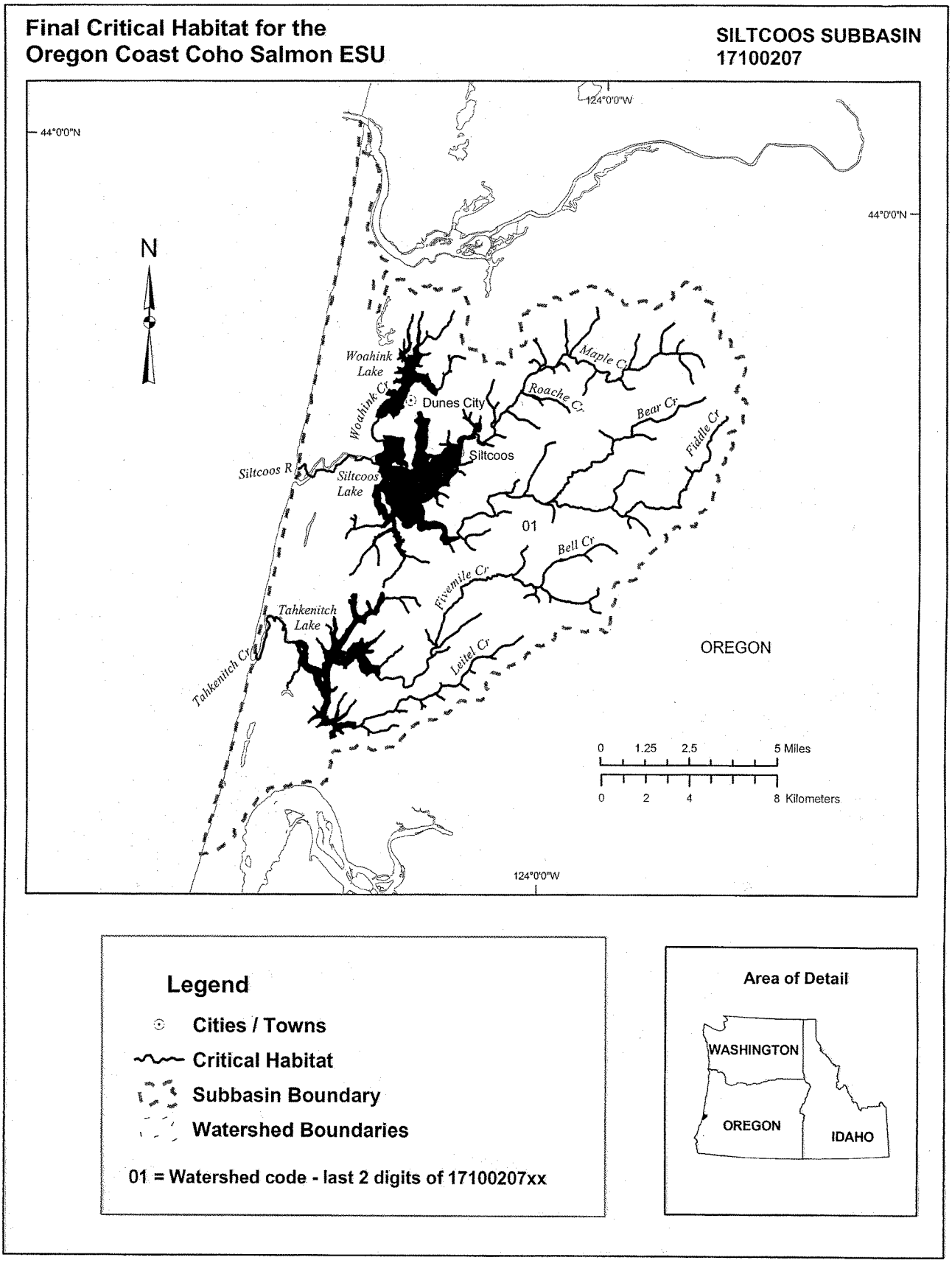
- Cities / Towns
- Critical Habitat
- Subbasin Boundary
- Watershed Boundaries

01 - 08 = Watershed code - last 2 digits of 17100205xx

Area of Detail

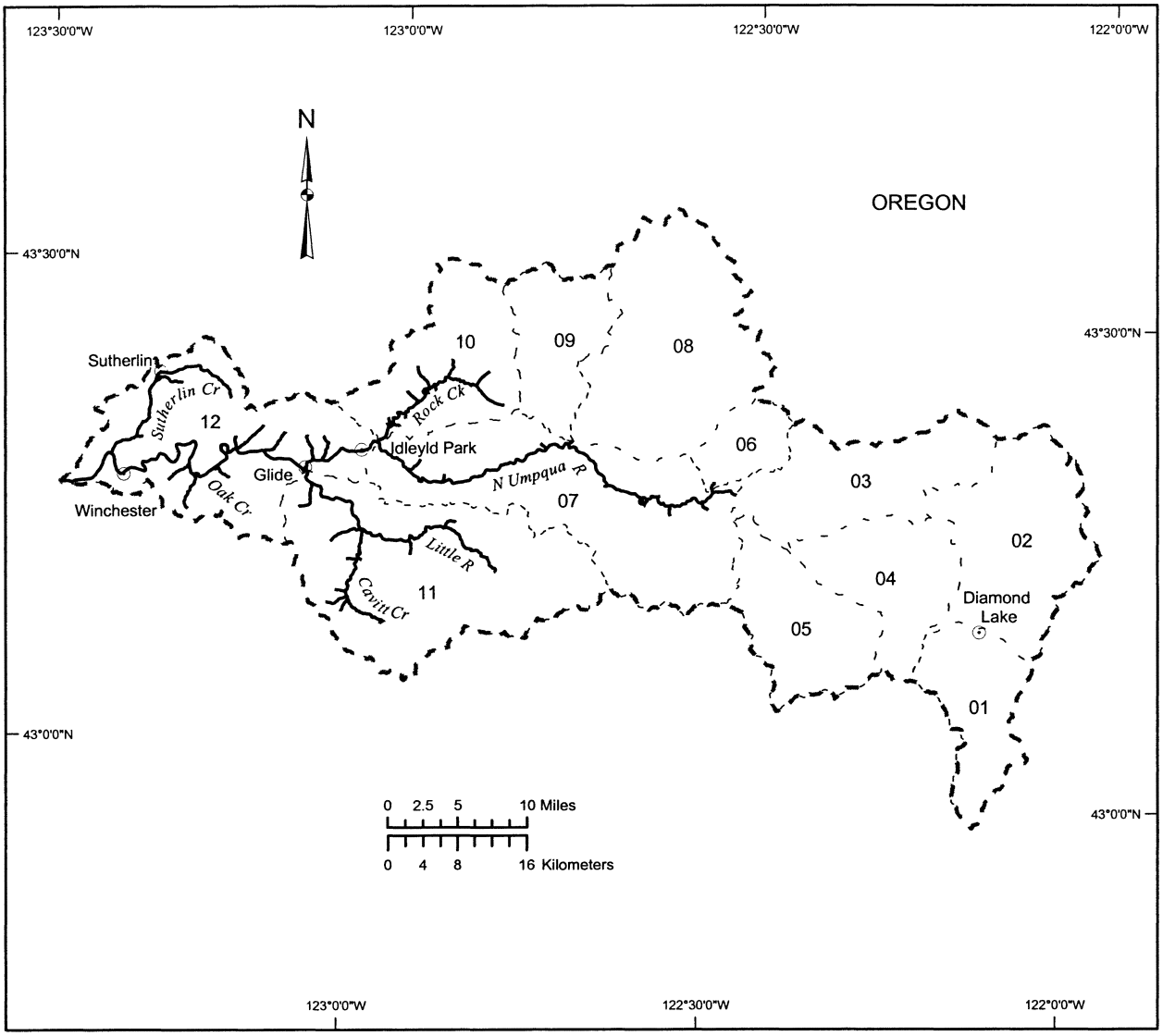



Final Critical Habitat for the
Oregon Coast Coho Salmon ESU
SIUSLAW SUBBASIN
17100206
124°0'0"W
123°30'0"W
44°0'0"N
Indian Cr
Wilhelm Cr
Deadwood Cr
Lake Cr
Nelson Cr
Lake Cr
Siuslaw R
Munsel Cr
Cushman
Mapleton
Swisshome
Knowles Cr
Hoffman Cr
Florence
Wildcat Cr
Wolf Crk
Doe Cr
Haight Cr
Kelly Cr
01
02
03
04
05
06
07
08
OREGON
N
0 2.5 5 10 Miles
0 4 8 16 Kilometers
Legend
Cities / Towns
Critical Habitat
Subbasin Boundary
Watershed Boundaries
01 - 08 = Watershed code - last 2 digits of 17100206xx
Area of Detail
WASHINGTON
OREGON
IDAHO


Final Critical Habitat for the
Oregon Coast Coho Salmon ESU
SILTCOOS SUBBASIN
17100207
124°0'0"W
44°0'0"N
44°0'0"N
N
Woahink Lake
Woahink Cr
Dunes City
Maple Cr
Roache Cr
Bear Cr
Fiddle Cr
Siltcoos R
Siltcoos Lake
Siltcoos
01
Bell Cr
Fivemile Cr
Tahkenitch Lake
Tahkenitch Cr
Leitel Cr
OREGON
0 1.25 2.5 5 Miles
0 2 4 8 Kilometers
124°0'0"W
Legend
Cities / Towns
Critical Habitat
Subbasin Boundary
Watershed Boundaries
01 = Watershed code - last 2 digits of 17100207xx
Area of Detail
WASHINGTON
OREGON
IDAHO

Final Critical Habitat for the Oregon Coast Coho Salmon ESU

NORTH UMPQUA SUBBASIN 17100301



Legend

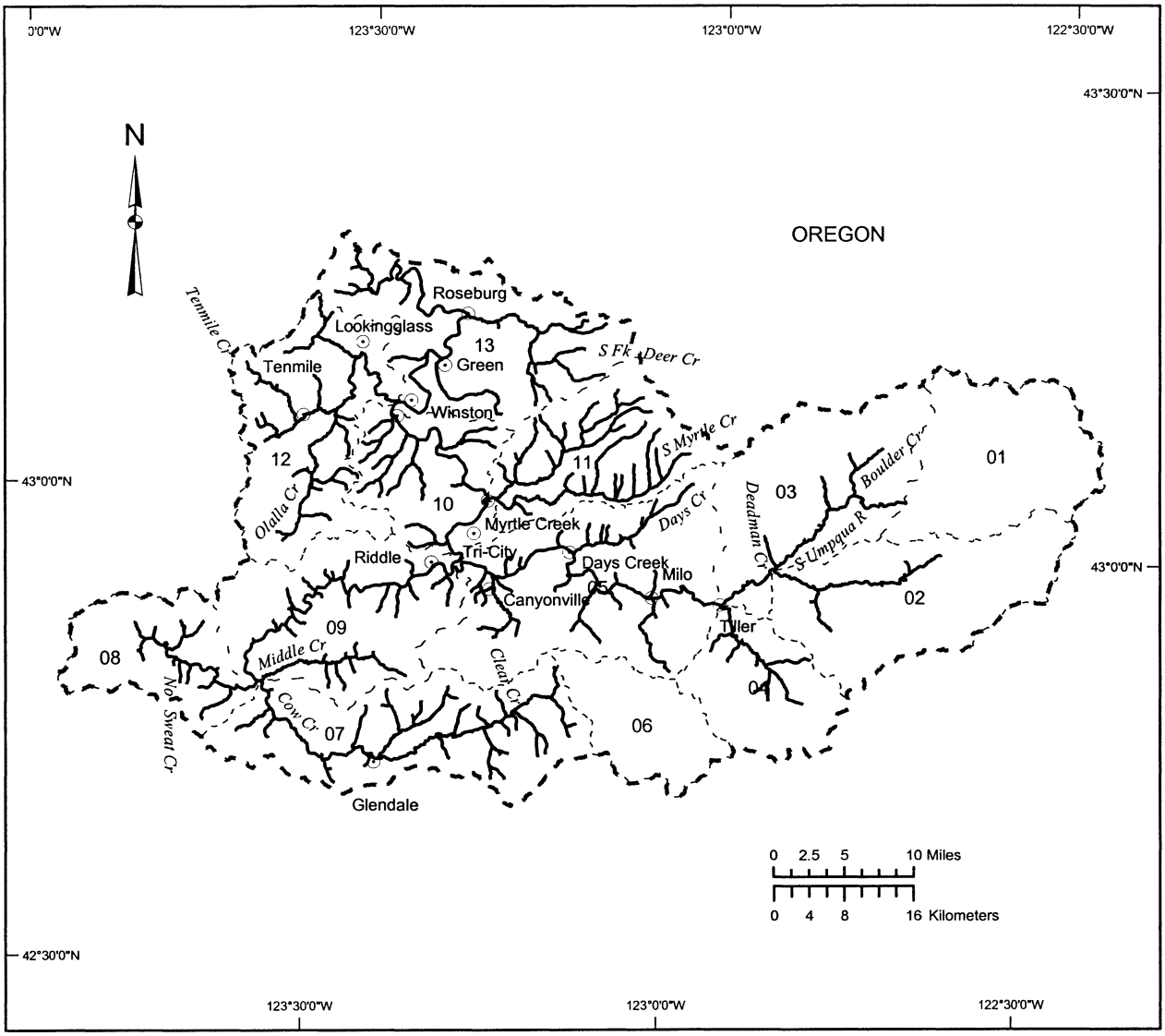
- Cities / Towns
- Critical Habitat
- Subbasin Boundary
- Watershed Boundaries

01 - 12 = Watershed code - last 2 digits of 17100301xx

Area of Detail

Final Critical Habitat for the Oregon Coast Coho Salmon ESU

SOUTH UMPQUA SUBBASIN 17100302

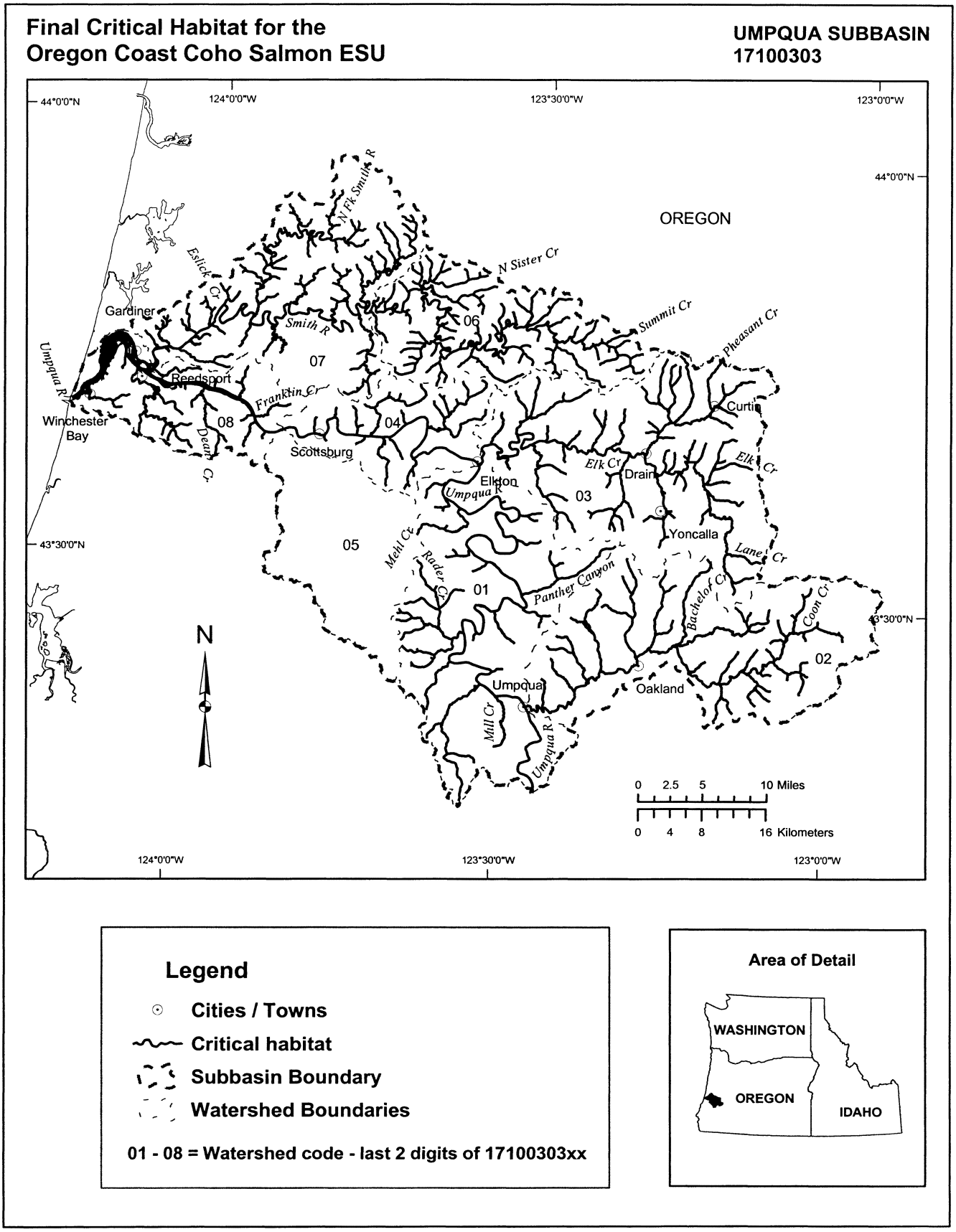


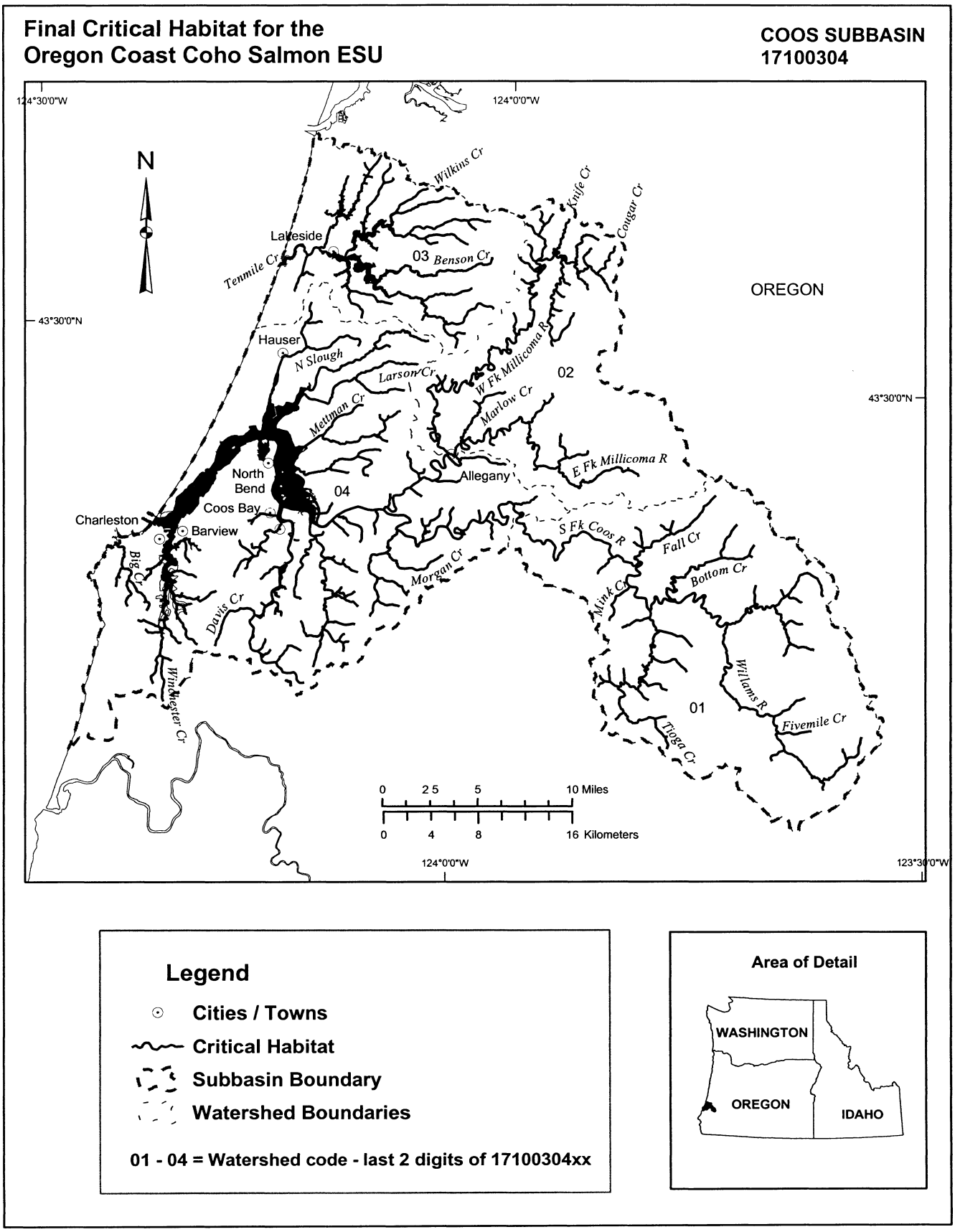
Legend

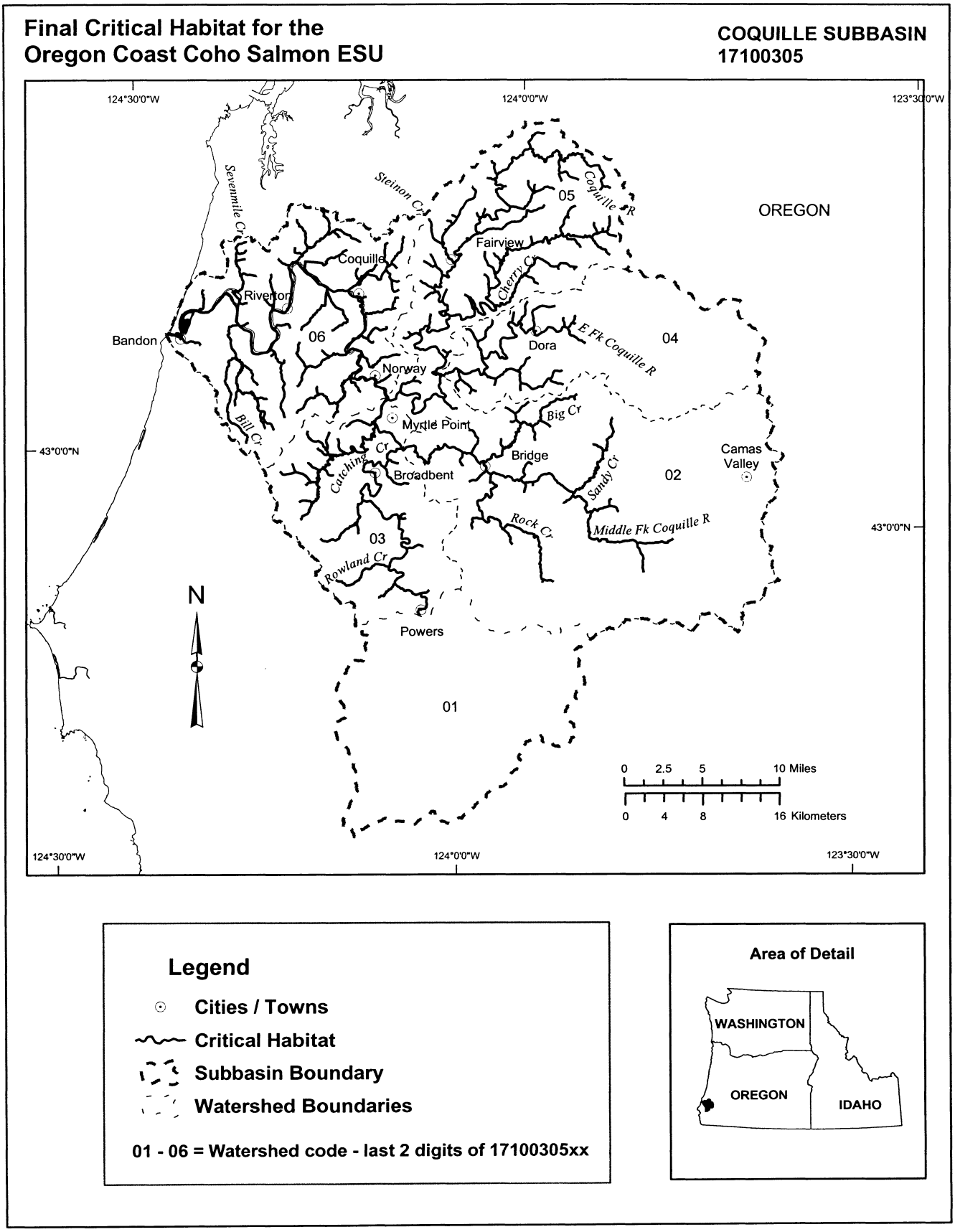
- Cities / Towns
- Critical Habitat
- Subbasin Boundary
- Watershed Boundaries

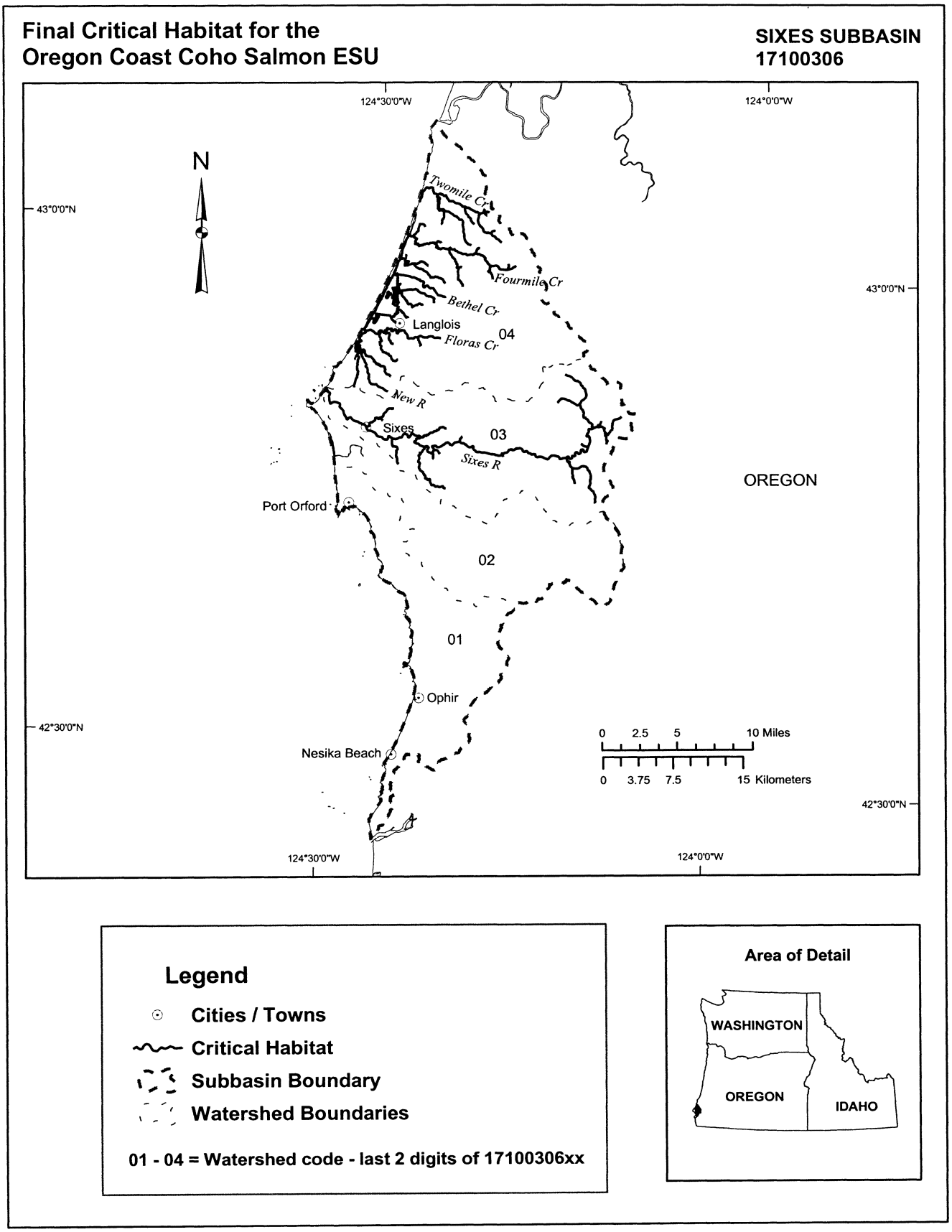
01 - 13 = Watershed code - last 2 digits of 17100302xx

Area of Detail


Final Critical Habitat for the
Oregon Coast Coho Salmon ESU
UMPQUA SUBBASIN
17100303
44°0'0"N
124°0'0"W
123°30'0"W
123°0'0"W
43°30'0"N
OREGON
N Fk Smith R
Eslick Cr
N Sister Cr
Summit Cr
Pheasant Cr
Gardiner
Smith R
06
07
Umpqua R
Reedsport
Franklin Cr
Winchester Bay
08
04
Dean Cr
Scottsburg
Elk Cr
Drain
Elkton
Umpqua R
03
Yoncalla
05
Mehl Cr
Rader Cr
01
Panther Canyon
Lane Cr
Bachelor Cr
Coon Cr
02
N
Umpqua
Oakland
Mill Cr
Umpqua R
0 2.5 5 10 Miles
0 4 8 16 Kilometers
Legend
Cities / Towns
Critical habitat
Subbasin Boundary
Watershed Boundaries
01 - 08 = Watershed code - last 2 digits of 17100303xx
Area of Detail
WASHINGTON
OREGON
IDAHO


Final Critical Habitat for the
Oregon Coast Coho Salmon ESU
COOS SUBBASIN
17100304
124°30'0"W
124°0'0"W
N
Wilkins Cr
Knife Cr
Cougar Cr
Lakeside
Tenmile Cr
03
Benson Cr
OREGON
43°30'0"N
Hauser
N Slough
Larson Cr
W Fk Millicoma R
02
Marlow Cr
Mettman Cr
E Fk Millicoma R
North
Bend
Allegany
04
Coos Bay
Charleston
Barview
S Fk Coos R
Fall Cr
Big Cr
Morgan Cr
Bottom Cr
Mink Cr
Davis Cr
Winchester Cr
Williams R
01
Fivemile Cr
Tioga Cr
0 2.5 5 10 Miles
0 4 8 16 Kilometers
124°0'0"W
123°30'0"W
Legend
Cities / Towns
Critical Habitat
Subbasin Boundary
Watershed Boundaries
01 - 04 = Watershed code - last 2 digits of 17100304xx
Area of Detail
WASHINGTON
OREGON
IDAHO


Final Critical Habitat for the
Oregon Coast Coho Salmon ESU
COQUILLE SUBBASIN
17100305
124°30'0"W
124°0'0"W
123°30'0"W
43°0'0"N
OREGON
Sevenmile Cr
Steinon Cr
Coquille R
05
Fairview
Coquille
Cherry Cr
Riverton
Bandon
06
Dora
E Fk Coquille R
04
Norway
Big Cr
Bill Cr
Myrtle Point
Catching Cr
Bridge
Camas Valley
Broadbent
Sandy Cr
02
Rock Cr
Middle Fk Coquille R
03
Rowland Cr
N
Powers
01
0 2.5 5 10 Miles
0 4 8 16 Kilometers
Legend
Cities / Towns
Critical Habitat
Subbasin Boundary
Watershed Boundaries
01 - 06 = Watershed code - last 2 digits of 17100305xx
Area of Detail
WASHINGTON
OREGON
IDAHO



[FR Doc. 08–552 Filed 2–4–08; 3:24 pm]

BILLING CODE 3510–22–C

Federal Register

Monday,
February 11, 2008

Part IV

Department of Labor

Employment Standards Adminstration
Wage and Hour Division

29 CFR Part 825
The Family and Medical Leave Act of 1993; Proposed Rule

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

29 CFR Part 825

RIN 1215–AB35

The Family and Medical Leave Act of 1993

AGENCY: Employment Standards Administration, Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Labor's Employment Standards Administration/Wage and Hour Division proposes to revise certain regulations implementing the Family and Medical Leave Act of 1993 (''FMLA''), the law that provides eligible workers with important rights to job protection for absences due to the birth or adoption of a child or for a serious health condition of the worker or a qualifying family member. The proposed changes are based on the Department's experience of nearly fifteen years administering the law, two previous Department of Labor studies of the FMLA in 1996 and 2001, several U.S. Supreme Court and lower court rulings, and the public comments received in response to a Request for Information (''RFI'') published in the **Federal Register** in December 2006 requesting information about experiences with the FMLA and comments on the effectiveness of these regulations.

The Department is also seeking public comment on issues to be addressed in final regulations regarding military family leave. Section 585(a) of the National Defense Authorization Act for FY 2008 amends the FMLA to provide leave to eligible employees of covered employers to care for injured servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation (collectively referred to herein as military family leave). The provisions of this amendment providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when the law was enacted. The provisions of this amendment providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective until the Secretary of Labor issues regulations defining ''qualifying exigencies.'' Because of the need to issue regulations under the military family leave provisions of the amendment as soon as possible, the Department is including in this Notice a description of the relevant military family leave statutory provisions, a discussion of issues the Department has identified, and a series of questions seeking comment on subjects and issues that may be considered in the final regulations.

DATES: Comments must be received on or before April 11, 2008.

ADDRESSES: You may submit comments, identified by RIN 1215–AB35, by either one of the following methods:

- *Electronic comments, through the Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Address all written submissions to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, N.W., Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions must include the agency name and Regulatory Information Number (RIN) identified above for this rulemaking. Please be advised that comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* or to submit them by mail early. For additional information on submitting comments and the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0066 (this is not a toll free number). Copies of this proposed rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675. TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's current regulations may be directed to the nearest Wage and Hour Division District Office. Locate the nearest office by calling the Wage and Hour Division's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the Wage and Hour Division's Web site for a nationwide listing of Wage and Hour District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Electronic Access and Filing Comments

Public Participation: This notice of proposed rulemaking is available through the **Federal Register** and the *http://www.regulations.gov* Web site. You may also access this document via the Wage and Hour Division's home page at *http://www.wagehour.dol.gov.* To comment electronically on Federal rulemakings, go to the Federal eRulemaking Portal at *http://www.regulations.gov,* which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the **Federal Register**. Please identify all comments submitted in electronic form by the RIN docket number (1215–AB35). Because of delays in receiving mail in the Washington, DC area, commenters should transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov,* or submit them by mail early to ensure timely receipt prior to the close of the comment period. Submit one copy of your comments by only one method.

II. Background

A. What the Law Provides

The Family and Medical Leave Act of 1993, Public Law 103–3, 107 Stat. 6 (29 U.S.C. 2601 *et. seq.*) (''FMLA'' or ''Act'') was enacted on February 5, 1993, and became effective for most covered employers on August 5, 1993. The FMLA entitles eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve month period for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health

condition. *See* 29 U.S.C. 2612. The twelve weeks of leave may be taken in a block, or, under certain circumstances, intermittently or on a reduced leave schedule. *Id.*

Employers covered by the law must maintain for the employee any preexisting group health coverage during the leave period under the same conditions coverage would have been provided if the employee had not taken leave and, once the leave period has concluded, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. *See* 29 U.S.C. 2614.

If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor (''Department'' or ''DOL'') or file a private lawsuit in Federal or State court. If the employer has violated an employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. *See*, 29 U.S.C. 2617.

Title I of the FMLA applies to private sector employers of fifty or more employees, public agencies and certain Federal employers and entities, such as the U.S. Postal Service and Postal Rate Commission. Title II applies to civil service employees covered by the annual and sick leave system established under 5 U.S.C. Chapter 63, plus certain employees covered by other Federal leave systems. Title III established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. Title IV contains miscellaneous provisions, including rules governing the effect of the FMLA on more generous leave policies, other laws, and existing employment benefits. Title V originally extended leave provisions to certain employees of the U.S. Senate and House of Representatives, but such coverage was repealed and replaced by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

B. Who the Law Covers

The FMLA generally covers employers with 50 or more employees, and employees must have worked for the employer for 12 months and for 1,250 hours of service during the previous year to be eligible for FMLA leave. Based on 2005 data, the latest year for which data are available, the Department estimates that:

- There were an estimated 95.8 million workers in establishments covered by the FMLA regulations,
- There were approximately 77.1 million workers in covered establishments who met the FMLA's requirements for eligibility, and
- About 7.0 million covered and eligible workers took FMLA leave in 2005.
- About 1.7 million covered and eligible employees who took FMLA leave took at least some of it intermittently—and may have taken that intermittent leave multiple times over the course of the year.

C. Implementing Regulations

The FMLA required the Department to issue regulations to implement Title I and Title IV of the FMLA within 120 days of enactment, or by June 5, 1993, with an effective date of August 5, 1993. Given this short implementation period, the Department published a notice of proposed rulemaking in the **Federal Register** on March 10, 1993 (58 FR 13394), inviting comments until March 31, 1993, on a variety of questions and issues. The Department received a total of 393 comments at that time from a wide variety of stakeholders, including employers, trade and professional associations, advocacy organizations, labor unions, State and local governments, law firms, employee benefit firms, academic institutions, financial institutions, medical institutions, Members of Congress, and others.

After considering these comments, the Department issued an interim final rule on June 4, 1993 (58 FR 31794) that became effective on August 5, 1993. The Department also invited further public comment on the interim regulations through September 3, 1993, later extended to December 3, 1993 (58 FR 45433). During this comment period, the Department received more than 900 substantive and editorial comments on the interim regulations, from a wide variety of stakeholders.

Based on this second round of public comments, the Department published final regulations to implement the FMLA on January 6, 1995 (60 FR 2180). The regulations were amended on February 3, 1995 (60 FR 6658) and on March 30, 1995 (60 FR 16382) to make minor technical corrections. The final regulations went into effect on April 6, 1995.

D. Legal Challenges

The Ragsdale Decision

Since the enactment of the FMLA, hundreds of reported Federal cases have addressed the Act and/or implementing regulations. The most significant court decision on the validity of the regulations is that of the United States Supreme Court in *Ragsdale* v. *Wolverine World Wide, Inc.,* 535 U.S. 81 (2002). In its first case involving the FMLA, the Court ruled in March 2002 that the penalty provision in 29 CFR 825.700(a), which states ''[i]f an employee takes * * * leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement[,]'' was invalid because in some circumstances it required employers to provide leave to employees beyond the 12-week statutory entitlement. ''The FMLA guaranteed [Plaintiff] 12-not 42-weeks of leave[.]'' *Ragsdale,* 535 U.S. at 96. While the Supreme Court did not invalidate the notice and designation provisions in the regulations, it made clear that any categorical penalty for a violation of such requirements set forth in the regulations would exceed the Department's statutory authority. *Id.* at 91–96.

Other Challenges to ''Categorical Penalty'' Provisions

As the Department explained in its December 2006 RFI [1] and the subsequent 2007 Report on the RFI comments,[2] Ragsdale is not the only court decision addressing penalty provisions contained in the regulations. Another provision of the regulations, § 825.110(d), requires an employer to notify an employee prior to the employee commencing leave as to whether or not the employee is eligible for FMLA leave. If the employer fails to provide the employee with such information or the information is not accurate, the regulation bars the employer from challenging eligibility at a later date, even if the employee is not eligible for FMLA leave according to the statutory requirements. The majority of courts addressing this notice provision have found it to be invalid, even prior to the *Ragsdale* decision. *See, e.g., Woodford* v. *Cmty. Action of Greene County, Inc.,* 268 F.3d 51, 57 (2d Cir. 2001) (''The regulation exceeds agency rulemaking powers by making eligible under the FMLA employees who do not meet the statute's clear eligibility requirements.''); *Brungart* v. *BellSouth Telecomm., Inc.,* 231 F.3d 791, 796–97 (11th Cir. 2000) (''There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be

[1] *See* 71 FR 69504, 69505 (Dec. 1, 2006).

[2] *See* ''Family and Medical Leave Act Regulations: A Report on the Department of Labor's request for Information,'' 72 FR 35550, 35560 (June 28, 2007).

filled.''); *Dormeyer* v. *Comerica Bank-Illinois,* 223 F.3d 579, 582 (7th Cir. 2000) (the regulation tries ''to change the Act'' because it makes eligible employees who, under the language of the statute, are ineligible for family leave; ''The statutory test is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months'').

Legal Challenges to the Definition of Serious Health Condition

Other regulatory provisions have been challenged as well. In particular, challenges to the regulatory section defining the term ''serious health condition'' as a condition causing a period of incapacity of more than three consecutive calendar days and continuing treatment, 29 CFR 825.114(a)(2)(i), has received significant attention. *See, e.g., Miller* v. *AT&T Corp.,* 250 F.3d 820 (4th Cir. 2001); *Thorson* v. *Gemini, Inc.,* 205 F.3d 370 (8th Cir. 2000).

As the Department explained in its December 2006 RFI [3] and subsequent Report on the RFI,[4] the Department itself has struggled with this definition. After the Act's passage, the Department promulgated § 825.114(c), which states that ''[o]rdinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.,* are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.'' This regulatory language was intended to reflect the legislative history of the FMLA and expresses the Congressional intent that minor, short-term illnesses for which treatment and recovery are very brief would be covered by employers' sick leave programs and not by the FMLA. *See* H.R. Rep. No. 103–8, at 40 (1993); S. Rep. No. 103–3, at 28–29 (1993). Consequently, in an early response about the proper handling of an employee's request for leave due to the common cold, the Department responded by stating ''[t]he fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).'' Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995). More than a year and a half later, however, the Department reversed its interpretation, stating that Wage and Hour Opinion Letter FMLA–57 ''expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying 'serious health conditions' under the FMLA regulations.'' Wage and Hour Opinion Letter FMLA–86 (Dec. 12, 1996). The Department further stated that such minor illnesses ordinarily would not be expected to last more than three days, but if they do meet the regulatory criteria for a serious health condition under § 825.114(a), they qualify for FMLA leave. The Department received significant commentary about its changing interpretations of the definition of serious health condition in response to its RFI. *See* Chapter III of the Department's 2007 Report on the RFI comments (72 FR at 35563).

Other Legal Challenges

Many other legal issues have arisen over the nearly thirteen years the final regulations have been in effect. For example, litigation has ensued under §§ 825.302–.303 as to what constitutes sufficient employee notice to trigger an employer's obligations under the FMLA. *See, e.g., Sarnowski* v. *Air Brook Limousine, Inc.,*—F.3d ,—2007 WL 4323259 (3rd Cir. 2007) (employee with chronic heart problems who informed employer of need for continuing medical monitoring and possible surgery provided sufficient notice); *Spangler* v. *Fed. Home Loan Bank of Des Moines,* 278 F.3d 847 (8th Cir. 2002) (employee who had made employer aware that she had problems with depression gave sufficient notice when she called in and indicated she was out because of ''depression again'').

Among other cases, the Tenth Circuit Court of Appeals considered the definition of ''worksite'' for determining whether an employee seeking FMLA leave was employed at a worksite where 50 or more employees were employed by the employer within 75 miles. Section 825.111(a)(3) states that when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee has been assigned or to which the employee reports. In *Harbert* v. *Healthcare Services Group, Inc.,* 391 F.3d 1140 (10th Cir. 2004), the Court of Appeals invalidated § 825.111(a)(3), insofar as it is applied to the situation of an employee with a long-term fixed worksite at a facility of the secondary employer. The First Circuit Court of Appeals looked at a different eligibility criterion, the requirement that the employee has been employed by the employer for at least 12 months, and addressed whether an employee who had a break in service may count previous periods of employment with the same employer toward satisfying the 12-month employment requirement (29 U.S.C. 2611(2)(A)(i); 29 CFR 825.110(a)(1) and (b)). *See Rucker* v. *Lee Holding Co.,* 471 F.3d 6 (1st Cir. 2006) (a complete break in service of a period of five years does not prevent the employee from counting previous employment to meet the 12-month employment requirement). Another regulation that has been the subject of litigation is § 825.220(d), which in part discusses the impact of a light duty work assignment on an employee's FMLA rights. Further, most recently, the Fourth Circuit Court of Appeals ruled in *Taylor* v. *Progress Energy,* 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed,* 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07–539), that other language in § 825.220(d) prevents an employee and employer from independently settling past claims for FMLA violations without the approval of the Department or a court.

E. Prior Studies and Reports

Title III of the FMLA established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. The Commission surveyed workers and employers in 1995 and issued a report published by the Department in 1996, ''A Workable Balance: Report to Congress on Family and Medical Leave Policies.'' [5] In 1999, the Department contracted with Westat, Inc.,[6] to update the employee and establishment surveys conducted in 1995. The Department published that report, ''Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update'' in January 2001.[7]

F. Request for Information

On December 1, 2006, the Department published a Request for Information (RFI) in the **Federal Register** (71 FR 69504).

The RFI asked the public to comment on its experiences with, and

[3] *See* 71 FR at 69506.

[4] *See* 72 FR at 35563.

[5] *See http://www.dol.gov/esa/whd/fmla/fmla/1995Report/Family.htm.*

[6] Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and State and local governments.

[7] *See http://www.dol.gov/esa/whd/fmla/fmla/toc.htm.*

observations of, the Department's administration of the law and the effectiveness of the FMLA regulations. The RFI's questions and subject areas were derived from a series of stakeholder meetings the Department conducted in 2002–2003, a number of rulings of the U.S. Supreme Court and other Federal courts as discussed above, the Department's own experience administering the law, information from Congressional hearings, and public comments filed with the Office of Management and Budget (OMB) as described by OMB in three annual reports to Congress on the FMLA's costs and benefits.[8] More than 15,000 comments were received from workers, family members, employers, academics, and other interested parties.[9] This input ranged from personal accounts, legal reviews, industry and academic studies, and surveys to recommendations for regulatory and statutory changes to address particular areas of concern. The Department published its Report on the comments received in response to the Department's RFI in June 2007 (*see* 72 FR 35550 (June 28, 2007)).

G. Stakeholder Meeting

The Department also conducted a stakeholder meeting regarding the medical certification process on September 6, 2007. This meeting included representatives from employee organizations, employer organizations, and the health care provider community.

H. Other Statutory and Regulatory Developments

As discussed in the RFI and the Report on the RFI, in addition to developments in the courts, several important legislative and regulatory developments have occurred that either directly or indirectly impact the FMLA regulations. In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104–191, which addresses in part the privacy of individually identifiable health information. On December 28, 2000, and as amended on August 14, 2002, the Department of Health and Human Services issued regulations that provide standards for the privacy of individually identifiable health information, codified at 45 CFR Parts 160 and 164 (''HIPAA Privacy Rule''). These standards apply to ''covered entities,'' defined as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction as defined in the privacy regulations.[10]

The HIPAA Privacy Rule has had an impact on the FMLA's medical certification process in a number of ways. For example, the FMLA provides employers with the right to obtain medical information to determine that a requested leave qualifies as FMLA leave, and the employee is required to assure that this information, if requested, is provided to the employer to be entitled to FMLA leave for a serious health condition. If an employee does not do this, the absence does not qualify for FMLA leave.[11] While these rules are fairly straightforward, recent enforcement experience reveals that there is confusion with regard to the interaction of the HIPAA Privacy Rule and FMLA. For example, some employees incorrectly believe that the HIPAA Privacy Rule prevents employers from requiring FMLA certification. *See* discussion of §§ 825.306–.308 for further discussion of the impact of the HIPAA Privacy Rule on the medical certification process.

Similarly, since the final FMLA regulations were implemented in 1995, the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing the Americans with Disabilities Act (ADA), has issued guidance with regard to the privacy of employee medical information. *See, e.g., Enforcement Guidance:* Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (EEOC 2000). The FMLA looks to the ADA for guidance on privacy of employee medical information.[12]

III. Proposed Changes to the FMLA Regulations

The following is a section-by-section discussion of the proposed revisions. Where a change is proposed to a regulatory section, that section is discussed below. *However, even if a section is not discussed, there may be minor editorial changes or corrections that did not warrant discussion.* The titles to each section of the existing regulations are in the form of a question. The proposal would reword each question into the more common format of a descriptive title and the Department invites comments on whether this change is helpful. In addition, several sections have been restructured and reorganized to improve the accessibility of the information (*e.g.*, guidance on leave for pregnancy and birth of a child is addressed in one consolidated section; an employer's notice obligations are combined in one section).

Section 825.102 (Effective date of the Act)

The proposal deletes this section, which discussed when the Act became effective, because it is no longer needed. The section number itself is reserved to avoid extensive renumbering of other sections in the regulations.

Section 825.103 (How the Act affects leave in progress on, or taken before, the effective date of the Act)

The proposal deletes and reserves this section, which discussed how the Act affected leave in progress on, or taken before, the Act's effective date, because it is no longer needed.

Section 825.106 (Joint employer coverage)

Sections 825.106 and 825.111(a)(3) of the existing regulations govern employer coverage and employee eligibility in the case of joint employment and set forth the responsibilities of the primary and secondary employers. Under § 825.106(d), employees jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility. Thus, for example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by the FMLA. Likewise, if an employer with 15 permanent workers jointly employs 40 workers from a leasing company that employer is also covered by the FMLA.

Although job restoration is the primary responsibility of the primary employer, the secondary employer is responsible for accepting the employee returning from FMLA leave if the secondary employer continues to utilize an employee from the temporary or leasing agency and the agency chooses to place the employee with that secondary employer. The secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its

[8] These OMB reports may be found at the following Web sites: 2001 report at: *http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf;* 2002 report at: *http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf;* and 2004 report at: *http://www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf.*

[9] All comments are available for viewing via the public docket of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Many comments are also available on *http://www.regulations.gov.*

[10] *See* 45 CFR 160.102(a) and 45 CFR 160.03.

[11] *See* Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005).

[12] *See* 29 CFR 825.500(g).

temporary/leased employees, and thus may not interfere with an employee's attempt to exercise rights under the Act, or discharge or discriminate against an employee for opposing a practice that is unlawful under FMLA. *See* the existing § 825.106(e).

In Wage and Hour Opinion Letter FMLA–111 (Sept. 11, 2000), the Department considered the application of the FMLA regulations' ''joint employment'' test in current § 825.106 to a ''Professional Employer Organization'' (PEO). The PEO in question had a contract with the client company under which it appeared to enter into an employer-employee relationship with the client's employees (who were leased back to the client and continued to work at the client's worksite pursuant to the terms of the contract). The PEO in this case assumed substantial employer rights, responsibilities and risks, including the responsibility for personnel management, health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. Moreover, the PEO in this case had the right to hire, fire, assign, and direct and control the employees.

Based on the facts described in the incoming letter, the Opinion Letter concluded that the PEO was in a joint employment relationship with its client companies for these reasons:

1. The PEO was a separately owned and distinct entity under contract with the client to lease employees for the purpose of handling ''critical human resource responsibilities and employer risks for the client.''
2. The PEO was acting directly in the interest of the client in assuming human resource responsibilities.
3. The PEO appeared to also share control of the leased employees consistent with the client's responsibility for its product or service.

The Opinion Letter stated that ''it would appear that'' the PEO is the ''primary employer'' for those employees ''leased'' under contract with the client. Thus, under existing § 825.106, the PEO would be responsible for giving required FMLA notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same or equivalent job upon return from leave. The ''secondary employer'' (*i.e.*, the client company) would be responsible for accepting the employee returning from FMLA leave if the PEO chose to place the employee with the client company. The Opinion Letter concluded that the client company, as the ''secondary employer,'' whether a covered employer or not under the FMLA, was prohibited from interfering with a ''leased'' employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice that is unlawful under the Act.

While no specific questions concerning PEOs were contained in the RFI, the Department did seek information on ''any issues that may arise when an employee is jointly employed by two or more employers'' (71 FR at 69509). In response to the RFI, a number of stakeholders commented that it is not correct to consider PEOs (sometimes called ''HR Outsourcing Vendors'') to be joint employers with their client companies and explained the differences between a temporary staffing agency and a PEO. ''A temporary staffing agency is a labor supplier. It supplies employees to a client while a PEO is a service provider providing services to existing employees of a company.'' *See* comments by Jackson-Lewis. Unlike a temporary staffing agency, a PEO does not have the ability to place an employee returning from FMLA leave with a different client employer. *Id.*

The AFL–CIO commented that PEOs engage in a practice known as ''payrolling,'' in which the client employers transfer the payroll and related responsibilities for some or all of their employees to the PEO, and that typically, the PEO also makes payments on behalf of the client employer into State workers' compensation and unemployment insurance funds, but the PEO does not provide placement services. In contrast with temporary staffing agencies, the AFL–CIO commented, PEOs do not match people to jobs.

The law firm of Littler Mendelson advised that ''Employee leasing arrangements''—like those involving temporary services firms and other staffing companies—refer to arrangements in which the staffing firm places its own employees at a customer's place of business to perform services for the recipient's enterprise. The PEO, in contrast, assumes certain administrative functions for its clients such as payroll and benefits coverage and administration (including workers' compensation insurance and health insurance). The PEO typically has no direct responsibility over the employees of its clients including ''hiring, training, supervision, evaluation, discipline or discharge, among other critical employer functions.''

The law firm of Fulbright & Jaworski commented that PEO responsibilities vary by organization and contract, but that most are not involved in the day-to-day operations of their client's business and do not exercise the right to hire, fire, supervise or manage daily activities of employees. The firm urged the Department to clarify that opinion letter FMLA–111 (Sept. 11, 2000) is about an atypical PEO that actually exercised control over the client's employees.

The Department proposes to amend § 825.106(b) to clarify that PEOs that contract with client employers merely to perform administrative functions, including payroll, benefits, regulatory paperwork, and updating employment policies, are not joint employers with their clients, provided they merely perform such administrative functions. On the other hand, if in a particular fact situation a PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client company.

Some of the comments concerning PEOs suggest confusion over how to count employees jointly employed for purposes of employer coverage (''over 50 workers'') and employee eligibility (''over 50 employees within 75 miles''). Some of these comments suggest that all of the employees of both the primary and secondary employers (and even those of other secondary employers) must be combined and counted together for purposes of these two tests. However, under the existing § 825.106(d) only those employees who are *jointly employed* by the primary and each of the secondary employers are included in the employee counts of both firms. The home office employees of the primary employer and the employees placed with other secondary employers are not included, for example, in the employee counts for each secondary employer.

For the reasons discussed above, existing paragraph (b) of § 825.106 is proposed to be changed to paragraph (b)(1) and a new paragraph (b)(2) is proposed to be added to clarify how the joint employment rules apply to PEOs. Under the proposal, PEOs that contract with client employers merely to perform administrative functions—including payroll, benefits, regulatory paperwork, and updating employment policies—are not joint employers with their clients, provided: (1) They do not have the right to exercise control over the activities of the client's employees, and do not have the right to hire, fire or supervise them, or determine their rates of pay, and (2) do not benefit from the work that the employees perform. On the other hand,

if in a particular fact situation a PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client employer. The proposal also includes a cross-reference in paragraph (d) to proposed § 825.111(a)(3), which, as discussed below, would change the determination of the ''worksite'' for purposes of employee eligibility with respect to employees who are placed by a primary employer at the worksite of a secondary employer for more than 12 months.

Section 825.108 (Public agency coverage)

This section addresses what constitutes a ''public agency'' for purposes of coverage under the Act. Under the current regulations, the dispositive test for determining whether a public agency is a separate and distinct entity (and therefore a separate employer for determining employee eligibility) or simply is part of another public agency is the U.S. Bureau of the Census' ''Census of Governments.'' *See* U.S. Census Bureau, 2002 Census of Governments, Volume 1, Number 1, Government Organization, GC02(1)–1, U.S. Government Printing Office, Washington, DC 20002 [13] (*http://www.census.gov/prod/2003pubs/gc021x1.pdf*). In contrast, regulations issued under the Fair Labor Standards Act (FLSA) use this test merely as *one factor* in determining what constitutes a separate public agency for its purposes. *See* 29 CFR 553.102. The Department proposes no changes to this section. Because the FMLA definition of ''public agency'' refers to the definition under the FLSA (29 U.S.C. 203(x)), however, the Department seeks public comment on whether this test in the FMLA regulations should be amended to conform with the test in the FLSA regulations.

Section 825.109 (Federal agency coverage)

This section of the existing regulations identifies the Federal agencies that are covered by the Department of Labor's FMLA regulations. Shortly after these regulations were promulgated, Congress enacted the Congressional Accountability Act of 1995, 2 U.S.C. 1301 (CAA), which in part amended the FMLA by repealing Title V of the FMLA pertaining to Congressional employees. *See* Section 504(b), Public Law 104–1. As a result, Congressional employees are now covered by the CAA as administered by the Office of Compliance created by the CAA.

Section 202(c) of the CAA also specifically provided that the General Accounting Office (now named the Government Accountability Office) (GAO) and Library of Congress (LOC) are subject to Title I of the FMLA. For those agencies, the FMLA is administered by the Comptroller General and the Librarian of Congress, respectively. *See* 29 U.S.C. 2611(4)(A)(iv) and 2617(f).

The CAA also called for a study of how the FMLA is administered for the Government Printing Office (GPO), as well as the GAO and LOC. 2 U.S.C. 1371. The Congressional Office of Compliance issued its study on December 31, 1996. The study concluded that the GPO is covered by Title II and the Office of Personnel Management's regulations, rather than Title I and the Department of Labor regulations. In a letter dated April 25, 2000, the GPO asked the Department to amend its FMLA regulations to delete the reference to GPO coverage, because that agency is covered by Title II. In its response of January 31, 2001, the Department concurred with the conclusion that the GPO is covered by Title II and stated that it would amend the regulations accordingly whenever they were next modified. The proposal would amend paragraphs (a) and (d) of this section to reflect these changes.

Pursuant to section 604(f) of the Postal Accountability and Enhancement Act, Public Law 109–435, Dec. 20, 2006, 120 Stat. 3242, the Postal Rate Commission was redesignated as the Postal Regulatory Commission, and the proposed rule would amend paragraph (b)(2) of this section to reflect this change.

Section 825.110 (''Eligible'' employee)

Current § 825.110 sets forth the eligibility standards employees must meet in order to take FMLA leave. Specifically, current § 825.110(a) restates the statutory requirement that to be eligible for FMLA leave, an employee must have been employed by an employer for at least 12 months, have been employed for at least 1,250 hours of service during the 12 months preceding the leave, and be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite.

Current § 825.110(b) provides detail on the requirement that the employee must have been employed by the employer for at least 12 months, stating that the 12 months need not be consecutive. It further explains that if the employee was maintained on the payroll for any part of a week, that week counts towards the employee's fulfilling the 12 months employment requirement and that 52 weeks is deemed equal to 12 months.

In its RFI, the Department sought comment on whether and how to address the treatment of combining nonconsecutive periods of employment to meet the 12 months of employment requirement. (71 FR at 69508) This eligibility criterion has been the subject of litigation. In *Rucker* v. *Lee Holding, Co.,* 471 F.3d 6 (1st Cir. 2006), the court considered whether an employee's previous employment of five years counted toward the 12-month employment eligibility requirement even though it was separated by a five-year break in service from his current employment. The First Circuit Court of Appeals held that ''the complete separation of an employee from his or her employer for a period of years, here five years, does not prevent the employee from counting earlier periods of employment toward satisfying the 12-month requirement.'' *Id.* at 13. In regard to whether a break in service of more than five years would be permissible, the court stated that this important policy issue should be resolved by the Department in the first instance as a part of its exercise of its statutory authority. *Id.*

A number of commenters urged the Department to support the *Rucker* decision that prior months of service may be combined for eligibility purposes even when separated by breaks in service of many years. The National Partnership for Women & Families, for example, stated that ''an arbitrary time limit on how long a worker could leave the employment of a particular employer would operate as an unfair and disproportionate burden on women workers. Many women leave work for extended periods of time, for example, to stay home with young children during their formative years.'' (*See* comments by National Partnership for Women & Families.)

Employer comments received on this issue overwhelmingly disagreed with the First Circuit ruling on combining prior periods of service together. For example, the University of Notre Dame stated, ''There is a tremendous administrative burden associated with adopting the First Circuit Court of Appeals' interpretation of section 825.110 that an employer has the duty to aggregate non-consecutive service to establish '12 months of service.' As we understand this possible interpretation, the ability to aggregate past service with current service to equate to 12 months

[13] The Census of Governments is taken at five-year intervals.

is virtually unlimited.'' Other comments received on this issue included suggestions for amending the regulations to allow the employer to: disregard prior employment periods if all ties between the company and worker were severed; follow company policy or State law regarding the treatment of previous employment; and require that the 12 months of employment be consecutive. Employer commenters cited the administrative burden associated with combining previous employment periods as the rationale for their recommendations including that the FMLA itself only requires recordkeeping for three years and not indefinitely.

The Department received comments similar to these in response to the 1993 interim final regulations, which suggested limiting the period of time used in determining whether the employee had been employed by the employer for 12 months. In the final regulations, however, the Department declined to include such a limit, reasoning that ''[m]any employers require prospective employees to submit applications for employment which disclose employees' previous employment histories. Thus, the information regarding previous employment with an employer should be readily available and may be confirmed by the employer's records if a question arises.'' (60 FR at 2185) Furthermore, the Department did not find a basis under the statute or its legislative history for adopting the recommendations received in response to the Interim Final Rule. *Id.* Indeed, the statute does not directly address the issue of whether the 12 months of employment must be consecutive, and the legislative history provides limited insight into Congressional intent regarding extended breaks in employment. The Senate Committee Report in discussing the requirement that the employee must have worked for the employer for 12 months states ''[t]hese 12 months of employment need not have been consecutive.'' S. Rep. No. 103–3, at 23 (1993). The House Committee Report uses the same language in describing the 12-month requirement. *See* H.R. Rep. No. 103–8, pt. 1, at 35 (1993).

Based on the Department's experience in administering the FMLA, the First Circuit's ruling in *Rucker,* and comments received in response to the RFI, the Department proposes a new § 825.110(b)(1) to provide that although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted. Thus, under the proposed rule, if an employee in 2008 has worked five months for an employer and worked for the same employer for two full years in 1997–8, the employer would not have to consider the two years of prior employment in determining whether the employee currently is eligible for FMLA leave. The FMLA requires covered employers to maintain records for three years. 29 CFR 825.500(b) (''[E]mployers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request.''). The Department is not proposing to change the three-year record keeping requirements under FMLA. Thus, employers would have documentation to confirm previous employment for a former employee who at the time of rehiring had a break in service of three years or less. Where an employee relies on a period of employment that predates the employer's records, it will be incumbent upon the employee to put forth some proof of the prior employment. This is consistent with the employee's obligation to establish he or she is an eligible employee. *See Novak* v. *MetroHealth Medical Center,* 503 F.3d 572, 577 (6th Cir. 2007); *Burnett* v. *LFW, Inc.,* 472 F.3d 471, 477 (7th Cir. 2006). Of course, in determining whether an employee has met the eligibility criterion, an employer may have a policy to consider employment prior to a longer break in service, but in that event must do so in a uniform manner for all employees with similar breaks in service.

The Department considered several alternatives in developing this proposed change to § 825.110(b). Because the legislative history states that the 12 months of employment need not be consecutive, the Department could not adopt suggestions that *any* break in service ''resets'' the count for determining whether the employee has met the 12 months employment eligibility criterion. On the other hand, the Department believes it is not reasonable that the time frame used for considering prior employment for eligibility should be without end. At the same time, the Department is mindful of the comment by the National Partnership for Women & Families about the burden on women workers who may leave and reenter the workforce after the formative years of their children. *But see* S. Rep. No. 103–3, at 16 (1993). The Department believes that the proposed outer limit of a five year break in service is a permissible interpretation of the statute and strikes an appropriate balance between providing re-employed workers with FMLA protections and not making the administration of the Act unduly burdensome for employers.

However, the Department also proposes new paragraph (b)(2) of this section to address two exceptions to the general rule contained in proposed new paragraph (b)(1): a break in service resulting from the employee's fulfillment of military obligations; and a period of approved absence or unpaid leave, such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. In these situations, employment prior to the break in service must be used in determining whether the employee has been employed for at least 12 months, regardless of the length of the break in service.

The current discussion of how weeks are counted for fulfilling the 12 months requirement is proposed to be re-designated as paragraph (b)(3) of this section.

Further, the Department proposes to add a new paragraph (b)(4) in this section to note that nothing prevents an employer from considering employment prior to a continuous break in service of more than five years when determining if an employee meets the 12-month employment criterion provided the employer does so uniformly with respect to all employees with similar breaks in service.

Paragraph (c) of § 825.110 is proposed to be revised to address hours an employee would have worked for his or her employer but for the employee's fulfillment of military service obligations. This revision codifies the protections and benefits offered by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In addition, the Department proposes several changes to § 825.110 in light of the *Ragsdale* decision. Current § 825.110(c) may result in some instances in employees who are ineligible for FMLA leave nonetheless being ''deemed eligible'' because of an employer's failure to meet its burden of maintaining records needed to establish the employee's eligibility. Current § 825.110(d) may also result in an employee who is not eligible for FMLA leave being ''deemed eligible'' based on the employer's lack of (or incorrect) notice to the employee. Read in concert with *Ragsdale*, in which the U.S. Supreme Court invalidated a similar provision in the current § 825.700(a),

the Department believes these provisions in current § 825.110(c) and (d) need to be modified.

On the other hand, the Court in *Ragsdale* suggested that if an employer fails to notify an employee of his or her FMLA rights, the employee may have a remedy if the employee can show that the employer interfered with, restrained or denied the employee the exercise of his or her FMLA rights and that the employee suffered damages as a result. *See Ragsdale*, 535 U.S. at 89. Therefore, the Department has incorporated into the proposed text of § 825.300 a statement that in these situations if an employee shows individualized harm because the employer interferes with, restrains or denies the employee of his or her FMLA rights, the employee is entitled to the remedies provided by the statute. The Department also proposes to add this language to § 825.220, which addresses how employees are protected when they assert their FMLA rights, and proposed § 825.301, which addresses designation of FMLA leave.

For organizational purposes, the notice provisions contained in current § 825.110(d) have been moved to proposed § 825.300(b) with other notice requirements employers must provide to employees under the regulations. This organizational change should make it easier for employees and employers to locate these requirements by consolidating them into one section. The proposal includes a cross-reference to § 825.300 in paragraph (d) of § 825.110.

The Department also proposes to clarify the language in current § 825.110(d) stating that employee eligibility determinations ''must be made as of the date leave commences.'' This language has led to confusion when employees who have fulfilled the 1,250 hours worked requirement for eligibility, but not the 12 months of employment requirement, begin a block of leave. (Although periods of leave do not count towards the 1,250 hour requirement because leave is not ''hours worked,'' periods of leave do count towards the 12 months of employment requirement because the employment relationship continues, and has not been severed, during the leave.) For example, where an employee who has worked for an employer for 11 months and 1,300 hours commences a three month block of leave for birth and bonding, confusion exists as to whether that portion of the leave that occurs after the employee reaches 12 months of employment is FMLA protected. *Compare Babcock* v. *BellSouth Advertising and Publishing Corp.,* 348 F.3d 73 (4th Cir. 2003), with *Willemssen* v. *The Conveyor Co.,* 359 F.Supp.2d 813 (N.D. Iowa 2005). The proposal clarifies that when an employee is on leave at the time he or she meets the 12-month eligibility requirement, the period of leave prior to meeting the statutory requirement is non-FMLA leave and the period of leave after the statutory requirement is met is FMLA leave.

The Department proposes to delete current § 825.110(e), regarding counting periods of employment prior to the effective date of the FMLA, because the revisions proposed in § 825.110(b) discussed above render the provision unnecessary.

The Department proposes no changes to current paragraph (f) (paragraph (e) in the proposal) of this section, which states that whether an employee works for an employer who employs 50 or more employees within 75 miles of the worksite is determined as of the date the leave request is made. In the RFI, the Department sought comment on the differing regulatory tests used for determining employee eligibility: the determination of whether the employee has been employed for at least 12 months and for at least 1,250 hours in the 12 months preceding the leave is made as of *the date the leave is to commence;* however, the determination of whether 50 employees are employed by the employer within 75 miles of the worksite is made as of *the date the leave request is made* (emphasis added). (71 FR at 69508). Some of the comments received in response to the RFI urged the Department to make these tests the same, namely, to require the determination of employee eligibility in both cases as of the date the leave is to begin. The Department appreciates the difficulty experienced by many employers in complying with these different regulatory tests; however, the proposal does not adopt this suggestion for the reasons discussed in the preamble to the 1995 final regulations:

> [T]he purpose and structure of FMLA's notice provisions intentionally encourage as much advance notice of an employee's need for leave as possible, to enable both the employer to plan for the absence and the employee to make necessary arrangements for the leave. Both parties are served by making this determination when the employee requests leave. Tying the worksite employee-count to the date leave commences as suggested could create the anomalous result of both the employee and employer planning for the leave, only to have it denied at the last moment before it starts if fewer than 50 employees are employed within 75 miles of the worksite at that time. This would entirely defeat the notice and planning aspects that are so integral and indispensable to the FMLA leave process.

(60 FR at 2186)

Section 825.111 (Determining whether 50 employees are employed within 75 miles)

Current § 825.111 sets forth the standards for determining whether an employer employs 50 employees within 75 miles for purposes of employee eligibility. Paragraph (a)(3) of this section provides that when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports.

In *Harbert* v. *Healthcare Services Group, Inc.,* 391 F.3d 1140 (10th Cir. 2004), the Court of Appeals held that § 825.111(a)(3), as applied to the situation of an employee with a long-term fixed worksite at a facility of the secondary employer, was arbitrary and capricious because it: (1) Contravened the plain meaning of the term ''worksite'' as the place where an employee actually works (as opposed to the location of the long-term care placement agency from which Harbert was assigned); (2) contradicted Congressional intent that if any employer, large or small, has no significant pool of employees nearby (within 75 miles) to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee; and (3) created an arbitrary distinction between sole and joint employers.

The court noted that Congress did not define the term ''worksite'' in the FMLA, and it concluded that the common understanding of the term ''worksite'' is the site where the employee works. With respect to the employee eligibility requirement of 50 employees within 75 miles, the court noted that Congress recognized that even potentially large employers may have difficulty finding temporary replacements for employees who work at geographically scattered locations. The court stated that Congress determined that if any employer (large or small) has no significant pool of employees in close geographic proximity to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee. Therefore, the court concluded:

> An employer's ability to replace a particular employee during his or her period of leave will depend on where that employee must perform his or her work. In general, therefore, the congressional purpose underlying the 50/75 provision is not effected if the ''worksite'' of an employee who has a regular place of work is defined as any site other than that place.

391 F.3d at 1150.

In comparing how the regulations apply the term ''worksite'' to joint employers and sole employers, the court stated:

> The challenged regulation also creates an arbitrary distinction between sole employers and joint employers. For example, if the employer is a company that operates a chain of convenience stores, the ''worksite'' of an employee hired to work at one of those convenience stores is that particular convenience store. *See* 58 Fed. Reg. 31794, 31798 (1993). If, on the other hand, the employer is a placement company that hires certain specialized employees to work at convenience stores owned by another entity (and therefore is considered a joint employer), the ''worksite'' of that same employee hired to work at that same convenience store is the office of the placement company.

Id.

Importantly, the court did not invalidate the regulation with respect to employees who work out of their homes: ''We do not intend this statement to cast doubt on the portion of the agency's regulation defining the 'worksite' of employees whose regular workplace is his or her home. *See* 29 C.F.R. § 825.111(a)(2).'' *Id.* at 1150 n.1. Nor did the court invalidate the regulatory definition in § 825.111(a)(3) with respect to employees of temporary help companies: ''An employee of a temporary help agency does not have a permanent, fixed worksite. It is therefore appropriate that the joint employment provision defines the 'worksite' of a temporary employee as the temporary help office, rather than the various changing locations at which the temporary employee performs his or her work.'' *Id.* at 1153.

The RFI requested specific information, in light of the court's decision in *Harbert,* on the definition in § 825.111 for determining employer coverage under the statutory requirement that FMLA-covered employers must employ 50 employees within 75 miles.

Some commenters who argued that the current regulations are sound and do not require change pointed to the legislative history that the term ''worksite'' is to be construed in the same manner as the term ''single site of employment'' under the WARN Act and the regulations under that Act. *See* comments by AFL-CIO and National Partnership for Women & Families. The AFL-CIO agreed with the dissent in *Harbert* that the Secretary's interpretation of ''single site of employment'' under the WARN Act regulations as applying equally to employees with and without a fixed worksite is a ''permissible and reasonable interpretation'' and does not result in arbitrary differences between sole and joint employers under the FMLA. The National Partnership commented that the purpose of designating the primary office as the worksite is to ensure that the employer with the primary responsibility for the employee's assignment is the one held accountable for compliance with these regulations. The National Partnership stated that the same principles articulated in the regulations with regard to ''no fixed worksite'' situations also should apply to this factual scenario. ''In cases where employees have long-term assignments, we believe the purposes of the FMLA are best served by using the primary employer from which the employee is assigned as the worksite for determining FMLA coverage.''

On the other hand, the law firm of Pilchak Cohen & Tice commented that, under the current regulations, employees at the same size establishment are treated differently because one works for a traditional sole employer and the other works for a staffing firm:

> For example, where a small retail store chain may have many employees nationwide, each store could employ fewer than 50 employees. Those employees clearly would not be eligible for FMLA in the traditional employment context. Yet, under the current regulation, if that same retail chain utilized contract employees from an entity which employed more than 50 employees from its home office and that is where the contract employees received their assignments from or reported to, those contract employees could have FMLA rights at the retail chain. This creates an arbitrary distinction between sole and joint employers. . . .Under 29 C.F.R. § 825.106(e), an employer could contract for an engineer, Employee A, for a six-month project, and then find out after the employee has only been there for two weeks, that Employee A will need 12 weeks off due to the upcoming birth of his child. Upon Employee A's departure, the employer would then have to spend the time and expense training Employee B only to [be] forced to return Employee A to the position, even though it had already spent time training two individuals. The employer would then have to spend additional time and expense bringing Employee A ''up to speed'' on the project and complete the training initially started.

Pilchak Cohen & Tice stated that the regulation would be more palatable if, to qualify for FMLA job restoration with the client company, the contract employee had to have at least 12 months of service at that location.

The National Coalition to Protect Family Leave commented that the court in *Harbert* was correct in distinguishing between a jointly-employed employee who is assigned to a fixed worksite and a jointly-employed employee who has no fixed worksite and changes worksites regularly. ''As for the former, the worksite for purposes of determining whether they are eligible employees * * * would be the fixed worksite of the secondary employer. As for the latter, the worksite would continue as stated in the regulation[.]''

After weighing the comments on this issue submitted in response to the RFI, the Department believes it needs to amend the regulations to reflect the decision in *Harbert.* The proposed rule would modify § 825.111(a)(3) to state that after an employee who is jointly employed is stationed at a fixed worksite for a period of at least one year, the employee's worksite for purposes of employee eligibility is the actual physical place where the employee works. No changes are proposed with respect to employees whose worksite has not been fixed for at least one year. Also, no changes are proposed for § 825.111(a)(2) with respect to employees who work out of their homes, except to update the current language ''as under the new concept of flexiplace'' to give it a more modern meaning, ''as under the concept of flexiplace or telecommuting.''

The Department has not adopted the comment from Pilchak Cohen & Tice that in order to qualify for FMLA job restoration with the client company, a contract employee should have at least 12 months of service at that location. To do so would take away the job restoration protections for an employee who is entitled to FMLA leave under the law. However, the primary responsibility for placement following FMLA leave rests with the primary employer, the staffing firm in the example given. The client company must consent to the placement only if it has used another contract employee from the same staffing firm to temporarily fill the position during the period of the FMLA leave.[14]

Section 825.112 (Qualifying Reasons for Leave, General Rule)

To make it easier to find information in the regulations, the Department has

[14] *See* 29 CFR 825.106(e). In the preamble to the final rule, the Department agreed with comments that joint employment relationships present special compliance concerns for temporary help and leasing agencies in that the ease with which they may be able to meet their statutory obligations under FMLA may depend largely on the nature of the relationship they have established with their client-employers. However, the Department found there were no viable alternatives that could be implemented by regulation that would not also deprive eligible employees of their statutory rights to job reinstatement at the conclusion of FMLA leave. *See* 60 FR at 2182.

reorganized some sections, including portions of current § 825.112, which sets forth the qualifying reasons that entitle an eligible employee to FMLA-protected leave. For example, there is no single place in the current regulations for the provisions that address leave taken for the birth of a child or placement of a child for adoption or foster care. Rather, these provisions are scattered throughout several sections of the current regulations, including paragraphs (c) and (d) of current § 825.112.

No changes have been made to current paragraphs (a) and (b) of this section except for the addition of new paragraph titles. Language from current paragraphs (c) and (d) addressing leave taken prior to the birth of a child or placement of a child for birth or adoption has been moved to new sections in the proposed regulations that cover pregnancy, birth, adoption and foster care. *See* proposed §§ 825.120 and 825.121.

Current paragraph (e) of this section that addresses foster care has been moved to proposed § 825.122, which provides definitions for the various family relationships covered by the Act. Similarly, current paragraph (g) of this section, which addresses leave for substance abuse treatment and an employer's ability to take disciplinary action in connection with substance abuse, has been moved to proposed § 825.119 that specifically addresses leave in connection with substance abuse.

Sections 825.113, 825.114, and 825.115 (Serious Health Condition, Inpatient Care, and Continuing Treatment)

In response to the RFI, the Department received extensive commentary on the regulatory definition of a serious health condition. The full range of comments is discussed in detail in Chapters III and IV of the Department's 2007 Report on the RFI comments (*see* 72 FR at 35563; 35571). There are six separate definitions of serious health condition in the regulations. Many stakeholders addressed their comments toward what is called the ''objective test'' contained in the regulations at § 825.114(a)(2), which defines ''continuing treatment'' as:

(i) A period of incapacity * * * *of more than three consecutive calendar days* * * * that also involves:

(A) Treatment two or more times by a health care provider * * * or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

29 CFR 825.114(a)(2)(i)(A)–(B). Many of the comments—including several from health care providers—reported that the current regulatory definition is ''vague and confusing.'' The American College of Occupational and Environmental Medicine stated, ''The term 'serious health condition' is unnecessarily vague. Employees, employers and medical providers would be well served if the FMLA were to more clearly define the criteria for considering a health condition serious.'' The American Academy of Family Physicians agreed: ''The definition of a serious health condition within the Act creates confusion not only for the administrators of the program and employers but also for physicians. Requiring a physician to certify that a gastrointestinal virus or upper respiratory infection is a serious health condition in an otherwise healthy individual is incongruous with medical training and experience. * * * . [Moreover, t]he categories of 'Serious Health Conditions' are overly complicated and * * * contradictory.''

Many in the employer community focused their comments on the perceived lack of ''seriousness'' inherent in certain conditions the definition covers. The Coolidge Wall Company stated: ''The DOL needs to limit the definition of serious health condition to what it was originally intended by Congress. For example, while a common cold or flu were never intended to be serious health conditions, in case law courts have essentially done away with all the exclusions from the original definition by stating that 'complications' (without defining this) could cause virtually anything (a cold, an earache, a cut on finger) to become a serious health condition.'' ORC Worldwide concurred: ''Uniformly, employers have found the definition of 'serious health condition' and the criteria for determining whether or not an employee has a 'serious health condition' to be extremely broad and very confusing.'' The City of Philadelphia wrote, ''What constitutes a serious health condition? The definition is not clear.''

Stakeholders proposed a number of potential revisions to the current definition of serious health condition. First, many commenters focused on the list of ailments in § 825.114(c), which states ''Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach * * * *etc.,* are examples of conditions that do not meet the definition of a serious health condition.'' These commenters recommended that, consistent with the legislative intent that these conditions are not FMLA-covered conditions, this list be converted into a *per se* rule whereby these conditions can *never* be covered under the Act. That is, the flu—no matter how severe—could not be a serious health condition. Second, some commenters recommended that the ''more than three days'' period of incapacity in the objective test be measured by *work* days as opposed to *calendar* days. Here, too, the commenters cited to legislative history to support their position: ''[w]ith respect to an employee, the term 'serious health condition' is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she *must be absent from work* on a recurring basis or for more than a few days for treatment or recovery.'' H.R. Rep. No. 103–8, at 40 (1993); S. Rep. No. 103–3, at 28 (1993) (emphasis added). Third, a number of stakeholders commented that the two health care provider visits in § 825.114(a)(2)(i)(B) must occur during the ''more than three days'' period of incapacity. Finally, a number of comments recommended that the required period of incapacity be extended from ''more than three days'' to five or seven or ten days or more.

At the same time, the Department also received many comments from employees and employee groups who felt that the current objective test is a good, clear test that is serving its intended purpose. For example, the National Partnership for Women & Families stated, ''[T]he current regulations are crafted appropriately to provide guidance on what constitutes a serious health condition without imposing overly rigid criteria that could hinder the ability of workers to take leave when necessary.'' Families USA concurred: ''To protect employers from employee abuse of this provision, the regulations establish an objective criteria to be used to determine whether conditions presented qualify for leave. This criteria creates a standard that can be applied in individual cases with sufficient flexibility to adjust for differences in how individuals are affected by illness. It also specifies that routine health matters cannot be considered serious health conditions, unless complications arise.''

After a review of the statute, the legislative history, and the significant feedback received from stakeholders in response to the RFI, the Department has not identified an alternative approach to the definition that would still cover all the types of conditions Congress intended to cover under the FMLA, but without also including some conditions that many believe the legislative history indicated should not be covered. The Department is well aware, as evidenced

by the extensive comments on this issue to the RFI, that many of the policy choices made in defining a serious health condition have not been without consequence. For example, the Department could put a higher degree of ''seriousness'' into the regulatory definition if we chose to adopt any one of the suggestions offered by employers to increase the required number of days of incapacity or to simply adopt a *work* days rather than a *calendar* days standard. Doing so would also go a long way to eliminate what many employers believe to be the ''weekend'' problem—that is, employers' inability to know or verify that an employee, who works a regular Monday through Friday schedule, is off on Saturday and Sunday, then calls in sick on Monday claiming an FMLA absence, was in fact incapacitated during the two days he or she was off work for the weekend, and meets the more than three consecutive calendar days standard (*see e.g.*, comment by Southwest Airlines Co., ''Unscheduled intermittent leave, which is typically based on recurring episodes of minor health conditions, gives employees many opportunities to misuse FMLA leave—to take vacations or a long weekend when they otherwise would be unable to do so * * *.''). However, Congress itself did not provide a statutory ''bright line'' of demarcation for ''seriousness.'' The Act defines serious health condition as either ''an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.'' 29 U.S.C. 2611(11). ''Continuing treatment'' is not further defined by the Act and Congress declined to establish any bright-line rules of what was covered and what was not. *See* discussion infra about chronic conditions specifically.

A review of the Preamble accompanying the current regulations reflects the struggle then, as now, to craft such an objective definition of serious health condition that covers all the conditions intended to be covered by the Act while still giving meaning to the legislative history that minor ailments like colds and flus generally not be covered. It also reflects the choice then, as now, between an objective test versus a list of types of health conditions that would qualify as serious. *See* 60 FR at 2191. There is no question, as explained by the legislative history, that Congress expected minor conditions (those that last less than a few days) to not be covered by the FMLA because they would likely be covered by a company's sick leave policy. *See* H.R. Rep. No. 103–8, at 40 (1993); S. Rep. No. 103–3, at 28 (1993). The difficulty is in adequately drawing the line between conditions that usually resolve in a few days, and those that are ''serious.'' Medical conditions that are benign to some may be truly incapacitating to others. For example, the Communication Workers of America submitted a comment to the RFI noting an employee who had a severe reaction to poison oak and was incapacitated for more than three days even though most individuals would have only a mild reaction to poison oak. As a result of all these factors, the Department has retained essentially the current definition of ''serious health condition,'' with some slight modifications as discussed below.

The Department has reorganized the structure of the definition so both employees and employers can better understand what constitutes a serious health condition. As noted above, serious health condition is currently defined in six different ways, and only one of the alternatives actually requires an absence of more than three consecutive calendar days under the current regulations. The Department believes that the new proposed structure will make the definition clearer.

Section 825.113 (Serious Health Condition)

Current § 825.113 addresses the definition of a parent, spouse, son or daughter. In the proposed regulations, the Department has moved this to § 825.122 for purposes of organization. Proposed § 825.113 is titled ''Serious health condition'' and provides the general rules and accompanying definitions governing what constitutes a serious health condition. Proposed § 825.113(a) provides the basic definition of what constitutes a serious health condition currently found in § 825.114(a). Proposed paragraph (b) contains a definition of what constitutes ''incapacity'' and incorporates language from current § 825.114(a)(2)(i) and (ii) without change. Proposed paragraph (c) contains the definition of ''treatment'' found in current § 825.114(b) without change.

Proposed paragraph (d) addresses the types of treatments and conditions not ordinarily expected to be covered by the definition and incorporates language from current § 825.114(c). As discussed above, this section has been the focus of considerable debate as to when the list of conditions enumerated (colds, flus, *etc.*) are or are not serious health conditions. The Department received many comments in response to the RFI on this issue from both employer and employee groups but has not been able to construct an alternative regulatory definition better than the objective test of more than three days incapacity plus treatment. The language of current § 825.114(c) listing common ailments and conditions—''Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, * * * *etc.,* are examples of conditions that do not meet the definition of a serious health condition''—was intended to be merely illustrative of the types of conditions that would not *ordinarily* qualify as serious health conditions. This sentence was not intended to create its own substantive definition of serious health condition that categorically excluded the listed conditions. Section 825.114(c) did not create a definition of covered conditions separate and apart from the regulatory definitions of serious health condition in § 825.114(a).

The Department's original opinion letter in 1995 stated that a minor illness such as the common cold *could not* be a serious health condition because colds were on the regulatory list of non-covered ailments. ''The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).'' Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995). Unfortunately, this was an incorrect statement of the law. As the Department explained in its subsequent 1996 opinion letter:

> The FMLA regulations * * * provide examples, in section 825.114(c), of conditions that *ordinarily,* unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, *e.g.*, an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA.

Wage and Hour Opinion Letter FMLA–86 (Dec. 12, 1996) (emphasis in original). This objective regulatory definition was upheld as a reasonable implementation of the Act by two United States Courts of Appeals even though the definition may sweep into its coverage some conditions Congress did not necessarily anticipate would be covered. *See Miller* v. *AT&T Corp.,* 250 F.3d 820, 835 (4th Cir. 2001) (''It is possible, of course, that the definition adopted by the Secretary will, in some cases— and perhaps even in this one— provide FMLA coverage to illnesses that Congress never envisioned would be protected. We cannot say, however, that the regulations adopted by the Secretary are so manifestly contrary to congressional intent as to be considered arbitrary.''); *Thorson* v. *Gemini, Inc.*, 205 F.3d 370, 380 (8th Cir. 2000) (''Under the DOL's definition, it is possible that some absences for minor illnesses that Congress did not intend to be classified as 'serious health conditions' may qualify for FMLA protection. But the DOL reasonably decided that such would be a legitimate trade-off for having a definition of 'serious health condition' that sets out an objective test that all employers can apply uniformly.'').

The Department considered whether the list of examples of non-serious ailments such as colds and flus in current § 825.114(c) should be deleted as surplusage. Both the Fourth and Eighth Circuit courts treated the list of examples of non-serious ailments in current § 825.114(c) as merely clarifying that common ailments such as colds and flu normally will not qualify for FMLA leave because they generally will not satisfy the regulatory criteria for a serious health condition. The Department continues to believe that the § 825.114(c) list serves a baseline purpose as explanatory language similar to that which is included in a preamble. Therefore, the sentence has been retained in the proposed regulations. Nevertheless, the Department agrees with the Fourth and Eighth Circuit Courts of Appeals and restates its view that the Department's objective regulatory definition is dispositive.

Section 825.114 (Inpatient Care)

Proposed § 825.114, titled, ''Inpatient care,'' defines what constitutes inpatient care. As noted above, the Department proposes a stand-alone definition of ''incapacity'' in § 825.113(b) in contrast to the current regulations. Therefore, the definitional language of incapacity has been removed from the definition of ''inpatient'' care, but the requirement remains and a cross-reference to § 825.113(b) has been included.

Section 825.115 (Continuing Treatment)

Proposed § 825.115, titled ''Continuing treatment,'' defines continuing treatment for purposes of establishing a serious health condition. The five different definitions are contained in § 825.115(a)–(e). Proposed § 825.115(a) (''Incapacity and treatment'') incorporates language from current § 825.114(a)(2)(i)(A) and (B), which establishes that an employee can meet this definition if, in connection with a period of incapacity of more than three consecutive calendar days, the employee or family member has one visit to a health care provider and a regimen of continuing treatment, such as a prescription, or two visits to a health care provider.

As discussed further below concerning proposed § 825.125, the Department proposes a conforming change in the definition of ''continuing treatment'' to generally recognize physician assistants as health care providers, which eliminates the need to refer to them separately in this section as performing ''under direct supervision of a health care provider'' (*see* current §§ 825.114(a)(2)(i)(A) and (iii)(A)). Otherwise, the current definition has been retained with one further proposed clarification. The Department proposes to specify that the two visits to a health care provider must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist, instead of the completely open-ended time frame under the current regulations. Accordingly, if an ill employee visits his/her health care provider, is told not to report to work for more than 3 days due to the health condition but is not prescribed any medication, whether the condition is considered a serious health condition for FMLA purposes will depend on whether the health care provider determines that additional treatment is needed within 30 days of the beginning of the initial period of incapacity (for example, whether the provider determines that an additional follow-up appointment should be scheduled in two weeks or two months). The beginning of the period of incapacity will usually correspond with the date of the employee's first absence, however, as under the current regulations, the more than three calendar day period of incapacity may commence on a day on which the employee is not scheduled to work. See 60 FR 2195.

The Department proposes this clarification because it believes, as a practical matter, that leaving the treatment requirement open-ended does not provide sufficient guidance for determining when the employee has a qualifying serious health condition. For example, under the current definition, an employer could decide that an employee does not qualify for FMLA coverage a week after an employee has been to see a health care provider on one occasion and has had more than three days of incapacity but no follow-up visit during that week-long time period. If the employee had a follow-up visit three months later, however, the test would be met but the employer may not be aware of that fact. The Department does not believe the regulations should leave such determinations open-ended and unresolved indefinitely. Rather, the period of incapacity and the timing of the health care provider's treatment regimen should be connected in a temporal sense to meet the definitional requirement and not left undefined as under the current rule.

The Department received many comments to the record on this issue, including a number suggesting that the Department adopt into regulation the interpretation offered by the United States Court of Appeals for the Tenth Circuit that the two treatments actually occur during the period of more than three days' incapacity in order to qualify as a serious health condition. *See Jones* v. *Denver Pub. Sch.,* 427 F.3d 1315, 1323 (10th Cir. 2005) (''[U]nder the regulations defining 'continuing treatment by a health care provider,' the '[t]reatment two or more times' described in 825.114(a)(2)(i)(A) must take place during the 'period of incapacity' required by 825.114(a)(2)(i).''). However, the Department believes the proposed 30-day limitation is more appropriate in that it guards against employers making quick judgments that deny FMLA leave when employees otherwise should qualify for FMLA protections. The Department is also aware that occasionally an employee may need a second visit to a health care provider or further diagnostic testing within a 30-day period but may experience difficulty scheduling the second appointment in time. The regulations therefore acknowledge an ''extenuating circumstances'' exception to the 30-day rule in proposed § 825.115(a)(1).

The Department is not proposing to extend the 30-day rule to treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider. The Department's enforcement

experience suggests that the doctor visit which results in a regimen of continuing treatment generally occurs close in time to the more than three days of incapacity. Accordingly, the 30-day limitation is not needed and could, in fact, extend the time period for receiving the regimen of treatment well beyond what is current practice. The Department, however, seeks comments on this approach, and whether this regulatory provision should be changed.

Proposed § 825.115(b), titled ''Pregnancy or prenatal care,'' incorporates language from current § 825.114(a)(2)(ii) without change except for a reference to the new consolidated section found in proposed § 825.120 addressing leave for pregnancy and childbirth discussed in detail below. The Department wishes to emphasize, however, that the phrase ''incapacity due to pregnancy, or for prenatal care'' includes time spent with a health care provider for prenatal care purposes. By definition, while an employee is visiting a health care provider for prenatal care purposes (*i.e.*, a doctor's appointment), the employee is unable to work and therefore incapacitated. In contrast, however, an employee is not entitled to FMLA leave to visit the store to purchase infant clothes because the employee is not incapacitated in such circumstances. In a case where a male employee is needed to care for (as defined by proposed § 825.124) a pregnant spouse who is incapacitated or requires prenatal care, the male employee will be entitled to FMLA leave. For example, a male employee's pregnant spouse may have severe morning sickness and need his assistance. Similarly, a male employee may be entitled to FMLA leave to accompany his pregnant spouse to a doctor's appointment for prenatal care. In this case, physical care may not be needed, but psychological care may be involved.

Proposed § 825.115(c), titled ''Chronic conditions,'' incorporates language from current § 825.114(a)(2)(iii) with one modification. The Department received extensive comments about the definition of ''chronic'' serious health conditions in response to the RFI. As a result, the Department provided extensive discussion and explanation in its Report on the RFI to the evolution of the ''chronic'' serious health condition definition. *See* Chapter IV of the RFI Report, 72 FR at 35571.

As the Department explained in the Report on the RFI comments, ''[t]here is no definition or specific mention of a 'chronic' serious health condition in the Act. The House and Senate Committee Reports do, however, refer to conditions where 'the underlying health condition or treatment for it requires that the employee be absent from work on a recurring basis * * * [A] patient with severe arthritis may require periodic treatment such as physical therapy.' '' 72 FR at 35572 (internal citations omitted). Many employer commenters were highly critical of the choice made by the Department in the 1995 final rule to allow employees to ''self-treat'' for ''any'' period of incapacity due to chronic conditions. *See current* § 825.114(e): ''Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) [chronic conditions] qualify for FMLA leave even though the employee or the family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days.'' Indeed, many employer commenters believe that coverage for absences due to chronic conditions which are accompanied only by self-treatment impermissibly undercuts the statutory requirement that intermittent leave may be taken only when medically necessary (29 U.S.C. 2612(b)(1)) as there is no way to verify the medical necessity of an absence for self-treatment. (*See, e.g.*, discussion of Workplace Consequences of Unscheduled Intermittent Leave in the Report on the RFI comments, 72 FR at 35575.) Employee representatives commenting on the RFI, however, stressed that self-treatment is appropriate for many chronic conditions and that coverage for such absences is crucial to ensuring that employees with chronic serious health conditions are able to maintain their employment. *Id.* at 35575; 35580.

While many employers urged the Department to alter the definition so that only chronic conditions that they perceive to be ''serious'' will be covered, and to eliminate the self-treatment provision, the Department declines to do so. As explained in the preamble when the current rule was adopted in 1995,

> The Department concurs with the comments that suggested that special recognition should be given to chronic conditions. The Department recognizes that certain conditions, such as asthma and diabetes, continue over an extended period of time (*i.e.*, from several months to several years), often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, staying home and self-treatment are often more effective than visiting the health care provider (*e.g.*, the asthma sufferer who is advised to stay home and inside due to the pollen count being too high). The definition has, therefore, been revised to include such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration.

60 FR at 2195.

Although the Department acknowledges employers' concerns regarding the inability to verify the medical necessity for an absence involving self-treatment, to eliminate coverage for such absences at this time would, like changing the calendar days standard to a work days standard, effectively render many currently-covered employees who have received the protections of the law ineligible. As the Department acknowledged in the Report on the RFI, it has no way to distinguish between those employees with chronic conditions who may be, in their employers' views, taking advantage of the self-treatment standard and those who are not and for whom the standard has worked very well.

The Department does propose one modification to the definition of a chronic serious health condition. Current § 825.114(a)(2)(iii) provides that a chronic serious health condition ''[r]equires periodic visits for treatment'' (§ 825.114(a)(2)(iii)(A)). The current regulations do not define the term ''periodic.'' The Department understands that some employers have chosen to provide their own definition of the term ''periodic'' for FMLA purposes to the detriment of employees. For example, one employer defined the term to require a visit to a health care provider at least once a month in order to satisfy this prong of the continuing treatment definition. The Department believes that not all serious health conditions Congress intended to cover require such frequent visits. For example, an employee may have epilepsy, which renders the employee unable to work periodically but does not require monthly doctor visits since the employee knows how to self-medicate. At the same time, because ''periodic'' is left open-ended in the current regulations, employers have struggled with the ''periodic'' requirement. The Department believes such a lack of definition leaves employers and employees in an untenable situation. (*See* Executive Summary and Chapters IV and VI of the Department's 2007 Report on the RFI comments, 72 FR at 35550, 35571, 35588.) The Department proposes to define the term ''periodic'' as twice or more a year, based on an expectation that employees with chronic serious health conditions generally will visit their health care providers with that minimum

frequency, but they may not visit them more frequently, especially if their conditions are stable. The Department believes this is reasonable but seeks public comments on whether the proposed definition of the term ''periodic'' is appropriate.

Proposed § 825.115(d), titled ''Permanent or long-term conditions,'' incorporates language from current § 825.114(a)(2)(iv) without change. Proposed § 825.115(e), titled ''Conditions requiring multiple treatments,'' incorporates language from current § 825.114(a)(2)(v), which provides coverage for any period of absence to receive multiple treatments by a health care provider for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment for conditions such as cancer, severe arthritis, and kidney disease. Multiple treatments are required to satisfy this prong of the continuing treatment definition.

Sections 825.116 Through 825.118 (Reserved)

Provisions in current § 825.116 defining the phrase ''needed to care for'' a family member are moved to proposed § 825.124, discussed below. Provisions in current § 825.117 addressing the ''medical necessity'' for taking and scheduling intermittent or reduced schedule leave are moved to proposed §§ 825.202 and .203, discussed below. Current § 825.118 defining ''health care provider'' is renumbered as § 825.125 of the proposed rule. Section numbers .116–.118 of the current rule are, therefore, reserved to reflect these organizational changes, as discussed further below.

Section 825.119 (Leave for Treatment of Substance Abuse)

The Department proposes to create a single, consolidated section to address substance abuse, which is currently addressed in two different sections of the regulations, specifically §§ 825.112(g) and .114(d). Current § 825.112(g) provides that while FMLA leave is available for substance abuse treatment, treatment does not prevent an employer from taking employment action against an employee for violating the employer's substance abuse policy, such as being intoxicated at work. The section further explains when such action is appropriate. Current § 825.114(d) states that substance abuse treatment may be covered as a serious health condition in certain circumstances.

Section 825.120 (Leave for Pregnancy or Birth)

The Department proposes to create a single section that addresses FMLA rights and responsibilities related to pregnancy and birth of a child. The current regulations contain regulatory guidance pertaining to pregnancy and birth throughout a number of regulatory sections. This new proposed section collects the existing guidance from the various regulatory sections into one comprehensive section.

Section 825.120(a)(1) of the proposed rule, titled ''[g]eneral rules,'' restates language from current § 825.112(b) that both the mother and father are entitled to FMLA leave for the birth of their child. Proposed paragraph (a)(2) of this section restates language from current § 825.201 explaining that leave following the birth of a healthy child (''bonding time'') must be completed within a year from the birth unless State law provides for a longer period of time or with an employer's agreement. Based on the statutory requirements (*see* 29 U.S.C. 2612(a)(2)), if leave is extended beyond a year from the birth per State law or employment agreement, the additional leave would not receive the FMLA protections. Proposed paragraph (a)(3) of this section incorporates language from current § 825.202(a), that husbands and wives who work for the same employer may be limited to a combined 12 weeks of FMLA leave for the birth or placement for adoption or foster care of a healthy child, or to care for an employee's parent with a serious health condition. (*See* 29 U.S.C. 2612(f).) This limitation does not apply if only one spouse is eligible for FMLA leave. For example, if a wife commenced employment with the employer only 6 months earlier and therefore does not meet the 12-month/1,250-hour eligibility requirement, but the husband has worked for the employer for five years and otherwise meets the eligibility requirements, the husband could take twelve weeks of leave to be with the newborn child. However, if the husband and wife have both worked for the same employer for five years and the husband already has used six weeks of his entitlement to care for his parent, the wife may be limited to six weeks to be with the newborn child (the wife would also be entitled to leave for her own serious health condition related to the birth).

Proposed § 825.120(a)(4) combines language from current §§ 825.114(a)(2)(ii), 825.114(e), and 825.112(a) and (c) to make clear that a mother may be entitled to FMLA leave for both prenatal care and incapacity related to pregnancy, and the mother's serious health condition following the birth of a child.

Proposed § 825.120(a)(6) has been added to reemphasize that both spouses may each take their full 12 weeks of leave to care for a child with a serious health condition, regardless of whether the spouses work for the same employer.

Proposed § 825.120(b), titled ''[i]ntermittent and reduced schedule leave,'' combines language from current §§ 825.203(b) and 825.204(a) on the use of intermittent or reduced schedule leave for pregnancy and birth of a child. *See* 29 U.S.C. 2612(b)(1). Current § 825.203(b) provides that leave taken after the birth of a healthy newborn child may only be taken on an intermittent or reduced leave schedule if the employer agrees. Current § 825.204(a) explains that in these cases, an employer may temporarily transfer an employee to an available alternative position that better accommodates the need for intermittent or reduced schedule leave if the employer does in fact agree to such a leave schedule. *See* 29 U.S.C. 2612(b)(2). The hours not worked due to a reduced leave schedule in this situation are considered intermittent FMLA leave and are counted toward the employee's FMLA leave entitlement (*see* proposed § 825.205). Proposed § 825.120(b) emphasizes that if intermittent or reduced schedule leave is medically necessary for a serious health condition of the mother or the newborn child, no employer agreement is necessary.

Section 825.121 (Leave for Adoption or Foster Care)

For the same reasons discussed above, the Department also proposes a single section that discusses FMLA rights and obligations with regard to adoption and foster care. The current regulations contain guidance pertaining to adoption and foster care throughout a number of sections. This new proposed section collects the existing guidance from the various regulatory sections into one comprehensive section on adoption and foster care.

Proposed § 825.121(a) is titled ''[g]eneral rules'' and provides that leave for adoption or foster care may begin prior to the actual birth or adoption. Examples incorporated from current § 825.112(d) include leave to attend counseling sessions, appear in court, consult with an attorney or doctor, or submit to a physical examination. The proposed section also cross-references proposed paragraph (b) of this section, which explains the statutory limitation that leave following the placement for

adoption and foster care of a healthy child can *only* be taken on an intermittent or reduced schedule basis if the employer agrees. *See* 29 U.S.C. 2612(b)(1).

Proposed § 825.121(a)(2) contains language from current § 825.201 explaining that leave for adoption or foster care must be completed within a year from the placement unless State law provides for a longer period of time or with an employer's agreement. Such leave taken under State law or with an employer's agreement beyond the one year period is not protected as FMLA leave. Section 825.121(a)(3) also incorporates language from current § 825.202(a), that husbands and wives working for the same employer are limited to a combined 12 weeks of leave for purposes of bonding with the healthy adopted or foster child, to care for the healthy child following the birth of the child, and to care for an employee's parent with a serious health condition. As discussed above under proposed § 825.120, this limitation does not apply if only one spouse is eligible for FMLA leave. *See* 29 U.S.C. 2612(f).

Proposed § 825.121(a)(4) has been added to emphasize that both spouses may each take their full twelve weeks of FMLA leave to care for an adopted or foster child with a serious health condition, regardless of whether the spouses work for the same employer.

Proposed § 825.121(b), titled ''[u]se of intermittent and reduced schedule leave,'' combines language from current §§ 825.203(b) and 825.204(a) on the use of intermittent or reduced schedule leave for adoption and foster care. Current § 825.203(b) provides that leave taken after the placement of a healthy child for adoption or foster care may only be taken on an intermittent or reduced leave basis if the employer agrees. *See* 29 U.S.C. 2612(b)(1). Current § 825.204(a) explains that in such cases, an employer may temporarily transfer an employee to an available alternative position that better accommodates the need for intermittent or reduced schedule leave. *See* 29 U.S.C. 2612(b)(2). The hours not worked due to a reduced leave schedule in this situation are considered intermittent FMLA leave and are counted toward the employee's FMLA leave entitlement (*see* proposed § 825.205). Proposed § 825.121(b) provides that if intermittent or reduced schedule leave is needed for a serious health condition of the adopted or foster child, no employer agreement is necessary.

Section 825.122 (Definition of Spouse, Parent, Son or Daughter, Adoption and Foster Care)

Current § 825.113 provides definitions of spouse, parent, and son or daughter for purposes of determining whether an employee qualifies for FMLA leave. These definitions are repeated in current and proposed § 825.800. The Department proposes to move the existing section to proposed § 825.122 for purposes of organization. Proposed § 825.122(a) and (b) defining spouse and parent are unchanged except for minor editorial changes in paragraph (b) to the definition of ''parent.''

Proposed § 825.122(c) that addresses, and is now titled, ''[s]on or daughter,'' has been rewritten for clarity. The one substantive addition the Department proposes is to specify that the determination of whether an adult child has a disability should be made *at the time leave is to commence.* In *Bryant* v. *Delbar,* 18 F.Supp.2d 799 (M.D. Tenn. 1998), the court conducted an analysis of whether an adult child had a disability for purposes of FMLA coverage based on facts and circumstances that occurred *well after* the leave commenced. In the Department's view, employers should decide FMLA eligibility based on information at the time the leave begins. A rule that takes into account information acquired after-the-fact causes confusion about coverage for both employees and employers. The Department aims to eliminate such confusion by adding the proposed language.

Proposed § 825.122(c)(1), (2) and (3) remain unchanged from current § 825.113(c)(1), (2) and (3).

A new § 825.122(d) has been added that defines ''adoption.'' The current regulations do not define the term, and the Department believes that providing such guidance will benefit both employees and employers. Language from current § 825.112(d) has been retained to clarify that the adoption source is not relevant to FMLA leave eligibility.

Proposed § 825.122(e), titled ''[f]oster care,'' incorporates the definition of foster care from the current § 825.112(e) without change.

Proposed § 825.122(f) addresses the documentation of relationships and incorporates the current language from § 825.113(d) with two clarifications. First, the current regulation states that in addition to a child's birth certificate or a court document, a simple statement from an employee is sufficient to establish a family relationship. The Department adds language in proposed paragraph (f) to clarify that the example of a statement by the employee as documentation should be a sworn, notarized statement. This provides consistency with the other examples used in the current regulations. Second, the Department proposes to add the example of a submitted and signed tax return as evidence of a qualified family relationship because in the case of an *in loco parentis* relationship, it may be difficult to determine what kind of proof may be reasonable to establish such a relationship.

Section 825.123 (Unable to Perform the Functions of the Position)

The Department proposes to renumber current § 825.115 as § 825.123 in the proposed regulation due to other organizational changes made. Proposed paragraph (a), titled ''[d]efinition,'' defines the statutory requirement that an individual be unable to perform the functions of a job in order to qualify for FMLA leave. The current regulatory definition states that the employee must be ''unable to work at all'' or be unable to perform ''one or more of the essential functions of the job.'' The Department proposes no substantive changes to this definition.

The Department proposes no substantive changes to current paragraph (b), now titled ''[s]tatement of functions,'' except to include language from current § 825.115 to clarify that the employer may provide a statement of the employee's essential functions to the employee's health care provider, and to clarify that the employer may require that the health care provider's medical certification specify what functions the employee cannot perform. This information is part of the ''medical facts'' the statute states an employer may obtain as part of the medical certification. *See 29* U.S.C. 2613(b)(4)(B).

Section 825.124 (Needed to Care for a Family Member)

The current regulations define the phrase ''needed to care for'' a family member in § 825.116. The Department proposes to move this section to proposed § 825.124 and clarify that the employee need not be the *only* individual or family member available to care for the qualified family member. A number of comments received in response to the RFI recommended that the Department impose some sort of limitation on what it means for an employee to be ''needed to care for'' a family member. A number of commenters, including the National Council of Chain Restaurants suggested that ''care'' be limited to actual physical

care only. The National Council of Chain Restaurants also recommended that the employee be required to provide a written certification ''that explains why the employee cannot rely upon other family members to care for'' the qualifying family member. Similarly, the law firm of Blank Rome suggested that the regulations ''be modified to allow for leave under these circumstances only when there is no other alternative care giver or provider.'' The Pepsi Bottling Group recommended that employers be ''able to deny or delay leave if an employee has a family member at home who is available to provide necessary medical care.'' The United Parcel Service suggested ''add[ing] language requiring that requests for intermittent leave to care for a family member be supported by a representation that the employee is the only family member available to provide such care.'' Finally, Manufacturers Alliance recommended the Department clarify that the term ''needed to care'' for a family member means ''that it [is] necessary for the employee to actually be providing care during * * * work time.''

After review of these comments, the Department has declined to adopt any of these proposals. The statute provides leave ''[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.'' 29 U.S.C. 2612(a)(1)(C). There is no additional limitation that the employee be the only available care giver in order to take FMLA leave. Indeed, it will often be the case that there are multiple potential care givers—none of whom is the only care giver without alternative—but all of whom would need to take FMLA leave in order to provide care. Moreover the legislative history to the Act indicates that the ''phrase 'to care for' * * * be read broadly to include both physical and *psychological* care.'' H.R. Rep. No. 103–8, at 36 (1993); S. Rep. No. 103–3, at 24 (1993). The Department intends to retain the psychological care language and to make clear that employers cannot impose an additional requirement upon employees for FMLA leave purposes that the employee needs to be the only individual, or even family member, available to provide care to the qualified family member with a serious health condition.

Section 825.125 (Definition of Health Care Provider)

Current § 825.118 is renumbered as § 825.125 in the proposed rule to reflect organizational changes. In its comments to the RFI, the American Academy of Physician Assistants noted that physician assistants (PAs) are usually recognized as authorized health care providers for FMLA purposes under the existing provision that recognizes ''[a]ny health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits'' (current § 825.118(b)(4)). Other language in § 825.118(c) of the current rule has created confusion over the status of PAs, however, where the phrase ''authorized to practice in the State'' is defined to mean that ''the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.'' The Department proposes to clarify the status of PAs as health care providers under proposed § 825.125(b)(2) (formerly § 825.118(b)(2) in the current rule) by adding ''physician assistants'' to the list of recognized health care providers and by deleting the requirement that PAs operate ''without supervision by a doctor or other health care provider.'' The Department has made corresponding changes to proposed § 825.115 (Continuing treatment) and § 825.800 (Definitions) to reflect this change that PAs would now generally be considered health care providers.

Section 825.200 (Amount of Leave)

This section explains the basic leave entitlement provided under the Act, as well as how to determine the 12-month period during which the FMLA leave entitlement may be used. The Department asked in its December 2006 RFI whether ''scheduled holidays [should] count against an employee's 12 weeks of FMLA leave when the employee is out for a full week as they do now?'' (71 FR at 69509) The Department heard from all sides on this issue. The Unum Group stated, ''Changing this process could add difficulty to the already complex method of calculating FMLA leave entitlements.'' The Pennsylvania Turnpike Commission agreed: ''We feel that scheduled holidays should continue to count against the 12 weeks of FMLA. That block of time is covered in the employee request—it is incidental that they would not have had to work due to a holiday. Because of differing holiday eligibility for different employee groups (*i.e.* mgmt/union), it would greatly complicate the calculation of eligible days if holidays were excluded. It would be more time consuming for an FMLA administrator to calculate the amount of time/days an employee [would] be off under FMLA if they had to make sure to subtract any holidays that the employee is eligible for during the time period they need to be off.'' The State of Ohio said it ''supports the current regulations in this area, and believes that scheduled holidays should continue to be counted against an employee's 12 weeks of FMLA leave when the employee is out a full week. This provision would allow employee's 12 weeks of FMLA leave to be treated consistently with employees participating in other Ohio benefit programs.'' The National Partnership for Women & Families disagreed: ''Under the current regulations, such holidays are counted as part of an employee's FMLA leave. We believe such a policy is inconsistent with how holidays are typically treated in other leave contexts. If an employee is out on FMLA leave and a scheduled holiday occurs, we believe the employee should be able to use holiday leave just like other employees rather than losing a day of FMLA leave. Thus, we would urge DOL to modify the regulations accordingly.''

A number of commenters noted a serious problem that would occur if holidays were not counted toward FMLA leave when an employee is out on a weekly block of leave; that is, such a rule could result in the employee obtaining greater than 12 weeks of FMLA leave per year. One commenter stated: ''For some employees counting holidays or days not worked during a full week of absence, may mean employees could be gone beyond the 12 weeks/60 days if it is determined that non-work days or holidays are not counted as part of the work week thus pro-longing an FMLA beyond the 60 days/12 weeks[.]'' The United Parcel Service concurred: ''DOL should maintain its current position that holidays occurring during an employee's scheduled work-week count against the 12 weeks of leave. That position is supported by the plain language of the FMLA, which provides for 12 weeks of unpaid leave, not 12 weeks of leave plus all holidays falling therein.'' The Commonwealth of Pennsylvania noted, ''Because the law references the absence period in terms of weeks, rather than days, and considers calendar days rather than work days, the practice of counting holidays seems to be within the spirit of the Act and regulations.''

Upon review of the comments received to the record, the Department believes it may lack the authority to change this regulation to not count against the FMLA entitlement holidays that fall within weeks-long blocks of FMLA leave. The statute grants

employees ''12 workweeks of leave'' which the Department has interpreted to mean 12 weeks of the employee's normal work schedule. See 60 FR at 2203. (''The statute uses the 'workweek' as the basis for the leave entitlement, and an employee's normal 'workweek' prior to the start of the FMLA leave is the controlling factor for determining how much leave an employee uses when switching to a reduced leave schedule.'') Holidays regularly occur during normal workweeks. Discounting the holidays that regularly fall within those weekly blocks of leave could well impermissibly extend an employee's leave period beyond the statutory 12 normal workweeks of leave that the Act permits. Moreover, the current rule is clear and apparently working well. *See, e.g., Mellen* v. *Trustees of Boston University*, 504 F.3d 21, 25 (1st Cir. 2007) (''[The Department's regulations governing] [w]hether holidays are to be counted against intermittent leave taken in an interval of a week or more * * * fit together naturally.'').

However, consistent with the discussion regarding § 825.205 below, when an employee is taking leave in increments of less than one week, the pertinent question for both overtime and holidays is whether the employee is required to be at work. If an employee is not required to be at work because of a holiday on the day he or she requested leave, then no leave would be charged to the employee's FMLA entitlement. Thus, the Department proposes language in § 825.200(f) to clarify that, if an employee needs less than a full week of FMLA leave, and a holiday falls within the partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee's FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day. If an employee needs a full week of leave in a week with a holiday, however, the hours the employee does not work on the holiday will count against the employee's FMLA entitlement. Accordingly, for an employee with a Monday through Friday work week schedule, in a week with a Friday holiday on which the employee would not normally be required to report, if the employee needs FMLA leave only for Wednesday through Friday, the employee would use only 2/5 of a week of FMLA leave because the employee is not required to report for work on the holiday. However, if the same employee needed FMLA leave for Monday through Friday of that week, the employee would use a full week of FMLA leave despite not being required to report to work on the Friday holiday.

Section 825.201 (Leave To Care for a Parent)

Current § 825.201 on leave for the birth or placement for adoption or foster care of a child has been incorporated into proposed §§ 825.120 and 825.121 discussed above. The current § 825.202 addresses how much leave a husband and wife may take if they are employed by the same employer, in situations where an employee wants to be with a healthy child following a birth or placement for adoption or foster care, or to care for a parent with a serious health condition. The portions of current § 825.202 pertaining to leave for birth or placement of a child have been moved to proposed §§ 825.120 and 825.121, respectively. The remainder of the section has been renumbered as § 825.201. Consistent with the current regulatory provisions, proposed § 825.201 now highlights when leave can be taken to care for a parent, as well as the statutory limitations on taking such leave when a husband and wife work for the same employer.

Section 825.202 (Intermittent Leave or Reduced Leave Schedule)

Current § 825.203 explains that FMLA leave can be taken in blocks or on an intermittent or reduced leave schedule basis. Current paragraph (a) of this section explains that FMLA leave can be taken intermittently or on a reduced leave schedule due to a qualifying reason, and defines what constitutes intermittent and reduced schedule leave. Current paragraph (b) explains that leave taken after the birth or placement for adoption or foster care of a healthy child may only be used intermittently or on a reduced leave schedule with the employer's agreement. Current paragraph (c) explains that leave may be taken on an intermittent or reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition or for recovery therefrom, and to provide care or psychological comfort to an immediate family member with a serious health condition. Current paragraph (d) explains what limitations exist with regard to tracking increments of intermittent leave and states that employers may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.

This section has been renumbered as proposed § 825.202 for purposes of organization. Current paragraph (a) from § 825.203 is proposed to be titled ''[d]efinition,'' but no other changes are proposed.

Language from current paragraph (b) of § 825.203 governing the use of intermittent or reduced schedule leave after the birth, adoption, or foster care placement of a child has been moved to proposed paragraph (c), titled ''[b]irth or placement,'' in proposed § 825.202, which also cross-references the birth and adoption/foster care placement sections in proposed §§ 825.120 and 825.121.

Proposed paragraph (b) now defines ''medical necessity'' and is so titled. It combines existing language from current § 825.117 and illustrations from current § 825.203(c). A cross-reference to proposed § 825.306 also is proposed in paragraph (b), which explains what constitutes sufficient information on the medical certification form.

Current paragraph (d), which explains how to count increments of leave taken, has been moved to proposed § 825.205, to be explained below.

Section 825.203 (Scheduling of Intermittent or Reduced Schedule Leave)

Current § 825.117 discusses an employee's statutory obligation to schedule foreseeable intermittent or reduced schedule leave for planned medical treatment so as to not unduly disrupt an employer's operations. See 29 U.S.C. 2612(e)(2). The Department proposes to move this discussion to proposed § 825.203 for organizational purposes. The statute does not limit this obligation to intermittent or reduced schedule leave, but rather applies it to all foreseeable leave for planned medical treatment. Proposed § 825.302(e) (addressing employee notice requirements for foreseeable leave) sets forth the requirement as to any foreseeable leave for planned medical treatment.

Proposed § 825.203 clarifies that an employee who takes intermittent leave when medically necessary has a statutory obligation to make a ''reasonable effort'' as opposed to an ''attempt'' to schedule leave so as not to disrupt unduly the employer's operations.

The preamble accompanying current § 825.203 also discussed whether overtime hours not worked may be counted against an employee's FMLA entitlement. See 60 FR at 2202. This issue is discussed in the preamble below concerning proposed changes to § 825.205, which addresses how to determine the amount of leave used.

Section 825.204 (Transfer of an Employee to an Alternative Position During Intermittent Leave or Reduced Schedule Leave)

Current § 825.204 explains when an employer may transfer an employee to an alternative position in order to accommodate intermittent leave or a reduced leave schedule. The Department proposes no substantive changes to this section, but proposes to add subheadings for clarity. Specifically, proposed paragraph (a) is titled ''transfer or reassignment,'' proposed paragraph (b) is titled ''compliance,'' proposed paragraph (c) is titled ''equivalent pay and benefits,'' proposed paragraph (d) is titled ''employer limitations,'' and proposed paragraph (e) is titled ''reinstatement of employee.'' Other than editorial changes, the Department proposes no other changes to this section. The Department asked no questions about transfer in its RFI but received a number of comments criticizing the current regulations particularly as regards employees who have a recurring need for unscheduled intermittent leave. The full range of comments is discussed in Chapter VIII of the Report on the RFI comments (see 72 FR at 35608). Some commenters saw no basis to differentiate between foreseeable and unforeseeable need for leave in the context of this provision. ''We do not see any basis for distinguishing between foreseeable vs. unforeseeable leaves for purposes of such temporary transfers.'' *See* comments by United Parcel Service, Inc. Similarly, The Southern Company stated:

> [Section 825.204 provides n]o similar option * * * for employers to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave. Even if the employee's unscheduled intermittent absences may result in substantial safety risks to the public or co-employees, or could cause serious disruption to the operations of the employer, such employee's duties or position cannot be altered as a result of the unscheduled intermittent leave.

The Edison Electric Institute echoed the same concern that under the current regulatory scheme ''[e]mployers do not have [the option] to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave.'' The Department requests further comments on whether this regulatory provision should be changed and if so how.

Section 825.205 (Increments of Leave for Intermittent or Reduced Schedule Leave)

Current § 825.205 explains how to determine the amount of leave used when an employee takes intermittent or reduced schedule leave. Current paragraph (a) makes clear that ''only the amount of leave actually taken may be counted toward the 12 weeks of leave'' to which an employee is entitled. Current paragraph (b) explains how to calculate the use of intermittent or reduced schedule leave when an employee works part-time or variable hours. Current paragraph (c) explains how to calculate leave when an employee's permanent schedule changes and current paragraph (d) explains how to calculate leave when an employee's schedule varies from week to week.

The Department proposes to add language from current § 825.203(d), which explains how to count increments of intermittent FMLA leave, to paragraph (a) of this section, titled ''Minimum increment.'' Current paragraphs (b) through (d) of § 825.205 have been renumbered as § 825.205(b)(1), (2), and (3) for purposes of clarity, but no changes have been made to the text of those sections. Paragraph (b) is proposed to be titled ''[c]alculation of leave.''

The Department received comments expressing concerns about the size of increments of intermittent leave that may be taken. No issue received more substantive commentary to the RFI than employee use of unscheduled intermittent leave. Employers identified a number of problems with current § 825.203(d), which permits FMLA leave to be taken in increments as small as the employer's payroll system will capture. These difficulties include basic administrative problems. Several commenters, including a supervisor at International Auto Processing, noted that their payroll systems capture time down to one minute, ''Since our clocks track time to the minute, I find myself spending an unusual amount of time determining how many hours and minutes the employee has used by using his weekly time sheet. * * * This is a nightmare and I sometimes feel like the only thing I accomplish during the day is tracking intermittent leave.'' Second, employers also stated that the current rule does not allow them to adequately staff their businesses, as it is very difficult to find replacement employees to cover absences that are less than one half-day. The Detroit Medical Center commented that, ''Scheduling of sufficient staff is regularly compromised, negatively affecting the quality of service or, in hospital settings, actual patient care because of unscheduled intermittent leave.'' Third, as documented in the Department's 2007 Report on the RFI comments, ''intermittent FMLA leave can have significant impacts on time-sensitive business models. In many situations, the absence of just a few employees can have a significant impact.'' 72 FR at 35632; *see generally* 72 FR 35632–35638 (discussing impacts of unscheduled intermittent leave on certain time-sensitive industries). For example, the City of New York stated that when its 911 operators do not show up for work due to a chronic FMLA condition, the remaining employees must work longer to maintain appropriate staffing and response levels: ''The number of overtime hours being worked leads to overtired people making critical life and death decisions in an emergency driven environment.'' As a result of all these factors, many employers suggested the Department allow employers to require that intermittent leave be taken in greater increments (*e.g.*, two or four hour blocks or one day or one week blocks).

Conversely, a number of commenters defended the current rule on minimum increments of leave. The Legal Aid Society's Employment Law Center asked the Department to ''please be mindful of the employee who, in an ideal world, would not suffer from such devastating illnesses that wreck havoc on their own lives. Employees, too, struggle with chronic and episodic illnesses. The FMLA was specifically designed to provide leave in these instances.'' The National Partnership for Women & Families noted its strong support for the current regulations and specifically urged the Department to resist making any changes in the minimum increment of leave that an employee could take: ''Intermittent leave was designed to help employers by ensuring that workers are not absent any longer than necessary. While some employers now argue for half-day increments of intermittent leave, enforcing a four-hour leave requirement would mean forcing employees to miss more work than necessary, which is contrary to the statute and harmful to both employees and employers.'' The organization 9to5, National Association of Working Women also stated it ''opposes any regulatory change that would impose additional obstacles or requirements on workers seeking to utilize intermittent FMLA leave. Currently, workers may take just the time needed for treatments, minimizing their own loss of pay and

the strain on employers and co-workers.''

The Department understands the burdens imposed on employers by employees using unscheduled intermittent leave as demonstrated by the comments received in response to the RFI. At the same time, the Department is aware of the importance of such leave to employees with serious health conditions. The Department is not proposing to increase the minimum increment of intermittent leave at this time.

The Department also seeks comment as to whether, in situations in which physical impossibility prevents an employee using intermittent leave or working a reduced leave schedule from commencing work mid-way through a shift, an exception should be made to allow the entire shift to be designated as FMLA leave and counted against the employee's FMLA entitlement. For example, if a railroad conductor is required to conduct a train from one point to another, the employee cannot begin or stop work in the middle of the trip. Similarly, an employee who works in a lab sealed at the start of the day cannot enter the lab later or the work performed would be lost. The Department has addressed this scenario in prior guidance. *See* Wage and Hour Opinion Letter FMLA–42 (Aug. 23, 1994). In that 1994 Opinion Letter, the Department stated that when a flight attendant needed only three hours of intermittent leave to care for her sick mother every Friday, preventing her from working a Friday flight assignment during a two month period, only the three hours of leave needed each week could be charged to FMLA, and the remainder of the time may be charged to some other form of paid or unpaid leave. Upon further review, the Department questions whether such an interpretation is appropriate. While the Department's interpretation allows employees to preserve their FMLA entitlement, it may expose them to disciplinary action based on the additional hours of unprotected leave that they must take. The Department seeks comment on whether it is more appropriate to extend FMLA protection to the entire period of leave taken from the employee's assigned schedule in this situation.

A number of commenters to the record addressed this phenomenon. Southwest Airlines stated, ''When * * * employees are absent, flights do not take off without another employee taking their place.'' Therefore, even a few minutes of FMLA leave can result in the employee missing an entire flight. Similarly, the Air Transport Association of America, Inc. and the Airline Industrial Relations Conference commented,

> In this industry, a six-minute absence can result in a flight attendant avoiding a three-day trip to which she or he was assigned. Most airlines ''bank'' flights or schedule multiple flights to arrive and depart in a concentrated time frame, followed by a relative lull in activity. An employee could use intermittent FMLA leave to miss the heavy flight bank, causing the carrier to either operate short-handed or to call in a replacement worker who likely must be paid a shift premium, then come in to work the rest of the shift during which no flights may arrive or depart, leaving the carrier now over-staffed.

The Regional Transportation District in Denver, Colorado commented that ''due to the particular needs of the industry, [there is] difficulty scheduling intermittent leave for bus and light rail operators, particularly if the operator must be relieved in the middle of the run. [We] would like clear guidance on the limitations it can place on an operator to avoid scheduling intermittent leave during a run.'' This situation is also prevalent in the rail industry. The Association of American Railroads commented,

> Railroads typically establish ''pools'' (and ''extra boards'') comprised of train service employees who report to duty when called by the employer, based on train operations. When called in, the worker leaves on the train and must be gone for the entire trip; given the nature of the work, the worker cannot work a ''reduced schedule leave'' or intermittently for less than the entire trip. If the employee cannot work the entire trip, he or she must miss the entire trip no matter how much FMLA leave the worker needs.

Instead of proposing specific language, the Department seeks comment from the public on this issue and what if any language should be included in the final rule to address these situations within the statutory requirements.

The Department also wishes to clarify the application of FMLA leave to overtime hours. An employee may be limited to working eight hours per day or 40 hours per week due to a serious health condition and, under FMLA, has the right not to work overtime hours without being subject to any discipline. It is a reduced leave schedule. Employers continue to have questions, however, as to whether and how the overtime hours not worked due to the serious health condition may be counted against the employee's FMLA entitlement. The preamble accompanying current § 825.203 stated that whether overtime hours not worked can be counted against the employee's FMLA entitlement is determined by whether the employee would be required to use some form of leave to cover those hours in a non-FMLA situation. (60 FR at 2202) The preamble also distinguished between mandatory overtime, voluntary overtime, and overtime on an ''as needed'' basis. The Department's enforcement experience and responses to the RFI lead us to believe that the distinction between these three types of overtime, and the focus on whether leave would normally need to be used to cover the hours not worked, has caused confusion. *See* Wage and Hour Opinion Letter FMLA–107 (July 19, 1999) (''If overtime hours are on an 'as needed' basis and are not part of the employee's *usual or normal workweek*, or is voluntary, such hours would neither be counted to calculate the amount of the employee's FMLA leave entitlement nor charged to the employee's FMLA leave entitlement.'') (emphasis in original). The confusion has been compounded by language in the preamble discussing § 825.205 of the current rule, which states ''[a]n employee's FMLA leave entitlement may only be reduced for time which the employee would otherwise be required to report for duty, *but for the taking of the leave*.'' (60 FR at 2203)

The Department recognizes that overtime by its nature is generally assigned on an as needed basis, and the fact that it is assigned as needed has no bearing on whether the employee has volunteered to work or is being required to work the additional hours. The Department believes the correct focus should be not on whether the employee would normally be required to use leave to cover the overtime hours, but on whether the employee would otherwise be required to report for duty but for the taking of FMLA leave. If the employee would be required to work the overtime hours were it not for being entitled to FMLA leave, then the hours the employee would have been required to (but did not) work may be counted against the employee's FMLA entitlement. Where, in such a case, the employee works a part-time or reduced leave schedule, the employee's leave usage in any given week is proportionate to the employee's scheduled hours in the week in which the leave is used. For example, if an employee has a certified serious health condition limiting the employee's work hours to 40 per week and that employee is scheduled for 48 hours in a week, the employee would take 8 hours of FMLA protected leave that week. This translates into 8/48ths or 1/6th of a week of FMLA leave. For ease of tracking, an employer may convert these

fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours.

Where the employee's schedule so varies from week to week such that no ''normal'' schedule or pattern can be discerned, a weekly average of the hours worked for the 12 weeks prior to the start of the FMLA leave is used to calculate the employee's normal workweek as in proposed § 825.205(b)(3) (current § 825.205(d)). In all instances, the employer must select employees for mandatory overtime in a manner that does not discriminate against workers who need to use FMLA leave (*see* § 825.220). The Department is not proposing any regulatory changes related to the overtime issue, which is not addressed in the text of the current regulations and is discussed only in the 1995 preamble to the current rule (*see* 60 FR at 2202).

Section 825.207 (Substitution of Paid Leave)

Current § 825.207 addresses the interaction between unpaid FMLA leave and employer provided paid leave. Current paragraph (a) repeats the statutory language that paid leave may be substituted for unpaid FMLA leave. Current paragraph (b) addresses substitution of accrued paid vacation, personal, or family leave for unpaid FMLA family leave for the birth or placement of a child for adoption or foster care or to care for a spouse, child or parent with a serious health condition. Current paragraph (c) addresses when accrued paid vacation, personal, or medical/sick leave can run concurrently with the employee's unpaid FMLA leave for the employee's own serious health condition or when the employee is needed to care for a spouse, child or parent with a serious health condition. Current paragraph (d) addresses the interaction between a disability plan and unpaid FMLA leave, as well as the interaction of unpaid FMLA leave with a workers' compensation absence. Current paragraph (e) addresses the use of paid vacation or personal leave when taking FMLA leave. Current paragraph (f) confirms that if paid leave is not substituted at the option of the employer or the employee, the employee remains entitled to all accrued paid leave. Current paragraph (g) explains that paid leave used for purposes not covered by the FMLA cannot count against the employee's FMLA entitlement. Current paragraph (h) states that an employer cannot apply the FMLA requirements if paid leave is substituted and the employer's paid leave program applies less stringent procedural standards for taking leave than the FMLA. Current paragraph (i) addresses the interaction between the use of compensatory time off in the public sector and the use of FMLA leave.

The Department's enforcement experience and responses to the RFI lead us to believe that current § 825.207 may be confusing to employees and employers. For example, the differing treatment of ''medical leave,'' ''family leave,'' ''sick leave,'' and ''vacation leave'' makes it difficult both for employers to administer these provisions and for employees to know what their rights and obligations are in substituting paid leave for unpaid FMLA leave. Additionally, both employees and employers have expressed confusion as to the application of the employer's normal leave rules when paid leave is substituted for unpaid FMLA leave.

In response to the RFI, many employees and employee advocacy groups commented that the ability to substitute paid leave for any portion of an otherwise unpaid FMLA leave in many cases was essential to the employee's ability to take leave at all. Several employers and employer groups, however, commented that the substitution provisions of the regulations require that employees seeking to use accrued paid leave concurrently with FMLA leave be treated more favorably than those who use paid leave for other reasons. Still other employers stated that the various rules for substituting different types of paid leave have added to the costs of administering FMLA leave and discouraged the employers from adopting or retaining leave policies that are more generous than required by the FMLA.

Section 102(d)(2) of the FMLA governs the substitution of paid leave for unpaid FMLA leave. 29 U.S.C. 2612(d)(2). Paragraph (A) of that section of the statute addresses substitution of ''accrued paid vacation leave, personal leave, or family leave'' for unpaid FMLA leave for the birth or placement of a child, or to care for a covered family member. Paragraph (B) of that section addresses substitution of ''accrued paid vacation leave, personal leave, or medical or sick leave'' for unpaid FMLA leave to care for a covered family member or for the employee's own serious health condition. Language in paragraph (B) clarifies that the FMLA does not require employers to provide paid sick or medical leave in any situation in which they would not normally do so.

In the current regulations, the Department interpreted the clarifying clause regarding paid sick and medical leave in section 102(d)(2)(B) of the Act as indicating congressional intent to allow employers to enforce their normal rules regarding the use of paid medical and sick leave when such leave was substituted for unpaid FMLA leave. The Department further interpreted the lack of a similar clarifying clause in paragraph (A) of that section of the statute to indicate that employers were not permitted to enforce normal rules regarding the use of paid vacation leave or personal leave when such leave was substituted for unpaid FMLA leave. *See* preamble to current FMLA rule, 60 FR at 2205 (''There are no limitations, however, on the employee's right to elect to substitute accrued paid vacation or personal leave for qualifying FMLA leave, and the employer may not limit the timing during the year in which paid vacation may be substituted for FMLA-qualifying absences or impose other limitations.'').

The Department's interpretation of the substitution of paid leave provision has evolved over time, as has been reflected in the Department's opinion letters on the subject. For example, while the preamble to the current regulations specifically stated that employers could not restrict the time during the year in which an employee could substitute paid vacation leave for unpaid FMLA leave, the Department has clarified in Opinion Letter FMLA–75 that where vacation leave was accrued pursuant to a generally applied restriction on when it could be used, an employee did not have the right to substitute vacation leave for unpaid FMLA leave at any other time. Wage and Hour Opinion Letter FMLA–75 (Nov. 14, 1995) (''[W]here an employee may only use leave under the employer's plan during a specified period when the plant is shut down, the employee has not fully vested in the right to substitute that leave for purposes of FMLA.''). In two other opinion letters on the substitution of paid vacation leave, the Department has recognized that both an employee's right to use paid leave and an employer's right to require substitution are subject to the policies pursuant to which the leave was accrued. *See* Wage and Hour Opinion Letter FMLA–81 (June 18, 1996) (''[T]he Department interprets these provisions to mean that the employee has both earned the [vacation] leave and is able to use that leave during the FMLA leave period.''); Wage and Hour Opinion Letter FMLA–61 (May 12, 1995) (''The Department interprets these provisions to mean that

the employee has both earned the leave and is able to use that leave during the FMLA period. * * * [I]n the particular situation that you describe, the employer could not require the employee to substitute [vacation] leave that is not yet available to the employee to use under the terms of the employer's leave plan.'').

On further consideration, the Department now believes that the better interpretation of paragraph (B) of section 102(d)(2) of the Act is that it simply clarifies the limits on the employer's obligation to allow the substitution of paid sick or medical leave. For example, it clarifies that an employer is not obligated to allow an employee to substitute paid sick leave for unpaid FMLA leave when the employee is caring for a child with a serious health condition if the employer's normal sick leave rules allow such paid leave to be used only for the employee's own illness. However, as the language in both sections of the statute makes clear, in all cases the substitution of paid leave pursuant to section 102(d)(2) of the Act is limited to the substitution of accrued paid leave. *See* FMLA's legislative history: ''Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis.'' H.R. Rep. No. 103–8, Pt. 1, at 38 (1993); *see also* S. Rep. No. 103–3, at 27–28 (1993).

Additionally, as several commenters to the RFI noted, by prohibiting employers from applying their normal leave policies to employees substituting paid vacation and personal leave for unpaid FMLA leave, the current regulations may have provided an incentive to employers to scale back on their provision of vacation and personal leave because they are unable to control its usage. Moreover, as other commenters pointed out, by allowing employees to substitute such paid leave for unpaid FMLA leave without meeting their employer's normal leave rules, the regulations have placed employees using FMLA leave in a more favored position regarding the use of employer provided paid leave than their coworkers taking vacation or personal leave for non-FMLA reasons.

The Department agrees that an unintended consequence of the current regulations on substitution has been to create tension with the plain language of the FMLA, which states that nothing in the Act or any other amendments made by it shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under the Act or any amendment made by it. *See* 29 U.S.C. 2653. Additionally, while the FMLA prohibits discrimination against FMLA leave users, there is nothing in the Act that requires employers to treat FMLA users more favorably than other employees with regard to the provision of paid leave. Furthermore, while the Act's protections prohibit an employee from losing any accrued benefits as a result of taking FMLA leave, nothing in that section entitles an FMLA leave-taker to any right or benefit other than that to which the employee would have been entitled had the employee not taken the leave. *See* 29 U.S.C. 2614(a)(2) and (3).

To more consistently apply these principles, the Department proposes to combine current paragraphs (a), (b), and (c) of § 825.207 into one paragraph (a), which now clearly states that the terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave—including, for example, paid vacation, personal leave, family leave, ''paid time off'' (PTO), or sick leave. Additionally, the Department proposes to clarify what is meant in § 825.207 by the term ''substitution,'' which normally means replacing one thing with another, but does not comfortably bear that meaning in the context of the FMLA. Thus, the Department proposes to add language clarifying that for FMLA purposes ''substitution'' means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently. This is standard practice under the current regulations and is not a change in enforcement policy.

Just as employees do not have the right to use leave which has not yet accrued, an employee's ability to use accrued leave is also limited by the leave policies pursuant to which the ''applicable'' leave is accrued (*i.e.*, available for use pursuant to the non-discriminatory terms and conditions of the employer's policy). Therefore, for example, if an employer's paid vacation leave policy prohibits the use of vacation leave in less than full day increments, employees would have no right to use less than a full day of vacation leave regardless of whether the vacation leave was being substituted for unpaid FMLA leave. Similarly, if an employer's paid personal leave policy requires two days notice for the use of personal leave, an employee seeking to substitute personal leave for unpaid FMLA leave would need to meet the two-day notice requirement prior to receiving the paid personal leave. Employers, of course, have the right to voluntarily waive the application of such restrictions on an employee's use of paid leave, but they are not required by the FMLA to do so.

The Department believes the proposed language on the substitution of paid leave for unpaid FMLA leave also is more consistent with the trend toward employers providing employees with ''paid time off'' (PTO) policies that do not distinguish the right to leave based on the reason (vacation versus illness) but instead give employees a pool of leave to use for whatever reason they choose. PTO plans generally allow employees to take paid leave for any reason as long as the employer's procedures are satisfied. Under the current FMLA regulations, such PTO policies were treated the same as paid vacation or personal leave and employers were therefore not allowed to apply their normal leave rules to the substitution of such leave for unpaid FMLA leave. As several commenters to the RFI noted, this interpretation prohibited an employer who chose to use a PTO leave plan from applying its existing policies for taking leave when the leave was being used for sick or family leave purposes.

In addition to the language proposed in this section as described above, the Department also believes certain safeguards for employees are necessary. Therefore, the Department also proposes to add language clarifying that, when providing notice of eligibility for FMLA leave to an employee pursuant to proposed § 825.300, an employer must make the employee aware of any additional requirements for the use of paid leave and must inform the employee that he/she remains entitled to unpaid FMLA leave even if he/she chooses not to meet the terms and conditions of the employer's paid leave policies (such as using leave only in full day increments or completing a specific leave request form). The Department invites comment as to whether this proposal appropriately implements Congressional intent regarding substitution of paid leave. *See* 29 U.S.C. 2612(d)(2).

Language from current § 825.207(d)(1), explaining that employers may apply more stringent requirements for receipt of disability payments, has been moved to new proposed § 825.306(c). The remaining language from current § 825.207(d)(1), making clear that substitution of paid leave does not apply where the employee is receiving paid disability leave, is retained in the proposed section. However, the Department also wishes to clarify that while the substitution provisions are not

applicable when an employee receives disability benefits while taking FMLA leave, if the employer and employee agree to have paid leave also run concurrently with FMLA leave to supplement disability benefits, such as in the case where an employee only receives two-thirds of his or her salary from the disability plan, such an agreement is permitted under FMLA to the degree that it is allowable under applicable State law. This is in keeping with the statutory mandate not to discourage more generous leave policies voluntarily provided by employers.

The language from current § 825.207(d)(2), addressing the interaction between workers' compensation, light duty and the FMLA, has been moved to proposed § 825.207(e). Additional discussion of light duty also can be found in § 825.220(c) of the proposed rule as discussed below. Current § 825.207(e), which states that no limitations may be placed by the employer on substitution of paid vacation or personal leave, including leave earned or accrued under PTO plans, has been deleted in light of the discussion of paragraph (a) above. Current § 825.207(h), which states that when an employer's procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with higher FMLA standards, has been deleted because it does not properly implement section 103 of the FMLA, which states that employers may require sufficient FMLA certification in support of *any* request for FMLA leave for either the employee's own serious health condition or a covered family member's serious health condition. It also is in conflict with section 102(e) of the FMLA, which requires employees to provide 30 days notice for foreseeable leave whenever possible for the birth or placement of a child or for planned medical treatment. Current § 825.207(f) and (g) remain unchanged but have been redesignated as paragraphs (b) and (c) of this section.

Finally, the Department proposes to revise current § 825.207(i) to allow the use of compensatory time accrued by public agency employees under the Fair Labor Standards Act (FLSA) to run concurrently with unpaid FMLA leave when leave is taken for an FMLA-qualifying reason. Although the Department did not receive many comments dealing specifically with the issue of compensatory time in response to the RFI, those received indicate a general agreement that the substitution of compensatory time for otherwise unpaid FMLA would be beneficial both to the employee, by minimizing the financial impact of unpaid leave, and to the employer, by allowing the two benefits to run concurrently. Furthermore, the Department believes the proposed revision is consistent with the U.S. Supreme Court's decision in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), in which the Court found that public employers always have the right to cash out a public sector employee's compensatory time or require the employee to use the time.

Section 825.208 (Reserved)

Current § 825.208 has been renumbered as proposed § 825.301, to be discussed below. The section is therefore reserved to avoid extensive renumbering of other sections.

Section 825.210 (Employee Payment of Group Health Benefit Premiums)

This section addresses an employee's obligation to pay his or her share of group health plan premiums while on FMLA leave. The Department received few comments regarding this specific section in response to the RFI. Some commenters stated that it was difficult to obtain payment for an employee's share of health benefit premiums during the period the employee is on FMLA leave. Employer representatives also expressed concern about their ability to recoup their portion of health insurance premiums when an employee decides not to return from FMLA leave. Other commenters requested that the Department clarify an employer's responsibility to maintain health insurance coverage when an employee on FMLA leave fails to pay his or her portion of the premiums.

The Department is proposing to revise paragraph (f) of this section by deleting the word ''unpaid.'' As noted in § 825.207(e), an individual who is simultaneously taking FMLA leave and receiving payments as a result of a workers' compensation injury is not on unpaid leave. No further changes are proposed for this section. For further discussion of an employer's responsibility to maintain the health insurance coverage of an employee on FMLA leave, *see* proposed § 825.212 as discussed below.

Section 825.212 (Employee Failure To Make Health Premium Payments)

Current § 825.212 explains that an employer may terminate an employee's health insurance coverage while the employee is on FMLA leave if the employee fails to pay the employee's share of the premiums, the grace period has expired, and the employer provides sufficient notification to the employee.

The Department received a number of comments regarding this section. For example, the Disability Management Employer Coalition requested that the Department better explain how employers should respond to an employee's failure to pay his or her share of health insurance premiums while on FMLA leave. In particular, the Coalition stated that while many employers pay the employee's share of health insurance premiums because of concerns regarding continuation of coverage, employers have concerns about the cost of doing so. Other commenters raised similar concerns, especially when individuals do not return to work after their FMLA leave has expired, and requested clarification regarding the timing of termination of an individual's coverage for failure to make payment.

The Department proposes to add language to current paragraph (c) of this section to make clear that if an employer allows an employee's health insurance to lapse due to the employee's failure to pay his or her share of the premium as set forth in the regulations, the employer still has a duty to reinstate the employee's health insurance when the employee returns to work and can be liable for harm suffered by the employee if it fails to do so. Alternatives exist in most cases to terminating an employee's health insurance when premium payments are not made. For instance, an employer could make payroll deductions to recoup such payments when an employee returns to work without violating the FMLA. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. *See* § 825.213 of the current and proposed regulations.

Section 825.213 (Employer Recovery of Benefit Costs)

This section explains what process an employer must follow to recoup insurance premiums from an employee when the employee does not return from leave in certain circumstances. A few employer representatives responded to the Department's RFI with concerns about this process, with some suggesting that employees on FMLA leave be provided coverage under the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended, 29 U.S.C. 1161–1168 (COBRA). These commenters were particularly concerned that the current

system requires that employers provide health insurance, and pay the majority of the premium, for individuals on FMLA leave who have no intention of returning to work once their leave entitlement expires. The Department understands these concerns, but cannot adopt the suggested change under current law.

The Department proposes to move language from existing § 825.310(h), which deals with certification requirements when an employee fails to return to work due to the continuation, recurrence, or onset of a serious health condition, to this section, as it believes it is more appropriately placed here with other issues involving repayment of health premiums. This language states that the cost of the certification an employee must obtain to avoid the repayment of health insurance premiums when the employee does not return from leave must be borne by the employee, as well as any travel costs.

Section 825.214 (Employee Right to Reinstatement)

Current § 825.214 addresses an employee's reinstatement rights upon returning to work. This section also makes clear that even if an employee is unable to return to work as a result of the serious health condition and would not have FMLA reinstatement rights, the employee may have rights under the ADA.

In response to the Department's RFI, employers expressed concern about the impact on their business operations of reinstating an individual to his or her same position. Many of these commenters were particularly concerned about the interplay between the use of intermittent leave by an employee and that employee's right to reinstatement. These commenters argued that, in many cases, such individuals should not be entitled to job restoration under current § 825.214(b) because they are unable to perform an essential function of their position, such as to work overtime or meet regular and reliable attendance requirements. Commenters in certain industries, such as those where individuals are trained to work with particular consumers, and smaller employers stated that returning an individual to his or her same position can be difficult, even when the individual takes block leave. These employers often have to hire an individual to replace the employee taking FMLA leave, and are uncertain how to manage the employee's return to work and their obligation to provide reinstatement. On the other hand, numerous employees stated that the ability to take FMLA leave, without having to worry whether their job was secure, was critical to their being able to manage their own serious health condition or caregiving responsibilities. The National Partnership for Women & Families stated that the job restoration provisions of FMLA ''promote[ ] greater workforce continuity and stability by helping employees retain their jobs when an emergency strikes.''

The Department believes that this regulatory provision meets the intent of Congress in this area, by providing employees with job protection while allowing employers some flexibility to return the employee to the same or an equivalent position, and that no changes are appropriate under current law.

The Department proposes minor clarifications along with organizational changes to this section. First, the Department proposes to add a heading titled ''[g]eneral rule,'' emphasizing that the section sets forth the general rule on reinstatement obligations under the FMLA. Proposed § 825.214 retains the language from current § 825.214(a) without change. Language from current paragraph (b) on limitations on reinstatement has been moved to proposed § 825.216(c) and combined with language from current § 825.216(d) on concurrent workers' compensation absences during FMLA leave, for organizational and clarification purposes.

Section 825.215 (Equivalent Position)

Current § 825.215 defines what constitutes an ''equivalent position'' for purposes of reinstatement. Current paragraph (a) explains that an equivalent position is one ''virtually identical'' to the employee's former position. Current paragraph (b) instructs employers to give an employee a ''reasonable opportunity'' to fulfill any conditions the employee needs to fulfill, such as attending a course, if the employee is no longer qualified for his or her position as a result of an FMLA absence. Current paragraph (c) defines equivalent pay, including when an employee is entitled to pay increases and certain types of bonuses when taking FMLA leave. Current paragraph (d) defines what constitutes ''equivalent benefits.'' Current paragraph (e) defines what constitutes ''equivalent terms and conditions'' of employment, and current paragraph (f) confirms that the definition of ''equivalency'' does not extend to *de minimis* or intangible, unmeasurable aspects of the job.

The Department received extensive feedback regarding the impact of the requirements of this regulatory section on employer incentive programs, especially perfect attendance awards. This issue has also been the subject of many requests for clarification to the Department over the years. Employers, and their representatives, almost uniformly stated that the current regulatory distinction between an attendance bonus and a production bonus has a ''chilling effect on employer incentive plans.'' These commenters argued that the current regulatory requirements are illogical and unfair, and have caused many companies to modify, or eliminate altogether, perfect attendance reward programs. Other employers stated that they would not consider implementing a perfect attendance program because, by requiring that employers provide awards to individuals with less than perfect attendance, these commenters believe that the Department has placed employees taking FMLA leave in a better position than those who take no leave. Many employees also commented on the perceived unfairness of providing a ''perfect attendance'' award to individuals who had been absent from work for up to 12 weeks of the eligible time period. Several employer representatives suggested that the Department permit employers to administer attendance incentives and reward perfect attendance without regard to the reason for an absence, thus allowing employers to treat all individuals absent for work in the same manner.

Several employee organizations stated that the current regulatory scheme appropriately recognizes that employees should not be penalized for exercising their FMLA rights. These commenters believed that permitting employers to exclude employees on FMLA leave from award programs would discourage employees from taking FMLA leave.

The Department proposes several changes to this section. No substantive changes have been made to proposed paragraph (a), titled ''[e]quivalent position,'' proposed paragraph (b), titled ''[c]onditions to qualify,'' or current paragraph (c)(1). The Department proposes changes to current paragraph (c)(2) regarding bonuses to allow an employer to disqualify an employee from a bonus or award predicated on the achievement of a goal where the employee fails to achieve that goal as a result of an FMLA absence. Of course, an employer could not disqualify only those individuals on FMLA-qualified leave and allow other employees on other forms of non-FMLA leave to receive such an award without violating the FMLA's non-discrimination requirement.

The Department proposes this change because the wording of current

§ 825.215(c)(2) on bonuses is confusing and because of the unfairness perceived by both employees and employers as a result of allowing an employee to obtain a perfect attendance award when the employee has been absent on FMLA leave. The confusion stems from language in the current section, which distinguishes between bonuses for job performance, such as those based on production goals, versus bonuses based on the absence of certain events occurring, and includes as examples both bonuses for perfect attendance and for working safely with no accidents. Moreover, the language of the current regulation incorrectly groups together bonuses for perfect attendance and safety as not requiring performance by the employee but rather the absence of occurrences. This defies the plain meaning of attendance. Employers are uncertain whether their employee incentive plans will be in violation of the current regulation. *See* Wage and Hour Opinion Letter FMLA–110 (Sept. 11, 2000) (Employer inquiry regarding a plan the employer believed to be a ''production incentive'' plan, which the Department found analogous to a perfect attendance program).

Section 825.215(c)(2), containing this confusing distinction between a bonus for perfect attendance or safety versus meeting or exceeding production goals, also seems to conflict with the language in current § 825.215(d)(5), which states that an employee is ''entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost.'' Current § 825.215(d)(5) is more consistent with 29 U.S.C. 2614(a)(3), which provides that nothing in that section shall be construed to entitle any restored employee to—(A) the accrual of any seniority or employment benefits during any period of leave; or (B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

The Department also is concerned that the regulatory language in current § 825.215(c)(2) provides the wrong incentive to employers to eliminate perfect attendance awards because of the inequity perceived by coworkers of allowing employees who have taken FMLA leave to receive these awards. The Department did not intend, nor does the Act itself intend, that the FMLA regulations result in a reduction of benefits to all employees.

Therefore, the Department proposes to eliminate the existing language of current § 825.215(c)(2) and replace it with the following:

> Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent non-FMLA leave status. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used vacation leave for an FMLA-protected purpose also must receive the payment.

The Department believes this proposed language better reflects the requirements of the statutory scheme.

The Department has re-titled paragraphs (e) and (f) in the proposed rule. The final sentence of the current section, which reminds employers that putting an employee in a job slated for lay-off when the employee's original position would not be eliminated would not meet the definition of an equivalent position, has been moved to proposed § 825.216(a)(1) where related issues are discussed, for organizational and clarification purposes.

Section 825.216 (Limitations on an employee's right to reinstatement)

Current § 825.216 addresses the limitations on an employee's right to reinstatement. Specifically, current paragraph (a)(1) addresses what happens when an employee is laid off or the employee's shift is eliminated while the employee is on FMLA leave. Current paragraph (b) addresses what happens when an employee taking FMLA leave was only hired for a specific term or project. Current paragraph (c) addresses limitations on reinstatement with regard to ''key employees.'' Current paragraph (d) addresses rules governing the interaction between FMLA leave and a workers' compensation absence when the employee is unable to return to work at the end of the 12-week FMLA leave period.

The Department's RFI generated a handful of comments regarding this section. Several of the comments focused on the difficulty in providing job restoration rights to individuals who take intermittent leave for chronic serious health conditions. For example, FNG Human Resources argued that an employer should have the right to replace employees who ''consistently use up to 11+ weeks of FMLA for year after year.'' One commenter requested that the Department more clearly define the employer's obligations should a layoff occur. A law firm asked that the Department clarify the interaction between § 825.216(a), which ''suggests that a seniority provision in a [collective bargaining agreement] would not yield to the FMLA'', and § 825.700, which, the commenter indicated, suggests the opposite result.

The Department is not proposing any changes to this section to address the use of intermittent leave for chronic serious health conditions. Likewise, the Department believes the current regulatory language in this section and current § 825.700 adequately explains the interaction between the job restoration provisions of FMLA and collectively-bargained seniority provisions.

Minor changes have been made to this section for purposes of greater clarity. The only change the Department proposes to current paragraph (a)(1) is to incorporate the last sentence of § 825.215(f) which, as discussed above, states that restoration to a job slated for lay-off would not meet the requirements of an equivalent position. This is proposed for organizational and clarification purposes, but no substantive change is intended. Similarly, the Department proposes to re-order current paragraph (b) as paragraph (a)(3) for purposes of organizational structure and clarity. The Department proposes a new paragraph (c) to address an employer's obligations when an employee cannot return to work after FMLA leave is exhausted because the serious health condition continues. This section combines language from current §§ 825.214(b) and 825.216(d), because both sections address limitations on reinstatement when an employee has exhausted his or her FMLA leave entitlement and is unable to perform the essential functions of his or her job, but no substantive changes are intended. The Department has not made any changes to current paragraph (c) except to re-designate it as paragraph (b). Current § 825.312 (g) and (h), which address the fraudulent use of FMLA leave and outside employment during FMLA leave, respectively, and therefore also address limitations on reinstatement, have been renumbered as proposed § 825.216 (d) and (e) for organizational purposes.

Sections 825.217 through 825.219 (Explanation of key employees and their rights)

Taken together, current §§ 825.217, 825.218 and 825.219 define the term ''key employee''; explain the meaning of the phrase ''substantial and grievous economic injury'' to the employer's operations; and provide an explanation of the rights of a key employee. A handful of comments received in response to the Department's RFI requested that the Department allow employers greater flexibility to designate ''key employees'', particularly in the safety industry. A law firm representing employers also requested that the Department provide guidance regarding the responsibility of a placement agency to provide job restoration rights when the secondary employer refuses to reinstate the individual because the position was ''mission-critical.''

The exemption for highly compensated employees is defined by statute as applying only to a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed. *See* 29 U.S.C. 2614(b)(2). While the Department understands that requiring job restoration for some lower-paid positions in public safety and other industries may cause ''substantial and grievous economic injury'' in particular situations or may cause hardship to the employer, the Department believes that any revisions to address such situations would require a change in the statute.

Minor changes to § 825.217(b) have been made to update the reference to the definition of ''salary basis'' as now contained in 29 CFR 541.602 (previously codified in 29 CFR 541.118) and to add ''computer employees'' to the list of employees who may qualify for exemption from the minimum wage and overtime requirements of the FLSA under those regulations if they meet certain duties and salary tests. The Department did not receive any comments specific to §§ 825.218 and 825.219 in response to the RFI and is not proposing any changes to these provisions.

Section 825.220 (Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights)

Current § 825.220 explains what actions taken by employers constitute an interference with an employee's rights under the FMLA. The Department proposes to change two provisions in this section, and to clarify two other provisions.

First, the Department proposes new language to current paragraph (b) that sets forth the remedy for interfering with an employee's rights under the FMLA. While this language also has been included in proposed § 825.300, which deals specifically with employer notice obligations, and proposed § 825.301, which addresses what triggers an employer's designation obligations, the Department believes it is important that the general rule governing an employer's obligations under the Act also provide guidance on the remedy for such violations. First, numerous commenters to the RFI asked the Department to strengthen or clarify the regulatory provisions implementing the Act's prohibitions on interference and discrimination. 29 U.S.C. 2615(a)(1) and (2). For example, the University of California, Hastings College of Law, Center for Worklife Law requested that the Department ''clarify that interference with an employee's right to take FMLA leave includes not only withholding information but also deterring employees from exercising their rights. * * *'' The Center for Worklife Law asserted that ''employees returning from [FMLA] leave have been given poorer quality assignments, been subjected to heightened scrutiny of their work and received undeservedly negative evaluations.'' Similarly, the law firm of Kennedy, Reeve & Knoll and several individual workers asserted that some employers actively discourage the taking of FMLA leave, especially intermittent leave, or penalize those employees who take such leave.

Second, the Department also received comments about the language contained in current § 825.220(d) stating that where an employee has voluntarily accepted a light duty position in lieu of taking FMLA leave, the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of ''light duty.'' The Department is aware that at least two courts have interpreted this language to mean that an employee uses up his or her twelve week FMLA leave entitlement while performing work in a light duty assignment. *See Roberts* v. *Owens-Illinois, Inc.,* 2004 WL 1087355 (S.D. Ind. 2004); *Artis* v. *Palos Community Hospital,* 2004 WL 2125414 (N.D. Ill. 2004). These holdings differ from the Department's interpretation of the current regulation, as further expressed in a 1995 DOL opinion letter which states that an employee who voluntarily accepts a light duty position: retains rights under FMLA to job restoration to the same or an equivalent position held prior to the start of the leave for a cumulative period of up to 12 workweeks. This ''cumulative period'' would be measured by the time designated as FMLA leave for the workers' compensation leave of absence and the time employed in a light duty assignment. The period of time employed in a light duty assignment cannot count, however, against the 12 weeks of FMLA leave.

Wage and Hour Opinion Letter FMLA–55 (Mar. 10, 1995).

Numerous employers, and their representatives, urged the Department to apply the current regulatory language to both voluntary and mandatory light duty assignments. The National Association of Convenience Stores, the U.S. Chamber of Commerce, the Society for Human Resource Management, and others asked the Department to require that employees accept light duty assignments, consistent with their medical restrictions, in lieu of taking FMLA leave. The College and University Professional Association for Human Resources stated that ''[i]n many cases, light duty may be a better alternative than placing the employee on leave, as it allows the employer greater flexibility in meeting its staffing needs'' while the Society for Human Resource Management noted that ''[e]xperience has shown that employees with minor injuries generally recover more quickly if they are working, gradually returning to their former capabilities.'' As an alternative, many employers suggested that the Department revise the regulation to make clear that light duty work counts against an employee's 12-week FMLA entitlement. The American Bakers Association, the National Coalition to Protect Family Leave, the National Business Group on Health, the Retail Industry Leaders Association, the National Restaurant Association, several management-side law firms, and individual employers and human resource professionals urged the Department to rescind Opinion Letter FMLA–55 and explicitly provide ''that time spent in light duty away from the employee's usual job counts against the 12 weeks of FMLA entitlement for all purposes.''

Other commenters, including the AFL-CIO, the Coalition of Labor Union Women, Families USA, the Maine Department of Labor, and the University of Michigan Center for the Education of Women, argued that counting light duty work as FMLA leave is not appropriate. Some employers, and organizations representing human resource professionals, also shared this view. For

example, MedStar Health, Inc. stated that ''[w]hen an employee works, even in an alternate light duty capacity, he/she is not absent under the meaning of the FMLA.''

Some commenters, such as the National Partnership for Women & Families, argued that the Department's current position, which counts the time spent in a light duty position for purposes of job restoration rights but not FMLA leave entitlement, struck the appropriate balance. Still others, such as the University of California, Hastings College of Law, Center for Worklife Law, expressed concern that counting light duty work against an employee's FMLA leave entitlement or reinstatement rights could negatively impact pregnant women. The National Retail Federation suggested that light duty not count against FMLA leave, unless the individual's medical restrictions required reduced hours, in which case any reduction in normal work hours would count against the individual's FMLA leave entitlement.

Upon further review, the Department believes that the current regulatory language does not serve the Act's purpose to provide job protection when FMLA leave is taken. Accordingly, the Department proposes deleting the final sentence of current § 825.220(d), which states that job restoration rights are available until 12 weeks have passed within the 12-month period including all FMLA leave taken and the period of light duty. This change will ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having the right diminished by the amount of time spent in a light duty position. The Department also is not proposing to require employees to accept light duty work in lieu of taking FMLA leave. If an employee is voluntarily performing a light duty assignment and performing work, the employee is not on FMLA leave and the employee should not be deprived of future FMLA-qualifying leave when performing such work. By deleting this language, the Department in no way intends to discourage employees and employers from engaging in such light duty work arrangements. Rather, the Department simply wishes to make clear that when an employee is performing a light duty assignment, that employee's rights to FMLA leave and to job restoration are not affected by such light duty assignment. The Department invites comment on whether the deletion of this language may negatively impact an employee's ability to return to his or her original position from a voluntary light duty position.

Many RFI commenters asked that the Department clarify the language in subsection (d) that states ''[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.'' Some courts have disagreed as to whether this language prohibits only the prospective waiver of FMLA rights, such as the right to 12 weeks of leave, or also prohibits the retrospective settlement of FMLA claims based on past employer conduct, such as through a settlement agreement. Compare *Taylor* v. *Progress Energy,* 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed,* 75 U.S.L.W. 3226 (Oct. 22, 2007) (No. 07–539) (Department's regulation prevents employees from independently settling past claims for FMLA violations with employers without the approval of the Department or a court) with *Faris* v. *Williams WPC–I, Inc.,* 332 F.3d 316 (5th Cir. 2003) (plain reading of the Department's regulation is that it prohibits prospective waiver of rights only and not retroactive settlement of claims).

A majority of commenters to the RFI, including the Connecticut Department of Labor, the Ohio Department of Administration, the National Coalition to Protect Family Leave, the National Retail Federation, the Association of Corporate Counsel, the United Parcel Service, American Electric Power, and the University of California, argued that § 825.220(d) should be amended to explicitly allow waivers and releases in connection with the settlement of FMLA claims, that is, claims for past violations. Commenters supporting this view stated that any interpretation preventing the waiver or release of past claims unnecessarily encourages litigation and interferes with the public policy favoring private resolution of disputes, is neither practical nor efficient (particularly in a reduction-in-force), may discourage companies from providing severance or separation packages, and is not required by the statutory language, which contains no indication that Congress intended to prevent such waivers. Many of these commenters, such as the Connecticut Department of Labor, the Indiana Chamber of Commerce, the Detroit Medical Center, Clark Hill PLC, and the Human Resource Management Association of Southeastern Wisconsin, suggested that the Department adopt minimum standards for knowing and voluntary waivers, similar to those provided for under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, 626(f). Other RFI commenters, such as the National Employment Lawyers Association, urged the Department to prohibit both prospective and retrospective waivers, stating that requiring Departmental or court approval of voluntary settlements in no way jeopardizes the public policy in favor of settlement and protects vulnerable workers who might be induced to waive their FMLA rights rather than forfeit income.

The Department proposes to clarify the language in paragraph (d) in light of the Fourth Circuit's decision in *Taylor* which held that employees cannot voluntarily settle their past FMLA claims. The Department disagrees with that reading of the regulations. As the example in the current regulations reveals, this provision was intended to apply only to the waiver of prospective rights. In the interest of clarity, however, the Department proposes to make explicit in paragraph (d) that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the Department or a court. The Department does not believe this is a change in the law as it has never been the Department's practice, since the enactment of the FMLA, to supervise such voluntary settlements.

Section 825.300 (Employer Notice Requirements)

The Act imposes notice obligations on both employers and employees. Current §§ 825.300 and 825.301 outline employers' responsibilities to notify employees of their FMLA rights. Several additional notice requirements, such as notifying employees of their FMLA eligibility and designation of their FMLA leave, also appear elsewhere in current §§ 825.110 and 825.208.

Current § 825.300(a) addresses the statutory posting requirement (*see* 29 U.S.C. 2619(a)). Under current § 825.300(b), an employer that willfully violates the posting requirement may be assessed a civil money penalty not to exceed $100 for each separate offense (*see* 29 U.S.C. 2619(b)). Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer is responsible for providing notice in a language in which the employees are literate. *See* § 825.300(c).

Current § 825.301(b) requires the employer to provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining the consequences of a failure to meet these obligations. The written notice must be provided in a language in which the employee is literate and must include, as appropriate:

(i) That the leave will be counted against the employee's annual FMLA leave entitlement (*see* § 825.208);

(ii) Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (*see* § 825.305);

(iii) The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*see* § 825.210), and the possible consequences of failure to make such payments on a timely basis (*i.e.,* the circumstances under which coverage may lapse);

(v) Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (*see* § 825.310);

(vi) The employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* § 825.218);

(vii) The employee's right to restoration to the same or an equivalent job upon return from leave (*see* §§ 825.214 and 825.604); and

(viii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*see* § 825.213).

29 CFR 825.301(b)(1). The specific notice may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so (§ 825.301(b)(2)). The notice must be given within a reasonable time after notice of the need for leave is given by the employee-within one or two business days if feasible (§ 825.301(c)). The written notification to the employee that the leave has been designated as FMLA leave may be in any form, including a notation on the employee's pay stub (§ 825.208(b)(2)).

The Department noted in its RFI that one consistent concern expressed by the employee representatives during stakeholder meetings was that employees need to be better aware of their rights under the FMLA. The RFI solicited public input on the effectiveness of these various regulatory notice provisions in promoting communications between employees and employers and on what more could be done to improve the general state of awareness of FMLA rights and responsibilities by both employees and employers. The Department sought information in response to several questions concerning the notice provisions and how those provisions relate to employee awareness of their rights and responsibilities.

Increasing employee and employer awareness of FMLA rights and responsibilities continues to be a challenge based on comments submitted to the RFI. International Auto Processing, Inc., suggested that employees may be unaware of their FMLA rights due to the timing of when they receive information about FMLA: ''If employees continue to be unaware of their FMLA rights, it may be because most employers will cover this at orientation. On the first day of the job, new employees are nervous and are overwhelmed with paperwork and work rules. Since FMLA won't affect them until they have in the requisite 12 months with the company, they may shove that information to the back burner.''

Some comments addressed the sufficiency of the information provided. The United Transportation Union stated that the ''posting requirements for employers under FMLA do not go far enough in that they do not actively educate employees on their rights under FMLA. In addition to posting FMLA basic facts as required by the regulation, employers should be required to give the information to employees, in writing, once they become eligible under the regulations with that employer. Contact phone numbers for the employer as well as detailed appeals process afforded to the employee should be provided, as well as recourse information for possible retaliatory practices by the employer.'' The International Association of Machinists and Aerospace Workers recommended that ''employees should be expressly notified of their right to take intermittent leave. * * * This has proven a real problem for some of our members. * * * An employee who suffers from a condition that is still being diagnosed, but doctors believe it is either lupus, a connective tissue disorder or rheumatoid arthritis, arrived late to work due to her condition on a number of occasions [and] was completely unaware that she could take FMLA on an intermittent basis. She thought if she took any FMLA leave, she would have to stop working altogether, something her illness did not necessitate and something she could not afford to do.''

The AFL–CIO urged the Department to consider ''requiring employers to provide an individualized notice provision to employees on an annual basis,'' and referred to another commenter who suggested requiring notice to employees at the point of hiring and annually thereafter. The Communications Workers of America reiterated that employees need to receive guidelines that ''explain their annual leave entitlement and the process for making application for FMLA leave.''

Proposed Revisions

The Department believes that a key component of making the FMLA a success is effective communication between employees and employers. To improve the process, the Department proposes to collect the notice requirements into one comprehensive section that better captures the appropriate communications that need to occur between an employer and employee in the FMLA process. Specifically, the Department proposes to combine components of current §§ 825.300, 825.301, 825.208, and 825.110 into one comprehensive section addressing an employer's notice obligations.

Proposed § 825.300 is divided into separate paragraphs that address the major topics of ''(a): [g]eneral notice''; ''(b): [e]ligibility notice''; ''(c): [d]esignation notice''; and ''(d): [c]onsequences of failing to provide notice''. The ''general notice'' requirement requires an employer to post a notice explaining the Act's provisions and complaint filing procedures, and to provide this same notice in employee handbooks or by distributing a copy annually. The ''eligibility notice'' provides notice to the employee that he or she is an eligible employee under FMLA (as defined in § 825.110), has FMLA leave available, and has certain rights and responsibilities. Within five business days of having obtained sufficient information to determine whether the requested leave is being taken for a qualifying reason, the employer must provide the employee with a notice regarding designation of FMLA leave—referred to as the ''designation notice.'' The designation notice informs the employee whether the particular leave requested will be designated as FMLA leave.

While the current regulations contain the ''provisional designation'' concept, the Department believes that this process may cause confusion over whether leave is protected prior to the actual designation. In some cases, the leave may not eventually qualify for the Act's protections. Thus, the Department's proposal restructures the regulations to recognize that employers may not be able to designate leave as FMLA covered until the employee provides additional information. The Department specifically invites

comment on whether this proposal will effectively communicate the required information to employees about their FMLA rights while relieving some of the administrative burdens for employers under the current process.

General Notice Requirements

Proposed § 825.300(a) is a ''general notice requirement'' that merges the poster/notice requirement contained in current § 825.300 with the written guidance required in current § 825.301(a). Proposed § 825.300(a)(1) maintains the statutory requirement that every covered employer post and keep posted in conspicuous places on its premises a notice providing information about the FMLA. Given the growth of the Internet since the Department issued the 1995 regulations, however, as well as the practical realities that more and more employees do not physically report to a central location, the Department proposes that this posting requirement may be satisfied through an electronic posting of the notice as long as it otherwise meets the requirements of this section. To provide sufficient notice required by the statute (*see* 29 U.S.C. 2619), the employer must make sure that the information is accessible to applicants as well as employees, so simply posting such information on an intranet that is not accessible to applicants will not meet the requirements. Electronic posting could be accomplished, for example, by posting the notice in a conspicuous manner on the employer's Internet web-page inviting applicants to apply if the employer accepts applications only through the Internet. If the employer also accepts applications on-site, however, the notice would have to be physically posted for applicants to view on-site unless the employer had a computer kiosk available for applicants to view the poster on-line. Similarly, in order for electronic-only posting to provide sufficient notice to employees, all employees must have access to company computers that post the information in a conspicuous manner. For example, the company may make computer kiosks available for use in employee lunch rooms. The Department specifically seeks comment on whether this ''posting'' alternative is considered workable and will ensure that employees and applicants obtain the required FMLA information.

Poster Civil Money Penalty

Section 109(b) of the FMLA (29 U.S.C. 2619(b)) provides that any employer who willfully violates the Act's requirement to post the FMLA notice as required by section 109(a) may be assessed a civil money penalty (CMP) not to exceed $100 for each separate offense. This CMP amount was set by the Congress as part of the original FMLA of 1993. The regulations, at § 825.300(b), currently provide for assessment of a $100 penalty for willful violations of the posting requirement.

The Department proposes to increase the civil money penalty for violation of this posting to $110.00 to meet requirements of the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, Title III, § 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373). The Debt Collection Improvement Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–410, Oct. 5, 1990, 104 Stat. 890) to require that Federal agencies issue regulations to adjust certain CMPs for inflation. As amended, the law requires each agency to initially adjust for inflation all covered CMPs, and to periodically make further inflationary adjustments thereafter. The adjustment prescribed in the amended Act is based on a cost-of-living formula according to the percentage determined by the Department of Labor's Consumer Price Index (CPI). The statute provides for rounding the penalty increases. Once the percentage change in the CPI is calculated, the amount of the adjustment is rounded according to a table in the Federal Civil Penalties Inflation Adjustment Act, which is scaled based on the dollar amount of the current penalty. For penalties less than or equal to $100, the increase is rounded to the nearest multiple of $10. The statute applies a cap, for the initial adjustment only, which limits the amount of the first penalty increase to 10 percent of the current penalty amount. Any increase under the Act applies prospectively to violations that occur after the date the increase takes effect in amendments to the regulations.

The amount by which the current CPI–U exceeds the CPI–U for June of 1993 is more than the statutory cap of 10 percent. Consequently, due to inflation since this CMP amount was first established in 1993, the adjustment permitted by law is limited to the maximum 10 percent initial cap. It is proposed, therefore, to amend § 825.300(a) to provide for assessment of a penalty of $110 for willful violations of the posting requirement.

Clarification of Covered Employer Responsibilities

For purposes of clarity, the Department proposes to separate out into a new paragraph the language from existing § 825.300(a) that requires a covered employer to post the general notice to individual employees even if no employees are eligible for FMLA leave. For example, an employer may employ 60 employees located in all 50 states, and no employee meets the eligibility requirement of working at a site to which 50 or more employees report within 75 miles. *See* 29 U.S.C. 2611(2)(B)(ii) and 29 CFR 825.110. In such a case, an employer still would have to comply with the posting requirement. This is a statutory posting requirement, *see* 29 U.S.C. 2611(4) and 2619(a), although some confusion exists on this point since it is not obvious that such a notice is required when an employer does not have any eligible employees. The Department aims to minimize such confusion by highlighting this requirement in a separate section.

Proposed § 825.300(a)(3) states that covered employers with eligible employees also must distribute the general notice described in proposed § 825.300(a) either by including it in an employee handbook or by distributing a copy to each employee at least once a year, either in paper or electronic form. This provision incorporates the existing notice distribution requirement found in current § 825.301(a)(1), which requires an employer to place in an employee handbook, if one exists, a notice of FMLA rights and responsibilities and the employer's policies on the FMLA. Current § 825.301(a)(2) states that if an employer does not have a handbook, when an employee gives specific notice of the need for leave, the employer must provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA, and the DOL Fact Sheet can meet this requirement. The information found in the DOL Fact Sheet mirrors, in part, information contained in the poster.

To streamline the notice requirement currently found in § 825.301(a)(1) and the posting requirement, the Department proposes that one document containing identical information be both posted and distributed, thereby satisfying the posting and distribution requirement. The Department intends that this proposed change will more effectively convey consistent, relevant information to employees. Moreover, the Department's proposed prototype notice is revised to provide employees more useful information on their FMLA rights and responsibilities.

To further address the concern that employees are unaware of their rights as explained above, the Department proposes that if the proposed notice is not contained in an employee handbook, it must be distributed annually, regardless of specific

employee requests for leave. This new frequency requirement exceeds that of the current regulations, but the Department is responding to the concern that employees may not be aware of their FMLA rights in many cases, and the Department believes that this requirement will promote increased awareness. In addition, the communication will be more effective if the notice is provided routinely and annually rather than only when an employee is facing a significant family event like the birth or adoption of a child or a serious medical emergency affecting the employee or a family member.

The Department's proposal does not require that a covered employer with no eligible employees distribute the general notice, although the employer would have to comply with this requirement even if it only has one eligible employee. The Department specifically seeks comments on all aspects of these proposed notice provisions.

Prototype General Notice

Proposed § 825.300(a)(4) explains that the Department has included a prototype notice in Appendix C for employers to use and that copies will be available from Wage and Hour offices and from the Department's Internet website. Consistent with current §§ 825.300(c) and 825.301(b)(1), proposed § 825.300(a)(4) requires that an employer provide the poster and general notice to employees in a language in which they are literate when the employer employs a significant portion of employees who are not literate in English. The Department intends to make such notices available in alternative languages in accordance with the requirements of this section on the Internet and through local Wage and Hour district offices. This section also includes language from current § 825.301(e) requiring notice to sensory-impaired individuals as required under applicable Federal and State law.

Eligibility Notice

Proposed § 825.300(b) consolidates the notice provisions contained in existing §§ 825.110(d) and 825.301(b) into a paragraph entitled ''eligibility notice.'' Consistent with current § 825.110, the employer continues to be responsible under proposed paragraph (b)(1) of this section for communicating eligibility status. As under the current regulations, the employer's obligation to notify the employee of his or her eligibility to take FMLA leave (*i.e.*, whether the employee has been employed for 12 months and has worked for 1,250 hours of service in the preceding 12 months) is not triggered until the employee has provided the employer with at least verbal notice sufficient to indicate that the employee needs FMLA-qualifying leave. *See* §§ 825.302 and 825.303. The proposed regulations require that the eligibility notice be conveyed within five business days after the employee either requests leave or the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason. While this proposal is a change from the current timeframe of two business days, the Department is responding to significant comments noting that the two-day turnaround time is in practice very difficult to meet, and the Department does not believe that extending this time frame to five business days will compromise an employee's FMLA rights. The Department specifically seeks comment on whether this timeframe will both impart sufficient information to employees in a timely manner and whether it is workable for employers.

Proposed paragraph (b)(2) of this section specifies what information an employer must convey when communicating with the employee as to eligibility status. While not required under the current regulations, the proposal requires the employer to notify the employee whether leave is still available in the applicable 12-month period. If the employee is not eligible or has no FMLA leave available, then, pursuant to proposed paragraph (b)(2), the notice must indicate the reasons why the employee is not eligible or that the employee has no FMLA leave available. For example, an employer might need to indicate that an employee has not worked long enough to meet the 12-month eligibility requirement.

The Department proposes these new notification requirements to address the concern that employees are not aware of their rights. The Department believes that a better understanding on the part of both employees and employers as to their respective FMLA rights and obligations will better ensure that employees who qualify for FMLA leave obtain such leave. In proposing these new notice requirements, the Department believes that the additional burden will be minimal, since the employer is already required to calculate such information in any case to determine eligibility in order to meet the requirements of the statute.

If the employee is eligible for FMLA leave, then proposed paragraph (b)(3) also requires, consistent with current § 825.301(b), that the employer inform the employee of the employee's rights and responsibilities, such as any requirement to provide sufficient medical certification, pay premiums for continuing benefits, and job restoration rights upon expiration of FMLA leave. The Department proposes to add language to clarify in § 825.300(b)(3)(iii) when an employer notifies an eligible employee of the right to substitute employer-provided paid leave and the conditions related to any such substitution that the employer also inform the employee that he/she may take unpaid FMLA leave if the employee does not comply with the terms and conditions of the employer's paid leave policies (*see* discussion *supra* at § 825.207). The Department also proposes to add language to § 825.300(b)(3)(v) indicating that employers should include a statement of the employee's essential job functions with the eligibility notice if they will require that those functions be addressed in a fitness-for-duty certification.

The remainder of proposed § 825.300(b) relies upon existing language in current § 825.301 with limited modifications. Specifically, proposed § 825.300(b)(4) adopts language from current § 825.301(b)(2), which provides that the eligibility notice may include other information on an employee's rights and responsibilities such as providing periodic reports of the employee's status and intent to return to work. Consistent with language from current § 825.301(c), proposed § 825.300(b)(6) states that the eligibility notice need not be provided more frequently than once every six months unless the specific information in the notice changes. If leave has already begun, the notice should be mailed to the employee's address of record. Proposed § 825.300(b)(7) states that if information changes, the employer should provide notice to the employee of any information that has changed within five business days, a change from the current two-day requirement. The proposal also contains new language stating that the employer should include the medical certification form, if the employer requires such information, along with the eligibility notice.

Consistent with the current regulations, proposed § 825.300(b)(8) provides that if an employer requires medical certification or a fitness-for-duty report, written notice of the requirement shall be given with respect to each employee notice of a need for leave, unless the employer communicates in writing to employees that such information will always be required in connection with certain

absences and then oral notice must still be given.

Proposed paragraph (b)(9) is unchanged from current § 825.301(d) and provides that employers will responsively answer employees' questions on their rights and responsibilities under FMLA.

Proposed paragraph (b)(10) provides that an optional prototype eligibility notice is included in Appendix D. This proposed prototype reflects changes in the proposed regulation. The Department also has attempted to simplify the form for easier use and adaptability.

Designation Notice

Proposed § 825.300(c) outlines the proposed requirements of the designation notice an employer must provide to an employee, currently located in § 825.208(b). This proposed designation notice requires that an employer notify the employee within five business days (a change from the current requirement of two business days) that leave is designated as FMLA leave once the employer has sufficient information to make such a determination.

The RFI sought comments on whether the current two business day time frame was adequate for employers to notify employees that their request for FMLA leave has been approved or denied. The majority of comments on this topic indicated that the current two-day time frame was too restrictive. United Parcel Service commented, ''In most cases, the initial notification of an absence or need for leave is received by front-line management, who conveys the information up the chain of command and to the local HR representative, who notifies the FMLA administrator, who is ultimately responsible for making a determination. It is not unusual for it to take one to two business days just for the right personnel to receive the information, much less make a determination and communicate it back to the employee.'' Courier Corporation noted similarly, ''The two-day timeframe is way too short for notifying employees about their leave request, since as employers we are often chasing information from the employee or physician.'' Spencer Fane Britt & Browne LLP agreed: ''For most employers, this is virtually impossible. Although most employers designate leave within a reasonable time frame, it is usually well outside the two-day time frame, thus creating a risk that the designation will be ineffective.'' Employers suggested varying timeframes to replace the two-day limit. *See, e.g.*, comments by Fisher & Phillips LLP (fifteen days from receipt of a certification form); National Coalition to Protect Family Leave (ten business days); Association of Corporate Counsel (five working days); Courier Corporation (five days); United States Postal Service (same); Northrop Grumman Newport News Shipbuilding and Dry Dock Company (same).

International Auto Processing, Inc., stated that while some decisions can be made in two days, even a week might not be sufficient in other cases, depending upon the amount of information supplied by an employee and whether clarification is needed from the health care provider. Hinshaw & Culbertson LLP commented similarly that the two-day time frame for providing notification to employees that FMLA leave has been approved or denied is inadequate, ''as there are many factors which result in delays in both obtaining information and processing requests.''

In light of the comments received, the proposed rule requires the employer to provide the employee notice of the designation of FMLA leave within five business days of receiving sufficient information from the employee to designate the leave as FMLA leave. The proposed designation notice also contains an additional provision that expressly requires the employer to inform the employee of the number of hours, days or weeks, if possible, that will be designated as FMLA leave. Although current § 825.208(b)(1) requires employers to inform employees that leave ''is designated and will be counted as FMLA leave,'' it does not specifically require employers to provide employees with information detailing the amount of leave so designated. When an employee requests a block of foreseeable leave and provides appropriate notice to the employer, it should be relatively straightforward for the employer to provide the employee with the amount of leave that will be designated as FMLA. However, to the extent that future leave will be needed by the employee for a condition but the exact amount of leave is unknown (as is often the case with unforeseeable intermittent leave for a chronic serious health condition), the employer must inform the employee every 30 days that leave has been designated and protected under the FMLA and advise the employee as to the amount so designated if the employee took leave during the 30-day period. Currently, the regulations do not specifically address designation of unforeseen, intermittent leave, and the Department believes that it is important for employees to be aware when such leave is designated as FMLA leave in a timely fashion. Further, the proposed section contains a new requirement that an employer notify the employee if the leave is *not* designated as FMLA leave due to insufficient information or a non-qualifying reason.

As noted above, the Department proposes to change the timeframe in which an employer must designate leave as FMLA leave from two business days to five business days. As discussed above with respect to the change in timeframe for providing the eligibility notice, the Department believes this will result in more accurate notice given to employees. Moreover, this change is proposed in concert with new notice requirements that would require employers to provide employees with more substantive information than that required under the current regulations. The Department does not believe that these new information requirements should be burdensome for employers since the employer will already need to determine in any event whether or not the leave should be designated and counted against the employee's 12-week FMLA leave entitlement. The proposed requirement merely requires the employer to expressly communicate this information to the employee. The Department specifically seeks comment on whether these proposed revisions both adequately protect employee rights and are workable for employers. Neither the proposed nor current regulations mandate a specific format for the written notice. The proposed paragraph (c)(2), consistent with current § 825.208(b)(2), indicates that this information may be communicated on a pay stub.

Proposed § 825.300(c)(3) improves the notices employers must provide to employees. It explicitly permits an employer to provide an employee with both the eligibility and designation notice at the same time in cases where the employer has adequate information to designate leave as FMLA leave when an employee requests the leave. This is an acknowledgement that in some cases there will be no question that a leave request qualifies as FMLA leave and the proposal encourages an employer to designate the leave as soon as possible.

Section 825.300(c)(4) states that a prototype designation notice is contained in Appendix E. This form is a new optional ''designation notice'' that an employer can use to satisfy its obligation to notify an employee that leave is being designated as FMLA leave because it is being taken for a qualifying reason, as required by proposed § 825.300(c)(1).

Remedy Provision

Proposed paragraph (d) has been added in light of *Ragsdale*, and expands on current § 825.301(f). Consistent with the Department's discussion of proposed § 825.301, the Department believes that the U.S. Supreme Court's *Ragsdale* decision requires a remedy provision for a notice violation that is tailored to individualized harm. Therefore, as noted in the discussion of §§ 825.110, 825.301, and 825.220, the Department has added a provision explaining that failure to comply with the notice requirements set forth in this section could result in the interference with, restraint of, or denial of the use of FMLA leave. If the employee is able to demonstrate harm as a result of the employer's failure to provide notice of eligibility or designation of FMLA leave as required, an employer may be liable for the harm suffered as a result of the violation, such as lost compensation and benefits, other monetary losses, and appropriate equitable or other relief, including employment, reinstatement, or promotion.

Section 825.301 (Employer Designation of FMLA Leave)

The Department proposes to delete current § 825.301, which addresses employer notices to employees, because its requirements have been incorporated into proposed § 825.300 as discussed above. Current § 825.208 addressing designation of FMLA leave has been moved to proposed § 825.301. Current § 825.208 explains under what circumstances an employer can designate leave as FMLA leave. Paragraph (a) of that section explains that it is the employer's obligation to designate leave as FMLA leave. Paragraph (a)(1) of that section explains that the employee has an obligation to provide the employer with enough information to determine if the leave is potentially FMLA-qualifying. Paragraph (a)(2) explains that the employee need not specifically request FMLA leave, although if an employee requests paid leave for an FMLA reason and the employer denies the request, the employee must provide the employer with sufficient information to make the determination that the leave is for an FMLA-qualifying reason. Paragraph (a) also explains that if the employer does not have sufficient information to designate paid leave as FMLA-covered, the employer has an obligation to inquire further in order to ascertain whether the paid leave is potentially covered by the FMLA. Current paragraph (b)(1) of that section states that once an employer has enough information that leave is taken for an FMLA-qualifying reason, the employer must designate the leave as FMLA leave. Paragraph (b)(2) explains that the designation may be oral or in writing and must be confirmed in writing no later than the following payday. Current paragraph (c) of that section provides that paid leave must be designated as FMLA-covered leave within two business days of when the employee gives notice of leave, or when the employer has sufficient information to make such a determination if not available until later. It also requires the employer to advise the employee if substitution of paid leave will be required. The section also explains that if the employer knows that paid leave is for an FMLA reason when the employee advises of the need for leave or when the leave commences and does not at that time designate (and notify the employee) that the leave is being charged to the employee's FMLA leave entitlement, the leave may not be designated as FMLA leave retroactively and may only be designated as FMLA leave prospectively. In such case, none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement, but ''the employee is subject to the full protections of the Act'' during that period of absence.

Current paragraph (d) of that section explains the rules for designating leave after leave has begun. Current paragraph (e) explains that leave may not be retroactively designated except in limited circumstances such as when a non-FMLA leave turns into an FMLA-qualifying leave or when an employee has taken leave for a short duration and only notifies the employer when the employee returns from leave.

The proposed revisions maintain the basic requirement from current § 825.208 that employers designate qualifying leave as FMLA promptly and notify employees of that designation. *See* the Department's 2007 Report on the RFI comments, Chapter V, Section D (72 FR at 35585). The revisions, however, account for the Supreme Court's ruling in *Ragsdale* prohibiting categorical penalties based on an employer's failure to appropriately designate FMLA leave.

The Department also proposes a new paragraph (b) in this section that specifically addresses employee responsibilities. The substance of the language contained in current paragraph (a) of § 825.208 that addresses such responsibilities has been retained and moved to this new section, but the proposal simplifies the language and mirrors changes made to §§ 825.302 and 825.303. The proposed paragraph cross-references §§ 825.302 and 825.303 that address what constitutes sufficient information an employee must communicate to an employer when needing FMLA leave, as further explained below. Proposed § 825.301(b) also incorporates the substance of the provision in current § 825.208(a)(2) that an employee need not invoke the FMLA when asserting rights under the Act. As a matter of clarification, the word ''unpaid'' is deleted, as these employee responsibilities apply whether the leave is paid or unpaid. The proposed section also explains that the consequences for an employee's failure to satisfy these responsibilities may include delay as well as denial of FMLA leave.

The substance of current § 825.208(b) has been moved to proposed § 825.300(c) that addresses the other notice obligations of employers. As noted above, current § 825.208(c) explains an employer's designation obligations with regard to paid leave and the consequences that apply when an employer fails to properly and timely designate leave. In light of *Ragsdale,* the Department cannot prohibit the retroactive designation of FMLA leave absent a showing of individual harm. By the same token, the Department believes that it is important that employers timely designate FMLA leave so that both employees and employers are aware as to what employee rights attach when a specific FMLA leave period is at issue. Indeed, in the preamble accompanying the current regulations, the Department explained that this section was intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted ''after the fact'' disputes. (60 FR at 2207) The Department has received comments, however, that in certain cases, the prohibition on retroactive designation actually may harm the employee.

The Department has reevaluated the original rationale for this rule and still believes it is beneficial to both employees and employers to know in advance, or at least as soon as possible, when leave is considered FMLA-protected leave. Therefore, the Department proposes to make clear that an employer has an obligation to timely designate leave (within five business days, absent extenuating circumstances) as proposed in § 825.301(a). However, in light of *Ragsdale* and the comments the Department has received, proposed paragraph (d) of this section acknowledges that retroactive designation may occur, but that if an employer fails to timely designate leave

as specified in § 825.300 and paragraph (a) of this section, and if an employee establishes that he or she has suffered harm as a result of the employer's actions, a remedy may be available. The Department provides examples in paragraph (e) to illustrate the type of circumstance where an employee may or may not be able to show that harm has occurred as a result of the employer's actions. In many cases where an employee's own serious health condition is involved, the Department believes it will be difficult to show harm as a result of the employer's failure to timely designate FMLA leave, as the employee will frequently be unable to delay or forgo the leave. *Cf. Downey* v. *Strain,*—F.3d—, 2007 WL 4328487 (5th Cir. 2007) (finding employee was harmed by employer's failure to designate leave as FMLA leave). On the other hand, if an employee knows he or she would need the FMLA leave later in the year for planned medical treatment, he or she may choose to have another family member provide care for a child with a serious health condition instead of taking leave at a certain point if the employee knew that the time off would count against the employee's FMLA entitlement. In addition, this proposal can benefit employees who did not fulfill their FMLA notice obligations at the time of taking leave, by allowing employers to retroactively designate leave to prevent disciplinary action.

The last sentence in proposed paragraph (d) states that in all cases where a leave is FMLA-qualifying, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

Proposed paragraph (e), titled ''[r]emedies,'' mirrors the statutory scheme and provides that failure to timely designate could constitute an interference with, restraint of, or denial of, the exercise of an employee's FMLA rights. Specifically, if the employee is able to establish prejudice as a result of the employer's failure to designate leave properly, an employer may be liable for compensation and benefits lost by reason of the violation, for other monetary losses sustained as a direct result of the violation, and for appropriate equitable relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. This language mirrors the statutory remedies set forth in 29 U.S.C. 2617, as well as language in the *Ragsdale* decision.

In light of proposed paragraphs (d) and (e) discussed above, current paragraphs (d) and (e) of § 825.208 discussing when leave can be retroactively designated under the current regulations have been deleted.

Section 825.302 (Employee Notice Requirements for Foreseeable FMLA Leave)

Current § 825.302(a) explains what notice an employee must give an employer when the need for FMLA leave is foreseeable. The requirement, as set forth in the statute, 29 U.S.C. 2612(e), is that an employee must give at least 30 days' notice if the need for FMLA leave is foreseeable. If 30 days' notice is not possible, the employee must give notice ''as soon as practicable.'' The current regulations define ''as soon as practicable'' in § 825.302(b) to mean ''as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.'' It further states that ''ordinarily'' as soon as practicable would mean ''at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.'' Current paragraph (c) explains the form and content of notice an employee must provide when taking leave and the obligations of employers to obtain follow-up information when needed. Current paragraph (d) explains that an employer can require an employee to comply with its usual and customary notice procedures, but that an employer cannot disallow or delay leave if such procedures are not followed if timely notice is given. Current paragraph (e) explains that an employee has a duty to plan medical treatment so as to not unduly disrupt an employer's operations; current paragraph (f) explains an employee's notification obligations with regard to intermittent leave; and current paragraph (g) explains that while an employer can waive an employee's FMLA notice requirements, an employer cannot require an employee to comply with stricter FMLA requirements if a collective bargaining agreement, State law, or the employer's leave policies allow less notice.

Timing of Notice

Proposed § 825.302(a) retains both the current requirement that an employee must give at least 30 days' notice when the need for FMLA leave is foreseeable at least 30 days in advance, and the requirement that notice be provided ''as soon as practicable'' if leave is foreseeable but 30 days' notice is not practicable. The Department further proposes to add that when an employee gives less than 30 days' advance notice, the employee must respond to a request from the employer and explain why it was not practicable to give 30 days' notice.

The Department proposes to delete the second sentence of current paragraph (b) of this section, which defines ''as soon as practicable'' as ''ordinarily * * * within one or two business days of when the need for leave becomes known to the employee.'' While the ''one to two business days' '' timeframe was intended as an illustrative outer limit, Wage and Hour Opinion Letter FMLA–101 (Jan. 15, 1999), in effect, mistakenly read the regulation as allowing employees two business days from learning of their need for leave to provide notice to their employers, regardless of whether it would have been practicable to provide notice more quickly. In that letter, the Department found that an absence policy that required employees to report their absences within one hour after the start of their shift, unless they were unable to do so due to circumstances beyond their control, was contrary to the FMLA's notice procedures. The Department provided the following example of the employee's notice obligation:

> For example, an employee receives notice on Monday that his/her therapy session for a seriously injured back, which normally is scheduled for Fridays, must be rescheduled for Thursday. If the employee failed to provide the employer notice of this scheduling change by close of business Wednesday (as would be required under FMLA's two-day notification rule), the employer could take an adverse action against the employee for failure to provide timely notice under the company's attendance policy.

Comments received in response to the RFI indicated that the ''two-day rule'' has created significant problems for employers in maintaining appropriate staffing levels. *See, e.g.*, Southwest Airlines Co. (''[T]he DOL's informal two-day notice practice is an arbitrary standard that fails to recognize an employer's legitimate operational need for timely notice and that contradicts with an employee's statutory duty to provide such notice as is practicable.''); National Coalition to Protect Family Leave (''The phrase 'as much notice as is practicable' is not well-defined. The current phrase puts employers in the difficult position of having to approve leaves where questionable notice has been given. The current regulatory definition—within one or two business days—has been applied by the Department to both foreseeable and unforeseeable leaves, and to protect employees who provide notice within two days, even if notice could have been

provided sooner under the particular facts and circumstances.'').

The Department is aware that timely notice of an employee's need for FMLA leave is critical to the balance struck in the Act between the employee's ability ''to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition'' and ''the legitimate interests of employers.'' 29 U.S.C. 2601(b). Absent emergency situations, where an employee becomes aware of a need for FMLA leave less than 30 days in advance, the Department expects that it will be practicable for the employee to provide notice of the need for leave either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours). Accordingly, the Department proposes to add examples to proposed paragraph (b) clarifying the employee's obligation to provide notice ''as soon as practicable.''

Content of Notice

Many commenters responding to the RFI identified issues relating to the sufficiency of the information provided by employees when notifying their employers of the need for FMLA leave, which is addressed in current § 825.302(c). For example, the National Coalition To Protect Family Leave stated that ''employees who call in because of their own or a family member's medical condition do not necessarily provide sufficient information for an employer to [determine whether the leave qualifies for FMLA protection]. Since what constitutes 'sufficient' information is not clearly defined anywhere in the regulations, both employees and employers face difficulties in meeting their rights and responsibilities under the FMLA.'' Jackson Lewis LLP similarly noted that employers sometimes have difficulty in identifying FMLA-qualifying absences: ''Employers are not 'mind readers' and they often refrain from asking employees why they are absent for fear that they may invade an employee's medical privacy. It is also näive to think that employers can effectively train front line supervisors on the myriad of health conditions and personal family emergencies that might qualify for FMLA protection.''

A number of commenters offered suggestions for how the Department could clarify what information constitutes sufficient notice. Some commenters suggested that an employee's leave request should have to be in writing, or that the request should have to specifically mention the FMLA. *See, e.g.*, Edison Electric Institute, Miles & Stockbridge, P.C., Pierce County, Washington, Spencer Fane Britt & Browne LLP, and DST Systems, Inc. The South Central Human Resource Management Association suggested:

> It would eliminate many disputes if an employee were required to request leave in writing or to follow up an oral request with a written request within a reasonable time (such as within two work days after returning to work in the case of intermittent leave, or five work days after requesting leave in the event of unforeseen continuous leave). * * * It would help both parties immensely if the employee were required to mention the FMLA when making such a request.

Other stakeholders expressed a desire for more information from employees, but stopped short of suggesting a requirement that the employee must specifically ask for FMLA leave. The Williams Mullen law firm suggested that the Department should implement detailed regulations that provide necessary language or actions that must be taken by employees to put their employers on notice of their intent to take FMLA leave. The U.S. Chamber of Commerce suggested that employees should be required to specify the purpose of any instance of FMLA leave, such as a doctor's appointment, physical treatment, *etc.,* so that employers can assess veracity when employees appear to be abusing the leave policy. The Association of Corporate Counsel proposed that the DOL should revise the regulations to make clear that an employee's notice to the employer must go beyond merely requesting leave and must provide a basis for the employer to conclude that the requested leave is covered by the FMLA.

One reason employees may provide less notice than employers want may be employees' lack of awareness of their rights and obligations. As noted above, numerous commenters to the RFI emphasized that employees remain unaware of their rights under the FMLA. *See* comments by National Partnership for Women & Families, Madison Gas and Electric Company, Legal Aid Society-Employer Law Center. As the AARP commented, even employees who have some general awareness of the law do not know the details of the law or whether it applies to them. These commenters also noted that employers fail to provide employees with effective information about their rights.

In light of these comments, the Department proposes to retain in § 825.302(c) the standard that an employee need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for FMLA leave, but at the same time employees must provide sufficient information to make an employer aware that FMLA rights may be at issue. The Department proposes to clarify that sufficient information must indicate that the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities), the anticipated duration of the absence, and whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment.

The Department believes that this proposal will provide employers with the information necessary to determine whether absences may be covered by the FMLA, without being overly prescriptive in the wording that an employee must use to request leave. The proposal will also facilitate the early identification of potentially FMLA-protected absences. Finally, the increased specificity in the proposed rule will protect employees from losing FMLA rights by inadvertently failing to put the employer on notice of the need for FMLA leave. The Department also proposes to include such information in the general notice that employers are required to post and either to provide in an employee handbook or distribute at least annually, as specified in proposed § 825.300(a), to ensure that employees are aware of the information they must provide.

This proposed section continues to require employers to inquire further if they need additional information in order to obtain the necessary details about the leave. The proposed rule also states that employees must respond to employers' inquiries designed to determine whether leave is FMLA-qualifying or risk losing FMLA protection if the employer is unable to determine whether the leave qualifies.

The Department seeks comment as to whether a different notice standard requiring employees to expressly assert their FMLA rights should apply in situations in which an employee has previously provided sufficient notice of a serious health condition necessitating leave and is subsequently providing notice of dates of leave due to the condition that were either previously unknown or changed. For example, where an employee has taken two weeks of FMLA leave for surgery and recovery, and then learns that he or she will need to undergo physical therapy once a week for four to six weeks upon returning to work, should the employee be required to specifically notify the

employer that the additional leave is due to the FMLA-covered condition?

Usual and Customary Employer Procedures

A number of commenters responding to the RFI also addressed the provisions in § 825.302(d) regarding compliance with employers' usual and customary notice procedures for requesting leave. Many employers specifically asserted that call-in procedures, which are enforced routinely outside the FMLA context, can serve as a crucial element of an attendance program and are often critical to an employer's ability to ensure appropriate staffing levels. In discussing the effect call-in requirements have on State agencies in particular, the Ohio Department of Administrative Services commented that such procedures are especially critical in institutional agencies that provide direct care and supervision of inmates or patients. A number of commenters urged reforming the regulations to allow employers to enforce attendance policies that require employees to observe reasonable call-in procedures, including policies that require employees to call in to their direct supervisors or to a designated person in human resources, and to allow a penalty for noncompliance. *See, e.g.*, comments by American Electric Power, Ohio Public Employer Relations Association, and National Association of Convenience Stores. The University of Wisconsin-Milwaukee stated that requiring employees to comply with regular attendance policies unless there is a medical emergency would be helpful, because the simple need for FMLA leave does not mean that regular notification is impossible.

In response to these comments, the proposed revision of § 825.302(d) retains the current rule providing that an employer may require an employee to comply with the employer's usual notice and procedural requirements for calling in absences and requesting leave. However, the Department proposes to eliminate the current language stating that an employer cannot delay or deny FMLA leave if an employee fails to follow such procedures. The combination of requiring employees to comply with employer absence policies, yet prohibiting employers from delaying or denying leave if such procedures are not met in the current regulation, has proved confusing. This confusion has been exacerbated by language in the preamble accompanying the current rule stating that while employers may not delay or deny FMLA leave for failure to follow absence policies, they may ''take appropriate disciplinary action.'' 60 FR at 2221. Cases addressing various types of employee call-in procedures, including employer requirements that employees report absences to specific individuals or offices and that they keep employers updated regarding their need for leave, have analyzed the issue differently. *Compare, e.g., Bones* v. *Honeywell Int'l Inc.,* 366 F.3d 869, 878 (10th Cir. 2004) (''[Employee's] request for an FMLA leave does not shelter her from the obligation, which is the same as that of any other Honeywell employee, to comply with Honeywell's employment policies, including its absence policy.''); *Cavin* v. *Honda of America Mfg., Inc.,* 346 F.3d 713, 723 (6th Cir. 2003) (''[E]mployers cannot deny FMLA relief for failure to comply with their internal notice requirements [to call a specified department].''); *Lewis* v. *Holsum of Fort Wayne, Inc.,* 278 F.3d 706, 710 (7th Cir. 2002) (failure to follow three-day no-call rule legitimate basis for termination and did not violate FMLA); *Gilliam* v. *UPS,* 233 F.3d 969 (7th Cir. 2000) (upholding application of three-day no-call rule).

Accordingly, the Department proposes that, absent unusual circumstances, employees may be required to follow established call-in procedures (except one that imposes a more stringent timing requirement than the regulations provide), and failure to properly notify employers of absences may cause a delay or denial of FMLA protections (as explained in § 825.304). Unusual circumstances would include situations such as when an employee is hospitalized and his/her spouse calls the supervisor to report the absence, unaware that the attendance policy requires that the human resources department be called instead of the supervisor. However, FMLA-protected leave cannot be delayed or denied for failure to meet the employer's timing standard where the standard is more stringent than those established in § 825.302(a). This proposed revision of § 825.302(d) recognizes that call-in procedures are necessary for employers to provide proper coverage to run their businesses. The proposal also benefits employees by ensuring early identification and protection of absences covered by the FMLA.

Where FMLA protection is appropriately delayed because the employee did not provide timely notice of the need for leave, and the employee has an absence during the period in which he/she accordingly is not entitled to FMLA protection, that absence is unprotected and can be treated in the same manner the employer would treat any other unexcused absence. This is a clarification of the ramifications of failing to provide timely notice, and not a change in current law. For example, if an employee could have provided two weeks notice of a doctor's appointment for treatment of a serious health condition, but instead provides only one week's notice of the appointment, the employer may delay FMLA-protected leave for one week (*i.e.*, if the employee could have provided notice on the 7th day of the month of an appointment on the 21st day, but instead only provides notice on the 14th day, the employer may delay FMLA leave until the 28th day (two weeks after the notice was provided)). If the employee does not delay the taking of the leave, the absence will be unprotected and the employer can treat the absence in the same manner as any unexcused absence (*i.e.*, if the employee in the example above is absent on the 21st day, instead of delaying the absence until the notice period is met, the employer may treat the absence as an unexcused absence under its normal leave policies). Alternatively, the employer would have the option of accepting the employee's late notice and counting the leave against the employee's FMLA entitlement. *See* § 825.302(g).

Proposed § 825.302(g) retains language stating that employers may waive employees' FMLA notice requirements. The Department proposes to delete language, however, stating that employers cannot enforce FMLA notice requirements if those requirements are stricter than the terms of a collective bargaining agreement, State law or employer leave policy. The example provided in current § 825.302(g) of an employee substituting paid vacation leave and the employer not being able to require notice from the employee under the FMLA because the vacation leave policy does not require advance notice has proved confusing because it is inconsistent with the employer's right to require notice under the FMLA. Accordingly, this language has been deleted. Sections 825.700 and 825.701 address in more detail the interaction between the FMLA and the provisions of collective bargaining agreements, State law, and employer policies.

Section 825.303 (Employee notice requirements for unforeseeable FMLA leave)

Current § 825.303 explains what notice an employee must give in the case of unforeseeable leave. Specifically, current paragraph (a) explains the ''as soon as practicable'' required timing of the notice, and current paragraph (b) sets forth the method by which notice can be given. The Department has heard from numerous employers that the

taking of unforeseeable leave is central to the administrative problems they experience with the FMLA, and the SHRM FMLA Survey revealed that in its members' experiences, 60 percent of all FMLA leave is unforeseeable leave. Indeed, the significant number of cases that have been litigated as to what constitutes sufficient notice from an employee in the case of unforeseeable leave confirms the difficulties both employers and employees experience under the current regulation. *See Spangler* v. *Federal Home Loan Bank,* 278 F.3d 847, 852 (8th Cir. 2002) (employee, who had made employer aware that she had problems with depression, gave sufficient notice when she called in and indicated she was out because of ''depression again''); *Gay* v. *Gilman Paper Co.,* 125 F.3d 1432, 1434–35 (11th Cir. 1997) (husband calling for employee and indicating wife in the hospital having some tests run was not sufficient notice); *Carter* v. *Ford Motor Co.,* 121 F.3d 1146, 1148–49 (8th Cir. 1997) (employee's wife calling and indicating he would be out because of family problems did not provide sufficient notice); *Barr* v. *New York City Transit Auth.,* 2002 WL 257823, at *7–8 (E.D.N.Y. 2002) (employee calling in sick reporting ''swelling and tightness'' in legs and follow-up doctor's note indicating swelling in legs and rapid heart beat provided sufficient notice); *Mora* v. *Chem-Tronics, Inc.,* 16 F. Supp. 2d 1192, 1216–17 (S.D. Cal. 1998) (invalidating call-in rule requiring employees to call in 30 minutes prior to shift in all circumstances); *Hendry* v. *GTE North, Inc.,* 896 F. Supp. 816, 828 (N.D. Ind. 1995) (employee calling in ill with a migraine headache provided sufficient notice).

Employers and their representatives also mentioned the timing of employee notification of the need for unforeseeable intermittent leave as a particular problem in their administration of the FMLA. For example, Spokane County commented that it is often not notified that an employee is out for a serious health condition until after the employee returns to work. The Pennsylvania Turnpike Commission stated:

> The issue of [employees] failing to notify their supervisors promptly that they are taking FMLA leave is very prevalent in our company. Some employees that are approved for intermittent FMLA simply don't show up for work, and then email or call their supervisor when the work day is almost over to inform them that they are taking FMLA. This is extremely frustrating as an employer, and there does not ever seem to be a valid reason that the employee could not notify the supervisor earlier.

Numerous other employer commenters asserted that the ''two day rule'' interpreted in Wage and Hour Opinion Letter FMLA–101 (see discussion in § 825.302) is even more unworkable in the context of unforeseen FMLA leave because the employee is not required to report the absence prior to the start of his/her shift even where it is practicable to do so. *See, e.g.*, Southwest Airlines Co. (the two-day rule allows employees to remain silent when they have the knowledge and ability to give timely notice, and it ''fails to recognize an employer's legitimate operational need for timely notice''); National Association of Manufacturers (employees taking ''unscheduled intermittent leave routinely ignore mandatory shift call-in procedures (even if they are fully able to comply), wait two working days * * * and then report their absence as FMLA-qualifying'').

The National Partnership for Women & Families and other employee advocates agreed that employees should notify their employers about their need for leave as quickly as is reasonably possible, but asserted that it also is important to ensure that employees are not penalized unfairly when confronted with unexpected emergencies. The Center for WorkLife Law similarly noted that for ''working caregivers with a seriously ill child or family member, medical emergencies are a way of life. Intermittent FMLA leave allows these employees to be available to their families when they are needed most without the stress of losing their jobs.'' The Legal Aid Society's Employment Law Center noted that chronic illnesses are devastating and wreak havoc on employees' lives also, and that the FMLA was specifically designed to cover such episodic absences. The AFL-CIO and the Association of Professional Flight Attendants emphasized that employees who experience unforeseeable absences due to chronic conditions are precisely those most in need of the FMLA's protections, because their jobs are more in jeopardy than those of employees who suffer from a longer illness only once every two or three years. In explaining the difficulties for employees who live with unforeseeable health conditions, an employee described her personal experiences with her daughter's chronic serious health condition:

> My daughter had a major asthma attack which caused a bronchial infection, swelling and bacteria in her throat. * * * No one is capable of predicting an[ ] asthma attack or the severity of the attack; I just would like the assurance of knowing that if or when the situation should arise, I have the time off required to handle her needs without the threat of being * * * terminated.

In light of the apparent confusion with regard to timing and sufficiency of the required notice, and the critically important nature of this topic, the Department proposes to further clarify what constitutes timely and sufficient notice when the need for leave is not foreseeable.

Timing of Notice When ''Not Foreseeable''

In the case of unforeseeable leave, the Department proposes to maintain the requirement that an employee provide notice as soon as practicable under the facts and circumstances of the particular case. While this is the same standard as notice for FMLA leave that is foreseeable less than 30 days in advance, the Department is aware that the employer's need for prompt notice of the need for leave is heightened in situations in which the need for leave is not foreseeable. It is critical in such situations that the employer be notified of the employee's absence promptly so that the employer can assure appropriate staffing. Accordingly, the Department expects that in all but the most extraordinary circumstances, employees will be able to provide notice to their employers of the need for leave at least prior to the start of their shift.

To emphasize the importance of notice when the need for FMLA leave was unforeseen, the Department proposes to add language to § 825.302(a) to clarify that it is expected employees will provide notice to their employers promptly. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his/her child in order to report the absence while the child is receiving emergency treatment; once the child's medical situation has stabilized, the employee can be expected to report the absence. However, if the child's asthma attack is resolved by the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler. The Department believes that this proposal better balances the needs of employees to take unforeseeable FMLA leave with the interests of employers and other employees.

Content of Notice When ''Not Foreseeable''

In proposed paragraph (b), the Department retains the standard that an employee need not assert his or her rights under the FMLA or even mention

the FMLA to put the employer on notice of the need for FMLA leave. However, consistent with the proposed changes discussed above with respect to § 825.302, the Department proposes to require that the employee provide the employer with sufficient information to put the employer on notice that the absence may be FMLA-protected. *See Sarnowski* v. *Air Brook Limousine, Inc.,* F.3d—, 2007 WL 4323259, at *3 (3rd Cir. 2007) (''In providing notice, the employee need not use any magic words. The critical question is how the information conveyed to the employer is reasonably interpreted.''). Sufficient information is defined in the same manner as proposed § 825.302(c), which is information that indicates that the employee is unable to perform the functions of the job, the anticipated duration of the absence, and whether the employee intends to visit a health care provider. In addition, because issues are frequently raised with employees giving notice of unforeseen absences by simply calling in ''sick,'' proposed § 825.303(b) clarifies that calling in with the simple statement that the employee or the employee's family member is ''sick'' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act in the case of unforeseeable leave. Of course, many unforeseeable conditions do develop and deteriorate over a period of a few days, and a condition that did not initially appear to be a serious health condition may develop into one. The employee would be expected to provide the employer the additional information needed to determine if the serious health condition standard is met as it became available.

The Department seeks comment as to whether a different notice standard requiring employees to expressly assert their FMLA rights should apply in situations in which an employee has previously provided sufficient notice of a serious health condition necessitating leave and is subsequently providing notice of dates of leave due to the condition that were either previously unknown or changed.

Complying With Employer Policy When ''Not Foreseeable''

Proposed § 825.303(c) clarifies that an employee must comply with the employer's usual procedures for calling in and requesting unforeseeable leave, except when extraordinary circumstances exist (or the procedure imposes a more stringent timing requirement than the regulations provide), such as when the employee or a family member needs emergency medical treatment. For example, an employee who seeks emergency treatment at a hospital may not be able to comply with the employer's absence reporting procedures if the employee does not have the telephone number for reporting absences with him or her and therefore leaves a message on the supervisor's voicemail (the employee may also be unable to comply with the employer's timing requirements due to the emergency treatment). In contrast, an employee who suffers a flare-up of a chronic condition for which rest and self-medication are the appropriate treatment should be able to comply with the employer's normal absence reporting procedure.

If an employee fails to follow the employer's call-in procedures (assuming any required timing is not more stringent than required by § 825.303(a)), except under extraordinary circumstances, then the employee is subject to whatever discipline the employer's rules provide for such a failure and the employer may delay FMLA coverage until the employee complies with the rules. For example, an employer requires that workers needing unscheduled leave call a designated call-in number instead of leaving a message on the supervisor's voicemail. An employee with a medical certification under FMLA for migraines leaves a message on the supervisor's voicemail indicating that the employee will be absent due to a migraine. Unless some extraordinary circumstance prevented the employee from complying with the employer's requirement that the employee call the designated call-in number, the employer may treat the employee's failure to comply with the call-in rule in the same manner it would normally handle such an infraction. The employer may also delay FMLA protected leave until the employee complies with the call-in procedure. Of course, if the employer chooses to delay the employee's FMLA leave until the employee complies with the call-in procedure, any leave that is not FMLA protected may not be counted against the employee's FMLA entitlement.

Proposed § 825.303(c) also contains language from current § 825.303(a) stating that employers may not enforce advance written notice requirements where the leave is due to a medical emergency.

Section 825.304 (Employee failure to provide notice)

Current § 825.304 addresses what employers may do if an employee fails to provide the required notice for FMLA leave. Specifically, current paragraph (a) states that an employer may waive FMLA notice obligations or its own internal rules. Current paragraph (b) explains that if 30 days notice is not provided to the employer for foreseeable leave, an employer may delay the taking of FMLA leave for 30 days after the date notice is given if no reasonable excuse is provided. Current paragraph (c) states that leave cannot be delayed if the employee was not aware of his or her notice requirements or the need for leave and its timing were not clearly foreseeable to the employee 30 days in advance.

The proposal states the rules applicable to leave foreseeable at least 30 days in advance, foreseeable less than 30 days in advance, and unforeseeable in different paragraphs for purposes of clarity. Specifically, the Department proposes language that provides practical examples of what it means to delay FMLA leave in cases of both foreseeable and unforeseeable leave, such as a case where an employee reasonably should have given the employer two weeks notice but instead only provided one week notice. The proposal provides that in such a case, the employer may delay FMLA protected leave for one week. The proposal also provides that an employer can take disciplinary action for the employee's violation of the employer's internal call-in procedures, as long as such procedures and discipline are applied equally to employees taking leave for non-FMLA reasons and the procedures do not require more advance notice than the standard in § 825.303.

Finally, the Department proposes to retain language from current paragraph (c) stating that FMLA leave cannot be delayed due to lack of required notice if the employer has not complied with its notice requirements, which now will also include providing the general notice in an employee handbook or annual distribution, as set forth in proposed § 825.300.

Section 825.305 (Medical certification, general rule)

Current § 825.305(a) sets forth the general rule as to when an employer may request that an employee provide a medical certification form to substantiate the need for FMLA leave in connection with a serious health condition.

Current § 825.305(b) states that when leave is foreseeable and at least 30 (calendar) days notice has been given, ''the employee should provide the medical certification before the leave begins.'' If that is not possible, then the employer must give the employee at least 15 calendar days to provide the certification, unless it is not practicable

to do so despite the employee's diligent, good-faith efforts.

To help ensure that both employees and employers better understand this requirement, the Department proposes that the time-frame in this section for submitting a medical certification be modified to clearly apply the 15-day standard for both foreseeable and unforeseeable leave, consistent with the language in current § 825.311(a) and (b).

The Department solicits comments on whether language should be added to paragraph (b) of this section that would state that an employer must notify the employee if the certification has not been returned in the 15-day time period, and give the employee another seven calendar days to provide the certification unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. The Department believes that this proposed requirement may be necessary in light of *Urban* v. *Dolgencorp of Texas, Inc.*, 393 F.3d 572 (5th Cir. 2004), a decision which found an employee was not entitled to FMLA leave because a certification was not returned to the employer after a 15-day extension was granted to the employee to submit the certification. In *Urban,* the employee argued that she did not realize that her health care provider had not returned the certification to the employer. She argued that since it was not sent to her employer, she provided an ''incomplete'' certification, and therefore should have had an opportunity to 'cure' the deficiency under § 825.305(d). The court rejected this argument, finding that a certification that was never given to the employer was not ''incomplete,'' and therefore the employee could not avail herself of the provisions in § 825.305(d). The court also observed that, as a policy matter, the stated purpose of the FMLA was to ''balance the demands of the workplace with the needs of families'' and ''to entitle employees to take reasonable leave for medical reasons'' in a ''manner that accommodates the legitimate interests of employers.'' The court reasoned that ''it would seem illogical to require an employer to continually notify an employee who failed to submit medical certification within a specified deadline,'' observing that in the case of Urban, a 15-day extension had already been granted. *Id.* at 577.

Current § 825.305(c) provides that an employer should request medical certification from the employee within two business days of receiving the employee notice. Consistent with the modifications made to proposed § 825.300, the Department proposes a five-business day standard and the requirement has been incorporated into proposed paragraph (b).

The Department proposes to create a new paragraph (c) entitled ''complete and sufficient certification,'' incorporated in part from paragraph (d) of the current regulation. The Department has retained the standard from the current regulations, which advises employers that in the case of an incomplete certification, they must give the employee a reasonable period of time to cure any deficiency. The Department proposes new language that states ''a certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed.'' In response to the RFI, many commenters, including employers, employees, and health care providers, expressed dissatisfaction with the current medical certification process. The Department held a stakeholder meeting with representatives of each of these groups in September 2007. Multiple employers commented to the RFI that a certification should require not just that the form is completed, but that meaningful responses are given to the questions. *See, e.g.*, National Coalition To Protect Family Leave (''If health care providers * * * do not provide direct responses to the questions, the regulations should be modified to specify that the certification is not considered 'complete' for purposes of the employee's certification obligations, thereby not qualifying the employee for FMLA leave.''); South Central Human Resource Management Association (''We recommend the Regulations make clear that a 'complete' certification is required, that meaningful answers have to be furnished for all questions, and that a certification is 'incomplete' if a doctor provides 'unknown' or 'as needed' to any question.''). The Department agrees that an adequate FMLA certification requires responsive answers and therefore also proposes to define an insufficient certification as one where the information provided is ''vague, ambiguous or non-responsive.'' The Department proposes to define these terms because it is aware that employers are unsure in many circumstances what the distinction is between an incomplete versus an insufficient certification, and whether they must give an employee another opportunity to provide sufficient certification when the initial certification does not establish that the employee has a serious health condition or whether they can simply deny FMLA leave. The Department believes that by defining these terms, employers will better understand what triggers their obligations to give employees further opportunity to provide sufficient certification, which will in turn protect employees from having employers immediately deny them FMLA protections based on the initial certification provided or deny their certifications based on technicalities. For example, under the current regulation, an employer could interpret a ''vague'' answer to simply be insufficient and a basis to deny FMLA leave. Under the proposed regulation, an employer must allow an employee an opportunity to provide sufficient certification when the initial certification is either incomplete or insufficient.

The Department also proposes to clarify the process for curing an incomplete or insufficient certification. The Department received many comments in response to the RFI indicating that employers were unsure how many opportunities an employee must be given to cure an insufficient certification. *See, e.g.*, Waste Management, Inc. (''The current regulation is open to interpretation regarding when information is due and how much additional time should be afforded to employees who do not share the FMLA certification forms timely.''); Federal Reserve Bank of Chicago (''There should be an absolute cut off when an employer can require the employee to submit a completed certification form and the consequence of not meeting that deadline is that the absence(s) is not covered by FMLA.''); Society for Human Resource Management (''HR professionals often have difficulty in determining how many times an employer must give an employee an opportunity to 'cure' a deficiency, and how long to allow them to provide such a complete certification.''). Employees and their representatives expressed a related concern that some employers repeatedly indicated that certifications were incomplete but failed to specify what additional information was necessary, oftentimes necessitating that the employee make repeated appointments with the health care provider in an effort to obtain a complete and sufficient certification. *See, e.g.*, An Employee Comment (''[I]nsurmountable hurdle which many employees encounter is, upon application for family leave, the Company returns the forms asking for 'more information'. Even though the employee's Health Care Provider has filled out the application sections

relevant to the illness/injury, the Company is able to delay, and many times deny, for many weeks and months the benefits and protections which the Act affords.''); Association of Professional Flight Attendants (''[I]t is simply unfair to send FMLA leave requests back to the employees and their treating health care providers for more medical facts, without ever indicating what kinds of additional medical facts are required before the employer will make a determination of medical eligibility or medical ineligibility.''); International Association of Machinists and Aerospace Workers (''We have many members who have their doctors fill out the paper work only to be told it is not properly filled out. The employee fixes that problem and the Company tells them there is another problem with the paper work. This occurs over and over until finally the doctor or the employee, or both give up.'') (emphasis in original). To address these concerns, proposed § 825.305(c) requires that when an employer determines that a certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency. Additional time must be allowed where the employee notifies the employer within the seven calendar day period that he or she is unable to obtain the additional information despite diligent good faith efforts. The current regulations provide an employee ''a reasonable opportunity'' but no timeframe for curing an insufficient certification and the Department believes that a clear timeframe will be helpful to employees and employers. If the deficiencies specified by the employer are not corrected in the resubmitted certification, the employer may deny the taking of FMLA leave. Finally, in light of the *Urban* decision discussed above and the confusion that exists on this issue, language also is proposed that specifies that a certification never submitted to the employer does not qualify as an incomplete or insufficient certification but constitutes a failure to provide certification.

Proposed paragraph (d), titled ''[c]onsequences,'' now sets forth the consequences if an employee fails to provide a complete and sufficient medical certification, and reiterates the standard under the existing regulations that an employer may deny leave. It clarifies that it is the employee's responsibility either to provide such a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member—such as that required by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Regulations, 45 CFR Part 160 and 164, or any other applicable law—in order for the health care provider to release a sufficient and complete certification to the employer to support the employee's FMLA request. *See* Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005) (''When requested, medical certification is a basic qualification for FMLA-qualifying leave for a serious health condition, and the employee is responsible for providing such certification to his or her employer. If an employee fails to submit a requested certification, the leave is not FMLA-protected leave.'').

Finally, current § 825.305(e) explains the interaction between the employer's sick or medical leave plan and the FMLA when paid leave (of any type) is substituted for unpaid FMLA leave. The current regulation explains that if less stringent medical certification standards apply to the sick leave plan, those standards must be followed when paid leave is substituted. The Department proposes to delete this section. The Department has heard feedback that it is unclear what constitutes less stringent information and how that information would allow an employer to determine if the leave should be designated as FMLA leave. For example, a plan that requires a doctor's note may be considered less stringent or more stringent depending on what type of information is provided on the note, and that information may or may not indicate whether the leave is FMLA-qualified. *See* Wage and Hour Opinion Letter FMLA–108 (Apr. 13, 2000) (finding that certification requirements the employer asserted were ''less stringent'' were, in fact, more stringent than FMLA requirements). Given this confusion, and the fact that Congress clearly provided in 29 U.S.C. 2613 that an employer could request a medical certification to substantiate a ''serious health condition'' as a prerequisite to being required to provide FMLA leave, the Department proposes to eliminate this language. Under the proposed rule, if an employee seeks the protections of FMLA leave for a serious health condition of the employee or qualifying family member, an employer has a right to have the medical information permitted by the statute. Such information will best enable an employer to determine if the leave is in fact FMLA-qualified. In place of the deleted text of current § 825.305(e), the Department proposes to add a provision allowing for annual medical certifications in those cases in which the serious health condition extends beyond a leave year. This proposal incorporates in the regulation the Department's statement in Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005) that a new medical certification may be required once each leave year.

Section 825.306 (Content of medical certification)

The information necessary for a sufficient certification is set forth in section 103 of the Act. *See* 29 U.S.C. 2613(b). The statute states that a medical certification ''shall be sufficient'' if it states the following: the date the condition commenced; the probable duration of the condition; ''appropriate medical facts'' regarding the condition; a statement that the employee is needed to care for a covered family member or a statement that the employee is unable to perform the functions of his/her position (as applicable); dates and duration of any planned treatment; and a statement of the medical necessity for intermittent leave or leave on a reduced leave schedule and expected duration of such leave. *Id.*

Current § 825.306 addresses how much information an employer can obtain in the medical certification to substantiate the fact that a serious health condition exists. This section currently explains that DOL has developed an optional form (Form WH–380) for employees or their family members to use in obtaining medical certifications and second and third opinions from a health care provider to substantiate the existence of a serious health condition for purposes of FMLA.

Passage of HIPAA

Since the current FMLA regulations were issued in 1995, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) in 1996. HIPAA addresses in part the privacy of individually identifiable health information. The Department of Health and Human Services (HHS) promulgated regulations in December 2000 found at 45 CFR Parts 160 and 164 that provide for the privacy of individually identifiable medical information.[15] These regulations apply only to ''covered entities,'' defined as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic

[15] *See* 65 FR 82462 (Dec. 28, 2000).

form in connection with a transaction as defined in the privacy regulations. *See* 45 CFR 160.102(a), 160.103. HHS has stated that the statute does not include ''employers per se as covered entities.'' Therefore, the HHS regulations do not regulate an employer, ''even when it is a covered entity acting as an employer.'' *See* 67 FR 53192 (Aug. 14, 2002).

The final regulations issued by HHS may have an impact, either directly or indirectly, on the medical certification process for FMLA purposes. Under the HIPAA Privacy Rule, the health care provider is permitted to disclose protected health information directly to the patient. Therefore, if the employee has the health care provider complete the medical certification form or a document containing the equivalent information and personally requests a copy of that form to take or send to the employer, the HIPAA Privacy Rule does not and should not impede the disclosure of the protected health information. If the employee asks the health care provider to send the completed certification form or medical information directly to the employer or the employer's representative, however, the HIPAA Privacy Rule will require the health care provider to receive a valid authorization from the employee before the health care provider can share the protected medical information with the employer. As employers have a statutory right to require sufficient medical information to support an employee's request for FMLA leave for a serious health condition, if an employee does not fulfill his or her obligation to provide such information upon request, the employee will not qualify for FMLA leave. *See* Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005).

Current Certification Requirements

With regard to what constitutes sufficient medical certification, current § 825.306(b)(1) states that the health care provider must identify which part of the definition of ''serious health condition,'' if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition. Current § 825.306(b)(2)(i) asks for the approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

Paragraph (b)(2)(ii) of this section asks whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (*i.e.*, part-time) as a result of the serious health condition (see current §§ 825.117, 825.203), and if so, the probable duration of such schedule. Current paragraph (b)(2)(iii) asks if the condition is pregnancy or a chronic condition within the meaning of current § 825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

Current paragraph (b)(3)(i)(A) asks if additional treatments will be required for the condition, and an estimate of the probable number of such treatments. Paragraph (b)(3)(i)(B) asks if the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any. Paragraph (b)(3)(ii) asks if any of the treatments will be provided by another provider of health services (*e.g.*, physical therapist), and the nature of the treatments. Paragraph (b)(3)(iii) asks if a regimen of continuing treatment by the patient is required under the supervision of the health care provider, and if so, a general description of the regimen (*see* current § 825.114(b)).

Paragraph (b)(4) asks, if medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee: (i) is unable to perform work of any kind; (ii) is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (*see* current § 825.115), based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or (iii) must be absent from work for treatment.

Paragraph (b)(5)(i) asks, if leave is required to care for the employee's family member with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period. Paragraph (b)(5)(ii) asks if the employee's family member will need care only intermittently or on a reduced leave schedule basis (*i.e.*, part-time), and the probable duration of the need.

The RFI sought comments on how the current form WH–380 is working and what improvements could be made to it to facilitate the certification process. The Department received significant feedback from the stakeholder community, including health care providers, that the existing form is confusing. *See, e.g.*, American Academy of Family Physicians (''The form WH–380 is overly complicated and confusing in its format.''); United Parcel Service, Inc. (''The current WH–380 form is poorly drafted and confusing.''); Association of Corporate Counsel (''The current form is confusing and often results in incomplete or vague responses by health care providers that are insufficient to assess the employee's eligibility for leave or the timing of the leave.''). Indeed, stakeholders have shared with the Department that in a number of cases, health care providers have refused to complete the certification form. As the employee has the statutory burden of providing sufficient medical information to substantiate the need for FMLA leave, this confusion poses a serious hardship to the employee. Several stakeholders also have criticized the form for asking health care providers to render legal conclusions by certifying whether a serious health condition exists as defined by the FMLA.

Several commenters suggested that the form could be simplified if it was broken into multiple forms, with separate forms either for intermittent and block leave, or for leave for the employee and leave for the employee's family member. *See, e.g.*, Yellow Book USA (suggesting separate forms for block and intermittent leave); National Council of Chain Restaurants (suggesting separate forms for employee and family members); Spencer Fane suggesting forms for: ''(a) continuous leave for employee's own serious health condition; (b) continuous leave for serious health condition of a family member; (c) reduced schedule/intermittent leave for employee's own serious health condition; and (d) reduced schedule/intermittent leave for serious health condition of a family member.''). A physicians group suggested that use of a standard form, as opposed to individual employer variations, would reduce the burden on health care providers. *See* American Academy of Family Physicians; *see also* Kennedy Reeve & Knoll (''The model certification form must be simplified,

and then it must be the required form for employers to use.'').

In reviewing the criticisms of the medical certification form, the Department notes that employers have a statutory right to obtain sufficient medical certification from an employee to substantiate the existence of a serious health condition. *See* 29 U.S.C. 2613(a), (b). However, the Department believes that the form can be simplified to make it easier for health care providers to understand and complete. The Department proposes the following revisions to the medical certification form, to implement the statutory requirements for ''sufficiency'' of the medical certification as set forth in 29 U.S.C. 2613(b). The Department has declined at this time to create multiple forms. However, the Department seeks feedback as to whether multiple forms would be clearer than the revised Form WH–380 proposed in this rulemaking (*see* Appendix B to these proposed regulations).

Proposed Certification Requirements

Before detailing the proposed changes to this section, the Department notes that the medical certification process remains optional for the employer. That is, an employer is always free to designate qualifying leave as FMLA leave without requiring medical certification of the underlying condition. *See* 29 CFR § 825.305(a).

Proposed § 825.306(a)(1) still requires that the name and address of the health care provider and type of medical practice be identified, but also requires that the pertinent specialization and fax number of the health care provider be provided. This addition allows the employer to more efficiently contact the health care provider for purposes of clarification and authentication as appropriate and in accordance with proposed § 825.307 (discussed below). The question of the approximate date on which the serious health condition commenced and the probable duration has been retained in proposed § 825.306(a)(2).

Consistent with the statute, the Department proposes to retain the requirement that a complete certification contain appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. *See* 29 U.S.C. 2613(b)(3). The Department also has added guidance in this regulatory section as to what constitutes sufficient medical facts for purposes of responding to this question. Specifically, the Department proposes that such medical facts may include information on symptoms, hospitalization, doctors visits, whether medication has been prescribed, referrals for evaluation or treatment (physical therapy, for example) or any other regimen of continuing treatment. These examples of what constitutes sufficient medical facts streamline the certification form by eliminating the need to ask several other questions that are contained in the current regulations, specifically those listed in § 825.306(b)(2)(iii), (b)(3)(i)(A), (b)(3)(ii), and (b)(3)(iii), and are intended to simplify the certification process for health care providers.

Proposed § 825.306(a)(3) also states that the health care provider may provide information on the diagnosis of the patient's health condition. The term ''diagnosis'' was specifically not included in the 1995 final regulations due to concerns expressed under the Americans with Disabilities Act. *See* Preamble to Final FMLA Regulations, 60 FR at 2222. As noted, in response to the RFI, several commenters specifically requested that the Department require the employee's health care provider to specify a diagnosis. *See, e.g.*, South Central Human Resource Management Association (''an employer should be permitted to obtain diagnosis and prognosis''); Detroit Medical Center (''It is critical that the regulations and WH–380 form be changed to require actual diagnoses to determine whether an employee's absences correlate with the medical certification.''); MedStar Health, Inc. (''[T]he FMLA's current restriction on obtaining a diagnosis creates an unnecessary and awkward limitation on the employee's health care provider in completing the medical certification form and the employer's health care provider in seeking clarification of information contained in that form. Generally, meaningful communications between the health care providers cannot take place without some discussion about the actual diagnosis, particularly if second and third opinions are involved.''). In practice, in many cases it may be difficult to provide sufficient medical facts without providing the actual diagnosis, and in some cases the employee may prefer that a diagnosis be provided as opposed to more detailed medical facts. The Department is also aware that the diagnosis may often be provided in practice under the current regulation. For example, many health care providers may currently write a diagnosis such as ''asthma'' on the certification form instead of describing symptoms such as ''intermittent difficulty in breathing due to inflamed airways.'' The Department proposes, therefore, that such information be allowed on the FMLA leave certification form. However, the Department does not intend to suggest, by including such language, that a diagnosis is a necessary component of a complete FMLA certification. If the medical facts set forth by the health care provider's medical certification establish the necessity for leave due to a serious health condition without reference to the employee's diagnosis, a diagnosis is not necessary and may not be required. The health care provider determines the appropriate relevant medical facts in any case and the employer determines if the certification is complete and sufficient to meet the regulatory definition of a serious health condition.

Proposed § 825.306(a)(4) requires that the health care provider provide sufficient information to establish that the employee cannot perform the functions of the employee's job and the likely duration of such inability, consistent with current § 825.306(b)(4).

Proposed § 825.306(a)(5) retains the requirement currently found in § 825.306(b)(5)(i) that information be provided sufficient to establish that the employee is needed to care for a family member, if applicable.

Proposed § 825.306(a)(6), (7), and (8) address the need for certification in connection with the need for reduced schedule or intermittent leave for the employee's own serious health condition or that of a family member. These paragraphs incorporate the requirements set forth in current § 825.306(b)(2)(i) and (ii), (b)(3)(i)(B), and (b)(5)(ii). In response to the RFI, several commenters noted that current § 825.306 and the WH–380 model certification form do not require the health care provider to certify the medical necessity for intermittent leave, which is a statutory requirement for the taking of such leave under section 102(b) of the Act. *See, e.g.*, National Coalition to Protect Family Leave (''In the case of intermittent leave, the medical necessity for the intermittent or reduced schedule also should be specified in accordance with 29 C.F.R. § 825.117 (not currently asked on the model form).''); Society for Human Resource Management (same); American Electric Power (''Unfortunately, the statutory requirement that 'medical necessity' be demonstrated by employees seeking intermittent leave has been effectively eliminated by the Department's regulations.''). Consistent with the statutory and the current regulatory requirements, the proposed section would now clarify that the health care provider must certify that intermittent or reduced schedule leave is medically necessary.

Interaction Between FMLA and Employer Policies

Current paragraph (c) of this section provides that an employer cannot request all of the information set forth above to substantiate the existence of a serious health condition if an employer's sick leave plan requires less information. Consistent with the change made to § 825.305(e), the Department proposes to eliminate this language. Instead, the proposal incorporates language from current § 825.307(a)(1), which explains the interaction between workers' compensation and the FMLA with regard to the clarification of medical information. Specifically, the current regulation provides that if a workers' compensation statute provides for an employer to have direct contact with the workers' compensation health care provider, the employer may do so even if the leave also may be designated FMLA leave. The Department proposes to amend this language to state that if the employer is permitted ''to request additional information'' from the workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions. The Department notes that for purposes of HIPAA, ''individuals do not have a right under the Privacy Rule at 56 CFR 164.522(a) to request that a covered entity restrict a disclosure of protected health information about them for workers' compensation purposes when that disclosure is required by law or authorized by, and necessary to comply with, a workers' compensation or similar law.'' *See* Department of Health and Human Services, Office of Civil Rights Publication, ''Disclosures For Workers' Compensation Purposes: Frequently Asked Questions,'' December 3, 2002.

The Department also proposes to add language to this section that clarifies the interaction between paid leave or benefit plans and FMLA leave. Consistent with Wage and Hour Opinion Letter FMLA2004–3–A (Oct. 4, 2004), the proposed language in this section clarifies that if an employee ordinarily is required to provide additional medical information to receive payments under a paid leave plan or benefit plan, an employer may require that the employee provide the additional information to receive those payments, as long as it is made clear to the employee that the additional information is requested only in connection with qualifying for the paid leave benefit and does not affect the employee's unpaid FMLA leave entitlement. This language reiterates what is contained in existing § 825.207(d)(1) with regard to temporary disability benefit plans and proposed § 825.207(a), although the existing regulations do not define what constitutes a disability plan. For consistency and clarity, the Department proposes that all disability and paid leave plans be covered by this provision.

Interaction Between FMLA Certification and ADA Medical Inquiries

The Department received comments in response to the RFI indicating that employers were frustrated and confused by the differing processes for gathering medical information under the FMLA and the ADA. *See generally* RFI Report, Chapter VII, Interplay Between the Family and Medical Leave Act and the Americans With Disabilities Act, 72 FR at 35599. The United Parcel Service, Inc. explained the dilemma faced by employers: ''When an FMLA-qualifying 'serious health condition' is also a potential 'disability' under the ADA, [§ 825.306's] restriction on medical information is in conflict with the ADA interactive process, which allows—and arguably requires—an employer to gather far more medical information regarding an employee so that it can make an informed decision regarding possible accommodations.'' *See also* Temple University (''FMLA restrictions particularly are problematic when employers face a request from an employee that triggers obligations under both the FMLA and ADA, given that the latter requires the employer to engage in interactive processes to accommodate the employee.''). The Department recognizes that an employee's request for leave due to a serious health condition may also trigger the interactive process under the ADA to determine whether the condition is also a disability. The Department therefore proposes to add a new § 825.306(d), which clarifies that where a serious health condition may also be a disability, employers are not prevented from following the procedures under the ADA for requesting medical information.

Finally, the Department received comments from employees and their representatives indicating that employers are incorporating medical releases into their FMLA certification forms and requiring employees to sign the release as a condition of providing FMLA leave. *See* An Employee Comment (''Also, my employer [has] requested me to sign a medical release form for my son's medical records, or I wouldn't be certified for FMLA.''); Legal Aid Society—Employment Law Center (''In some cases, a medical release is attached to the FMLA form requesting leave, with no explanation of its purpose. As a result, many employees unwittingly forego their right to medical privacy and agree to the unlimited disclosure of their entire medical history, believing that they must sign the release in order to qualify for the FMLA.''); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (''The USW asks the DOL to clarify that employees are not required to provide a release of medical information to the employer as a condition of applying for or receiving FMLA leave.''). In the preamble to the current regulations, the Department specifically rejected suggestions that employees be required to sign a release or waiver as part of the medical certification process. *See* 60 FR 2222 (''The Department has not adopted the suggestion that a waiver by the employee is necessary for FMLA purposes.''). The Department continues to believe that employees should not be required to sign a release as a condition of taking FMLA leave and has added a new § 825.306(e) to clarify this issue. Of course, when certification is requested, the employee is required to provide the employer with a complete and sufficient certification and failure to do so may result in the delay or denial of FMLA leave.

Section 825.307 (Authentication and clarification of medical certification)

Current § 825.307(a) explains that a health care provider working for an employer can contact the employee's health care provider with the employee's permission for purposes of clarification and authentication of the medical certification. Commenters raised two major areas of concern in their response to the RFI regarding the authentication and clarification process: (1) The requirement that employers obtain employee permission to contact the employee's health care provider, and (2) the requirement that a health care provider working for the employer be utilized to contact the employee's health care provider, rather than allowing direct employer contact.

Several commenters asserted that the requirement that an employer obtain the employee's permission prior to seeking authentication of the certification from the employee's health care provider makes it extremely difficult for employers to investigate suspected fraud related to medical certifications. *See, e.g.*, Robert Haynes, HR—Compliance Supervisor, Pemco Aeroplex, Inc. (noting difficulty in

investigating fraud when employee's consent is necessary for the employer to authenticate form with employee's health care provider); United States Postal Service (suggesting that a ''simple and fair way to remedy this problem is to allow an employer to make contact with the provider for the purpose of confirming authenticity''); Taft, Stettinius & Hollister LLP (''Where authenticity is suspect, the employer's inquiry is not medically related but rather, is intended to determine whether the employee's health care provider issued the certificate and that it has not been altered. In such circumstances, the restrictions contained in Section 825.307(a) serve no useful purpose, impose unnecessary expense on employers, and are not justified by any language in the Act.''). The Department notes that authentication involves only verifying that the certification was completed, or authorized, by the employee's health care provider and does not involve disclosure of any additional medical information. Accordingly, proposed § 825.307(a) clarifies the limited nature of the authentication process and removes the requirement of employee consent to authenticate the certification.

Unlike authentication, clarification does involve communication with the employee's health care provider regarding the substance of the medical information contained in the certification. Several commenters noted that the passage of HIPAA (discussed above in § 825.306) has complicated the process of clarification of FMLA certifications. *See, e.g.*, Methodist Hospital, Thomas Jefferson University Hospital (''With [HIPAA] regulations physicians are reluctant to share information with Employers who are trying to accommodate Employee medical conditions to minimize absence.''); American Academy of Family Physicians (''We agree with comments that the Health Insurance Portability and Accountability Act (HIPAA) has created confusion about the disclosure of information on the FMLA form. As employers are not covered entities, disclosure directly to the employer is prohibited without an authorization by the patient.''); AIG Employee Benefit Solutions' Disability Claims Center (''More than one Provider has written 'HIPAA' across the Form and returned it.''); Briggs & Stratton Corporation (''[M]any physicians still insist that they are prohibited by [HIPAA] from responding to questions on the Certification.'').

The Department notes that the HIPAA Privacy Rule provides far more protection for employee medical information than current § 825.307(a). For example, a valid authorization under the HIPAA Privacy Rule requires, in part, a written document containing: (1) A description of the information that may be disclosed; (2) the name or specific identification of the person(s) to whom the requested disclosure may be made; (3) a description of the purpose of the requested disclosure; (4) an expiration date or event for the authorization; and (5) a signature of the individual and date. 45 CFR 164.508(c)(1). In any instance in which the employee's health care provider is disclosing medical information to the employer, the HIPAA Privacy Rule requires that the employee execute a valid authorization prior to the disclosure. The Department agrees with those commenters who suggested that the protections afforded to employee medical information by the HIPAA Privacy Rule have supplanted the requirement in current § 825.307(a) for employee permission to clarify the certification. *See* Ohio Public Employer Labor Relations Association (''With HIPAA laws protecting confidential medical information, the excessive restrictions found in 29 C.F.R. § 825.307 are unnecessary and should be removed.''); Taft, Stettinius & Hollister LLP (''HIPAA and similar laws provide ample protection for personal health data and the employee's health care provider can always refuse to disclose information if he or she considers a request for clarification to implicate privacy issues.''); Hewitt Associates LLC (''[G]iven HIPAA concerns, it's likely that the employee will still have a check over the process as the health care provider would require the employee's permission before he or she would speak with the employer.''). Accordingly, in lieu of the requirement in current § 825.307(a) that the employee provide permission for the employer to clarify the medical certification, the Department proposes language highlighting that contact between the employer and the employee's health care provider for the purpose of clarifying the medical certification must comply with the HIPAA Privacy Rule. Language has also been added to make clear that if such consent is not given, an employee may jeopardize his or her FMLA rights if the information provided is incomplete or insufficient.

The second major area of concern raised in the comments to the RFI regarding § 825.307(a) was the requirement that the employer utilize a health care provider to contact the employee's health care provider. Many employers commented that the requirement that they communicate only through a health care practitioner resulted in significant cost and delay. *See, e.g.*, Milwaukee Transport Services, Inc. (''In 2006 alone, MTS spent $23,000.00 for the services of a designated health care provider because it was not itself permitted under the FMLA regulations to ask questions which that provider was then forced to ask on its behalf.''); City of Portland (''The Act requires employers to use the employee as an intermediary to communicate with doctors or incur substantial costs hiring additional doctors to consult with employee physicians or, in narrow circumstances, to give second and third opinions.''); Hewitt Associates LLC (''The employer's engagement of its own health care provider is expensive, takes additional time and ultimately delays the decision to approve or deny a leave request.''). Other commenters suggested that their human resources professionals could more efficiently clarify the certification with the employee's health care provider because they were both better versed in the FMLA and more familiar with the employee's job duties and the work environment than the employer's health care provider. See, *e.g.*, Association of Corporate Counsel (''[T]he employer's staff members—often its Human Resources employees—are usually more knowledgeable about the specific job requirements and other information that may be relevant or helpful to the employee's health care provider in making his/her assessment.''). Commenters also noted that the ADA does not contain a similar restriction requiring employers to engage medical providers to contact employees' doctors. *See*, *e.g.*, Commonwealth of Pennsylvania; Clark Hill PLC; City of New York; Edison Electric Instituted. The AFL–CIO, however, commented that the use of a health care provider was necessary to preserve employee privacy.

The Department has considered the comments on this issue particularly in light of the HIPAA Privacy Rule, and has determined that employers should be allowed to directly contact the employee's health care provider for the purposes of authenticating and clarifying the medical certification. Accordingly, proposed § 825.307(a) eliminates the requirement that the employer's health care provider, as opposed to the employer itself, make the contact to an employee's health care provider. The Department believes that this change would significantly address the unnecessary administrative burdens

the current requirement creates and, in light of the protections provided by the HIPAA Privacy Rule, will not significantly impact employee privacy. The Department notes again, however, that such contact by the employer may only take place after the employee has been afforded the opportunity to cure any deficiencies with the certification.

Current § 825.307(a)(1), which addresses rules governing access to medical information when a workers' compensation absence also is at issue, has been moved to proposed § 825.306 because that section also addresses what medical information an employer can obtain in connection with an FMLA absence.

Current § 825.307(a)(2) and (b) cover the requirements an employer must meet when obtaining a second opinion. The existing language of current § 825.307(a)(2) and (b) has been incorporated into proposed § 825.307(b), titled ''[s]econd opinion''. Employers expressed significant frustration with the second and third opinion process in responding to the RFI— and questioned its utility. Specifically, several employers commented on the expense involved in the second and third opinion process. *See*, *e.g.*, Honda (''Based upon Honda's experience, second and third opinions average over $700 per second or third opinion, and cost the employees their time.''); Yellow Book USA (asserting that second opinions are so expensive they are not used). Other commenters noted practical concerns regarding finding physicians to perform second opinions. See, *e.g.*, United States Postal Service (''We are experiencing increasing difficulty finding physicians who will perform a second opinion medical exam.''); FNG Human Resources (''Requesting a second opinion is neither economically feasible nor beneficial in our area. We do not find healthcare providers willing to state that another provider is incorrect in his/her diagnosis.''). The Department notes that the statute itself mandates the second and third opinion process, including that the employer cannot use a health care provider it regularly employs to render the second opinion, and that the employer bears the costs of the second and third opinions. 29 U.S.C. 2613(c), (d). Thus, the Department has determined that it is not appropriate to change the current regulation. In order to increase the utility of the second and third opinion process, however, the Department proposes to add language to § 825.307(b)(1) and (c) requiring the employee (or family member) to authorize the release of relevant medical information regarding the condition for which leave is sought from the employee's (or family member's) health care provider to the second or third opinion provider.

The final issue in § 825.307 that garnered significant comments and an issue which the Department is hearing about more is the requirement in current § 825.307(f) that under certain circumstances, the employer shall accept the medical certification and second and third opinions from a foreign health care provider. In response to the RFI, several commenters stated that this requirement has caused numerous problems. See, *e.g.*, Spencer, Fane, Britt & Browne LLP (''First, employers have no idea whether the health care provider has training and credentials equivalent to U.S.-licensed health care providers. Second, it is difficult to verify that the foreign health care provider even completed the form. * * * Third, obtaining a second and third opinion is next to impossible * * * .''); U.S. Chamber of Commerce (''These companies have had to obtain the services of translators and health care providers with foreign language skills to discuss the certification with foreign doctors.''); Fairfax County Public Schools (''Approximately 20% of the FCPS FMLA requests are for leave for immediate family members who live outside the U.S. and have received medical diagnoses from individuals of unclear medical qualifications.''). Commenters suggested that there should be additional requirements for certifications for foreign health care providers. *See*, *e.g.*, Spencer, Fane, Britt & Browne LLP; U.S. Chamber of Commerce; Fry's Electronics, Inc. At the present time, the substance of § 825.307(f) remains unchanged. Nevertheless, the Department seeks further public comment about what specific changes would allow for better authentication in this area.

In order to assist individuals referring to the regulations on second and third opinions, proposed changes have been made to add titles to each paragraph in this section. Paragraph (c) is now titled, ''[t]hird opinion,'' paragraph (d) is titled, ''[c]opies of opinions,'' paragraph (e) is titled ''[t]ravel expenses,'' and paragraph (f) is titled, ''[m]edical certification abroad.'' The timeframe for employers to provide employees with copies of second and third medical opinions upon the employees' request under paragraph (d) is proposed to be extended from two to five business days, to be uniform with other similar timeframes.

Section 825.308 (Recertifications)

Current § 825.308 specifies when an employer may request subsequent recertifications of medical conditions. In cases of pregnancy, chronic, or permanent/long-term conditions, recertifications may be requested no more often than every 30 days (and only in connection with an absence) unless circumstances described in the initial certification have changed significantly, or the employer receives information to cast doubt on the employee's stated reason for the absence. If the time period specified by the health care provider for the duration of the incapacity or its treatment is longer than 30 days, an employer may not request recertification until the minimum duration has passed, unless the employee requests an extension of leave, circumstances have changed significantly, or an employer has received information that casts doubt on the validity of the certification. This same rule applies to intermittent leaves of absence. If no time period is specified and the condition is other than pregnancy, chronic, or long-term or permanent, an employer can request recertification every 30 days or more frequently if the employee requests an extension of leave, circumstances have changed significantly, or an employer has received information that casts doubt on the validity of the certification.

The Department proposes to re-structure § 825.308 for the sake of clarity. Proposed paragraphs (a), (b), and (c) now clearly apply to all medical conditions and work in conjunction with each other. Paragraph (a), titled ''30-day rule,'' merely states a general rule that an employer may request recertification no more often than every 30 days and only in connection with the absence of the employee. This rule is subject to the more specific occurrences described in paragraphs (b) and (c).

Paragraph (b), titled ''[m]ore than 30 days,'' explains, consistent with the existing regulation, that if a minimum duration for the period of incapacity is specified, the employer may not request recertification until that time period has expired, but adds that in all cases, recertifications may be requested every six months. An example has been provided to give further guidance on this issue. This proposal addresses situations where a certification is provided that states an employee may be incapacitated and in need of intermittent leave for an extended period. There is confusion under the existing requirements as to whether an employer would be able to obtain recertification in a given year absent a

significant change in circumstance or a reason that casts doubt on the validity of the absence where the certification indicates that the duration of the condition is ''lifetime.'' Conversely, under current law, where an employee has a chronic condition certified to last an ''indefinite'' period of time, that certification may be treated as having no durational timeframe and the employer may require a recertification every 30 days in connection with an absence. *See* Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004).

In response to the RFI, some employers argued that recertification should be permitted every 30 days even where the certification indicates that the condition will last for an extended duration. See, *e.g.*, University of Minnesota (''In all cases, employers should have the right to request recertification from an employee on FMLA leave every thirty days.''); Carolyn Cooper, FMLA Coordinator, City of Los Angeles (''A remedy to this manipulation or gaming of the medical recertification restriction pertaining to *intermittent/reduced work schedule leaves* is to *allow employers to request recertification every 30 days, regardless if the duration indicated in the initial medical certification is greater than 30 days.*'') (emphasis in original); United Parcel Service, Inc. (''As currently drafted, [the] language permits employees to evade the 30-day recertification requirement by having their health care provider specify a longer period of time.''). Employees and their representatives, however, commented that frequent recertifcations are burdensome for employees. *See, e.g.*, International Association of Machinists and Aerospace Workers (''[O]ur members find that the requirement to recertify every 30 days is incredibly burdensome. * * * [I]t is very expensive for employees to get re-certifications. Some employees, particularly in rural areas, have to travel long distances to even see their doctor. It is ironic that often these employees actually have to miss more work time just to get the recertification.''); An Employee Comment (''For an employer to repeatedly request for recertifications every 30 days, for an chronic Asthmatic who has an *unforeseeable mild flare-up* that can be taken care of with prescription medication, seems unreasonable and repetitious.''); Kennedy Reeve & Knoll (''The frequency with which some employers are requiring notes and recertification is both logistically (due to the availability of doctor's appointment times) and financially burdensome on the employee and physician.''). The American Academy of Family Physicians also objected to allowing recertifications every 30 days for conditions that are medically stable: ''This is a burden to physicians who must spend time completing the form to indicate that a chronic condition is still being managed. It would lessen this burden to allow recertification only for those conditions which are not categorized as chronic care or permanent disability.'' *See also* Mark Blick DO, Rene Darveaux MD, Eric Reiner MD, Susan R. Manuel PA-C (''One employer requires us to complete the form every 60 days (ATT/SBC), one employer every 90 days and another every year. Chronic conditions extending a patient's lifetime such as diabetes and hypertension are not going to change and there is no reason the form has to be updated multiple times throughout the year.''); An Employee Comment (''[E]ven though my mother's illness is terminal and my father's condition is considered lifetime, I still am required to fill out forms and have a doctor sign them every 3 months. The physician's office now charges me $20 for each form I have to have them sign. As you can imagine, this takes a lot of time and money.'').

Taking all of the comments into consideration, the Department believes that it would be reasonable for employers to obtain recertifications every six months in circumstances in which the certification indicates that the condition will last for an extended period of time. An extended period of time includes not only specific months or years (*e.g.*, one year) but certified durations of ''indefinite,'' ''unknown,'' or ''lifetime.'' This is a change in the law from the current construction as explained above and expounded in Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004). The Department feels six months is a reasonable timeframe for permitting recertification of such conditions but requests comments on this proposal. This is also consistent with the Department's proposal in § 825.115(c) that ''periodic'' visits to a health care provider for a chronic serious health condition is defined as at least twice per year.

Proposed paragraph (c) of this section explains, with some modifications to the current rule, what circumstances must exist to request medical recertification in less than 30 days and is now titled ''[l]ess than 30 days.'' The proposed paragraph explains that recertification may be requested in less than 30 days if the employee requests an extension of leave, the circumstances have changed significantly based on the duration or frequency of the absence or the nature or severity of the illness, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. The remaining provisions of the existing regulation have been incorporated without any substantive changes. However, examples have been added to illustrate what constitutes a change in circumstances or information that would ''cast doubt.'' *See also* Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004) (noting that a pattern of Friday/Monday absences would permit an employer to request recertification in less than 30 days provided that there was no evidence of a medical basis for the timing of the absences).

No changes have been proposed to paragraph (d) from the current regulations except it is titled, ''[t]iming.''

A new paragraph (e) has been proposed, titled ''[c]ontent,'' that confirms an employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in current § 825.306. In addition, consistent with Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004), the proposed regulation states that as part of the information allowed to be obtained on recertification, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

Proposed paragraph (f) sets forth without change the requirements of current § 825.308(e) that the employee is responsible for the costs associated with the recertification and that no second or third opinion may be required. The Department notes that several employers responding to the RFI requested that the Department allow second and third opinions on recertifications. *See, e.g.*, United States Postal Service (''[A] second opinion should be allowed during the lifetime of an employee's condition, so long as there is reason to doubt the validity of the information in the certification.''); Air Transport Association of America, Inc. and Airline Industrial Relations Conference (''Second and third opinions should also be available to employers on a medical recertification.''). The National Partnership for Women & Families, however, argued that the fact that the statute only refers to second and third opinions on initial certifications supports the current regulatory

prohibition on second and third opinions on recertification. However, both Honda and the AFL-CIO noted that employers are already permitted to reinitiate the certification process on an annual basis, which offers the employer the opportunity to seek a second opinion annually. *See supra* discussion of proposed § 825.305(e). The Department believes that allowing employers to request a new medical certification on an annual basis (and a second and third opinion, if appropriate) allows employers sufficient opportunity to verify the serious health condition. Accordingly, the Department has retained the regulatory prohibition on second and third opinions on recertification, but seeks comment about this in light of the restructuring of § 825.308.

Section 825.310 (Fitness-for-duty certification)

Current § 825.310 explains when an employer may require an employee to provide a fitness-for-duty certification. Current paragraph (a) of this section explains that employers may have a uniformly applied policy or practice that requires similarly situated employees who take leave to provide a certification that they are able to resume work. The Department proposes to add a sentence to paragraph (a) clarifying that employees have the same obligation to provide a complete certification or provide sufficient authorization to the health care provider to provide the information directly to the employer at the fitness-for-duty stage as they do in the initial certification stage.

No changes have been proposed to paragraph (b), which explains that if State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions apply, and that the ADA requires that any return-to-work physical be job-related and consistent with business necessity. The court in *Harrell* v. *USPS*, 445 F.3d 913, 926–27 (7th Cir.), *cert. denied*, 127 S. Ct. 845 (2006), deferred to this regulation, holding that it reasonably implements the statute and is consistent with the legislative history by providing that a collective bargaining agreement ''may impose more stringent return-to-work requirements on the employee than those set forth in the statute.''

Current paragraph (c) of this section explains the procedures for obtaining a fitness-for-duty certification and states that an employer may seek certification only with regard to the condition that caused the employee's need for leave. The existing regulation provides that the certification itself need only be a simple statement of ability to return to work. It also provides that a health care provider employed by the employer can contact the employee's health care provider with the employee's permission for purposes of clarifying the employee's fitness to return to work, that no additional information may be acquired, and that the employee's reinstatement may not be delayed while contact with the health provider is made. A number of commenters responding to the RFI addressed the ''simple statement'' rule. Some employers noted that particular safety concerns inherent in their workplaces necessitated that they obtain clear information regarding an employee's ability to safely return from leave. For example, Union Pacific Railroad Company noted that clear information regarding its employees' ability to work is critical as ''those very employees are entrusted with jobs that affect the safety and security of the general public.'' The Association of American Railroads also stated that ''returning an employee to work is not a 'simple' process in cases where the employee performs a safety sensitive job.'' Therefore, it recommended that the Department should ''define a return to work 'certification' in such a way as to allow employers to require a detailed certification similar to what is required when an employee first requests FMLA leave.'' Similarly, the Maine Pulp & Paper Association stated:

> Employees in the paper industry routinely work with hazardous materials in close proximity to heavy machinery. Forcing employers to accept the employee's medical provider's simple statement that the employee ''is able to resume work,'' or worse, in the case of an intermittent leave-taker, accept the employee's word alone with no medical verification whatsoever jeopardizes the safety of co-workers and increases exposure to expensive workers' compensation claims. MPPA's members have strong safety programs which should not be undercut by administrative requirements of the FMLA.

Jackson Lewis LLP stated that the ''simple statement'' provision allows employees to present ''cursory and conclusory notes asserting, without any factual explanation, that they are 'cleared to return to work without restrictions.' Employers must ignore facts suggesting employees are not qualified to perform their jobs or might pose a direct threat of harm to themselves or others.'' The National Coalition To Protect Family Leave also noted that ''the inability of an employer to obtain more than a 'statement' that the employee can return to work, and lack of opportunity to challenge such a statement, creates risk for everyone involved.'' The Coalition and a number of other commenters stated that the return to work process under the FMLA conflicts with the return to work process under the ADA, with the latter providing a better model because it allows both more substantive information and physical examinations.

In contrast, as explained in more detail with regard to paragraph (g) of this section, several commenters representing employees, including the National Partnership for Women & Families, cautioned that altering the fitness for duty certification procedures under the FMLA would place an ''unwarranted burden'' on employees.

The proposed regulation retains the basic fitness-for-duty certification procedures, but states that for purposes of authenticating and clarifying the fitness-for-duty statement, the employer may contact the employee's health care provider consistent with the procedures set forth in § 825.307 above. The proposal also replaces the requirement that the certification must only be a ''simple statement'' with the statutory language that the employee must obtain a certification from his or her health care provider that the employee is able to resume work. The employer may provide the employee with a list of the employee's essential job duties together with the eligibility notice, in which (as provided for in proposed § 825.300(b)(3)(v)) the employer advises the employee of the necessity for a fitness-for-duty certification. If the employer provides such a list of essential functions, it may require the employee's health care provider to certify that the employee can perform them. When providing a fitness-for-duty certification, the health care provider therefore must assess the employee's ability to return to work against these identified essential functions. However, if the employer wants the health care provider to consider a list of essential functions, it must provide them with the eligibility notice; providing the list at a later date could force the employee to make an extra visit to the health care provider or to incur extra expense or delay. The statement in the current regulations that no additional information may be acquired has been deleted, as the process of clarifying the fitness-for-duty certification may result in the employer obtaining additional information not initially provided on the fitness-for-duty certification. But the employer may not request or require additional information in a certification to establish fitness-for-duty than is specified under these regulations.

The Department also requests further input concerning the appropriate level

of information that may be obtained and the process that employers may follow in connection with a fitness-for-duty certification. This includes, but is not limited to, whether additional information or procedures (such as a second and third opinion process) should be permitted where an employer has reason to doubt the validity of the fitness-for-duty certification. Although the Department did not ask specific questions regarding these topics in the RFI, some commenters did address them. For example, the Association of Corporate Counsel suggested that employers should be permitted to require an employee returning from FMLA leave to undergo a return to work physical conducted by the employer's physician, so long as the employer regularly requires such a physical for all employees returning to work. The Ohio Department of Administrative Services and the National Council of Chain Restaurants stated that employers should be allowed to get a second opinion on a return to work certification when they have reason to doubt the validity of the release. Briggs & Stratton Corporation similarly suggested that an employer should be permitted, ''at its expense, to require verification of the treating health care providers' return to work certification,'' arguing that the current prohibition impedes an employer's ability to fulfill its OSHA obligation to provide a safe work place. The National Coalition To Protect Family Leave also stated that the prohibition on second and third opinions on fitness for duty certifications is ''problematic from a safety perspective'' and conflicts with the ADA process. Therefore, it suggested that employers should be able to challenge a certification obtained from an employee's health care provider and ''to delay the employee's return to work pending receipt of a second opinion if the employer has a reasonable basis to believe that the employee may not be able to safely return to work and perform all the essential functions of the job.'' The Department is proposing no changes in this area, but requests further comments on these issues.

The Department proposes no changes to current paragraph (d) of this section, which explains who bears the cost of the fitness-for-duty certification. Under both the current and proposed regulations, the employee is responsible for the cost of obtaining a fitness-for-duty certification.

Current paragraph (e) of this section explains that advance notice of the need to provide a fitness-for-duty certification must be given when an employee goes out on leave. It also requires that if an employer has a handbook, the employer should include its general policy with regard to fitness-for-duty certifications. The current regulations further provide that no second or third opinions on fitness-for-duty certifications may be required. The Department proposes to modify this section by specifying that the notice of the fitness-for-duty certification requirement is to be provided in the eligibility notice set forth in proposed § 825.300(b).

Current paragraph (f) of this section provides that an employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required by paragraph (e). This language has been retained in the proposed regulations. The Department proposes, however, to add language, consistent with current § 825.311(c), to make clear that the employee is not entitled to the reinstatement protections of the Act if he or she does not provide such a requested certification or request additional FMLA leave.

Current § 825.310(g) provides that an employer cannot obtain a fitness-for-duty certification when an employee returns from an intermittent leave absence. Numerous commenters responding to the request for information addressed this provision. The employer comments indicate that the primary purpose of requiring a fitness-for-duty certification is to make sure the employee is able to resume work safely without harming the employee, co-workers, or the public. When leave is taken intermittently, employers state that they may need to determine whether the employee is fit for duty when safety concerns are at issue, the same as when an employee returns from a block of leave. For example, the United States Postal Service stated:

> Exempting chronic conditions from return to work clearance seems to make little sense because those conditions are just as likely as any other to compromise the health or safety of the workforce. Indeed, some chronic conditions are even more likely to give rise to a justifiable need for return to work clearance than the other serious health conditions under the FMLA. For example, an employer may have little concern about the clerical assistant returning to work after giving birth, but far more (and legitimate) concern about allowing a utility worker to return after a series of epileptic seizures on the job.

Honda similarly stated that, ''[i]n manufacturing, many of the jobs include safety-sensitive duties. Therefore, the current regulation prohibiting a fitness-for-duty form for intermittent leaves puts the employee and his/her co-workers at risk and requires the employer to assume a legal risk for liability, if there is an accident caused by the reinstated employee.'' Therefore, Honda suggested that employers should be permitted to require a fitness-for-duty form for employees returning from intermittent leave, but only ''when it is consistent with the employer's 'uniformly-applied policy or practice' applicable to all similarly-situated employees [the general standard for fitness-for-duty certifications in § 825.310(a)].'' The City of New York commented that ''Fitness for Duty Certifications for employees in safety-sensitive positions who are intermittently absent should be an option for employers. For example, if a sanitation worker responsible for driving a two-ton truck on public roadways takes intermittent leave to treat high blood pressure, a fitness for duty certification should be required before the employee is restored to the position which carries an extreme responsibility to the public.'' Dallas Area Rapid Transit similarly stated that allowing employers ''to request a Fitness for Duty certification [for employees returning from intermittent leave] would protect the safety of both the employee and the public, and support the employer's efforts and regulatory requirement to provide a safe workplace, while also providing a safe efficient service to its customers.'' Such employers suggested that the FMLA return to work process undercuts legitimate employer safety programs. Therefore, numerous commenters, including Willcox & Savage, Foley & Lardner LLP, the National Retail Federation, the National Council of Chain Restaurants, and the National Coalition to Protect Family Leave, suggested that the Department should delete or revise this section of the regulations so that employers would have the same right to seek fitness for duty certifications from employees returning to work from intermittent leave as they do for block leave. Hinshaw & Culbertson LLP suggested that fitness-for-duty certifications ''could be regulated to prevent abuse by the employer by limiting such statements to certain time frames, such as once a quarter. It could also be based on the frequency of the intermittent leave; the more frequent the leave, the more frequent the statement.''

However, numerous commenters representing employees vigorously supported the existing regulation. The National Partnership for Women & Families commented that requiring

employees returning from intermittent leave to provide fitness for duty certifications—which are at the employee's expense—would significantly undermine the statutory purpose behind allowing employees to take intermittent leave. It stated that ''[a]ny benefit to the employer of obtaining fitness for duty statements from intermittent leave-takers is far outstripped by the unwarranted burden that such a change in the regulations would impose on employees. * * * The intermittent leave option helps to take some of the financial strain off employees by enabling them to continue earning a paycheck while addressing serious health or family needs, and allows employees to preserve as much of the twelve weeks of leave as possible.'' The American Federation of Teachers, Local 2026, stated that ''[t]here is no reason to disturb the current rule barring employers from requesting fitness for duty statements from workers who take intermittent leave.'' The AFL–CIO noted that ''[r]equiring employees who take intermittent leave to present fitness for duty certifications for potentially every absence is burdensome and unnecessary.'' The Pennsylvania Social Services Union, SEIU 668, concurred, stating that there is no reason to disturb the current rule. Kennedy Reeve & Knoll commented that ''the logistical impossibility and financial burdens of allowing employers to require fitness-for-duty statements for each and every day of absence make such a policy not feasible.'' The National Business Group on Health also stated that ''[i]t would be an administrative headache to require a fitness for duty statement from an employee who is absent intermittently. The added paperwork to cover this would be overly burdensome.'' The Indiana State Personnel Department, Employee Relations Division, also recognized that the burden of providing fitness for duty certifications after every intermittent absence would be significant for employees and health care providers, but beneficial to employers. In an attempt to address the cost concern, the United Parcel Service suggested that employers bear the cost of fitness for duty certifications when the employee is returning from intermittent leave.

The Department believes, as the comments from employee representatives assert, that it would be unduly burdensome on employees to have to provide a fitness-for-duty certificate for each intermittent leave absence. However, the numerous employer comments addressing the significant safety risks that can exist when some employees return from intermittent leave absences indicate that the current regulation does not appropriately address those concerns. Therefore, the Department proposes that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist. For example, if an employee is out periodically for high blood pressure, and the employee operates heavy equipment as part of the employee's essential functions, an employer may have reason to get certification that the employee can perform the essential functions of the job. The employer may not terminate the employment of the employee while awaiting such a certification of fitness for duty for an intermittent or reduced schedule leave absence. The Department is cognizant of the potential burdens on employees who may need to provide both a recertification and a fitness-for-duty certificate within a short period of time. The Department specifically seeks comment on ways to minimize this burden and asks whether this proposal strikes the appropriate balance.

Current paragraph (h) of this section would be deleted to avoid redundancy. This paragraph, which provides an explanation as to the repayment of health insurance premiums if the employee is unable to return to work as a result of a continuation of a serious health condition, is duplicative of the provisions set forth in § 825.213. The last sentence of current § 825.310(h), which explains who bears the cost of the certification in such circumstances, is moved to proposed § 825.213(a)(3).

Section 825.311 (Failure to provide medical certification)

Current § 825.311(a) provides that, in the case of foreseeable leave, if an employee fails to provide medical certification in a timely manner, the employer may delay the taking of FMLA leave until it has been provided. In response to the RFI, Foley & Lardner LLP noted that the regulation ''does not explain how long the delay may last or what the consequences of a 'delay' can be.'' The Department agrees and proposes to explain more clearly the implications of an employee's failure to provide the medical certification in a timely manner. Currently, the regulation states that an employer may ''delay the taking of FMLA leave.'' If the employee takes leave without timely providing a sufficient medical certification for foreseeable leave, then any leave during the time period that the certification was ''delayed'' is not FMLA-protected. To make sure both employees and employers understand the intended meaning of this provision, the Department proposes to amend the wording to state that the employer may ''deny FMLA coverage'' for the period at issue. This proposed language ensures that there is no misunderstanding as to the impact of the ultimate failure to provide a medical certification in a timely manner, but substantively this is not a change from the current regulation. *See* current § 825.312(b) (''If the employee never produces the certification, the leave is not FMLA leave.''); *see also* Sherman & Howard LLC (''The regulations should make clear that if an employee does not ultimately qualify for FMLA leave, or fails to provide medical certification to support the requested leave, the employee's absence will be unprotected. This means that the employer may appropriately enforce its attendance policy which may result in disciplinary action being taken against the employee.''). Proposed paragraph (a) is titled ''[f]oreseeable leave.'' Current § 825.311(b) contains similar language to current paragraph (a) with regard to unforeseeable leave. The Department proposes language similar to that proposed in paragraph (a), to be titled ''[u]nforeseeable leave,'' in proposed § 825.311(b). Section 825.311(b) is proposed to be reworded for purposes of clarity, but no other substantive changes have been made. The Department proposes a new paragraph (c), to be titled ''[r]ecertification,'' that addresses the consequences of failing to provide a timely recertification when requested by the employer. The proposed regulations provide that if a recertification is not provided within 15 days of the request, or as soon as practicable, the employer may deny the continuation of the FMLA leave protections until the recertification is provided. Former paragraph (c) is moved to proposed paragraph (d) but no changes have been made in the requirement to provide medical certification that an employee is fit for duty and able to return to work when seeking reinstatement following FMLA leave for a serious health condition.

Section 825.312 (When can an employer refuse reinstatement)

Current § 825.312(a) through (f) address when an employer can delay or deny FMLA leave to an employee, or deny reinstatement after FMLA leave, when an employee fails to timely provide the required notifications and certifications set forth in the regulations. As these sections are duplicative of

other regulatory sections, they have been deleted from the proposed rule. Current paragraphs (g) and (h) of § 825.312, which address the fraudulent use of leave and outside employment, have been renumbered as § 825.216(d) and (e), which also deal with limitations on reinstatement, but no substantive changes have been made.

Sections 825.400 through 825.600

No changes are proposed in §§ 825.400 through 825.600 other than to the titles of the sections and very minor editorial changes (adding a reference to the Department's website in proposed § 825.401(a), updating the reference in proposed § 825.500(c)(4) to the new employer eligibility notice requirement proposed in § 825.300(b), and deleting a cross-reference in proposed section 825.601(b)).

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

Section 825.700 (Interaction with employer's policies)

Current § 825.700(a) provides that an employer may not diminish the rights established by the FMLA through an employment benefit program or plan, but that an employer may provide greater leave rights than the FMLA requires. As noted previously, the U.S. Supreme Court in *Ragsdale* invalidated the last sentence of current § 825.700(a), which states that if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

A number of commenters responding to the RFI addressed the effect of *Ragsdale*. For example, the National Coalition to Protect Family Leave stated that § 825.700(a) should be removed from the regulations. The Air Transport Association of America, Inc. and the Airline Industrial Relations Conference suggested that the regulations should be revised in light of *Ragsdale,* because employers do not know which regulations they must follow and which are no longer valid, and employees who read them also are confused about which regulations their employers must follow. The Association of Corporate Counsel similarly suggested that § 825.700(a) should be deleted to clarify that an employer's failure to timely designate leave does not increase the statutory leave period. Hewitt Associates LLC commented that ''by deleting the 'penalty' provision and simply reinforcing employer notification obligations,'' the Department would appropriately respond to *Ragsdale.* The National Partnership for Women & Families stated that while the Supreme Court struck down the ''categorical penalty'' in the current regulations, it left intact the requirement that employers designate leave, and it ''did not prohibit DOL from imposing *any* penalties on employers for failing to properly designate and notify employee about leave'' (emphasis in original). (Related comments from both employer and employee representatives addressing possible changes to the notice and designation of leave requirements are addressed in the preamble discussing changes to § 825.208.)

In light of these comments, the Department proposes to delete the last sentence from paragraph (a) of this section struck down by *Ragsdale.* Other than this change required by the Court's decision, the Department proposes no changes to current paragraph (a).

The Department proposes no changes to current § 825.700(b), which provides that an employer may amend existing leave programs, so long as they comply with the FMLA, and that nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

The Department proposes to delete § 825.700(c)(1) and (2) from the current regulations, as they discuss the initial applicability of the statute and periods of employment prior to the statute's effective date, which are no longer necessary.

Section 825.702 (Interaction with Federal and State anti-discrimination laws)

Current § 825.702 addresses the interaction between the FMLA and other Federal and State anti-discrimination laws. Current paragraph (a) confirms that the FMLA and other Federal or State laws are wholly distinct and must be complied with independently. Paragraphs (b), (c), (d) and (e) primarily focus on the interaction between the FMLA and the Americans with Disabilities Act (ADA), particularly with regard to leave rights, job modification, light duty, reassignment, and reinstatement. Paragraph (f) focuses on the interaction of the FMLA with Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and paragraph (g) states that the U.S. Equal Employment Opportunity Commission can provide further information on Title VII and the ADA.

The Department proposes to add a new paragraph (g) in this section. Existing paragraph (g) would become proposed paragraph (h) in this section. Proposed paragraph (g) incorporates a discussion of the interaction between the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the FMLA. The current regulations contain no such reference, and the interaction between these two laws has been confusing to employees and employers alike. On July 22, 2002, the Department issued guidance stating that, based upon the reinstatement rights provided by USERRA, an employee is entitled to credit for FMLA eligibility purposes for the months and hours that the employee would have worked during the 12 months preceding the start of the leave but for his or her qualifying active duty uniformed service. *See http://www.dol.gov/vets/media/fmlarights.pdf.* This guidance has been incorporated into paragraph (g) of the proposed regulations. The only other change the Department is proposing is to conform the cross-reference in paragraph (d)(2) to the proper paragraph in proposed § 825.207.

The Department received numerous comments in response to the RFI that discussed the relationship between the FMLA and the ADA. Many of those comments were discussed in Chapter VII of the Department's 2007 Report on the RFI comments (*see* 72 FR at 35599), and other sections of this preamble address comments that are relevant to those sections (*see, e.g.*, §§ 825.306–.307). The Department also received comments regarding the interaction between the FMLA and the ADA that are relevant to the job modification, light duty, and reassignment issues addressed in this section.

A number of organizations commented on the differences between the FMLA's and ADA's treatment of light duty work. Sections 825.702(d)(2) and 825.220(d) of the FMLA regulations provide that an employee may voluntarily accept a ''light duty'' assignment while recovering from a serious health condition, but cannot be coerced to do so. Under the ADA, an employer does not have to create a light duty position for an individual with a disability but, if a vacant, light duty position already exists, the employer must reassign the individual with a disability to the position if there is no other effective accommodation available and the reassignment would not pose an undue hardship. *See* EEOC, Workers' Compensation Guidance, at Questions 27 and 28. In addition, if the only effective accommodation available is similar or equivalent to a light duty position, an employer must provide that accommodation, absent undue

hardship. *See* EEOC, Workers' Compensation Guidance, at Question 27.

The Department also received comments regarding the differing standards under the FMLA and the ADA for transferring or reassigning employees to alternative positions. The FMLA permits an employer to temporarily transfer an employee who needs foreseeable intermittent or reduced schedule leave for planned medical treatment to an alternative position; however, the position must have equivalent pay and benefits. The position also must be one for which the employee is qualified and which better accommodates recurring periods of leave. Under the ADA, part-time work or occasional time-off may be a reasonable accommodation. As a general matter, reassignment is the accommodation of last resort under the ADA. However, if or when an employee's need for part-time work or reduced hours in his or her current position creates an undue hardship for an employer, the employer must transfer the employee to a vacant, equivalent position for which the employee is qualified, unless doing so would present an undue hardship for the employer. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Further accommodation is not required if a lower level position is also unavailable. *See* EEOC, Fact Sheet: ''The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964'' (hereafter ''EEOC FMLA and ADA Fact Sheet''), at Question 13. Under the ADA, employers who place employees in lower level positions are not required to maintain the employee's salary at the level of the higher grade, unless the employer does so for other employees. *See* EEOC Technical Assistance Manual § 3.10.5.

Commenters also focused on the differences between the FMLA and the ADA with regard to the use of leave. Under current § 825.115, an eligible employee may use leave ''where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position.'' Other provisions of the FMLA allow an employee to take leave intermittently or on a reduced schedule. *See* 29 U.S.C. 2612(b); 29 CFR 825.203–.205. Under the ADA, an employee is entitled to reasonable accommodation, including medical leave, only if he or she has an impairment that ''substantially limits'' one or more major life activities. Moreover, an employer is not required to provide any accommodation that would pose an ''undue hardship'' on the operation of the employer's business. Neither the FMLA regulations nor the statute limits the availability of FMLA leave to situations where the employee's absence does not impose an ''undue hardship'' on the employer.

Although the Department received many comments seeking greater consistency between the FMLA and the ADA, the Department can do nothing to alter the fact that the two statutes serve distinctly different purposes, provide different rights, and have different eligibility criteria. Moreover, the FMLA legislative history clearly states that the ''purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection,'' and it specifically recognizes that ''the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA].'' S. Rep. No. 103–3, at 38 (1993). Therefore, the Department proposes no changes to this section (other than the addition of a new section addressing USERRA and the changed internal cross-reference, as described previously). However, the Department believes that both employees and employers would benefit from a better understanding of the interaction between the ADA and FMLA, and provides the following additional description of that interaction.

Although the FMLA adopts the ADA definition of ''essential functions,'' an FMLA ''serious health condition'' is not necessarily an ADA ''disability.'' An ADA ''disability'' is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. 12102(2). Some FMLA ''serious health conditions'' may be ADA disabilities, for example, most cancers and serious strokes and some chronic conditions. Other ''serious health conditions'' may not be ADA disabilities, for example, pregnancy or a routine broken leg or hernia. This is because the condition is not an impairment (*e.g.*, normal pregnancy), or because the impairment is not substantially limiting (*e.g.*, a routine broken leg or hernia). *See* EEOC FMLA and ADA Fact Sheet, at Question 9.

Under the ADA, an employer is required to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability if it would not impose an ''undue hardship'' on the operation of the employer's business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation. Reasonable accommodation may include adapting existing facilities, job restructuring, modifying work schedules, acquiring or modifying equipment or devices, or adjusting or modifying policies. Reasonable accommodation can include reassignment to a vacant equivalent position, if available, or to a lesser position if an equivalent one is unavailable or causes undue hardship. An employer must provide an effective reasonable accommodation that does not pose an undue hardship, but need not provide the employee's preferred accommodation.

Generally, an individual with a disability (or his or her representative) must notify the employer of a request for reasonable accommodation. An individual may use ''plain English'' and the request need not be in writing or mention the ADA or the phrase ''reasonable accommodation.'' Instead, an individual must let the employer know that he or she needs an adjustment or change at work for a reason related to a medical condition. After receiving a request for reasonable accommodation, an employer and the individual with a disability should engage in an informal, ''interactive process'' to clarify what the individual needs and identify the appropriate reasonable accommodation. *See* 29 CFR pt. 1630 app. § 1630.9. As part of this ''interactive process,'' the employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his or her disability and functional limitations. *See* ''EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,'' revised Oct. 17, 2002, at Questions 1, 3, 5, and 6. This is similar to the rule under the FMLA (*see* § 825.302), where an employee need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for FMLA leave, but must provide sufficient information to an employer so that the employer is aware that FMLA rights may be at issue. The proposed rule states that sufficient information includes information that indicates that

the employee is unable to perform the functions of the job, the anticipated duration of the absence, and whether the employee intends to visit a health care provider. Once the employer is put on notice of a FMLA leave request, the regulations specify what information must be exchanged between the employee and employer, rather than them engaging in an informal, ''interactive'' process.

Unpaid leave is a potential reasonable accommodation that an employer might need to provide to an otherwise qualified individual with a disability, unless (or until) it imposes an undue hardship on the operation of the employer's business. *See* 29 CFR pt. 1630 app. § 1630.2(o). An otherwise qualified individual with a disability may be entitled to additional unpaid leave as a reasonable accommodation under the ADA, beyond the 12 weeks of unpaid leave available under the FMLA, if the additional leave would not impose an undue hardship on the operation of the employer's business. Generally, unpaid leave is explored as a reasonable accommodation only after examining, through the interactive process, whether reasonable accommodations can be made to the employee's job to keep the employee at work. No set amount of leave is required as a reasonable accommodation under the ADA. The existence of the FMLA does not mean that more than 12 weeks of unpaid leave automatically imposes an undue hardship for purposes of the ADA. To evaluate whether additional leave would impose an undue hardship, the employer may consider the impact on its operations caused by the employee's initial 12-week absence, along with the undue hardship factors specified in the ADA and its regulations found at 29 CFR 1630.2(p). *See* EEOC FMLA and ADA Fact Sheet.

Under the ADA, a qualified individual with a disability may work part-time in his or her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer. If (or when) reduced hours create an undue hardship in the current position, the employer must see if there is another effective accommodation or if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship while working a reduced schedule. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Continued accommodation is not required if a vacant position at a lower level is also unavailable. *See* EEOC FMLA and ADA Fact Sheet, at Question 13.

Under the ADA, an employer must continue health insurance coverage for an employee taking leave or working part-time only if the employer also provides coverage for other employees in the same leave or part-time status. The coverage must be on the same terms normally provided to those in the same leave or part-time status. *See* EEOC FMLA and ADA Fact Sheet, at Question 15. Under the FMLA, an employer must maintain the employee's existing level of coverage (including family or dependent coverage) under a group health plan during the period of FMLA leave, provided the employee pays his or her share of the premiums. 29 CFR 825.209–.210. An employer may not discriminate against an employee using FMLA leave, and therefore must also provide such an employee with the same benefits (*e.g.*, life or disability insurance) normally provided to an employee in the same leave or part-time status. 29 CFR 825.220(c).

Under the ADA, an employer and employee may agree to a transfer, on either a temporary or a permanent basis, if both parties believe that such a transfer is preferable to accommodating the employee in his or her current position. Note that a qualified individual with a disability who is using FMLA leave to work reduced hours, and/or has been temporarily transferred into another job under the FMLA, may also need a reasonable accommodation (*e.g.*, special equipment) to perform an essential function of the job. *See* 29 CFR 825.204(b).

Section 825.800 (Definitions)

Current § 825.800 contains the definitions of significant terms used in the regulations. Changes to definitions that were affected by the Department's proposed changes and clarifications have been made. Specifically, changes and clarifications have been made to the terms ''continuing treatment,'' ''eligible employee,'' ''employee,'' ''health care provider,'' ''serious health condition,'' ''parent,'' and ''son or daughter.''

Family Leave in Connection With Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty

Section 585(a) of H.R. 4986, the National Defense Authorization Act for FY 2008, amends the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation (collectively referred to herein as the military family leave provisions of H.R. 4986). The provisions of H.R. 4986 providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when the law was enacted. The provisions of H.R. 4986 providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective until the Secretary of Labor issues regulations defining ''qualifying exigencies.'' Because a significant number of United States military servicemembers are currently on active duty or call to active duty status, the Department is fully aware of the need to issue regulations under the military family leave provisions of H.R. 4986 as soon as possible. Towards that end, the Department began preliminary consultations with the Departments of Defense and Veterans Affairs and the U.S. Office of Personnel Management (which will administer similar provisions regarding leave to care for a covered servicemember for most Federal employees) prior to the passage of H.R. 4986.

As it did in the initial notice of proposed rulemaking under the FMLA in 1993, 58 FR 13394 (Mar. 10, 1993), and in the interest of ensuring the expedient publication of regulations, the Department is including in this Notice a description of the relevant military family leave statutory provisions, a discussion of issues the Department has identified, and a series of questions seeking comment on subjects and issues that may be considered in the final regulations. 5 U.S.C. 553(b)(3) (notice of proposed rulemaking shall include ''either the terms or substance of the proposed rule or a description of the subjects and issues involved''). Because of the need to issue regulations as soon as possible so that employees and employers are aware of their respective rights and obligations regarding military family leave under the FMLA, the Department anticipates that the next step in the rulemaking process, after full consideration of the comments received in response to this Notice, will be the issuance of final regulations.

The Department strongly encourages the submission of any comments or concerns which should be considered in the course of developing the final regulations. Commenters are encouraged to identify any issues related to military family leave they believe need to be addressed—even if the Department has not identified such issues—and to offer

their views, with supporting rationale, as to how such issues should be addressed by the Department. Commenters also are invited to submit data relating to the economic impact of the FMLA provisions in H.R. 4986. The Department will undertake to implement the new military family leave provisions so as to maximize the benefits and minimize the burdens on both employees and employers consistent with the purposes of the FMLA.

Summary of the Military Family Leave Provisions and Regulatory Issues

The FMLA amendments in Section 585(a) of H.R. 4986 are summarized below. In addition to creating new leave entitlements, the FMLA provisions of H.R. 4986 include conforming amendments to incorporate the new leave entitlements into the current FMLA statutory provisions relating to the use of leave and to add certain new terms to the FMLA's statutory definitions. The FMLA amendments in H.R. 4986 raise a number of issues about which the Department seeks comment. Although specific issues for public comment are listed below after the discussion of each FMLA statutory amendment in H.R. 4986, commenters are encouraged to identify any issues they believe need to be addressed.

Section 101—Definitions

The military family leave provisions of H.R. 4986 add certain new terms to the FMLA's definitions. The Department is considering adding these definitions to proposed FMLA regulatory § 825.800 as follows:

The term ''Active duty'' is defined by H.R. 4986 as duty under a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B). This definition will be codified in the FMLA at 29 U.S.C. 2611(14). The Department believes that the Department of Defense is in the best position to determine when a servicemember has been called to active duty. Title 10 provides extensive information regarding a servicemember's active duty or call to active duty status, the terms of which, as noted in H.R. 4986, are referenced in Section 101(a)(13)(B) of that Title. Accordingly, the Department believes that the definition of ''active duty'' in the military family leave provisions of H.R. 4986 does not require further clarification and is considering adding it to proposed FMLA regulatory § 825.800 as currently defined in H.R. 4986, and cross-referencing 10 U.S.C. 101(a)(13)(B).

''Contingency operation'' is defined by the military family leave provisions of H.R. 4986 as a military operation designated by the Secretary of Defense as provided under 10 U.S.C. 101(a)(13). This definition will be codified in the FMLA at 29 U.S.C. 2611(15). The Department believes that the Department of Defense's definition of ''contingency operation'' found in Title 10 does not require further clarification; therefore, the Department is considering including a definition of ''contingency operations'' in proposed FMLA regulatory § 825.800 as currently defined in Section 585(a)(1) of H.R. 4986, and cross-referencing 10 U.S.C. 101(a)(13).

''Covered servicemember'' is defined by the military family leave provisions of H.R. 4986 as a member of the Armed Forces (including National Guard or Reserves) ''who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.'' This definition will be codified in the FMLA at 29 U.S.C. 2611(16). The Department believes that determining whether a member of the Armed Forces is in outpatient status or is otherwise on the temporary disability retired list for a serious illness or injury is likely to be relatively straightforward. There may be issues, however, regarding what it means for a servicemember to be ''undergoing medical treatment, recuperation, or therapy'' for a serious illness or injury. The Department's initial view is that any treatment, recuperation, or therapy provided to a servicemember for a serious injury or illness, and not just that provided by the Armed Forces, should be covered. The Department solicits public comments on this issue. Should there be a temporal proximity requirement between the covered servicemember's injury or illness and the treatment, recuperation, or therapy for which care is required? Should the Department rely on a determination made by the Department of Defense as to whether a servicemember is undergoing medical treatment, recuperation, or therapy for a serious injury or illness?

''Outpatient status'' for a covered servicemember is defined by the military family leave provisions of H.R. 4986 as the status of a member of the Armed Forces assigned to (a) a medical treatment facility as an outpatient or (b) a unit established to provide command and control of members of the Armed Forces receiving medical care as outpatients. This definition will be codified in the FMLA at 29 U.S.C. 2611(17). The Department believes this definition does not require further clarification, and is considering including it in proposed FMLA regulatory § 825.800 as currently drafted in Section 585(a)(1) of H.R. 4986.

''Next of kin'' is defined by the military family leave provisions of H.R. 4986 as the ''nearest blood relative'' of an individual. This definition will be codified in the FMLA at 29 U.S.C. 2611(18). The Department is consulting with the Department of Defense regarding this definition. Preliminary information suggests that, for disposition of remains, personal effects and the release of records, the Department of Defense generally considers the following individuals ''next of kin'' of a servicemember in the following order: (1) Unremarried surviving spouse; (2) natural and adopted children; (3) parents; (4) remarried surviving spouses (except those who obtained a divorce from the servicemember or who remarried before a finding of death by the military); (4) blood or adoptive relatives who have been granted legal custody of the servicemember by court decree or statutory provisions; (5) brothers or sisters; (6) grandparents; (7) other relatives of legal age in order of relationship to the individual according to civil laws; and (8) persons standing in loco parentis to the servicemember. The Department seeks comments on whether it should adopt the above list of next of kin for purposes of the military family leave provisions. The Department also seeks comments on whether a definition of ''next of kin'' that relies on differing State law interpretations is appropriate, and whether a certification of ''next of kin'' status should be required. If such a certification is required, the Department seeks comments on who should issue such a certification, and its contents.

The Department also seeks public comments on the requirement in the military family leave provisions of H.R. 4986 that the next of kin be the ''nearest'' blood relative. Should the Department interpret this provision to mean that each covered servicemember may only have one next of kin who is eligible to take FMLA leave to provide care if the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious illness or injury? The Department seeks comments on how to determine if an employee is the nearest blood relative of a covered servicemember when a servicemember has several relatives of close consanguinity still alive, and whether this language could be

interpreted to provide military caregiver leave to any eligible next of kin of a covered servicemember. If the nearest blood relative of a covered servicemember is unable or unwilling to provide care, should the next nearest blood relative of the covered servicemember be eligible to take FMLA leave to care for the wounded servicemember? The Department also seeks comments on whether it would be appropriate to permit a covered servicemember to designate any blood relative, or other individuals such as those recognized by the Department of Defense as the servicemember's Committed And Designated Representative (CADRE), as next of kin for purposes of FMLA leave taken to care for the servicemember.

''Serious injury or illness'' in the case of members of the Armed Forces, National Guard, or Reserves is defined by the military family leave provisions of H.R. 4986 as ''an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.'' This definition will be codified in the FMLA at 29 U.S.C. 2611(19). The Department believes that the Departments of Defense or Veterans Affairs are likely in the best position to provide the standard for what constitutes a ''serious illness or injury'' that *may* ''render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.'' Preliminary information suggests that the military branches already regularly provide, when requested, a medical certification to family members of covered servicemembers certifying that the member is seriously injured or ill and is actively receiving medical treatment. The Department seeks comments on whether a certification from the Departments of Defense or Veterans Affairs should be sufficient to establish whether a servicemember has a serious injury or illness that was incurred by the member in the line of duty while on active duty status in the Armed Forces, as well as on other approaches to determining whether a servicemember has an injury or illness that may render a servicemember medically unfit. The Department also seeks comments on whether H.R. 4986 permits eligible employees to take military caregiver leave under FMLA to care for a servicemember whose serious injury or illness was incurred in the line of duty but does not manifest itself until after the servicemember has left military service. In such circumstances, how would one determine whether the injury or illness renders, or may render, the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating, when the servicemember is no longer serving in the military?

The military family leave provisions of H.R. 4986 appear to rely on certain of the FMLA's existing definitions (*e.g.*, ''parent'', ''son or daughter'', and ''spouse''). Although H.R. 4986 does not change these definitions, the legislative history includes statements by members of Congress that suggest that the term ''son or daughter'' should be given a broader meaning under the military family leave provisions to include adult children. As discussed in greater detail below, the Department seeks comment on whether it would be appropriate to define some of these terms differently for purposes of leave taken because of a qualifying exigency or to care for a covered servicemember under the military family leave provisions of H.R. 4986.

Section 102(a)—Leave Entitlement

The military family leave provisions of H.R. 4986 add a new qualifying reason to take FMLA leave: ''[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.'' This provision will be codified in the FMLA at 29 U.S.C. 2612(a)(1)(E) and, by its terms, is not operative until the Secretary of Labor determines, by regulation, the qualifying exigencies that will entitle an eligible employee to take FMLA leave.

Representative Jason Altmire, who introduced this provision, made the following three statements on the House Floor regarding leave taken for a qualifying exigency:

> This amendment allows the immediate family of military personnel to use Family Medical Leave Act time for issues directly arising from deployment and extended deployments. The wife of a recently deployed military servicemember could use the Family and Medical Leave Act to arrange for childcare. The husband of a servicemember could use the Family Medical Leave Act to attend predeployment briefings and family support sessions. The parents of a deployed servicemember could take Family Medical Leave Act time to see their raised child off or welcome them back home. This amendment does not expand eligibility to employees not already covered by the Family Medical Leave Act * * *
>
> [W]hat this legislation does is allow family members of our brave men and women serving in the Guard and Reserve to use Family and Medical Leave Act time to see off, to see the deployment, or to see the members return when they come back, and to use that, importantly, to deal with economic issues, and get the household economics in order * * *
>
> It will allow military families to use family and medical leave time to manage issues such as childcare and financial planning that arise as a result of the deployment of an immediate family member.

153 Cong. Rec. H5258 (daily ed. May 16, 2007); 153 Cong. Rec. H15325 (daily ed. Dec. 12, 2007); 153 Cong. Rec. H15349 (daily ed. Dec. 12, 2007) (statements of Representative Altmire).

In addition to Representative Altmire's statements, in remarks on the Floor, Representative Tom Udall stated:

> For every soldier who is deployed overseas, there is a family back home faced with new and challenging hardships. The toll extends beyond emotional stress. From raising a child to managing household finances to day-to-day events, families have to find the time and resources to deal with the absence of a loved one. * * * The Altmire-Udall amendment would allow spouses, parents or children of military personnel to use Family and Medical Leave Act benefits for issues related directly to the deployment of a soldier. Current FMLA benefits allow individuals to take time off for the birth of a child or to care for a family member with a serious illness. The deployment of a soldier is no less of a crisis and certainly puts new demands on families. We should ensure that the FMLA benefits given in other circumstances are provided to our fighting families during their time of need.

153 Cong. Rec. E1076 (daily ed. May 17, 2007) (statement of Representative Udall).

Finally, Representative George Miller stated that:

> Under the amendment * * * a worker can take family and medical leave to deal with the issues that arise as a result of a spouse, parent, or child's deployment to a combat zone like Iraq or Afghanistan. Under this amendment family members can use the leave to take care of issues like making legal and financial arrangements and making child care arrangements or other family obligations that arise and double when family members are on active duty deployments * * * These deployments and extended tours are not easy on families, and two-parent households can suddenly become a single-parent household and one parent is left alone to deal with paying the bills, going to the bank, picking up the kids from school, watching the kids, providing emotional support to the rest of the family. You have got to deal with these predeployment preparations.

153 Cong. Rec. H5336 (daily ed. May 17, 2007) (statement of Representative Miller).

Given the statements above and Webster's Dictionary definition of ''exigency'' as ''the quality or state of requiring immediate aid or action, or a state of affairs that makes urgent demands,'' how should the Department define qualifying exigencies for purposes of the military family leave provisions of H.R. 4986? Should qualifying exigencies be limited to those items of an urgent or one-time nature arising from deployment as opposed to routine, everyday life occurrences? The military family leave provisions of H.R. 4986 would allow leave for any ''qualifying'' exigency arising out of the fact that the spouse, son, daughter, or parent of an eligible employee is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. Because the statute uses the word ''qualifying'', it is the Department's initial view that not every exigency necessarily will entitle a military family member to leave. It also is the Department's initial view that there must be some nexus between the eligible employee's need for leave and the servicemember's active duty status. The Department solicits comments on the degree of nexus required to demonstrate that the exigency arises out of the servicemember's active duty status. In light of the fact that this new entitlement to leave would be in addition to the existing qualifying reasons for FMLA leave, which already permit an eligible employee to take FMLA leave to care for a son or daughter, parent, or spouse with a serious health condition, the Department's initial view is that leave for qualifying exigencies should be limited to non-medical related exigencies, as suggested by Representative Altmire's statements. The Department seeks comment on these issues and on whether it would be appropriate to develop a list of pre-deployment, deployment, and post-deployment qualifying exigencies. If so, should the following types of exigencies qualify: making arrangements for child care; making financial and legal arrangements to address the servicemember's absence; attending counseling related to the active duty of the servicemember; attending official ceremonies or programs where the participation of the family member is requested by the military; attending to farewell or arrival arrangements for a servicemember; and attending to affairs caused by the missing status or death of a servicemember? Are there other types of exigencies that should qualify? Additionally, should such a list be a *per se* list of qualified exigencies?

Although Representative Altmire's statements suggest that a parent of an adult son or daughter should be permitted to take FMLA leave for a qualifying exigency arising out of the deployment of the son or daughter, the military family leave provisions of H.R. 4986 do not alter the current FMLA definition of ''son or daughter.'' Under this definition, a son or daughter must either be (1) under the age of 18 or (2) 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. 2611(12). The Department recognizes that applying this definition of ''son or daughter'' to leave taken because of a qualifying exigency would mean parents would only be able to take FMLA leave because of a qualifying exigency if their son or daughter is under the age of 18 or older than age 18 and incapable of self-care because of a mental or physical disability. By Federal law, however, the minimum age for enlistment in the United States Military is 17 (with parental consent). 10 U.S.C. 505. Moreover, children over the age of 18 who are incapable of self-care are unlikely to be found medically qualified to perform military duties. Therefore, the Department seeks comments on whether it would be appropriate, given the language of H.R. 4986, to define the term ''son or daughter'' differently for purposes of FMLA leave taken because of a qualifying exigency.

The military family leave provisions of H.R. 4986 also establish an additional leave entitlement that permits an ''an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember'' to ''a total of 26 workweeks of leave during a 12-month period to care for the servicemember.'' This provision will be codified in the FMLA at 29 U.S.C. 2612(a)(3). A number of issues regarding the application of this new FMLA leave entitlement are discussed below. The Department invites comments on these, and any other issues, related to the provision of FMLA leave to care for a covered servicemember.

First, as with leave taken for a qualifying exigency, the military caregiver provision of H.R. 4986 does not alter the current FMLA definition of ''son or daughter'' for purposes of defining who is eligible to take leave to care for a covered servicemember. Thus, the only sons or daughters who will be eligible to take FMLA leave to care for a seriously injured servicemember will be those who are under the age of 18 or age 18 or older and incapable of self-care because of a mental or physical disability. One alternative would be for the Department to define ''next of kin'' as including children of covered servicemembers. The Department could then define the term ''children'' more expansively than the term ''son or daughter'' is currently defined in the FMLA to allow adult children of covered servicemembers to take FMLA leave to care for a covered servicemember. Alternatively, the Department could define the term ''son or daughter of a covered servicemember'' differently than the term ''son or daughter.'' The Department seeks comments on these approaches, whether these approaches are allowed by the military family leave provisions of H.R. 4986, and whether it is appropriate to define the term ''son or daughter'' differently for purposes of FMLA leave taken to care for a covered servicemember.

Second, the military family leave provisions of H.R. 4986 provide that leave to care for a covered servicemember shall only be available ''during a single 12-month period.'' The amendments do not specify whether that 12-month period should be calculated from the date of the servicemember's injury, the date of the determination that the servicemember has a serious injury or illness, the first date on which an eligible employee is needed to care for a seriously injured servicemember, or on some other basis. Current and proposed § 825.200 of the FMLA regulations permits an employer to choose any of the following methods when determining the 12-month period in which the current 12 weeks of FMLA leave entitlement occurs: (1) The calendar year; (2) any fixed 12-month ''leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's anniversary date; (3) the 12-month period measured forward from the date any employee's first FMLA leave begins; or, (4) a ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave. The Department seeks comments on how the ''single 12-month period'' should be measured for purposes of determining entitlement to leave to care for a covered servicemember. For example, should an employer be permitted to choose a method when determining the 12-month period in which the 26 workweeks of leave entitlement to care for a covered servicemember occurs, as is the case for other types of FMLA-qualifying leave? What distinctions should the Department draw between calculating the 12-month period for leave to care for a covered servicemember and the other

qualifying reasons for FMLA leave? The Department also seeks comments on how to reconcile this single 12-month period to the employer's regular FMLA leave year, if different 12-month periods are used.

Third, the military family leave provisions of H.R. 4986 provide that the eligible employee is entitled to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember. Is the 26 workweek leave entitlement to care for a covered servicemember a one-time entitlement or may an employee have multiple entitlements? The FMLA currently provides that an eligible employee is entitled to a total of 12 workweeks of leave during the relevant 12-month period. The 12 workweeks of leave may be taken for any qualifying FMLA reason until the leave is exhausted in the relevant 12-month period. Assuming the employee continues to meet the eligibility requirements, the employee may take leave again (up to 12 weeks) for any qualifying FMLA reason in a new leave year. The Department seeks comments on whether a similar approach to leave taken to care for a covered servicemember would be appropriate even though the leave entitlement to care for a covered servicemember is limited to a ''single 12-month period'' under the military family leave provisions of H.R. 4986.

Given the statutory language of H.R. 4986, can the 26 workweek leave entitlement be interpreted to apply per covered servicemember, *i.e.*, each eligible employee may take 26 workweeks of leave to care for each covered servicemember? Under this reading, an eligible employee would be permitted to take 26 workweeks of leave to care for his or her spouse who is a covered servicemember in a 12-month period, and could take another 26 workweeks of leave to care for his or her parent who is a covered servicemember in another 12-month period. Could an employee take leave to care for both a spouse and a child who are covered servicemembers in the same 12-month period? Alternatively, could the 26 workweek leave entitlement be calculated per injury of a covered servicemember, such that an eligible employee may take 26 workweeks of leave during a single 12-month period to provide care to a covered servicemember and then may take another 26 workweeks of leave during a different 12-month period to provide care to the same covered servicemember who is experiencing a second serious injury or illness? The 26 workweek leave entitlement also may be viewed as a one-time entitlement to each eligible employee. This interpretation would permit each eligible employee to take 26 workweeks of leave during any single 12-month period, but would not entitle that employee to any additional periods of military family leave to care for the same or other covered servicemembers while still employed by the same covered employer. In this circumstance, does the 12-month limitation continue to apply to the employee in the event he or she goes to work for a different employer? Under any of these examples, should an employee be permitted to take more than 26 workweeks of leave during a single 12-month period? The Department seeks comments on these and any other options relating to how this provision should be interpreted.

Fourth, because leave to care for a covered servicemember with a serious illness or injury may, in some circumstances, also qualify as leave to care for a spouse, parent, or child with a serious health condition, the Department seeks comments on how such leave should be designated. In particular, the Department seeks comments on whether the employee or employer should be able to select whether the leave is counted as FMLA leave taken to care for a covered servicemember or FMLA leave taken to care for a spouse, parent or child with a serious health condition. The Department also seeks comments on whether an initial designation of this leave as one type of FMLA leave may be changed retroactively in any circumstances.

Finally, the military family leave provisions of H.R. 4986 provide for a combined total of 26 workweeks of FMLA leave for an eligible employee who takes leave to care for a covered servicemember as well as leave for other FMLA-qualifying reasons during the applicable 12-month period. The military family leave provisions of H.R. 4986 do not limit the availability of leave to an eligible employee for other FMLA-qualifying reasons during any other 12-month period. These provisions will be codified in the FMLA at 29 U.S.C. 2612(a)(4). How should these provisions be implemented if different methods are used to calculate the 12-month period for leave taken to care for a covered servicemember versus leave for other FMLA-qualifying reasons?

Section 102(b)—Requirements Relating to Leave Taken Intermittently or on a Reduced Leave Schedule

The military family leave provisions of H.R. 4986 allow eligible employees to take FMLA leave to care for a covered servicemember intermittently or on a reduced leave schedule when medically necessary. Eligible employees also are permitted to take FMLA leave for a qualifying exigency intermittently or on a reduced leave schedule. These provisions will be codified in the FMLA at 29 U.S.C. 2612(b)(1). The military family leave provisions of H.R. 4986 also permit an employer to require an employee taking FMLA leave to care for a covered servicemember who is undergoing planned treatment to temporarily transfer to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of intermittent leave or leave on a reduced leave schedule. This is the case currently for FMLA leave taken for planned medical treatment due to the employee's own serious health condition or the serious health condition of a spouse, son, daughter, or parent. The military family leave provisions of H.R. 4986 do not specifically provide for such temporary transfers when FMLA leave is taken for a qualifying exigency. The Department seeks comment on whether it would be appropriate to permit temporary transfers when FMLA leave is taken on an intermittent or reduced leave schedule basis for a qualifying exigency. The Department also seeks comment on how H.R. 4986's provisions regarding leave taken intermittently or on a reduced leave schedule should be incorporated into proposed FMLA regulatory § 825.202, which generally explains the taking of FMLA leave intermittently or on a reduced leave schedule, and proposed FMLA regulatory § 825.204, which covers temporary transfers.

Section 102(d)—Relationship to Paid Leave

The military family leave provisions of H.R. 4986 amend the statutory provisions for substitution of paid leave to include the new FMLA leave entitlements. These amendments will be codified in the FMLA at 29 U.S.C. 2612(d). Under the military family leave provisions of H.R. 4986, an eligible employee may elect, or an employer may require, that an employee substitute any accrued paid vacation leave, personal leave, or family leave for unpaid FMLA leave taken because of a qualifying exigency. In addition, the military family leave provisions of H.R. 4986 permit an eligible employee to elect, or an employer to require, that an employee substitute any accrued paid vacation leave, personal leave, family leave, or medical or sick leave for unpaid FMLA leave taken to care for a covered servicemember. The Department is considering how to

incorporate the military family leave provisions into proposed FMLA regulatory § 825.207, which addresses the substitution of paid leave for unpaid FMLA leave. Because that section as currently proposed in this NPRM refers generally to the substitution of paid leave for unpaid FMLA leave, the Department does not believe that specific reference to the new types of leave entitlement is required. The Department also seeks comments on alternative approaches relating to substitution of paid leave for military family leave provided under H.R. 4986.

Section 102(e)—Employee Notice

The military family leave provisions of H.R. 4986 extend to the new leave provision related to care for a servicemember the FMLA's existing requirements for employees to provide advance notice when the need for leave is foreseeable based on planned medical treatment, and for making reasonable efforts to schedule planned medical treatment so as not to disrupt unduly the employer's operations. The military family leave provisions of H.R. 4986 also provide for new notice requirements for leave taken due to qualifying exigencies whenever the need for such leave is foreseeable. The military family leave provisions of H.R. 4986 require that eligible employees provide notice to the employer that is ''reasonable and practicable'' in these circumstances. These amendments will be codified in the FMLA at 29 U.S.C. 2612(e)(2) and (e)(3).

Under the proposed FMLA regulations in this NPRM, an employee must generally provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, a medical emergency, or because the leave is unforeseeable, notice must be given as soon as practicable under the particular facts and circumstances. For a further discussion of the employee notice requirements proposed in this NPRM, see the preamble discussion of proposed FMLA regulatory §§ 825.302 and 825.303.

The Department's initial view is that these same notice requirements should be extended to leave taken to care for a covered servicemember. If the same notice requirements were adopted, an employee taking FMLA leave to care for a covered servicemember generally would be expected to provide the employer at least 30 days advance notice before FMLA leave is to begin when the need for the leave is foreseeable based on planned medical treatment for the covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, a medical emergency, or because the leave is unforeseeable, notice must be given as soon as practicable under the particular facts and circumstances. The Department seeks comments on whether it should incorporate leave to care for a covered servicemember into the notice provisions of proposed FMLA regulatory §§ 825.302 and 825.303. The Department also is considering applying the requirements in proposed FMLA regulatory §§ 825.302(c) and 825.303(b), which require that the employee provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave and provide information regarding the anticipated timing and duration of the leave, to the taking of FMLA leave to care for a covered servicemember. Finally, the Department requests comments on whether proposed FMLA regulatory §§ 825.203 and 825.302(e), which address an employee's obligation to make a reasonable effort to schedule foreseeable leave for planned medical treatment so as not to disrupt unduly the employer's operations, should specifically reference the requirement in H.R. 4986 that servicemember family leave that is foreseeable based on planned medical treatment be scheduled in the same manner.

The military family leave provisions of H.R. 4986 provide that an employee taking leave due to a qualifying exigency provide ''such notice to the employer as is reasonable and is practicable.'' The Department's initial view is that the notice requirements in proposed FMLA regulatory §§ 825.302 and 825.303 also should be applied to leave taken due to qualifying exigencies. If different notice requirements should be used, the Department seeks comments on what should be required. For example, should the notice timing requirements for leave taken due to qualifying exigencies distinguish between foreseeable leave and unforeseeable leave, as proposed FMLA regulatory §§ 825.302 and 825.303 do? Additionally, leave taken because of a qualifying exigency may not involve a medical condition; therefore, the Department seeks comments on the type of information an employee should provide to the employer in order for the notice to be sufficient to make the employer aware that the employee's need is FMLA-qualifying.

These changes also will likely require that the Department make conforming changes to proposed FMLA regulatory § 825.301(b), which generally addresses employee responsibilities to provide notice of the need for FMLA leave. The exact nature of the changes will depend on whether the same notice standards are applied to all qualifying reasons for FMLA leave. The Department believes that the general notice principles set forth in proposed FMLA regulatory § 825.301 should apply to all qualifying reasons for FMLA leave. The public is invited, however, to comment on this issue and provide alternative views.

Section 102(f)—Leave Entitlements for Spouses Employed by the Same Employer

Under the military family leave provisions of H.R. 4986, an employer may limit the aggregate amount of leave to which eligible spouses employed by the same employer may be entitled in some circumstances. H.R. 4986 provides that a husband and wife employed by the same employer are limited to a combined total of 26 workweeks of leave during the relevant 12-month period if the leave taken is to care for a covered servicemember or a combination of leave taken to care for a covered servicemember and leave for the birth or placement of a healthy child or to care for a parent with a serious health condition. This provision does not alter the existing 12-week limitation that applies to leave taken by a husband and wife employed by the same employer for leave for the birth or placement of a healthy child or to care for a parent with a serious health condition (*e.g.*, a husband and wife employed by the same employer could take no more than a combined total of 12 weeks of FMLA leave for the birth or placement of a healthy child in a 12-month period, even if the husband and wife combined took fewer than 14 weeks of leave to care for a covered servicemember, in that same period). These provisions will be codified in the FMLA at 29 U.S.C. 2612(f). How should the Department incorporate the same employer limitation of the military family leave provisions of H.R. 4986 into the regulatory scheme proposed in this NPRM? The Department specifically seeks comments on how H.R. 4986's limitation on spouses employed by the same employer would interact with FMLA's existing limitation

on spouses employed by the same employer if different 12-month periods are used to determine eligibility for leave taken to care for a covered servicemember and other FMLA-qualifying leave.

Conforming regulatory changes likely will be required to proposed FMLA regulatory § 825.120(a)(3), which discusses the applicability of the same employer limit to FMLA leave taken for pregnancy or birth; proposed FMLA regulatory § 825.121(a)(3), applying the same employer limit to FMLA leave taken for adoption or foster care; and proposed FMLA regulatory § 825.201(b), which discusses the same employer limit in the context of FMLA leave taken to care for a parent with a serious health condition. The Department requests comments on how these sections should be changed to incorporate the same employer limit in the military family leave provisions of H.R. 4986.

Section 103—Certification

The military family leave provisions of H.R. 4986 allow employers to apply the FMLA's existing medical certification requirements for serious health conditions to leave taken to care for a covered servicemember. In addition, the military family leave provisions of H.R. 4986 provide for a new certification related to leave taken because of a qualifying exigency. Under the military family leave provisions of H.R. 4986, an employer may require that leave taken because of a qualifying exigency be ''supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe.'' These provisions will be codified in the FMLA at 29 U.S.C. 2613.

The military family leave provisions of H.R. 4986 amend FMLA's current certification requirements to permit an employer to request that leave taken to care for a covered servicemember be supported by a medical certification. FMLA's current certification requirements, however, focus on providing information related to a serious health condition—a term that is not relevant to leave taken to care for a covered servicemember. At the same time, the military family leave provisions of H.R. 4986 do not explicitly require that a sufficient certification for purposes of military caregiver leave provide relevant information regarding the covered servicemember's serious injury or illness, such as whether the injury was incurred by the member in the line of duty while on active duty in the Armed Forces, or whether the injury may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. In light of this, the Department seeks comments on the appropriate certification requirements for military caregiver leave, including whether it would be appropriate to interpret FMLA's statutory certification requirements differently for purposes of leave taken to care for a covered servicemember.

Furthermore, FMLA currently provides that an employer may request a medical certification issued by the health care provider of the employee's son, daughter, spouse, or parent in order to support a request for FMLA leave to care for a spouse, parent, or child with a serious health condition. 29 U.S.C. 2613. Although the leave entitlement provisions of H.R. 4986 permit an eligible employee who is the next of kin of a covered servicemember to take military family leave, H.R. 4986's certification requirements appear to permit an employer to obtain certification issued by the health care provider of the employee's next of kin, rather than the covered servicemember. The Department believes that an employer should only be able to obtain a certification from the health care provider or military branch of the covered servicemember for whom the eligible employee is caring. The Department seeks comment on whether it is appropriate to interpret the military family leave provisions of H.R. 4986 in this manner when a medical certification is sought for leave taken by an eligible employee who is the next of kin of a covered servicemember.

The Department is considering whether a medical certification to support leave taken to care for a covered servicemember issued by the Departments of Defense or Veterans Affairs would, in all cases, eliminate the need to both define a sufficient medical certification for purposes of taking leave to care for a covered servicemember and develop a clarification, authentication, validation, and recertification process for leave taken for this purpose. The Department also seeks comment on whether, and how, to incorporate the new certification requirement for leave taken to care for a covered servicemember into proposed FMLA regulatory § 825.305, which describes the general rule applicable to FMLA medical certifications; and proposed FMLA regulatory § 825.306, which addresses the required content of a FMLA medical certification. In light of the fact that many of the certifications supporting leave taken to care for a covered servicemember may be issued by the Departments of Defense or Veterans Affairs, the Department specifically seeks comment on whether there should be different timing requirements that an employee must follow when providing such certification. Likewise, should the content of a sufficient medical certification be different when it is required to support a leave request to care for a covered servicemember? Should the clarification, authentication, and second and third opinion provisions of proposed FMLA regulatory § 825.307 and the recertification provisions in proposed FMLA regulatory § 825.308 be applied to certifications supporting FMLA leave taken to care for a covered servicemember, and, if so, how?

The military family leave provisions of H.R. 4986 also permit the Secretary of Labor to prescribe a new certification requirement for leave taken because of a qualifying exigency arising out of a servicemember's active duty or call to active duty. The Department is considering how to implement such a requirement and seeks comments on the following specific issues:

(A) What type of information should be provided in a certification related to active duty or call to active duty status in order for it to be considered complete and sufficient? Should the certification merely require confirmation of the covered servicemember's active duty status?

(B) Who may issue a certification related to active duty or call to active duty status? Should anyone other than the Department of Defense provide a certification of the covered servicemember's active duty or call to active duty status?

(C) The Department's initial view is that an employee also must provide certification that an absence(s) is due to a qualifying exigency. Because the military family leave provisions of H.R. 4986 require that the qualifying exigency arise out of the covered servicemember's active duty or call to active duty status in support of a contingency operation, should any required certification specify that the requested leave is a qualifying exigency or that it arises out of the covered servicemember's active duty or call to active duty status in support of a contingency operation?

(D) Should an employee seeking FMLA leave due to a qualifying exigency provide certification of the qualifying exigency by statement or affidavit? Who else might certify that a particular request for FMLA leave is because of a qualifying exigency?

(E) Should the certification requirements for leave taken because of a qualifying exigency vary depending on

the nature of the qualifying exigency for which leave is being taken?

(F) What timing requirements should be applied to certifications related to leave taken because of a qualifying exigency?

(G) Who should bear the cost, if any, of obtaining certifications related to leave taken because of a qualifying exigency?

(H) Should an employer be permitted to clarify, authenticate, or validate an active duty or call to active duty certification? Likewise, should an employer be permitted to clarify, authenticate, or validate a certification that a particular event is a qualifying exigency? If so, what limitations, if any, should be imposed on an employer's ability to seek such clarification, authentication, or validation for both types of certifications?

(I) Should a recertification process be established for certifications related to leave taken because of a qualifying exigency? If so, how would that process compare to the current FMLA recertification process?

Section 104(c)—Maintenance of Health Benefits

Under the FMLA, an employer must maintain group health insurance coverage for an eligible employee on FMLA leave on the same terms as if the employee continued to work. 29 U.S.C. 2614(c). When an eligible employee takes qualifying leave to care for a covered servicemember and fails to return from leave after the period of leave entitlement has expired, under the FMLA amendments in H.R. 4986, the employer may recover the premiums paid for maintaining the employee's group health plan coverage during any period of unpaid leave if the employee fails to return to work for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave or other circumstances beyond the control of the employee. In addition, the military family leave provisions of H.R. 4986 provide that an employer may require an employee to support a claim that he or she did not return to work after taking military caregiver leave because of the continuation, recurrence, or onset of a serious health condition with a certification issued by the health care provider of the servicemember being cared for by the employee. These provisions will be codified in the FMLA at 29 U.S.C. 2614(c)(2)–(3).

These new requirements focus on whether an employee does not return to work because of the continuation, recurrence, or onset of a serious health condition—a term that is not relevant to leave taken to care for a covered servicemember. At the same time, the military family leave provisions of H.R. 4986 do not explicitly address whether an employer may recover premiums paid when an employee fails to return to work because of the continuation, recurrence, or onset of a serious injury or illness of the covered servicemember. Likewise, the military family leave provisions of H.R. 4986 do not specifically provide that an employer may obtain a certification regarding the continuation, recurrence, or onset of the servicemember's serious injury or illness if an employee does not return to work after taking FMLA leave to care for a covered servicemember. In light of this, the Department seeks comments on how to appropriately implement these provisions of H.R. 4986.

The Department is considering revisions to proposed FMLA regulatory § 825.213(a) to incorporate these new requirements. The Department believes that proposed FMLA regulatory § 825.213(a)(1) will need to be changed in order to address an employee's failure to return to work after taking leave to care for a covered servicemember. Proposed FMLA regulatory § 825.213(a)(3) also will need to be changed to provide that an employer may require an employee to provide a certification issued by the health care provider of the covered servicemember being cared for by the employee. The Department requests comments on how the requirements in H.R. 4986 should be incorporated into these proposed FMLA regulatory provisions, and whether any additional guidance may be required on this topic.

Section 107—Enforcement

The military family leave provisions of H.R. 4986 provide for conforming amendments to the FMLA to include the new leave entitlements in the FMLA's statutory enforcement scheme. These provisions will be codified in the FMLA at 29 U.S.C. 2617 and amend FMLA's damages provision to provide for the recovery of damages equal to any actual monetary losses sustained by the employee up to a total of 26 weeks (rather than the current 12 weeks) in a case involving leave to care for a covered servicemember in which wages, salary, employment benefits or other compensation have not been denied or lost to the employee.

The Department believes that a similar revision is required to FMLA regulatory § 825.400(c). That regulatory provision currently and as proposed in this NPRM provides that an employee is entitled to actual monetary losses sustained by an employee as a direct result of an employer's violation of one or more of the provisions of FMLA up to a total of 12 weeks of wages. In order to reflect that the leave provisions relating to care for a covered servicemember provide up to 26 weeks of leave, the Department anticipates changing FMLA regulatory § 825.400(c) to provide that, in a case involving a violation of the military family leave provisions, an employee is entitled to actual monetary losses sustained up to a total of 26 weeks of wages. The Department does not believe that further changes to the FMLA regulatory provisions on enforcement are required in order to implement the military family leave provisions of H.R. 4986. The Department invites the public to comment on this and any other enforcement provisions that they believe may need to be revised.

Section 108—Instructional Employees

The military family leave provisions of H.R. 4986 also extend the entitlement to take FMLA leave to care for a covered servicemember and because of a qualifying exigency to eligible instructional employees of local educational agencies. In order to implement this revision, H.R. 4986 contains three statutory changes to the FMLA, which will be codified in subsections (c)(1), (d)(2), and (d)(3) of 29 U.S.C. 2618, and apply the current FMLA rules regarding the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term, by employees of local educational agencies to certain leave taken to care for a covered servicemember by these same employees. The Department believes that three related regulatory changes are required to incorporate these provisions of H.R. 4986 into the FMLA regulatory scheme proposed in this NPRM, which other than changes to titles and very minor editorial changes is the same as the instructional employee provisions in the current FMLA regulations.

First, the military family leave provisions of H.R. 4986 provide that an employer covered by 29 U.S.C. 2618 could require that, in the case of an instructional employee who requests FMLA leave intermittently or on a reduced leave schedule for foreseeable planned medical treatment of a covered servicemember and who, as a result, will be on leave for greater than 20 percent of the total number of working days during the period of leave, the employee choose to either (1) take leave for a period or periods of particular duration; or (2) transfer temporarily to an available alternative position with equivalent pay and benefits that better

accommodates recurring periods of leave. In order to incorporate this change, the Department believes a minor technical revision is required to current and proposed FMLA regulatory § 825.601(a)(1) to provide that the provisions of that section apply when an eligible instructional employee needs intermittent leave or leave on a reduced schedule to care for a covered servicemember, in addition to applying to situations where the employee takes such leave to care for a family member or for the employee's own serious health condition. In all three cases, the provision would continue to apply only to intermittent leave or leave on a reduced leave schedule which is foreseeable based on planned medical treatment and requires the employee to be on leave for more than 20 percent of the total number of working days over the period the leave would extend.

Second, the military family leave provisions of H.R. 4986 extend some of the limitations on leave near the end of an academic term to leave requested during this period to care for a covered servicemember. The Department believes that several FMLA regulatory sections will need to be changed in order to apply the limitations on leave near the end of an academic term to military family leave. Current and proposed FMLA regulatory § 825.602(a)(2) provides that, where an instructional employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of the term, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term. Because the military family leave provisions of H.R. 4986 only extend this limitation on leave near the end of an academic term to leave taken to care for a covered servicemember, and not leave taken because of a qualifying exigency, the Department believes that this FMLA regulatory section may need to be changed in order to specifically reference the types of leave that are subject to the limitation: (1) Leave because of the birth of a son or daughter, (2) leave because of the placement of a son or daughter for adoption or foster care, (3) leave taken to care for a spouse, parent, or child with a serious health condition, and (4) leave taken to care for a covered servicemember. A similar revision also may be required to FMLA regulatory § 825.602(a)(3), which currently and as proposed in this NPRM provides that an employer may require an instructional employee to continue taking leave until the end of the term where the employee begins leave which will last more than five working days for a purpose other than the employee's own serious health condition during the three-week period before the end of the term.

The Department invites comments on whether additional revisions are required to the regulatory provisions governing local educational institutions in light of the military family leave provisions of H.R. 4986.

Incorporation of New FMLA Leave Entitlements Into Proposed FMLA Regulatory Scheme

In addition to the issues discussed above, the Department specifically requests comments on whether the FMLA leave entitlements in H.R. 4986 should generally be incorporated into the FMLA regulatory scheme proposed in this NPRM, or whether stand-alone regulatory sections should be created for one or both of the military family leave provisions of H.R. 4986. The Department seeks comments on which of these approaches would be most beneficial for employees and employers.

Although not specified in the military family leave provisions of H.R. 4986, the Department believes that a number of additional conforming changes may be required to the proposed FMLA regulations in this NPRM in order to fully integrate the military family leave provisions into FMLA's regulatory scheme. For example, proposed FMLA regulatory § 825.100 may need to be changed to incorporate a discussion of the new leave entitlements into the general description of what the FMLA provides. Similarly, proposed FMLA regulatory § 825.112(a), which provides the general rule regarding the circumstances that will qualify for leave, may need to be changed to reference the two qualifying reasons for FMLA leave in H.R. 4986.

The Department also plans on changing the proposed poster and general notice to incorporate the military family leave provisions of H.R. 4986. The Department's initial view is that these new qualifying reasons for FMLA leave should be incorporated into the poster and general notice discussed in proposed FMLA regulatory § 825.300(a). However, the Department seeks comments on whether a separate poster and general notice should be created for military family leave. The proposed eligibility and designation notices in FMLA regulatory § 825.300(b) and (c) also will need to incorporate appropriate references to military family leave. The Department seeks comments on how these notices should be revised in order to incorporate these new FMLA leave entitlements.

The Department seeks public comment on whether there are additional regulatory sections that should be reexamined in light of the military family leave provisions of H.R. 4986. The questions set forth above are not intended to be an exhaustive list of issues that might arise when FMLA leave is taken to care for a covered servicemember or because of a qualifying exigency. The Department encourages the public to identify any other issues which should be considered during the rulemaking process.

Paperwork Reduction Act

In accordance with requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, the DOL seeks to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the agency. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to the information collection requirements as contained in this proposal unless and until they are approved by the OMB under the PRA at the final rule stage.

This ''paperwork burden'' analysis estimates the burdens for the proposed regulations as drafted. In addition and as already discussed, the military family leave provisions of H.R. 4986 amend the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. The new statutory provisions will be codified at 29 U.S.C. 2612(e)(2) and (e)(3). The earlier preamble discussion on *Family Leave in Connection with Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty* provides a fuller explanation of the specific provisions and issues on which the Department seeks public comments. Because of the need to issue regulations as soon as possible so that employees and employers are aware of the respective rights and obligations

regarding military family leave under the FMLA, the Department anticipates issuing, after full consideration of the comments received in response to this Notice, final regulations that will include necessary revisions to the currently proposed FMLA information collections.

As will be more fully explained later, many of the estimates in the analysis of the ''paperwork'' requirements derive from data developed for the Preliminary Regulatory Impact Analysis (PRIA) under E.O. 12866. However, the specific needs that the PRA analysis and PRIA are intended to meet often require that the data undergo a different analysis to estimate the burdens imposed by the ''paperwork'' requirements from the analysis used in estimating the effect the regulations will have on the economy. Consequently, the differing treatment that must be undertaken in the PRA analysis and the PRIA may result in different results. For example, the PRA analysis measures the total burden of the information collection; however, the PRIA measures the incremental changes expected to result from the proposed regulatory changes. Thus, the PRA analysis will calculate a paperwork burden for an information collection that remains unchanged from the current regulation and the PRIA will not consider that item. Conversely, the regulatory definition for ''collection of information'' for PRA purposes specifically excludes the public disclosure 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). The PRIA, however, may need to consider the impact of any regulatory changes in such notifications provided by the government. For example, in the context of the proposed FMLA changes, the general notice that employers currently must develop and provide to their workers is proposed to be replaced with a notice using wording provided by the DOL that employers must periodically provide to their employees. This proposed DOL-provided FMLA notice would not be a ''collection of information'' for PRA purposes; therefore, the proposal reduces burden for PRA purposes. The PRIA, however, must address the economic impact of the frequency with which employers must provide the DOL's FMLA notice under the proposed change to the regulations. Finally, the PRA definition of ''burden'' can exclude the time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (*e.g.,* in compiling and maintaining business records). 5 CFR 1320.3(b)(2). The PRIA, however, must consider the economic impact of any changes in the proposed regulation.

Circumstances Necessitating Collection: The FMLA requires private sector employers of 50 or more employees and public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to ''eligible'' employees for certain family and medical reasons (*i.e.,* for birth of a son or daughter, and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent with a serious health condition; and because of a serious health condition that makes the employee unable to perform the functions of the employee's job). FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654. The proposed regulations provide for the following information collections, many of which are third-party notifications between employers and employees.

A. Employee Notice of Need for FMLA Leave [29 U.S.C. 2612(e); 29 CFR 825.100(d), 825.301(b), 825.302, and 825.303]. An employee must provide the employer at least 30 days' advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable under the facts and circumstances of the particular case. In neither case must an employee expressly assert rights under the FMLA or even mention the FMLA. The employee must, however, provide information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave.

B. Notice to Employee of FMLA Eligibility [29 CFR 825.219 and 825.300(b)]. When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying condition, the employer must notify the employee within five business days of the employee's eligibility to take FMLA leave and any additional requirements for qualifying for such leave. This eligibility notice must provide information regarding the employee's eligibility for FMLA leave, detail the specific responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. The employer generally must provide the notice the first time in each six-month period that an employee gives notice of the need for FMLA leave; however, if the specific information provided by the notice changes with respect to a subsequent period of FMLA leave, the employer would need to provide an updated notice.

C. Medical Certification and Recertification [29 U.S.C. 2613, 2614(c)(3); 29 CFR 825.100(d) and 825.305 through 825.308]. An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more essential functions of the employee's position, be supported by a certification issued by the health care provider of the eligible employee or of the ill family member. The proposal provides that the employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. In addition, an employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient. An employer, at its own expense and subject to certain limitations, also may require an employee to obtain a second and third medical opinion. In addition, an employer may also request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the initial certification and any subsequent recertification. The proposed regulations would provide that the employer must provide seven

calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any deficiency identified by the employer.

D. Notice to Employees of FMLA Designation [29 CFR 825.300(c) and 825.301(a)]. When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided every 30 days to the employee if leave is taken during the prior 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation.

E. Fitness-for-Duty Medical Certification [29 U.S.C. 2614(a)(4); 29 CFR 825.100(d) and 825.310]. As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.,* same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. The DOL is also proposing in § 825.310(g) that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

F. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 CFR 825.200(d)(1)]. An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period in which the 12-week entitlement occurs for purposes of FMLA leave. An employer wishing to change to another alternative is required to give at least 60 days' notice to all employees.

G. Key Employee Notification [29 U.S.C. 2614(b)(1)(B); 29 CFR 825.219 and 825.300(b)(3)(vi)]. An employer that believes that it may deny reinstatement to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee's notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer makes a good faith determination—based on the facts available—that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer must notify the employee in writing of its determination; that the employer cannot deny FMLA leave; and that the employer intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

An employee may still request reinstatement at the end of the leave period, even if the employee did not return to work in response to the employer's notice. The employer must then determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result from reinstating the employee, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.

H. Periodic Employee Status Reports [29 CFR 825.300(b)(4) and 825.309]. An employer may require an employee to provide periodic reports regarding the employee's status and intent to return to work.

I. Notice to Employee of Pending Cancellation of Health Benefits [29 CFR 825.212(a)]. Unless an employer establishes a policy providing a longer grace period, an employer's obligation to maintain health insurance coverage ceases under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease and advise the employee that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date.

J. Documenting Family Relationship [29 CFR 825.122(f)]. An employer may require an employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a child's birth certificate, a court document, a sworn notarized statement, a submitted or signed tax return, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

K. Recordkeeping [29 U.S.C. 2616; 29 CFR 825.500]. The FMLA provides that employers shall make, keep, and preserve records pertaining to the FMLA in accordance with the recordkeeping requirements of Fair Labor Standards Act section 11(c), 29 U.S.C. 211(c), and regulations issued by the Secretary of Labor. This statutory authority provides that no employer or plan, fund, or program shall be required to submit books or records more than once during any 12-month period unless the DOL has reasonable cause to believe a violation of the FMLA exists or is investigating a complaint.

Employers must maintain basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and

weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid; dates FMLA leave is taken by FMLA eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA; if FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave; copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations; any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves; premium payments of employee benefits; records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers with no eligible employees must maintain the basic payroll and identifying employee data already discussed. Covered employers that jointly employ workers with other employers must keep all the records required by the regulations with respect to any primary employees, and must keep the basic payroll and identifying employee data with respect to any secondary employees.

If FMLA-eligible employees are not subject to FLSA recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, not covered by, or exempt from, FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that: eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record.

Employers must maintain records and documents relating to any medical certification, recertification or medical history of an employee or employee's family member, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable ADA confidentiality requirements; except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with the FMLA, or other pertinent law, shall be provided relevant information upon request.

The FLSA recordkeeping requirements, contained in 29 CFR part 516, are currently approved under Office of Management and Budget (OMB) control number 1215–0017; consequently, this information collection does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

L. Military Family Leave [29 U.S.C. 2612(e), 2613]: The military family leave provisions of H.R. 4986 extend to the new leave provision related to care for a servicemember the FMLA's existing requirements for employees to provide advance notice when the need for leave is foreseeable based on planned medical treatment, and for making reasonable efforts to schedule planned medical treatment so as not to disrupt unduly the employer's operations. The military family leave provisions of H.R. 4986 also provide for new notice requirements for leave taken due to qualifying exigencies whenever the need for such leave is foreseeable. The military family leave provisions of H.R. 4986 require that eligible employees provide notice to the employer that is ''reasonable and practicable'' in these circumstances.

The military family leave provisions of H.R. 4986 allow employers to apply the FMLA's existing medical certification requirements for serious health conditions to leave taken to care for a covered servicemember. In addition, the military family leave provisions of H.R. 4986 also permit the Secretary of Labor to prescribe a new certification requirement to leave taken because of a qualifying exigency arising out of a servicemember's active duty or call to active duty.

The earlier preamble discussion on Family Leave in Connection with Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty provides a fuller explanation of the specific provisions and issues on which the Department seeks public comments.

Purpose and Use: The WHD has created optional use Forms WH–380, WH–381, and the proposed WH–382 to assist employees and employers in meeting their FMLA third-party notification obligations. Form WH–380 allows an employee requesting FMLA leave based on a serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, a medical certification (including a second or third opinion and recertification) from the health care provider. *See* §§ 825.306 and 825.307 and Appendices B, D, and E. Form WH–381 allows an employer to satisfy the regulatory requirement to provide employees taking FMLA leave with written notice detailing specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* § 825.301(b). Form WH–382 allows an employer to meet its obligation to designate an absence as FMLA leave. *See* §§ 825.300(c) and 825 .301(a). While the use of the DOL forms is optional, the regulations require employers and employees to make the third-party disclosures that the forms cover. The FMLA third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA.

The recordkeeping requirements are necessary in order for the DOL to carry out its statutory obligation under FMLA section 106 to investigate and ensure employer compliance. The WHD uses these records to determine employer compliance.

Information Technology: The proposed regulations continue to prescribe no particular order or form of records. *See* § 825.500(b). The preservation of records in such forms as microfilm or automated word or data processing memory is acceptable, provided the employer maintains the information and provides adequate facilities to the DOL for inspection, copying, and transcription of the records. In addition, photocopies of records are also acceptable under the regulations. *Id.*

Aside from the basic requirement that all third-party notifications be in writing, with a possible exception for the employee's FMLA request that depends on the employer's leave policies, there are no restrictions on the method of transmission. Respondents may meet many of their notification obligations by using DOL-prepared publications available on the WHD Web site. These forms are in a PDF, fillable

format for downloading and printing. The employers may keep recordkeeping requirements covered by this information collection in any form, including electronic.

Minimizing Duplication: The FMLA information collections do not duplicate other existing information collections. In order to provide all relevant FMLA information in one set of requirements, the recordkeeping requirements restate a portion of the records employers must maintain under the FLSA. Employers do not need to duplicate the records when basic records maintained to meet FLSA requirements also document FMLA compliance. The additional records required by the FMLA regulations, with the exception of specifically tracking FMLA leave, are records that employers ordinarily maintain for monitoring employee leave in the usual and ordinary course of business. The regulations do impose, however, a three-year minimum time limit that employers must make the records available for inspection, copying, and transcription by the DOL. The DOL minimizes the FMLA information collection burden by accepting records maintained by employers as a matter of usual or customary business practices. The DOL also accepts records kept due to requirements of other governmental requirements (*e.g.*, records maintained for tax and payroll purposes). The DOL has reviewed the needs of both employers and employees to determine the frequency of the third-party notifications covered by this collection to establish frequencies that provide timely information with the least burden. The DOL has further minimized burden by developing prototype notices for many of the third-party disclosures covered by this information collection.

Agency Need: The DOL is assigned a statutory responsibility to ensure employer compliance with the FMLA. The DOL uses records covered by the FMLA information collection to determine compliance, as required of the agency by FMLA section 107(b)(1). 29 U.S.C. 2617(b)(1). Without the third-party notifications required by the law and/or regulations, employers and employees would have difficulty knowing their FMLA rights and obligations.

Special Circumstances: Because of the unforeseeable and often urgent nature of the need for FMLA leave, notice and response times must be of short duration to ensure that employers and employees are sufficiently informed and can exercise their FMLA rights and obligations. The discussion above outlines the circumstances necessitating the information collection and provides the details of when employees and employers must provide certain notices.

Employers must maintain employee medical information they obtain for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable ADA confidentiality requirements, except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Public Comments: On December 1, 2006, the DOL published a Request for Information (RFI) in the **Federal Register** inviting public comment about the FMLA paperwork requirements and other issues. 71 FR 69504. On June 28, 2007, the DOL published a report that summarized the comments received in response to the RFI. 72 FR 35550. The DOL also engaged various stakeholders representing the interests of employees, employers, and healthcare providers to discuss the FMLA information collection requirements. The proposed FMLA regulations reflect the results of these efforts.

The DOL seeks additional public comments regarding the burdens imposed by information collections contained in this proposed rule. In particular, the DOL seeks comments that: evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; enhance the quality, utility and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses. Commenters may send their views about these information collections to the DOL in the same way as all other comments (*e.g.*, through the regulations.gov Web site). All comments received will be made a matter of public record, and posted without change to *http://www.regulations.gov,* including any personal information provided.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the DOL has submitted the identified information collections contained in the proposed rule to the OMB for review under the PRA under Control Number 1215–0181. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. While much of the information provided to the OMB in support of the information collection request appears in this preamble, interested parties may obtain a copy of the full supporting statement by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble or by visiting the *http://www.reginfo.gov/public/do/PRAMain* Web site.

In addition to having an opportunity to file comments with the DOL, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Employment Standards Administration (ESA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers).

Confidentiality: The DOL makes no assurances of confidentiality to respondents. Much of the information covered by this information collection consists of third-party disclosures. Employers generally must maintain records and documents relating to any medical certification, recertification, or medical history of an employee or employee's family members as confidential medical records in separate files/records from usual personnel files. Employers must also generally maintain such records in conformance with any applicable ADA confidentiality requirements. As a practical matter, the DOL would only disclose agency investigation records of materials subject to this collection in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and the attendant regulations, 29 CFR part 70, and the Privacy Act, 5 U.S.C. 552a, and its attendant regulations, 29 CFR part 71.

Hours Burden Estimates: The DOL bases the following burden estimates on the estimates the PRIA presented elsewhere in this document, except as otherwise noted. The DOL estimates 77.1 million employees were eligible for FMLA leave in 2005. The FMLA applied

to approximately 415,000 private business establishments and State and local governments in 2005. *See County Business Patterns, 2005, U.S. Census Bureau, http://censtats.census.gov/cgi-bin/cbpnaic/cbpsel.pl;* and *Census of Governments, Volume 3, Public Employment, Compendium of Public Employment: 2002* at 248–249, *http://www.census.gov/prod/2004pubs/gc023x2.pdf.* The PRIA data also suggest 7 million employees took FMLA leave in 2005.

A. Employee Notice of Need for FMLA Leave. While employees normally will provide general information regarding their absences, the regulations may impose requirements for workers to provide their employers with more detailed information than might otherwise be the case. The DOL estimates that providing this additional information will take approximately two minutes per employee notice of the need to take FMLA leave. In addition, Westat Report data indicate about 75 percent of FMLA users take leave in a single block, 15 percent take leave in two blocks, and 10 percent take leave in more than two blocks. *See* 2000 Westat Report at 2–3, *http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf.* The DOL, consequently, estimates FMLA leave takers, on a per capita basis, annually provide 1.5 notices of the need for FMLA leave. In addition, the PRIA estimates some employees who are not eligible for FMLA protections will make some 2,200,000 requests for FMLA leave.

(7,000,000 FMLA covered employee respondents × 1.5 valid responses [*i.e.*, notices to employers]) + 2,200,000 ineligible FMLA requests = 12,700,000 total responses

12,700,000 total responses × 2 minutes/60 minutes per hour = 423,333 hours

B. Notice to Employee of FMLA Eligibility. The DOL estimates that each written notice to an employee of FMLA eligibility, rights, and responsibilities takes approximately ten minutes. Consistent with the estimates for the number of notices employees provide, the DOL estimates that employers will provide 12,700,000 FMLA eligibility notices to employees. Employers may use optional Form WH–381 to satisfy this requirement.

12,700,000 total responses × 10 minutes/60 minutes per hour = 2,116,667 hours

C. Medical Certification and Recertification. The DOL estimates 81.5 percent of employees taking FMLA leave do so because of their own serious health condition or that of a family member. *See* 2000 Westat Report at 2–5, *http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf.* The DOL also estimates 92 percent of these employees provide medical certifications. *See* 2000 Westat Report at A–2–51. Additionally, the DOL estimates that second or third opinions and/or recertifications add 15 percent to the total number of certifications and that employees spend an average of 20 minutes in obtaining the certifications. Employers may have employees use optional Form WH–380 to satisfy this requirement.

7,000,000 employees taking FMLA leave × 81.5% rate for serious health condition × 92% asked to provide initial medical certifications = 5,248,600 employee respondents

5,248,600 employee respondents × 1.15 responses = 6,035,890 total responses

6,035,890 total responses × 20 minutes/60 minutes per hour = 2,011,963 hours

The DOL associates no paperwork burden with the portion of this information collection employers complete, since—even absent the FMLA—similar information would customarily appear in their internal instructions requesting a medical certification or recertification. The DOL accounts for health care provider burdens to complete these certifications as a ''maintenance and operation'' cost burden, discussed later.

D. Notice to Employees of FMLA Designation. The DOL estimates that each written FMLA designation notice takes approximately ten minutes and that there are 10,500,000 FMLA leaves taken each year. Employers can designate FMLA leave at the same time they provide the eligibility notice about 25 percent of the time, based on the number of instances where employers request a medical certification. According to a 2005 WorldatWork survey, 28.6 percent of absences result from either chronic or permanent/long term conditions. (*See FMLA Perspectives and Practices: Survey of WorldatWork Members,* April 2005, WorldatWork, Figure 9a, p. 8.) Assuming that this applies to FMLA leave takers, the DOL estimates that the notices will have to be sent to about 2,000,000 workers (*i.e.*, 28.6% of 7 million) taking FMLA for either chronic or permanent/long term conditions. For purposes of estimating the paperwork burden, the DOL assumes that for workers with chronic conditions (either temporary or permanent) ten additional notices will have to be provided each year to each of these employees.

7,875,000 initial notices + 20,000,000 additional notices = 27,875,000 total responses

27,875,000 total responses × 10 minutes/60 minutes per hour = 4,645,833 hours

E. Fitness-for-Duty Medical Certification. The DOL estimates that 367,000 employees will each have to provide one fitness for duty certification and 44,000 employees will each have to provide three such certifications, for a total of 499,000 certifications provided by 411,000 employees and that each fitness for duty certification will require ten minutes of the employee's time.

499,000 responses × 10 minutes/60 minutes per hour = 83,167 hours

The DOL accounts for health care provider burdens to complete these certifications as a ''maintenance and operation'' cost burden, discussed later.

F. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement. The DOL estimates that annually 10 percent of FMLA covered employers choose to change their 12-month period for determining FMLA eligibility and must notify employees of the change, requiring approximately 10 minutes per change.

415,000 covered employers × 10% response rate = 41,500 respondents

41,500 respondents × 10 minutes/60 minutes = 6917 hours

G. Key Employee Notification. The ''key employee'' status notification to an employee is part of the employee eligibility notice; accordingly, the DOL associates no additional burden for the initial notification. The DOL estimates that annually 10 percent of employers notify one employee of the intent not to restore the employee at the conclusion of FMLA leave. In addition, the DOL estimates half of these cases will require the employer to issue a second notice from the employer to address a key employee's subsequent request for reinstatement. Finally, the DOL estimates each key employee notification takes approximately 5 minutes. The DOL associates no paperwork burden with the employee requests, since these employees would ordinarily ask for reinstatement even if the rule were not to exist.

415,000 covered employers × 10% response rate = 41,500 employer respondents

41,500 employer respondents × 1.5 responses = 62,250 total responses

62,250 total responses × 5 minutes/60 minutes = 5188 hours

H. Periodic Employee Status Reports. The DOL estimates employers require periodic reports from 25 percent of FMLA leave users (based on the percentage of FMLA leave takers with absences lasting more than 30 days). *See*

2000 Westat Report at A–2–29, *http://www.dol.gov/esa/whd/fmla/fmla/appendixa-2.pdf.* The DOL also estimates a typical employee would normally respond to an employer's request for a status report; however, to account for any additional burden the regulations might impose, the DOL estimates a 10 percent response rate and a burden of two minutes per response. The DOL also estimates that each such respondent annually provides two periodic status reports. While the DOL believes most employers would only seek these reports in accordance with customary business practices, the agency has accounted for any potential additional employer burden in the ''Eligibility Notice.''

7,000,000 FMLA leave takers × 25% rate of employer requests × 10% regulatory burden = 175,000 employee respondents

175,000 employee respondents × 2 responses = 350,000 total responses

350,000 total responses × 2 minutes/60 minutes per hour = 11,667 hours

I. Notice to Employee of Pending Cancellation of Health Benefits. The DOL estimates the regulations require employers send notifications of not having received health insurance premiums to 2% of leave takers, based on the number of employees indicating they have lost benefits. For purposes of estimating the paperwork burden associated with this information collection, the DOL expects that unique respondents would send all responses. *See* 2000 Westat Report at 4–4, *http://www.dol.gov/esa/whd/fmla/fmla/chapter4.pdf.* The DOL also estimates each notification will take 5 minutes.

7,000,000 FMLA leave takers × 2% rate notification = 140,000 respondents and responses

140,000 responses × 5 minutes/60 minutes per hour = 11,667 hours

J. Documenting Family Relationships. The DOL estimates 50% of FMLA leave takers do so for ''family'' related reasons, such as caring for a newborn or recently adopted child or a qualifying family member with a serious health condition. *See* 2000 Westat Report at 2–5, *http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf.* The DOL also estimates employers require additional documentation to support a family relationship in 5 percent of these cases, and the additional documentation requires 20 minutes.

7,000,000 employees taking FMLA leave × 50% rate for family leave × 5% response rate = 175,000 employee respondents

175,000 × 20 minutes/60 minutes per hour = 58,333 hours

K. General Recordkeeping. The DOL estimates the FMLA imposes an additional general recordkeeping burden on each employer that equals 1.25 minutes for each notation of an employee absence.

10,500,000 total records × 1.25 minutes/60 minutes per hour = 218,750 hours

L. Military Family Leave. This ''paperwork burden'' analysis estimates the burdens for the proposed regulations as drafted. The Department anticipates issuing, after full consideration of the comments received in response to the Proposed Rule, final regulations that will include necessary revisions to the currently proposed FMLA information burden estimates to account for the military family leave provisions of H.R. 4986.

GRAND TOTAL ANNUAL BURDEN HOURS = 9,593,485 HOURS

Persons responding to the various FMLA information collections may be employees of any of a wide variety of businesses. Absent specific wage data regarding respondents, the DOL has used the average hourly rate of non-supervisory workers on non-farm payrolls for September 2007 of $17.62 plus 40 percent for fringe benefits to estimate respondent costs. *See The Employment Situation, November 2007,* at DOL, Bureau of Labor Statistics (BLS) (*http://www.bls.gov/news.release/archives/empsit_12072007.pdf*). The DOL estimates total annual respondent costs for the value of their time to be $236,652,088 ($17.62 × 1.4 × 9,593,485 hours).

Other Respondent Cost Burdens (Maintenance and Operation): Employees seeking FMLA leave for a serious health condition must obtain, upon their employer's request, a certification of the serious health condition from a health care provider. Often the heath care provider's office staff completes the form for the provider's signature. In other cases, the health care provider personally completes it. While most health care providers do not charge for completing these certifications, some do. The DOL estimates completion of Form WH–380 to take about 20 minutes and a fitness-for-duty certification to require 10 minutes; thus, the time would equal the respondent's time in obtaining the certification. The DOL has used the 2005 average hourly wage rate for a physician's assistant of $36.49 plus 40 percent in fringe benefits to compute a $17.03 cost for Form WH–380 ($51.09 × 20 minutes/60 minutes per hour) and $8.52 cost for fitness-for-duty certifications ($51.09 × 10 minutes/60 minutes per hour) *See National Compensation Survey 2005, DOL,* BLS.

The DOL also attributes an average $1.00 cost for each documentation of a family relationship to cover notary costs when an employee does not have other documentation available.

6,035,890 total medical certifications x $17.03 cost per certification =	$102,791,207
499,000 fitness-for-duty certifications x $8.52 cost per certification =	4,251,480
+175,000 documentations of family relationship x $1.00 each =	175,000
Total Maintenance and Operations Cost Burden for Respondents	107,217,687

Federal Costs: The Federal costs that the DOL associates with this information collection relate to printing/duplicating and mailing the subject forms. The DOL also estimates it will annually provide an average of one copy of each form covered by this information collection to each FMLA-covered employer, and that the agency will mail all forms simultaneously to any given requestor. The DOL further estimates information technology costs will offset some of the printing and duplicating costs in an equal amount; therefore, the agency is presenting only the costs of the latter:

415,000 WH–380s (Certification of Health Care Provider) × 4 pages =	1,660,000 pages.
415,000 WH–381s (Notice to Employee of FMLA Eligibility) × 2 pages =	830,000 pages.
415,000 WH–382s (Notice to Employee of FMLA Designation) × 1 page =	415,000 pages.
Total Forms = 1,245,000, Total pages = 2,905,000.	
2,905,000 pages × $0.03 printing costs =	$87,150.
1,245,000 forms × $0.03 envelopes =	$37,350.

1,245,000 forms × $0.41 postage =	$510,450.
Total Estimated Annual Federal Costs =	$634,950.

Displaying OMB Expiration Date: The DOL will display the expiration dates for OMB clearances on the DOL forms cleared under this information collection.

Executive Order 12866, the Small Business Regulatory Enforcement Fairness Act, and the Regulatory Flexibility Act

This rule has been drafted and reviewed in accordance with Executive Order 12866, Section 1(b), Principles of Regulation. The Department has preliminarily determined that this proposed rule is an ''economically significant'' regulatory action under Section 3(f)(1) of Executive Order 12866, based on the analysis presented below. As a result, the Office of Management and Budget has reviewed this proposed rule. The Department also has concluded that this proposed rule is a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). In addition, the Department has certified that the proposed rule as drafted will not have ''a significant economic impact on a substantial number of small entities'' and, therefore, has not prepared an initial regulatory flexibility analysis under the Regulatory Flexibility Act of 1980 (see the Regulatory Flexibility Act section below). However, the new military family leave provisions of H.R. 4986 will result in an increase in the annual number of FMLA leaves taken. If these additional leaves significantly increase the economic impacts imposed by the FMLA regulation on a substantial number of small businesses, then a regulatory flexibility analysis will be required.

The Department has prepared a Preliminary Regulatory Impact Analysis (PRIA) in connection with this rule, which is presented below in its entirety.

Preliminary Regulatory Impact Analysis of the Proposed Revisions to the Family and Medical Leave Act Regulations

Chapter 1: Industry Profile

Background

The Family and Medical Leave Act established a bipartisan Commission on Family and Medical Leave to study family and medical leave policies and their impact on workers and their employers. The Commission surveyed workers and employers and issued a report in 1995.[16]

In 1999, the Department contracted with Westat to update the employee and establishment surveys conducted in 1995.[17] The two surveys were completed in 2000. A report entitled ''Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update'' (the ''2000 Westat Report'') was published in January 2001.[18]

In 2006, the Department published a Request for Information (RFI) seeking public comment on the Department's administration and implementation of the FMLA regulations.[19] To assist in analyzing the impacts of the FMLA, the Department presented estimates of the coverage and usage of FMLA leave in 2005 in the ''FMLA Coverage and Usage Estimates'' section of the RFI (71 FR 69510). That presentation updated Westat's estimates of the number of workers employed at establishments covered by the FMLA, the number of workers eligible for FMLA leave at covered establishments, and the number of workers who took FMLA leave in 2005 (the latest year for which BLS employment data was available). It also highlighted a number of important findings in the 2000 Westat Report including some of the limitations in using the estimates presented in the report that were noted by Westat and others.

The methodology to calculate the estimates presented in the RFI was to apply coverage, eligibility, and usage rates from the 2000 Westat Report to employment estimates from the 2005 Current Population Survey to produce national estimates of FMLA coverage, eligibility, and usage. The estimates the Department developed using this methodology are reproduced in Table 1 below.

TABLE 1.—ESTIMATES OF NUMBER OF COVERED AND ELIGIBLE EMPLOYEES AND LEAVE TAKEN UNDER THE FAMILY AND MEDICAL LEAVE ACT IN 2005

[Millions of employees]

Employees at FMLA-covered worksites	94.4
Eligible Employees at FMLA-covered worksites	76.1
Non-eligible Employees at FMLA-covered worksites	18.4
Employees taking FMLA-protected leave	6.1
Employees taking intermittent FMLA leave **	1.5

** Note: Many of these 1.5 million workers repeatedly take intermittent leave.
Source: U.S. Department of Labor, Request for Information, (71 FR 69510 and 69511).

As discussed in the Department's report entitled ''Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information'' (the ''RFI Report''), the Department did not receive any substantive comments on its coverage or eligibility estimates, or the methodology it used to produce those estimates.[20] However, the Department received many comments regarding the FMLA leave usage rates that the Department used.

In the RFI, the Department presented three estimates of the percent (or rate) of covered and eligible workers who took FMLA leave in 2005, and asked for information and data on the estimates. These estimates are reproduced in Table 2 below.

[16] ''A Workable Balance: Report to Congress on Family and Medical Leave Policies.'' The report is available at: *http://www.dol.gov/esa/whd/fmlacoments.htm.*

[17] Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and State and local governments.

[18] The report is available at *http://www.dol.gov/esa/whd/fmlacomments.htm.*

[19] The Department received many comments about how the 2000 Westat Report in response to the RFI.

[20] The report is available at: *www.dol.gov/esa/whd/Fmla2007Report.htm* and 72 FR at 35550.

TABLE 2.—PERCENT OF COVERED AND ELIGIBLE EMPLOYEES TAKING FMLA LEAVE IN 2005

	Percent
Upper-bound Estimate *	17.1
Employer Survey Based Estimate **	8.0
Lower-bound Estimate *	3.2

* From the Westat Employee Survey.
** The Department used a rate of 6.5 percent of covered workers in the RFI. The rate presented here is the percentage of covered and eligible workers calculated by dividing 6.1 million by 76.1 million.
Source: U.S. Department of Labor, ''Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information'' (72 FR at 35622).

In response to the RFI the Department received a significant amount of data on FMLA leave usage from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. Although many of the comments concerning FMLA usage rates submitted data higher than the employer survey based estimate presented in Table 2 above, many of the comments included usage rates that were consistent with the range of estimates presented in the RFI and Table 2. Clearly, some employers in some industries will experience higher rates of usage just as other employers in other industries may experience lower rates. Indeed, a few comments to the RFI suggested the Department develop industry specific estimates because the issues related to the FMLA vary by industry.

The RFI was a useful information collection method that yielded a wide variety of objective survey data and research, as well as a considerable amount of company-specific data and information. As explained in the RFI and the RFI Report, despite the criticisms and limitations of the 2000 Westat Report,[21] the Department believes that it provides a great deal of useful information and data on FMLA leave-takers. Moreover, based upon that data, coupled with the information received in response to the RFI, the Department has significantly supplemented and updated its knowledge of the impacts of FMLA leave, particularly intermittent FMLA leave.

Data Sources and Total Estimates by Industry

The estimates presented in this Preliminary Regulatory Impact Analysis (PRIA) are primarily derived from an industry profile developed by CONSAD Research.[22] Just as the Department did for the RFI, CONSAD used data from the 2000 Westat Report as the basis for many of its estimates. However, rather than applying the Westat coverage, eligibility, and usage rates to data from the Current Population Survey (CPS), CONSAD primarily used data from the U.S. Census Bureau, 2005 County Business Patterns (CBP). The CBP data was used because it provides data on the number of employees, establishments, and the size of the payroll in each industry, as well as these data by size of establishment. However, since the CBP only covers most non-agricultural businesses in the private sector, CONSAD supplemented the CBP with data from other sources including the U.S. Department of Agriculture, Census of Agriculture, 2002, the U.S. Census Bureau, Census of Governments, Compendium of Public Employment, 2002, the annual reports of certain Federal agencies (Bonneville Power Authority and Tennessee Valley Authority), the Association of American Railroads, Railroad Service in the United States, 2005, and the U.S. Postal Service, Annual Report, 2006.

CONSAD estimated the number of firms based upon the U.S. Census Bureau, Statistics of U.S. Business, 2004. The Statistics of U.S. Business is based upon the same underlying data as CBP, but presents the data on a firm basis rather than the establishment basis presented in the CBP. This was an important consideration in studying the FMLA regulations, since the 50-employee cutoff above which the FMLA applies refers to the number of employees at a particular firm within a geographic area. The Statistics of U.S. Business contains both the number of firms and the number of establishments in those firms at the 2-digit industry level.

CONSAD based its estimates of revenues at the 2-digit industry level primarily on data from the U.S. Census Bureau, 2002 Economic Census series (2005). Depending upon the particular industry sector, CONSAD used the value of shipments, value of business done, receipts, sales, or revenues, in conjunction with the employment estimates in the Economic Census. In addition, CONSAD obtained some revenue estimates directly from the Census of Agriculture, as well as in the annual reports for the Bonneville Power Authority, the Tennessee Valley Authority, and the U.S. Postal Service.[23]

CONSAD developed estimates of net income before taxes (profits) for each 2-digit industry primarily from the Statistics of Income, 2004, published by the Internal Revenue Service. In addition, CONSAD obtained net income estimates directly from the annual reports for the Bonneville Power Authority, the Tennessee Valley Authority, and the U.S. Postal Service.[24]

Table 3 below presents CONSAD's estimates of the total number of firms, establishments, and employees in the 2-digit industries in which Title I of the FMLA applies. It also presents the annual payroll, revenues, and profits for each 2-digit industry sector. See the CONSAD Report for the complete details on these estimates.[25]

[21] For comments on, and critiques of, the 2000 Westat Report *see* Chapter XI, Section A, of the RFI Report (72 FR at 35550).

[22] CONSAD Research Corporation is an economic and public policy analysis consulting firm serving agencies of the U.S. Government, as well as businesses, foundations, and State and local governments.

[23] Revenue estimates were not available for parts of Forestry, Fishing, and Hunting; Public Utilities; Public Transit and Transportation; Public Educational Services; and Public Administration.

[24] For certain industry sectors net income estimates were not available.

[25] Available at: *http://www.wagehour.dol.gov.*

TABLE 3.—NUMBER OF FIRMS, ESTABLISHMENTS, EMPLOYMENT, PAYROLLS, ANNUAL REVENUE, AND PROFITS, THAT TITLE I OF THE FMLA APPLIES TO, BY INDUSTRY, 2005

NAICS codes	Industry description	Number of firms	Number of establishments	Number of employees	Annual payroll ($million)	Revenues ($million)	Profits ($million)
11	Agriculture, Forestry, Fishing and Hunting	563,692	578,536	3,205,214	$23,664	$200,646	$16,001
21	Mining, Quarrying, and Oil and Gas Extraction.	19,271	24,696	497,272	30,823	190,349	24,598
22	Utilities	6,565	17,328	908,106	57,540	391,226	20,509
23	Construction	778,065	787,672	6,781,327	292,519	1,139,542	71,579
31–33	Manufacturing	288,595	333,460	13,667,337	600,696	3,641,146	257,170
42	Wholesale Trade	337,905	429,823	5,968,929	308,918	4,706,128	181,334
44–45	Retail Trade	737,188	1,123,207	15,338,672	348,047	3,200,607	119,040
48–49	Transportation and Warehousing	168,769	249,211	6,067,022	257,686	556,815	27,340
51	Information	76,138	141,290	3,402,599	203,130	812,244	88,977
52	Finance and Insurance	255,273	476,806	6,431,837	446,740	2,741,213	416,135
53	Real Estate and Rental and Leasing	300,555	370,651	2,144,077	81,790	369,242	58,386
54	Professional, Scientific, and Technical Services.	754,580	826,101	7,689,366	456,456	941,493	87,964
55	Management of Companies and Enterprises	27,353	47,593	2,856,418	243,267	119,588	20,295
56	Administrative and Support and Waste Management and Remediation Services.	320,615	369,507	9,280,282	255,400	459,221	28,777
61	Educational Services	87,807	95,500	13,210,374	405,009	205,433	23,715
62	Health Care and Social Assistance	599,987	746,600	16,025,147	589,654	1,285,333	111,556
71	Arts, Entertainment, and Recreation	114,072	121,777	1,936,484	52,936	148,644	18,926
72	Accommodation and Food Services	462,956	603,435	11,025,909	156,041	489,690	33,202
81	Other Services (except Public Administration).	676,401	740,034	5,390,954	127,481	476,300	31,751
92	Public Administration	74,067	74,067	7,534,000	222,832	.....	.....
All Industry Sectors Covered by Title 1 of the FMLA		6,649,854	8,157,294	139,361,326	$5,160,628	$22,074,860	$1,637,255

Source: CONSAD 2007.
—Data Not Available.
The totals may not sum due to rounding.

Note the total number of employees in Table 3, 139.361 million, is very close to the total number of workers (less Federal employees) in 2005 published by the Bureau of Labor Statistics, 139.773 million. The difference is just 412,000, or 0.3 percent—not enough to significantly affect the estimates presented below.

FMLA Coverage and Eligibility Estimates

Title I of the FMLA covers private-sector employers of 50 or more employees, public agencies and certain Federal employers and entities, such as the U.S. Postal Service and the Postal Rate Commission. To be eligible for FMLA benefits, an employee must: (1) Work for a covered employer; (2) have worked for the employer for a total of 12 months; (3) have worked at least 1,250 hours over the previous 12 months; and 4) work at a location where at least 50 employees are employed by the employer within 75 miles.

CONSAD's best estimate of FMLA coverage, by 2-digit industry, was developed by summing the number of establishments with 50 or more employees from the CBP with data from the U.S. Census Bureau, Statistics of U.S. Business for estimates of employment in private firms with 50 or more employees within a 75 mile radius of each other. Some additional data for the operations not covered by the CBP and Statistics of U.S. Business (*i.e.*, the estimates from Census of Agriculture, Census of Governments, U.S. Postal Service, Association of American Railroads, Bonneville Power Authority, and Tennessee Valley Authority) were also used.

All employers in primary and secondary education are covered. Although data for the U.S. Postal Service, classified by the employment size of the post office, are not available, CONSAD assumed that all career postal workers are employed at worksites where 50 or more employees work for the U.S. Postal Service within 75 miles of those locations and that all non-career postal workers, which primarily include casual workers and workers at rural substations, likely do not meet the coverage and eligibility requirements relating to worksite location or to job tenure and working hours (and are not included in these estimates).

For the railroad industry (more specifically, the freight railroad industry), data for 2005 from the Association of American Railroads include Class I railroads, regional line haul railroads, local line haul carriers, and switching and terminal carriers. Based on the average employment in each type of freight railroad, CONSAD assumed that Class I railroads and regional line haul railroads are, in general, covered under the FMLA, while local line haul carriers and switching and terminal carriers are generally not covered because they generally do not employ 50 or more workers.

Data for the agricultural sectors are from the 2002 Census of Agriculture for both crop production and animal production combined. These data identify those farms with 10 or more workers and those workers on these farms who are employed at least 150 days per year. To the extent that these farms have a total of 50 or more employees (and the data suggest that they likely would when the average number of workers employed on these farms working less than 150 days per year is added into the average number of workers employed on these farms working at least 150 days per year), these farms would then be covered under the FMLA. Their employees include those workers employed at least 150 days per year (and likely eligible for FMLA leave), as well as workers employed less than 150 days per year (and not eligible for FMLA leave).

Table 4 below presents CONSAD's estimates for covered establishments. Note the 95.8 million estimate of the total number of workers employed at covered establishments based upon this methodology and data is close to the Department's estimate of 94.4 million (presented in the RFI and the report on the RFI) based upon the 2005 CPS and the methodology in the RFI.

TABLE 4.—NUMBER OF FMLA COVERED FIRMS AND ESTABLISHMENTS, EMPLOYMENT, PAYROLLS, ANNUAL REVENUE, AND PROFITS BY INDUSTRY, 2005

NAICS codes	Industry description	Number of firms	Number of establishments	Number of employees	Annual payroll ($million)	Revenues ($million)	Profits ($million)
11	Agriculture, Forestry, Fishing and Hunting	7,893	16,399	1,008,802	$7,485	$62,902	$5,016
21	Mining, Quarrying, and Oil and Gas Extraction.	881	3,914	336,604	21,389	128,848	16,651
22	Utilities	570	4,773	796,896	50,865	324,319	16,933
23	Construction	16,650	24,291	2,741,450	133,635	460,676	28,937
31–33	Manufacturing	29,765	66,333	11,065,335	501,498	2,947,941	208,210
42	Wholesale Trade	11,926	59,989	3,390,529	184,438	2,673,220	103,003
44–45	Retail Trade	14,512	218,674	9,229,640	206,364	1,925,881	71,629
48–49	Transportation and Warehousing	5,175	80,665	4,922,320	213,610	418,618	19,793
51	Information	3,703	31,089	2,664,028	164,743	635,938	69,663
52	Finance and Insurance	5,335	89,035	4,367,850	325,031	1,861,553	282,597
53	Real Estate and Rental and Leasing	3,726	62,188	1,033,014	39,438	177,900	28,130
54	Professional, Scientific, and Technical Services.	17,492	70,715	4,315,079	269,222	528,342	49,363
55	Management of Companies and Enterprises	2,800	11,322	2,500,373	211,486	104,682	17,765
56	Administrative and Support and Waste Management and Remediation Services.	12,945	52,333	7,428,951	191,044	367,611	23,036
61	Educational Services	18,130	27,610	12,655,139	391,513	165,820	19,142
62	Health Care and Social Assistance	22,161	89,592	11,330,723	400,431	908,806	78,877
71	Arts, Entertainment, and Recreation	3,626	14,661	1,276,356	34,243	97,973	12,475
72	Accommodation and Food Services	19,882	80,376	5,352,996	80,221	237,741	16,119
81	Other Services (except Public Administration).	13,997	56,587	1,843,408	44,489	162,868	10,857
92	Public Administration	74,067	74,067	7,534,000	222,832	.....	.....
All Establishments Covered by Title 1 of the FMLA		285,237	1,134,612	95,793,493	$3,693,976	$14,191,639	$1,078,197

Source: CONSAD 2007.
—Data Not Available.
Note: The totals may not sum due to rounding.

Estimates of Workers Eligible To Take FMLA Leave and FMLA Leave Usage

The estimates of the number of workers eligible to take FMLA leave and FMLA leave usage were developed by applying estimates from the 2000 Westat Report to the coverage estimates. The number of workers eligible to take FMLA leave in each industry was calculated by multiplying Westat's estimate that 80.5 percent of workers employed at covered establishments are eligible to take FMLA leave [26] by the number of workers covered by the FMLA in each industry. Note that CONSAD's estimates of the total number of workers covered by the FMLA is relatively close to the Department's estimates published in the RFI, because both were developed by applying the same Westat estimate to the number of covered employees.

In the RFI, the Department estimated the number of workers who took FMLA leave in 2005 by multiplying the number of workers employed in establishments covered by the FMLA by Westat's estimate that 6.5 percent of workers employed at establishments covered by the FMLA took FMLA leave.[27] However, the Department received many comments in response to RFI that noted this estimate does not represent current conditions because employees today are more aware of their FMLA rights than they were in 1999 when Westat conducted its survey. In the RFI Report, the Department concurred and stated that ''awareness of the FMLA appears to be higher in 2005 than in 1999 when Westat conducted its surveys. So just as FMLA usage increased between the times the two surveys sponsored by the Department were conducted in the 1990s, given the comments received it is likely that FMLA usage increased between 1999 and 2005.'' (72 FR at 35623)

To account for the increase in employee awareness of the FMLA, CONSAD examined the changes in FMLA usage between the 1995 and the 1999 surveys commissioned by the Department. CONSAD then assumed that the extrapolation would look like a typical learning curve and plotted three points corresponding to zero FMLA leave taking in 1993, 3.6 percent in 1995, and 6.5 percent in 2000, and sketched a smooth, monotonically increasing curve through the points and projected it through 2007. On this basis, CONSAD estimated that the curve would have a value of roughly 7.3 in 2007 (*i.e.*, 7.3 percent of workers employed at establishments covered by the FMLA currently take FMLA leave).

Estimates of the number of workers taking FMLA in each industry were then calculated by multiplying the estimated number of workers covered by the FMLA in each industry by 7.3 percent. *See* Table 5 below.

The number of workers who took intermittent FMLA leave in 2005 in each industry was estimated by multiplying Westat's estimate that 23.9 percent of workers who take FMLA leave take some of the leave intermittently (*i.e.*, they repeatedly took leave for a few *hours* or *days* at a time because of ongoing family or medical

[26] DOL estimate developed from 2000 Westat Report, p. A–2–21.

[27] *See* 2000 Westat Report, pp. 3–14—3–15.

reasons)[28] by the estimated number of workers taking FMLA leave in each industry. Table 5 below also presents these estimates.

TABLE 5.—ESTIMATED OF NUMBER OF FMLA ELIGIBLE WORKERS AND FMLA LEAVE USAGE, BY INDUSTRY, 2005

NAICS codes	Industry description	Number of employees		
		Eligible to take FMLA leave	Taking FMLA leave	Taking intermittent FMLA leave
11	Agriculture, Forestry, Fishing and Hunting	812,085	73,643	17,601
21	Mining, Quarrying, and Oil and Gas Extraction	270,966	24,572	5,873
22	Utilities	641,501	58,173	13,903
23	Construction	2,206,867	200,126	47,830
31–33	Manufacturing	8,907,594	807,769	193,057
42	Wholesale Trade	2,729,376	247,509	59,155
44–45	Retail Trade	7,429,860	673,764	161,030
48–49	Transportation and Warehousing	3,962,468	359,329	85,880
51	Information	2,144,543	194,474	46,479
52	Finance and Insurance	3,516,119	318,853	76,206
53	Real Estate and Rental and Leasing	831,576	75,410	18,023
54	Professional, Scientific, and Technical Services	3,473,638	315,001	75,285
55	Management of Companies and Enterprises	2,012,800	182,527	43,624
56	Administrative and Support and Waste Management and Remediation Services	5,980,306	542,313	129,613
61	Educational Services	10,187,387	923,825	220,794
62	Health Care and Social Assistance	9,121,232	827,143	197,687
71	Arts, Entertainment, and Recreation	1,027,467	93,174	22,269
72	Accommodation and Food Services	4,309,162	390,769	93,394
81	Other Services (except Public Administration)	1,483,944	134,569	32,162
92	Public Administration	6,064,870	549,982	131,446
All Establishments Covered by Title 1 of the FMLA		77,113,762	6,992,925	** 1,671,309

** Note: Many of these workers are likely to take multiple FMLA leaves. See Chapter XI, Section E, of the RFI Report (72 FR at 35550).
Source: CONSAD 2007.

Although the Department presented a range for the number of FMLA leave-takers in the RFI Report (*see* Chapter XI, Section D, of the RFI Report (72 FR at 35550)), for this PRIA the Department presents its best estimate—7.0 million workers. The Department departed from presenting a range here because the comments received in response to the RFI strongly suggested that the Department's Employer Survey Based (point) Estimate that it presented in the RFI (6.1 million workers) was reasonable and the Department received very few comments on the approach that it used to develop that estimate.

Estimates of the Number of FMLA Leaves Taken

Because the impacts of some of the proposed revisions are related to the number of FMLA leaves taken rather than the number of workers taking FMLA leave, for this analysis it was necessary to estimate the number of FMLA leaves taken. To do this, CONSAD examined the data collected by the Westat employee survey. From this survey, CONSAD estimated that during 1999, 8.8 million leave-takers working in FMLA covered establishments took 13.3 million leaves. Therefore, on average each leave-taker took 1.5 leaves.[29] Assuming this rate applies to workers taking FMLA leave in 2005, CONSAD estimates that the 7.0 million workers taking FMLA leave took about 10.5 million leaves in 2005.[30] The Department did not develop estimates of the number of FMLA leaves by industry based upon the national average, because comments to the RFI indicate that leave usage can vary greatly by industry.[31]

Chapter 2: Estimated Impacts of the Proposed Revisions Introduction

In this Chapter, the Department presents its estimates of the impacts of the proposed revisions to the FMLA. The approach utilized was to present a summary of the changes most likely to result in behavior changes by covered employers and their employees and to estimate the monetary value of these changes whenever possible. (The preamble to the proposed rule provides a more detailed discussion of each proposed change.) Several findings in the Department's RFI Report, noted below, influenced the methodology used to estimate the impact of the proposed revisions.

[28] Those that answered yes to Question A5B of Westat's employee questionnaire: *See* 2000 Westat Report, Appendix D, p. 10.

[29] It is important to note that the average number of leaves is higher for many leave-takers. For example, as was noted in the CONSAD Report, the covered and eligible leave-takers who reported taking both leave intermittently (*i.e.,* repeatedly at different times) and taking more than one leave, took an average of 4.6 leaves. There also is some uncertainty over how respondents interpreted the term ''leave'' (*i.e.,* whether it means each incident/absence or a group of absences for a single qualifying condition). For example, 1.3 percent of the covered and eligible leave-takers who reported taking leave intermittently reported taking *no FMLA* leaves. Another 53.2 percent of the covered and eligible leave-takers who reported taking leave intermittently reported taking only *one* FMLA leave. Thus, it would appear that many workers considered a leave to be a single qualified reason (*e.g.,* pregnancy and birth of a child) regardless of the number of incidents/absences (*e.g.,* for pre-natal care, morning sickness, childbirth, recovery from child birth). On the other hand, 8.3 percent of the covered and eligible leave-takers who reported taking leave intermittently reported taking 10 or more FMLA leaves. Presumably, many of these leave-takers were reporting the number of incidents (*e.g.,* absences, late arrivals, *etc.*) rather than the number of leaves based on different qualifying conditions.

[30] Although there is some uncertainty over how respondents interpreted the term ''leave'' in the Westat employee survey (*see* footnote 29), this is the Department's best estimate given available data.

[31] In addition to the difficulty interpreting the term ''leave'' discussed in footnote 29, the Westat surveys were not large enough to develop industry-specific leave usage estimates. Although information provided in response to the RFI suggests that leave usage varies by industry, the data submitted do not permit the development of estimates by industry.

• ''Previous congressional testimony, the 2000 Westat Report, other surveys, and stakeholder meetings suggest that the FMLA has significant benefits and costs.'' (72 FR at 35627)

• ''Further, most surveys of workers and employers show that, while the FMLA has been generally effective in carrying out the congressional intent of the Act, some aspects of the statute and regulations have created challenges for both workers and employers * * * employers report job disruptions and adverse effects on the workforce when employees take frequent, unscheduled, intermittent leave from work with little or no advance notice to the employer.'' (72 FR at 35627)

• ''[S]ome employers are likely to incur higher costs than the 'average' firm responding to Westat's employer survey. If these high costs are clustered in specific industries or types of work, then the FMLA could impose significant costs for those clusters of employers while the average number of employers may have reported relatively lower costs.'' (72 FR at 35630)

• ''The RFI record suggests that intermittent FMLA leave can have significant impacts on time-sensitive business models * * * In many situations, the absence of just a few employees can have a significant impact * * * Comments received in response to the RFI suggest at least four types of business operations appear to have particular difficulty with unscheduled intermittent FMLA leave: (1) Assembly line manufacturing; (2) operations with peak demand; (3) transportation operations; (4) and operations involving public health and safety.'' (72 FR at 35632)

Based on these findings, the Department used a bifurcated approach to assessing the impacts of the proposed revisions. First, the PRIA assesses the impacts that are generally applicable to most employers and their employees. Second, the PRIA qualitatively discusses the impacts on employers and employees with highly time-sensitive operations.

Although many of the estimates presented below are developed from the same data sources used in the Department's estimates under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, there are several differences in the estimates. These differences, however, result from the differing requirements imposed by the E.O. 12866 and the PRA. For example, many of the employer estimates developed for the PRIA are based upon the number of covered establishments while the estimates in the PRA are based upon the number of respondents, which is often the number of employers covered by the FMLA. In addition, the estimates in the PRIA represent the incremental changes of the proposed rule while those in the PRA analysis represent the total burden of the *information collection.* In some cases, this results in the PRA analysis calculating a paperwork burden for an information collection that remains unchanged from the current regulation and is thus not considered an incremental cost of the new regulation in the PRIA. Conversely, the regulatory definition for ''collection of information'' for PRA purposes specifically excludes the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public (see 5 CFR 1320.3(c)(2)), while the PRIA needs to consider the impact of any regulatory changes in such notifications provided by the government.

Cost of Reviewing and Implementing Revisions

Any change in a regulation will result in costs for the regulated community to review the changes and revise their policies and procedures. The Department estimates that, on average, a human resource professional at each firm with FMLA covered establishments will spend an average of six hours to review the revised FMLA provisions, adjust existing company policies accordingly, and disseminate information to managers and staff. Given that the average hourly wage and benefits rate of a Human Resource compensation and benefits specialist is $36.51,[32] the average one time cost per covered firm is $219.06 (6 hours × $36.51). Multiplying this average cost per firm by the estimated 273,937 firms that have FMLA covered establishments (see the industry profile above) results in an estimated one-time cost of about $60.0 million for firms to review the changes and revise their policies and procedures.

Clarifying the Treatment of Professional Employer Organizations (§ 825.106)

The Department is proposing to clarify how the joint employment rules apply to Professional Employer Organizations (PEOs). Under the proposal, PEOs that contract with client employers merely to perform administrative functions—including payroll, benefits, regulatory paperwork, and updating employment policies—are not joint employers with their clients, provided: (1) They do not have the right to exercise control over the activities of the client's employees, and do not have the right to hire, fire or supervise them, or determine their rates of pay, and (2) do not benefit from the work that the employees perform.

Based upon the comments received in response to the RFI, it appears that some commenters were under the erroneous impression that PEOs were treated the same as temporary staffing agencies. Thus, some workers may have been mistakenly treated as if they were covered by the FMLA when they were not. Other comments indicated that some small employers do not use PEOs because of uncertainty over FMLA coverage. Some of these employers may choose to use PEOs after the clarification and provide their employees with some of the benefits offered by the PEOs such as access to group life and health insurance, and retirement plans. Although data limitations inhibit the Department from estimating the impact of this clarification, the Department expects that very few workers or employers will be impacted by this clarification.

Clarifying the Definition of ''Eligible Employee'' (§ 825.110)

Current § 825.110 sets forth the eligibility standards employees must meet in order to take FMLA leave. Specifically, current § 825.110(a) restates the statutory requirement that to be eligible for FMLA leave, an employee must have been employed by an employer for 12 months, been employed for 1,250 hours in the 12 months preceding the leave, and be employed by an employer with 50 or more employees within 75 miles of the worksite. Current § 825.110(b) provides detail on the requirement that the employee must have been employed by the employer for at least 12 months, stating that the 12 months need not be consecutive.

The Department is proposing a new § 825.110(b)(1) to provide that although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted. The Department expects that very few workers will be impacted by this clarification.[33]

[32] Bureau of Labor Statistics, ''National Compensation Survey: Occupational Wages in the United States, June 2006.'' Rate assumes hourly wage plus 40% for benefits.

[33] In order to be impacted by the proposed provision a worker would have to (1) be employed for at least 1,250 hours during the previous 12 months, (2) have a break in employment with that employer for more than 5 years, and (3) need time

Continued

The Determination of Whether 50 Employees Are Employed Within 75 Miles (§ 825.111)

Current § 825.111 sets forth the standards for determining whether an employer employs 50 employees within 75 miles for purposes of employee eligibility. Paragraph (a)(3) of this section provides that when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports. The Department is proposing to modify § 825.111(a)(3) to state that after an employee who is jointly employed is stationed at a fixed worksite for a period of at least one year, the employee's worksite for purposes of employee eligibility is the actual physical place where the employee works. No changes are being proposed with respect to employees whose worksite has not been fixed for at least one year.

The Department expects that this clarification will have little net impact. Some employees currently covered by FMLA may not be covered if their official worksite is changed because they have worked more than one year at an establishment which has less than 50 employees within 75 miles, while other employees not currently covered may become covered if their worksite is changed to an establishment which has 50 or more employees within 75 miles.

Clarifying the Definitions of ''Continuing Treatment'' and ''Periodic Visit'' (§ 825.113, § 825.114 and § 825.115)

The current regulations (§ 825.114(a)(2)(i)(A)) define ''continuing treatment'' for purposes of establishing a serious health condition as a period of incapacity of more than three consecutive calendar days and treatment two or more times by a health care provider. However, the current ''two visit'' requirement for serious health conditions is open-ended. One of the proposed clarifications specifies that the two visits to a health care provider must take place within a 30 calendar-day period to meet the definition.

Similarly, a chronic serious health condition is currently defined in § 825.114(a)(2)(iii) as one that requires periodic visits for treatment, but the regulations do not define the term ''periodic visit.'' In the proposal, ''periodic visit'' is defined as visiting a physician twice or more per year for the same condition. This is based on an expectation that employees with chronic serious health conditions will generally visit their health care providers with a minimum frequency of semi-annually.

Although the proposed clarification will reduce uncertainty in the workplace, it is unlikely to have any identifiable impact on FMLA leave-takers for several reasons. First, of the five different definitions of continuing treatment contained in current § 825.114(a)(2)(i) through (v), the Department is proposing to update only two. Those workers who meet the other tests will not be affected (*i.e.*, the clarifications do not impact workers who take FMLA leave for a pregnancy or prenatal care; workers who use leave for a condition that is permanent or long-term for which treatment may not be effective; or workers who use leave for multiple treatments, such as for a condition that would likely result in more than three consecutive days of incapacity in the absence of treatment. The proposed changes also do not affect employees who take FMLA leave for serious health conditions that required an overnight hospital stay or workers who will qualify on the basis of one visit to a health care professional and a continuing regimen of treatment. Second, serious health conditions usually require two visits to a health care provider within 30 days, and workers with chronic serious health conditions typically visit their health care providers twice a year. Finally, the Department has also proposed an ''extenuating circumstances'' exception to the 30-day rule in § 825.115(a)(1), so it is likely that very few workers will be negatively impacted by the proposed changes.

In fact, the Department believes it is providing FMLA protection to more workers by clarifying that the period should be 30 days, instead of adopting the stricter regulatory interpretation offered by the United States Court of Appeals for the Tenth Circuit (see discussion in preamble). Further, to the extent that some employers have chosen to provide their own more stringent definition of the term ''periodic'' for FMLA purposes, clarifying the term ''periodic'' for chronic conditions to mean two or more visits per year will reduce uncertainty in the workplace and decrease the burden for some workers.

The following analysis illustrates how few workers and leaves this may involve. According to both the Westat and WorldatWork surveys, leaves based on multiple visits to a health care provider (as distinct from leaves for self-treatment) represent only a small percentage of FMLA leaves. In fact, the WorldatWork survey states that multiple treatments were the basis of only 5.1 percent of FMLA episodes.[34] However, it is very unlikely that the proposed changes will impact even this small percentage of leaves because: (1) The multiple treatments that most workers currently have will likely meet the revised requirements with no change in the behavior of those workers; and (2) other workers will simply move up the time of their second treatments to meet the revised requirements (*e.g.*, the 30 day period), or provide an explanation of the ''extenuating circumstances.'' Therefore, it is likely that on balance very few workers will be impacted by the proposed changes.[35] The Department specifically requests comment on this conclusion.

Substitution of Paid Leave (§ 825.207)

In the RFI the Department noted ''Some employers commented that the substitution of leave provisions contribute to increased FMLA leave at otherwise popular vacation or personal leave times.'' Moreover, this increased use of FMLA leave resulted in some workers receiving more favorable treatment than others. ''Many employers commented that the regulations force employers to treat employees seeking to use accrued paid leave concurrently with FMLA leave more favorably than those who use their accrued paid leave for other reasons. The Madison Gas and Electric Company, for example, stated that ''during 'peak' or 'high demand' vacation periods, employees may request FMLA leave causing the employer to deny other employees their scheduled leaves due to staffing level concerns based on business needs.'' (72 FR at 35612) The proposed revision will address both of these concerns by combining current paragraphs (a), (b), and (c) of § 825.207 into one paragraph (a), which now clearly states that the

from the earlier period of employment with the same employer to meet the 12 months of employment requirement for FMLA eligibility. Very few workers are likely to meet these three conditions. For example, part-time employees would have to work an average of 25 hours per week for 50 weeks to meet the 1,250 hours employed requirement. So the only ones impacted are those who want to use FMLA leave and who need a few additional weeks of employment from their previous period of employment more than 5 years ago with the same employer. Similarly, returning full-time employees will need more than 7 months of employment at 40 hours per week to meet the 1,250 hours employed requirement. So the only ones impacted are those who want to use FMLA leave and who need a few extra months of employment from their previous period of employment more than 5 years ago with the same employer.

[34] WorldatWork, *FMLA Perspectives and Practices: Survey of WorldatWork Members,* April 2005, Figure 9a, p. 8.

[35] The Department anticipates that at most 27,000 leaves may require an additional visit to a healthcare professional to qualify for FMLA protection.

terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave—including, for example, paid vacation, personal leave, family leave, ''paid time off'' (PTO), or sick leave. In addition, the proposed revision will help reduce the impact of unforeseeable intermittent leave and uncertainty in the workplace by providing employers with sufficient notice of their employees' need for leave and thereby allowing for better staffing adjustments.

Proposed § 825.207 requires FMLA leave-takers who are also receiving paid leave to meet their employer's uniformly-applied paid leave policies for accrued paid vacation and personal leave. If an employee does not comply with the requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid vacation and personal leave, but remains entitled to all the protections of unpaid FMLA leave.

According to Westat, 65.8 percent of workers who take FMLA leave received some type of pay during their longest FMLA leave.[36] Further, CONSAD estimated that 55.0 percent of these leave-takers received paid vacation or personal leave.[37] Therefore, about 2.5 million workers (*i.e.*, 7.0 million × 65.8% × 55%) received paid vacation or personal leave during their FMLA leave. However, the proposal will not impact all of these workers because many of them will continue to be eligible to use paid vacation pursuant to their employers' normal vacation leave policies.

Most employers do not have very strict requirements regarding paid leave. According to the 2000 Westat Report, 77.8 percent of leave-takers reported that it was easy to get their employer to let them take time off. This suggests that the vast majority of workers will have no problem complying with their employers' paid leave policies. On the other hand, 14 percent reported that it was difficult to get time off.[38] This suggests that a similarly small percentage of the 2.5 million workers who received paid vacation or personal leave during their FMLA leave may have some difficulty satisfying their employers' paid leave policies.

Some of these FMLA leave-takers will be encouraged to provide their employers with additional notice of a pending absence so they can utilize paid vacation and personal leave in conjunction with their FMLA leave. Other FMLA leave-takers will not be able to satisfy their employer's procedures for taking paid leave (*e.g.*, because the procedures require that leave be taken at specific times of the year or in minimum blocks of time such as a week). However, workers who do not or cannot satisfy their employer's procedures for taking paid leave will still remain entitled to all the protections of unpaid FMLA leave.

The inability to take paid vacation leave concurrently with FMLA leave may have a negative impact on the cash flow of those few who do not satisfy their employer's requirements for taking paid leave, and the Department understands that many commenters responding to the RFI emphasized the importance of the ability to substitute paid leave. However, for the few workers who will no longer be able to substitute paid vacation in all situations, these workers will still be entitled to use their accrued paid leave at some other time.

Perfect Attendance Awards (§ 825.215(c)(2))

The Department is proposing to replace the existing language in § 825.215(c)(2) with language that better reflects the requirements of the statute and reduces uncertainty in the workplace. Specifically, employers are uncertain whether their employee incentive plans are in violation of the current regulation. The confusion stems from language which distinguishes between bonuses for job performance such as those based on production goals, and bonuses that contemplate the absence of occurrences, such as bonuses for working safely with no accidents or for perfect attendance.

Perfect attendance incentives are traditionally offered by employers where the costs of absent employees (*i.e.*, the cost of the production delay itself or the cost of overstaffing or overtime to avoid the delay) are high. Employers would offer the bonuses to motivate workers not to be absent, thereby avoiding costs that are far in excess of the bonus.[39] In such situations, both employers and employees gain from the bonus. Employers reduce their costs. Employees increase their income.

Comments made in response to the RFI indicate that the current FMLA regulations interfere with the effectiveness of perfect attendance bonuses because employees could still qualify for the bonus while absent on FMLA leave. As a result, the benefits of the bonuses to employers are diminished because employers still incur the costs related to absenteeism in addition to the cost of the bonuses, which means that fewer employers may offer these awards, ultimately hurting employees as well.

The Department believes that this revision will restore perfect attendance awards to their intended purpose. By reducing the uncertainty surrounding employee incentive plans, this revision may encourage more employers to provide larger bonuses as incentives to reduce absenteeism among all workers. Based upon the comments to the RFI, the Department expects that some reduction in unnecessary absenteeism will reduce overall employer costs. However, data limitations inhibit the Department from quantifying the impact of this revision.

The Treatment of Light Duty (§ 825.220(d))

The Department is proposing to delete the final sentence of current § 825.220(d) to ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having the right diminished by the amount of time spent in a light duty position.

Under FMLA employees have no right to a light duty position. Therefore, employers will only offer such duty to employees when it is advantageous for them to do so. This will continue to be the case under the revised provision. Although the Department believes that this change will have a negligible impact on employers, a few workers whose employers are counting their light duty hours towards their 12 weeks of FMLA leave will now have more hours of leave available. The only impact that the Department anticipates is that some workers may not be offered light duty because their employers will not consider such duty cost-effective if the time is not counted against the worker's FMLA allotment, either for purposes of restoration rights or length of leave.

Changes to the Employer Notification Requirements (§ 825.300)

Proposed § 825.300(a)(3) requires covered employers with eligible employees to distribute a general notice of information about the FMLA to employees either by including it in an employee handbook or by distributing a copy to each employee at least once a year, either in paper or electronic

[36] *See* the 2000 Westat Report, Table 4.2, p. 4–5.

[37] The 2000 Westat Report indicated that of leave-takers who received paid leave during their longest FMLA leave, 39.4% received paid vacation leave and 25.7% received paid personal leave (Table 4.6, p. 4–6). Using probabilities, 55.0% = 39.4% + 25.7%—(39.4% × 25.7%).

[38] *See* 2000 Westat Report, Table 4.2, p. 4–3.

[39] A rational employer would balance the perfect attendance award cost with the cost of employee absence, and not offer such bonuses where the cost of an absence is relatively low.

format, regardless of whether an employee requests leave.

Current § 825.301(a)(1) requires an employer to place in an employee handbook, if one exists, a notice of FMLA rights and responsibilities and the employer's policies on FMLA. Current § 825.301(a)(2) states that an employer without a handbook must provide written guidance to an employee concerning all the employee's rights and obligations under FMLA when the employee gives specific notice of the need for leave.

The difference between the proposed and current provisions, therefore, is that under the proposal all employees working in covered establishments without handbooks must be notified annually rather than just when they ask for leave that could be FMLA leave. The proposed change will likely increase notification costs for some covered employers (*i.e.*, those without handbooks), and will likely increase awareness of the Act and therefore FMLA usage.

CONSAD estimated the number of additional notices that may be required for this provision, based upon data from the 2000 Westat Report. The 2000 Westat Report indicates that 18.9 percent of employees request FMLA leave annually. CONSAD added 1 percent to this estimate to account for the growth in awareness of the FMLA from 1999 to 2005, and then the 19.9 percent was multiplied by ⅔ to account for the fact that the Westat survey covered 18 months instead of 12 months. Thus, CONSAD estimated that about 12.7 million covered employees request leave each year (*i.e.*, 13.3% of the 95.8 million FMLA covered employees).[40] Data from Westat also indicate that 8.1 percent of covered employees did not receive information regarding their FMLA rights in handbooks.[41] Therefore, employers currently send out about 1 million general notices to employees requesting leave (*i.e.*, 12.7 million × 8.1%).

Under the new provision, all FMLA-covered employees must receive an FMLA general notice at least annually, regardless of whether they request leave, if the information is not in an employee handbook. Therefore, employers will have to send annual notices to about 7.8 million workers (*i.e.*, 8.1% of the 95.8 million covered employees), and the net impact of the proposal will be 6.8 million additional general notices sent out each year (*i.e.*, 7.8 million—1 million sent out under the current rule).

The 2000 Westat Report suggests that 32 percent of employees without FMLA information in a handbook will receive an annual notice via e-mail, 62 percent will receive a hand-delivered memo at work, and the remaining 6 percent will receive their annual notice via regular mail.[42] Therefore, among the additional notices needed each year, 2.2 million (*i.e.*, 32% of 6.8 million) will be e-mailed, 4.2 million will be hand-delivered at work, and 0.4 million notices will be sent by regular mail.

Of the 1.135 million FMLA covered establishments, an estimated 92,000 (8.1%) do not include FMLA information in an employee handbook and will be required to send annual notices to employees. For e-mail notices, the Department estimates that it will take on average one hour for a ''benefits and compensation'' specialist to prepare a notice (or find a pre-made one from the Department of Labor's Web site) and e-mail the notice to employees. For hand-delivered notices, the Department assumes that it will take on average 1.5 hours to prepare the notice and hand-deliver it through the interoffice mail. Finally, the Department estimates that it will take a similar specialist an average of two hours to prepare notices to be mailed by regular mail. This time includes preparing the notice, printing mailing labels, and putting the notices in envelopes.

Based on data from the Bureau of Labor Statistics, the average cost for wage and benefits of a ''benefits and compensation specialist'' is $36.51 per hour.[43] So the estimated cost to prepare the 29,000 e-mail notices is about $1.1 million (*i.e.*, 92,000 establishments multiplied by 32%, times the cost of $36.51 per establishment) and the estimated cost for 57,000 firms to hand-deliver notices is about $3.4 million (*i.e.*, 92,000 establishments multiplied by 62%, times the cost of $54.77 per establishment, plus the cost of copying the notice for 4.2 million workers at 8 cents per copy). The estimated cost for 5,500 firms to prepare and deliver the notice through regular mail is about $0.6 million (*i.e.*, 92,000 establishments multiplied by 6%, times the cost of $73.02 per establishment, plus the cost of mailing a notice via regular mail (about 49 cents) times the 0.4 million additional annual notices sent via mail).

Adding all of these costs together yields a total estimated annual additional cost of about $5.1 million for the general notice proposal.[44]

After receiving these general notices on an annual basis some employees who previously did not take FMLA leave, may choose to do so because they acquire additional information from the notice regarding the protections afforded by the FMLA. Data from Westat employee survey reveal that 2.7 percent, or 2.4 million, of covered and eligible employees needed leave for FMLA covered reasons, but did not take it, and that 8.6 percent, or 210,000, of covered and eligible leave-needers reported that they could have afforded to take the leave, but had never heard about the FMLA.[45] The Department also estimates that 17.7 percent of covered and eligible leave-needers who reported they could afford to take leave, but had never heard about the FMLA, did not take the leave for fear of losing their jobs.[46] Assuming these workers would now be more aware of their FMLA protections they would most likely take FMLA leave, the Department estimates that the number of FMLA leave-takers will increase by about 37,000 employees (*i.e.*, 17.7% of 210,000) because of the proposed general notice provision.

The estimated administrative costs associated with these additional workers taking FMLA leave is based upon the estimate of 1.25 hours of a ''compensation and benefits specialist'' to process the paperwork for each worker at a cost of $36.51 per hour. Thus, the administrative burden of 37,000 additional workers taking FMLA leave will cost approximately $1.7 million.

Proposed § 825.300(b) consolidates the notice provisions contained in existing § 825.110(d) and § 825.301(b) into a paragraph entitled ''eligibility notice.'' Consistent with current § 825.110, the employer continues to be responsible under proposed paragraph (b)(1) of this section for communicating eligibility status. The proposed regulations require that this information be conveyed within five business days after the employee requests leave or the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason (a change from the

[40] Although 12.7 million workers *requested* leave, only 7.0 million were *eligible* and took leave.

[41] *See* the 2000 Westat Report, Table A2–6.1, p. A–2–50.

[42] *Id.* The Department assumes that the distribution of the means of communication among employees is the same as the distribution of means of communication among establishments.

[43] National Compensation Survey: Occupational Wages in the United States, June 2006. Based on an hourly wage of $26.08 plus 40% for benefits.

[44] To the extent that e-mail or other electronic means of communication may be more common now than in 2000, this may be an overestimate of the impact of this provision.

[45] Department of Labor, Employment Standards Administration, estimates from the Westat Employee Survey data.

[46] *Id.*

current requirement of two business days).

Proposed § 825.300(b)(2) specifies what information an employer must convey when communicating with the employee as to eligibility status. While not required under the current regulations, the proposal requires the employer to notify the employee whether leave is still available in the applicable 12-month period. If the employee is not eligible or has no FMLA leave available, then, pursuant to proposed (b)(2), the notice must indicate the reasons why the employee is not eligible or that the employee has no FMLA leave available. In proposing these new notice requirements, the Department believes there will be very little additional burden, since the employer is already required to calculate such information in order to determine eligibility. Moreover, any additional reporting burden will likely be more than offset by the benefit of changing the notification requirement from two to five days. Providing more time will reduce mistakes and provide greater certainty in the workplace, and this typically benefits both workers and employers.

Similarly, proposed § 825.300(c) outlines the proposed requirements of the designation notice an employer must provide to an employee, currently located in § 825.208(b). This proposed designation notice requires that an employer notify the employee within five business days (a change from the current requirement of two business days) that the leave is designated as FMLA leave once the employer has sufficient information to make such a determination.

Proposed § 825.300(c)(3) explicitly permits an employer to provide an employee with both the eligibility and designation notice at the same time in cases where the employer has adequate information to designate leave as FMLA leave when an employee requests the leave.

The Department estimates that the changes related to increasing the time permitted to provide the notices and the ability to combine the notices will save employers on average about 15 minutes of a ''compensation and benefits specialist'' time in processing each leave. At a cost of $36.51 per hour, saving 0.25 hours on each of the estimated 10.5 million leaves taken results in a savings of about $95.8 million. However, these savings are offset by the cost of the new requirement that an employer notify the employee if the leave is not designated as FMLA leave due to insufficient information or a non-qualifying reason and the cost of providing more information to employees in the designation notices (see below).

Proposed § 825.300(c) requires that an employer notify the employee if the leave is not designated as FMLA leave. As was noted above, CONSAD estimated that 12.7 million covered employees request leave each year. Subtracting the estimated 10.5 million FMLA leaves from the number of requests for FMLA leave yields an estimated 2.2 million FMLA leave requests denied each year. Based upon an estimated 0.5 hours to process each of these requests at a cost of $36.51 per hour, the Department estimates that notifying the 2.2 million workers why their requests for FMLA has been denied will results in a cost to employers of about $40.2 million.

Proposed § 825.300(c)(1) requires employers to inform their employees of the number of hours, days, or weeks, if possible, designated as FMLA leave. To estimate the impact of this change, the Department assumes it would take an additional 10 minutes of a ''compensation and benefits specialist'' time to process each designation because of the new requirement to provide the amount of time that will be designated as FMLA leave.[47] Based upon 10.5 million leaves, this will result in about $65.9 million in additional costs.

Moreover, where the amount of future leave that will be needed by an employee is unknown, such as for workers with chronic conditions, proposed § 825.300(c)(1) requires that the notice of the amount of leave designated and counted be provided every 30 days, to the extent that the employee took leave for the condition in the prior 30-day period. Currently, the regulations do not specifically address the designation of the particular amount of unforeseen, intermittent leave used. Current § 825.208 requires an employer to designate leave as FMLA-qualifying leave, and current § 825.301(c) requires that the notice of an employee's specific obligations must be provided no less often than once every six months, but they do not expressly address the number of days or hours of leave used. To estimate the impact of this change, the Department assumes that for workers with chronic conditions (either temporary or permanent) an additional 10 notices[48] will have to be provided each year and that each notice will take about 10 minutes of a ''compensation and benefits specialist'' time to process.[49] According to the WorldatWork survey, 28.6 percent of absences result from either chronic or permanent/long term conditions.[50] Assuming that this applies to leave takers, the Department estimates that 10 additional designation notices will have to be sent to about 2 million workers (*i.e.*, 28.6% of 7 million) taking FMLA for either chronic or permanent/long term conditions each year at a cost of $121.9 million (*i.e.*, 2 million × 10 notices × 0.167 hour × $36.51 per hour).[51] The Department has not estimated the cost of alternative notification frequencies (*e.g.*, every 60 days, every three months, *etc.*) because the cost of this revision depends solely on the frequency of the designation notices.[52] The Department, however, requests comment on its assumption that 10 additional designation notices would be required each year under the proposed language of § 825.300(c)(1) and whether some alternative frequency for employers to provide the designation notices is more appropriate than the proposed frequency of every 30 days.

The net impact of all of the revisions discussed in this subsection, therefore, will be a net cost of about $139.0 million.

Changes Related to Employees Notifying Their Employers (§§ 825.302, .303 and .304)

The current regulations require an employee to notify his or her employer of the need for leave and generally to schedule leave for planned medical treatments in a way that the absences do not unduly disrupt the employer's business operations. These proposed revisions are intended to reduce the impact of unforeseeable intermittent leave and uncertainty in the workplace without negatively impacting leave-needers.

[47] This estimate is consistent with the data presented in WorldatWork, *FMLA Perspectives and Practices: Survey of WorldatWork Members,* April 2005, Figure 6, p. 7.

[48] Currently up to 2 notices are required each year.

[49] This estimate is consistent with the data presented in WorldatWork, *FMLA Perspectives and Practices: Survey of WorldatWork Members,* April 2005, Figure 6, p. 7.

[50] *Id.*, Figure 9a, p. 8.

[51] This is an upper bound estimate because it is based upon the assumption that the workers will take some FMLA leave each month and that a designation notice will be required every month. Clearly, some workers with FMLA certifications for chronic health conditions do not take FMLA leave every month. Moreover, although the current regulations do not specifically address the designation of unforeseen intermittent leave, the RFI record suggests that many employers are already sending out designation notices for this type of FMLA leave to avoid any potential legal liability.

[52] Additional Annual Cost = (Annual Number of Notices Required—2 Current Notices) × $12.2 million.

Under the Department's proposal, an employee must provide notice as soon as practicable, meaning feasible under the circumstances, and must comply with the employer's usual procedures for calling in and requesting leave, except when extraordinary circumstances exist such as when the employee or covered family member needs emergency medical treatment. The Department expects that in all but the most extraordinary circumstances, employees will be able to provide notice to their employers of the need for leave prior to the start of their shift. The proposed changes should reduce some of the uncertainty and disruptions caused by employees taking unforeseeable FMLA leave with little or no advance notice to their employers.

As was noted in the RFI Report, unscheduled leave is more disruptive to employers than foreseeable leave. By its very definition, foreseeable FMLA leave can be anticipated and planned for as employees are aware of their need in advance and can easily notify their employers prior to taking FMLA leave. Even in cases where the exact timing of the leave is not known 30 days in advance, the Department believes that most employees taking foreseeable FMLA will easily be able to comply with their employers' leave policies (see discussion in preamble). On the other hand, by its very nature, unforeseeable leave presents difficulties for both employees and their employers, particularly as to the requirement that the employee provide notice of the need for leave as soon as practicable.

According to a 2007 survey conducted by the Society for Human Resource Management (SHRM), 34 percent of FMLA leave takers for episodic conditions did not provide notice before the day the leave was taken and 12 percent provided notice more than one day after the leave was taken.[53] Therefore, according to SHRM's survey about 46 percent of employees are not providing notice prior to the start of their workday. This estimate is consistent with the findings of the Employment Policy Foundation, which found that 41 percent of employees are not providing notice prior to the start of their workday or shift.[54] Thus, the Department estimates that no notice is currently being provided prior to the start of the workday for 4.8 million leaves (*i.e.*, 46% of 10.5 million leaves).

It is this late notification that results in greatest uncertainty and disruption to employers' business operations. For example, it creates significant problems if the employer cannot obtain adequate staffing;[55] the production process is often slowed down or brought to a halt;[56] and the situation is particularly ominous when the employee works in a safety-sensitive position, such as 911 operators.[57] Moreover, workplace uncertainty can impact other employees who may have to pull double-duty to cover for a team member or co-worker.[58]

There are three anticipated behavioral responses that leave-takers will have to the proposed provisions. First, most leave-takers will simply change their notification behavior and notify their employers of leaves prior to the start of their workday. This change will mean that although the leaves are taken, staff uncertainty will be reduced and employers will have more time to obtain a replacement and be in a better position to meet staffing needs despite the unexpected absence. The Department expects that 95 percent or 4.6 million of the 4.8 million leaves where employees are currently not providing notification until the start of the workday will be in this category.

Better control of the unforeseen absences will reduce the disruptions associated with the labor absence. The Westat Survey and comments made in response to the RFI suggest that the most likely response of employers to an unforeseen absence of short duration is to simply assign the absent employee's work to other employees. However, the comments to the RFI also indicate that it may take employers some time to arrange for coverage, especially in cases where the notification of the FMLA comes in after the start of the shift. For this proposed rule, therefore, DOL has used one hour of the average earnings of production and nonsupervisory workers on private nonfarm payrolls ($17.57)[59] plus 40 percent for benefits as a proxy for the cost of an absence without sufficient notification. This savings is not a *productivity* savings in the traditional sense because there is no output and no time involved. Rather, the Department is using one hour of employees' compensation[60] as a rough estimate of the costs related to the uncertainty and disruptions caused by unscheduled intermittent FMLA leave (*e.g.*, work being left undone until the absent employee's work can be shifted to another employee or until another employee can cover for the absent employee). Further, this estimate is limited to the typical impact. If the absence of an employee affects the productivity of other employees besides the one reassigned the task (*i.e.*, in highly time-sensitive production processes such as manufacturing), this may be an underestimate of the effects of this provision.[61] Thus, the Department estimates that more timely notifications by employees will result in a savings of about $113.2 million to employers. The Department specifically request comments on the analysis used to develop this estimate.

The second possible response to this change is that some workers who continue to avoid compliance with their employer's attendance policies may be subject to their employer's disciplinary procedures for being absent. No workers with a legitimate need for FMLA leave will be in this group or decide not to take the leave in response to a last-minute emergency because: (1) The revisions provide for ''extraordinary circumstances'' (see below); and (2) an employee is likely to take leave regardless of the interpretation of ''as soon as practicable'' during a serious health situation.[62]

The Department expects that 4.9 percent or 235,000 of the 4.8 million leaves where employees are currently not providing notification until the start of the workday will be in this category. The Department estimates that each of the leaves not covered by FMLA will save employers' administration and

[53] Society for Human Resource Management, FMLA and Its Impact on Organizations, Figure 7, p. 17, available at: *http://www.shrm.org/hrresources/surveys_published/FMLA%20And%20Its%20Impact%20On%20Organizations%20Survey%20Report.pdf.*

[54] Janemarie Mulvey, PhD, Employment Policy Foundation *Issue Backgrounder,* ''The Cost and Characteristics of Family and Medical Leave,'' April 19, 2005, p. 3. ''With respect to providing notice prior to taking FMLA leave, the survey results show that nearly 50 percent of all FMLA leave takers do not provide notice before the day the leave is taken. According to the survey, in over 30 percent of cases, employees provide notice after the leave has started. In another 11 percent of cases, employees providing notice [sic] at the time the leave begins or immediately after.''

[55] RFI Report, 72 FR at 35631.

[56] *Id.* at 35633.

[57] *Id.* at 35635.

[58] *Id.* at 35633.

[59] According to the October 2007 BLS Employment Report.

[60] The wage plus benefits represents the marginal cost of the absent employee. In a perfectly competitive market, this would be equal to the marginal revenue brought in by that employee. Therefore, one hour of compensation is used as a proxy for the opportunity cost of having the worker missing for an hour.

[61] See the later discussion on the possible impacts on highly time-sensitive industries.

[62] The Department received a number of comments in response to the RFI that suggest some employees may be misusing FMLA leave to avoid their employers' attendance policies (*see* Chapter IV, Section B.2, of the RFI Report, 72 FR at 35571). However, as noted in the RFI Report, the Department cannot assess from the record how much leave taking is actual ''abuse'' and how much is legitimate, and therefore cannot estimate what impact this proposal would have on the alleged misuse of FMLA leave.

reduced operational costs equal to an average of about 1 hour of a ''compensation and benefits specialist's'' time. At a cost of $36.51 per hour, this will result in a savings of about $8.6 million.

The third possible response is that some leave-takers will have ''extraordinary circumstances'' with a serious health condition and take leave without providing advance notice. However, the number of leaves for which advance notice cannot be given will likely be very small, on the order of 0.1 percent of the 4.8 million leaves or 48,000. The uncertainty, disruptions, and costs associated with this type of unscheduled leave for both employers and employees are inevitable, unavoidable, and will likely continue, but the incremental impacts of this continued type of leave, relative to the current rule, is minimal.

The net impact of all of the revisions discussed in this subsection, therefore, will be a net savings of about $121.8 million.

Medical Certifications (§§ 825.305, 825.306 and 825.307)

Current § 825.305(c) provides that an employer should request medical certification from the employee within two business days of receiving the employee notice of the need for leave. The Department is proposing to modify this time-frame to a five-business-day standard. This change is being proposed to maintain consistency with the modifications being proposed to § 825.300. Providing more time will reduce mistakes and provide greater certainty in the workplace, and this typically benefits both workers and employers.

The Department is also proposing in § 825.305(c) that when an employer determines that a medical certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency (additional time must be allowed where the employee is unable to obtain the additional information despite diligent good faith efforts). Under the current rule no written statement from the employer is necessary.

In § 825.306 the Department is proposing several revisions to the medical certification form, to implement the statutory requirements for ''sufficiency'' of the medical certification as set forth in 29 U.S.C. 2613(b) and to make it easier for health care providers to understand and complete. The Department has revised its optional form (Form WH–380) for employees or their family members to use in obtaining medical certifications and second and third opinions from a health care provider.

There are three proposed changes to § 825.307. First, the proposed provision clarifies the limited nature of the authentication process and removes the requirement that employees consent to authentication of the certification. Second, the proposal allows employers to contact the employee's health care provider directly, rather than through a third-party health care provider that represents the employer, provided the contact between the provider and the employer comply with the privacy rule under the Health Insurance Portability and Accountability Act (HIPAA). Third, the new provision extends the time allowed for an employer to provide the results of second and third opinions of medical certifications from two business days to five.

According to the 2000 Westat Report, 73.6 percent of leave-takers took leave for a serious health condition (either their own or for a covered family member),[63] and 92 percent of covered establishments required medical documentation for covered leave due to a serious health condition.[64] The Department estimates that these provisions will affect about 7.1 million FMLA leaves taken for serious health conditions (*i.e.*, 7.0 million leave-takers × 73.6% × 1.5 leaves × 92% = 7.1 million). The Department also estimates that these changes, as well as the changes discussed above, will result in a net savings to employers of on average about 15 minutes of a ''compensation and benefits specialist'' time in processing each leave request.[65] At a cost of $36.51 per hour, saving 0.25 hours on each of the estimated 7.1 million leaves taken results in a savings of about $64.8 million for employers.

In response to the RFI, some employee groups stated that it was often very challenging for workers to obtain certifications because the ambiguities on the form made it difficult for their health care providers to address deficiencies noted by their employers. The proposed revisions will make it easier for employees to understand what is required and will reduce uncertainty as to whether the condition qualifies as a serious health condition under the FMLA. In addition, the Department expects that employees will have to make fewer trips and phone calls to their health care providers to obtain ''complete and sufficient'' certifications, although the Department has not quantified this impact.

In response to the RFI, some health care providers expressed their frustration with the current form and the amount of time required to provide their patients with ''complete and sufficient'' certifications. The Department expects that the proposed clarifications will decrease the burden on health care providers and possibly reverse the trend of increasing numbers of health care providers charging their patients for filling out the medical certification forms.

Recertifications (§ 825.308) and Certifications for Fitness-for-Duty (§ 825.310)

Consistent with Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004), the proposed change to § 825.308(e) of the FMLA would allow employers to send the absence schedule of an employee to a health care provider and to ask the health care provider whether or not the employee's pattern of intermittent leave use is congruent with the employee's qualifying medical condition. Further, consistent with the existing regulation, proposed § 825.308(b) explains that if a minimum duration for the leave is specified, the employer may not request recertification until that time period has expired but adds that, in all cases, recertifications may be requested every six months. Thus, the Department assumes that this clarification will not impact either employers or employees. The proposed change to § 825.308(e) will, however, provide employers with a tool to determine if the employee's pattern of FMLA leave is consistent with their condition, or possible misuse. However, as noted in the RFI Report, the Department cannot assess from the record how much leave taking is actual ''abuse'' and how much is legitimate, and therefore can not estimate what impact this proposal would have on the alleged misuse of FMLA leave.[66]

[63] The 2000 Westat Report, Table 2.3, p. 2–5.

[64] The 2000 Westat Report, Table A2–6.3, p. A–2–51.

[65] The net savings of 15 minutes includes: 1) the savings associated with extending the time allowed to ''process'' medical certifications from two to five days (providing more time will reduce the number of mistakes involved in the medical certification process and time required to address and correct those mistakes); plus 2) the time saved by allowing employers to contact the employee's health care provider directly; less 3) the additional time and cost that employers will have to take to provide a written explanation of why a medical certification is incomplete or insufficient.

[66] The Department received a number of comments in response to the RFI that suggest some employees may be misusing FMLA leave. For example, a number of commenters stated that some employees appear to be misusing the FMLA rules to secure for themselves a preferred schedule (*see*

Continued

Current § 825.310(c) states that a fitness-for-duty certification need only be a simple statement of the employee's ability to return to work. The proposed provision allows a fitness-for-duty certification similar to that of the initial medical certification of the FMLA leave. The Department is also proposing in § 825.310(g) that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist. For example, if a bus driver takes intermittent leave for a serious health condition that may influence his or her ability to drive safely over the road, then a fitness-for-duty certification is permitted. Finally, the Department is proposing in § 825.310(c) that, consistent with the HIPAA Privacy Rule, employers may contact an employee's health care provider directly, rather than through a third-party health care provider which represents the employer, for purposes of clarifying and authenticating the fitness-for-duty certification.

These proposed changes have several important impacts. First, they would better protect the safety and health of workers taking leave, and their coworkers. Second, § 825.310(c) will reduce administrative burdens. Third, the proposed change to § 825.308(e) will reduce uncertainty in the workplace by permitting an employer to determine if an employee's pattern of leave is consistent with the serious health condition.[67]

The additional information needed for a fitness-for-duty certification is likely to result in additional costs. The 2000 Westat Report found that 52.4 percent of workers took leave for their own serious health condition;[68] and the Department assumes that 10 percent of these leave-takers, or 367,000 workers, are required to have a fitness-for-duty certification to return to work (*i.e.*, 7.0 million workers × 52.4% × 10.0% = 367,000). Their health care providers will have to take an additional 10 minutes to provide the additional information on the proposed fitness-for-duty certification, and this additional time will cost an average of $51.06 per hour.[69] Thus, health care providers are likely to incur about $4.7 million in additional costs and these costs are likely to be shifted to employees in the form of higher fees for filling out the certifications.[70]

Although employers will take longer to review these certifications, the Department assumes that these costs will be offset by the ability of employers to directly contact the workers' health care providers.

The proposal in § 825.310(g) to permit an employer to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist is likely to impact very few workers. The 2000 Westat Report found that 52.4 percent of workers took leave for their own serious health condition and 23.9 percent of those workers took it intermittently.[71] The Department assumes that 5 percent of these leave-takers, or 44,000 workers, will be required to have a fitness-for-duty certification where reasonable safety concerns exist[72] in order to return to work from intermittent leave (*i.e.*, 7.0 million workers taking FMLA leave × 52.4% × 23.9% × 5.0% = 44,000).[73] On average the Department assumes these 44,000 workers will be required to provide three fitness-for-duty certifications for the intermittent leave they take, and obtaining each of these 132,000 certifications will cost an average of $50.[74] Thus, the revised provision will likely cost workers about $6.6 million per year.[75]

To estimate the impact of these additional certifications on employers, the Department assumed that it would take an additional 30 minutes of a ''compensation and benefits specialist's'' time at a cost of $36.51 per hour to request and process each certification. Based upon 132,000 fitness-for-duty certifications, this will result in about $2.4 million in additional costs for employers.

Although the net impact of the revisions discussed in this subsection will be a net cost of about $2.4 million for employers and $11.3 million for employees, the proposed revisions to § 825.310(g) will increase workplace safety by making sure that workers are healthy enough to return to work and do not pose a safety risk to themselves and others. However, data limitations inhibit the Department from estimating the number of workers who may be impacted by this proposal, or quantifying the resulting safety benefit.

Summary of Impacts

The Department estimates that the proposed revisions will result in a total first year net costs of about $26.1 million, and a net savings of about $33.9 million, each year thereafter (and this does not include the additional savings expected in the time-sensitive high-impact industries that are discussed in the next section).

For employers, the most significant costs will be the first year cost of reviewing and implementing the proposed revisions and the cost of providing employees with additional and more specific notifications. After the first year, however, these costs will be more than offset by the reduction in administrative costs and increased productivity resulting from employees providing better notice of their need for FMLA leave (*see* previous discussion of §§ 825.302, 825.303 and 825.304).

Although the vast majority of FMLA leave-takers will see no difference, the Department estimates that employees will incur $11.3 million in additional expenses related to taking FMLA leave, primarily as the result of the increased number of certifications that they will have to provide their employers. However, since these costs are primarily related to health care, a large portion is likely to be paid by the employee's

Chapter IV, Section B, of the RFI Report, 72 FR at 35575). However, the RFI Report also noted that the increase in the use of unscheduled intermittent FMLA leave seen in the data submitted by some employers could be due to other factors, such as workers suffering from the adverse health effects associated with the stress of staffing shorthanded operations (*see* Chapter XI, Section L, of the RFI Report, *Id.* at 35635).

[67] A number of comments to the RFI questioned employee leave patterns.

[68] The 2000 Westat Report, Table 2.3, p. 2–5. The establishment survey also found that 37.8 percent of FMLA leave-takers took leave for their own serious health condition; Table 3.8, p. 3–16.

[69] Average cost of physicians' assistants from the Bureau of Labor Statistics, National Compensation Survey, 2005. The average hourly wage was multiplied by 1.4 to account for benefits.

[70] Comments to the RFI indicate that many health care providers are now charging fees for FMLA certifications. It should be noted that the Department expects the majority of these fees will be paid by workers' health insurance. According to the Bureau of Labor Statistics, 2007 National Compensation Survey, unpublished data, 90 percent of establishments with 50 or more employees offer health care benefits, and 81 percent of workers in those establishments have access to those health care benefits. Further, employers with 50 or more employees paid for 81 percent of health insurance premiums for single coverage, and 73 percent for family coverage.

[71] The 2000 Westat Report, Table 2.3, p. 2–5; and those that answered yes to Question A5B of Westat's employee Questionnaire.

[72] *See* the preamble for a discussion and examples of the term ''reasonable safety concerns.''

[73] The Department assumed a lower rate here because of the additional ''reasonable safety concern'' requirement on employer's ability to require a fitness-for-duty certification for intermittent leave.

[74] The Department assumes that workers with chronic conditions are under doctors' care so that for most workers the added cost of the certifications will only be the charge for the doctor to fill out the forms, which will probably cost less than $50. Other workers will, of course, require medical examinations, which will probably cost more than $50.

[75] It should be noted that the Department expects the majority of these costs will be paid by workers' health insurance. *See* footnote 70.

health insurance, some of which is financed by employers. According to the Bureau of Labor Statistics, 2007 National Compensation Survey, 90 percent of establishments with 50 or more employees offer health care benefits, and 81 percent of workers in those establishments have access to those health care benefits. Further, employers with 50 or more employees paid for 81 percent of health insurance premiums for single coverage, and 73 percent for family coverage.[76]

Table 6 presents a summary of the impacts discussed above.

TABLE 6.—SUMMARY OF THE MAJOR IMPACTS OF THE PROPOSED REVISIONS

Provision	Cost to employers ($ millions)	Employees or health in ($ millions)
Reviewing and Implementing Revisions *	$60.0	N/A
§ 825.300	139.0	N/A
§ 825.302, § 825.303 and § 825.304	−121.8	N/A
§ 825.305, § 825.306 and § 825.307	−64.8	N/A
§ 825.308 and § 825.310	2.4	$11.3
First Year Impact of Major Revisions	14.8	11.34
Recurring Impact of Major Revisions	−45.2	11.3

* First Year Impact, only.
Source: U.S. Department of Labor.

Although these impacts are substantial, the Department has determined that they do not account for all of the impacts that can be reasonably anticipated from the proposed revisions. The Department expects that the impact that the revisions will have in the highly time-sensitive operations will add to the benefits. Analyses of these impacts are presented below, however, because of data limitations the Department has not attempted to quantify these benefits.

Impact of the Revisions on Highly Time-Sensitive Operations

Comments in response to the RFI indicate that firms in industries with time-sensitive operations incur greater costs than the typical establishments. These vulnerable industries include manufacturing, health care, transportation, public safety, and communications. For example, unexpectedly absent employees in these industries can disrupt assembly lines for manufacturing, delay the take-off of commercial airliners, and jeopardize adequate staffing in public safety positions.[77] This section discusses the impacts the proposed revisions will have on highly time-sensitive operations.

Untimely notification of an absence of a high-impact employee can have a more costly effect in highly time-sensitive industries than others. Examples provided in response to the RFI indicate that if an employer is unable to plan for the absence of a high-impact employee in one of these industries because of late notification, the following disruptive events can occur:

- Manufacturing assembly lines may be interrupted if there is not a stand-by employee to take the absent employee's place.
- Passengers are delayed and productivity losses increase if an airline pilot, flight attendant, bus driver, or train engineer does not show up for work at their expected time.
- Adequate public safety may not be provided when police officers, emergency dispatch workers, fire fighters, and paramedic shifts are not fully covered because of inadequate notice.

The conventional economic assumption is that the wage rate represents the value of the marginal product for the occupation and/or the industry. This was the reason in the previous sections that wage rates were used as a proxy of the cost of the disruption caused by the absence of a worker taking unscheduled FMLA leave. However, this assumption does not hold in highly time-sensitive operations because of the asymmetrical nature of their operations.

Workers' wages are primarily based upon their average output. Yet, in time-sensitive operations the absence of a single worker can sometimes result in disruptions that cost far in excess of the value of the worker's average output or wage. For example, a worker's absence may cause expensive equipment and other workers to be idled. In these situations, the worker's average compensation or productivity cannot be used to estimate the total welfare cost of the absence.

''Data on the productivity impact of FMLA, while potentially probative, cannot by itself be used to estimate welfare effects accurately. While it is broadly true that reductions in productivity reduce economic welfare, the magnitude of the reduction depends on how the effect is distributed across inputs and industries. A regulation that reduces labor productivity, for example, will have a larger impact on economic welfare in industries where production requires ''fixed proportions'' of capital and labor (e.g., air transport, which requires at least one pilot and one co-pilot per airplane) than in industries where capital can easily be substituted for labor. Similarly, a reduction in total factor productivity in an industry producing products for which there are few economic substitutes will have a larger effect on economic welfare than one affecting an industry producing a product with many substitutes. In the latter case, consumers will simply shift their purchases away from the products of the less productive industry, suffering little or no loss in consumer surplus. For these and other reasons, economists do not generally attempt to measure the impact of policies on economic welfare effects by tracking their effects on productivity.'' [78]

This situation is akin to the peak demand situation at an electric utility

[76] Bureau of Labor Statistics, National Compensation Survey, 2007, unpublished data.

[77] For example, New York City noted: ''The situation is particularly ominous when the employee works in a safety-sensitive position, such as 911 operators, or other employees requiring face-to-face relief, because if the person's shift is not able to be covered by a colleague who in some instances is required to work overtime, then the public may receive a slow response to an emergency call.'' Fairfax County Public Schools provided the example of school bus drivers. ''[T]he essence of a school bus driver's job is to deliver children to school on time and safely. A few bus drivers have used chronic conditions such as CFS, depression, or sleep problems as an excuse not to report on time and not to call in when they will be late. They claim that their 'condition' precludes them from providing notice or from being on time. These behaviors mean that children are often left waiting on street corners in all weather for some other bus driver.'' For a complete discussion, *see* Section K of Chapter XI of the Department's Report on the RFI (72 FR at 35632).

[78] Jeffrey A. Eisenach, *Assessing the Costs of the Family and Medical Leave Act,* Criterion Economics, February 16, 2007, p. 6. (Doc. 10172A in response to RFI.)

company. Most customers are charged rates equal to the average cost of power generation. During periods of peak demand (when the marginal high-cost equipment is pressed into service and when the utility is sometimes forced to buy power to meet customer demands), the utility may take a loss on the sale of power. However, this loss is made up when demand drops so that the utility can generate the needed power at a much lower rate. This is why electric utilities offer customers variable rates tied to overall power demand. By charging higher rates during periods when power is more expensive to supply (so-called peak load pricing), this pricing structure motivates customers to cut back on their power use during periods of high or peak demand.

The U.S. labor market is not perfectly competitive. For instance, some labor laws and regulations limit the flexibility of employers and employees to enter into some mutually agreeable arrangements. Moreover, most employers cannot use peak load pricing to vary the wages paid to their employees based upon the demand at that moment.

> [The] FMLA may inhibit the market's ability to allocate labor efficiently among firms (and jobs among workers). Both firms and workers display heterogeneity with respect to values they place on absenteeism. In some industries, employee absenteeism will have a relatively small effect on firms' overall ability to operate, and therefore entail a relatively modest financial impact. In other sectors, absenteeism hinders production substantially by, for example, diminishing the productivity of other workers and equipment. If the effect of worker absence on a company's productivity is relatively modest, economists classify that firm as operating a so called *linear production technology*. Firms whose productivity is more sensitive to absenteeism are said to employ *assembly line technologies.* Companies relying on assembly line production techniques depend to a much greater extent on coordinated efforts of labor and machinery. Therefore, the absence of a single employee has a ripple effect throughout the organization.[79]

The RFI record suggests that intermittent FMLA leave can have significant impacts on time-sensitive business models. For example, the United States Postal Service reported ''[i]n a time-sensitive environment * * * unscheduled leave presents significant operational challenges.'' The United Parcel Service, Inc. stated ''employers typically can arrange coverage for an employee who might require intermittent leave to take his mother to regularly scheduled * * * treatments. However, it is a huge burden for management to cover for an employee who is certified for intermittent leave for chronic * * * [conditions] and who calls in with no advance notice * * * especially in time-sensitive/service-related industries.''[80]

In many situations, the absence of just a few employees can have a significant impact. For example, with respect to unscheduled intermittent leaves, some employers find they have to over staff on a continuing basis just to make sure they have sufficient coverage on any particular day (such as hourly positions in manufacturing, public transportation, customer service, health care, call centers, and other establishments that operate on a 24/7 basis). Some employers require their employees to work overtime to cover the absent employee's work. Both of these options result in additional costs.[81]

Unfortunately, without an accurate production function for each of these industries, it is not possible to quantitatively estimate the impact that the absence of these workers, including unforeseen absences, will have on the time-sensitive operations. However, to the extent the proposed rule reduces the cost of uncertainty in staffing, time-sensitive operations are likely to see larger productivity benefits than other industries.

Appendix A: Potential Impact of Section 585(a) of H.R. 4986, the National Defense Authorization Act for FY 2008

Introduction

As discussed in the preamble above, Section 585(a) of H.R. 4986, the National Defense Authorization Act for FY 2008, amends the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers, or for any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. The provisions of H.R. 4986 providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when the law was enacted. The provisions of H.R. 4986 providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective until the Secretary of Labor issues regulations defining ''qualifying exigencies.'' Because a significant number of United States military are currently on active duty or call to active duty status, the Department is fully aware of the need to issue regulations under the military family leave provisions of H.R. 4986 as soon as possible and is seeking public comment on any issues related to military family leave that may need to be addressed in final regulations.

This appendix to the PRIA indentifies the potential number of covered and eligible workers who may be impacted by the military family leave provisions of H.R. 4986. Commenters are invited to submit any data relating to the economic impact of the military family leave provisions of H.R. 4986. Estimating such impacts is required under Executive Order 12866.

Impact of Section 585(a) of H.R. 4986 on the Number of FMLA Covered Employers and Eligible Workers

Section 585(a) of H.R. 4986 has no impact on the number of establishments covered by the FMLA, or on the number of workers eligible to take FMLA. Therefore, many of the estimates presented in the Chapter 1 of the PRIA (e.g., number of covered employers, covered establishments, workers employed at covered establishments and FMLA eligible workers) remain the same.

Impact of Section 585(a) of H.R. 4986 on the Number of Workers Who May Take FMLA Leave

Under the new military family leave provisions of H.R. 4986, workers who are eligible to take FMLA leave will be permitted to take protected leave under two new circumstances (i.e., to care for covered servicemembers, or for any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation). Since both of these circumstances are related to family relationships with servicemembers, the first step in estimating the number of workers who may take FMLA Leave under the military family leave provisions of H.R. 4986 was to develop a family profile of servicemembers.

Using data from the Defense Manpower Data Center, the Current Population Survey (CPS), and the Decennial Census of Population, CONSAD developed a model to estimate the number of parents, spouses, and adult sons and daughters of

[79] *Id.* at 8.

[80] *See* RFI Report, 72 FR at 35632.

[81] *Id.*

servicemembers.[82] A summary of the methodology used by CONSAD to develop its estimates of the number of parents, spouses, and sons and daughters of servicemembers eligible to take FMLA leave is presented below.

CONSAD estimated the number of parents by first computing, for CPS reference persons in a set of age ranges that are compatible with the age ranges of servicemembers in general, the numbers and proportions of married males living with spouses, married females living with spouses, married males living separately, married females living separately, separated males, separated females, divorced males, divorced females, widowed males, widowed females, never married males, and never married females reported in the CPS for each age range.

Next, CONSAD made adjustments for the expected separate inclusion of both parents of the same child or children in two different categories (married living separately, separated, or divorced), for the expected remarriage of widowed or divorced parents, and for the expected death of both parents of some children. Then, CONSAD summed the adjusted estimates within each age range, to produce estimates of the proportion of people with parents in that age range who can be expected to have zero, one, or two living parents. For the estimate of the number of guardians and persons in loco parentis, CONSAD assumed that all servicemembers age 17 and 18 with no living parents would have one guardian or a person in loco parentis.

CONSAD estimated the proportion of servicemembers with spouses using data from the Defense Manpower Data Center.

CONSAD estimated the number of dependent adult children among servicemembers in different age ranges based upon data from the CPS.[83] First, CONSAD estimated the number of dependent children among servicemembers in different age ranges. Then based on those estimates, CONSAD estimated the number of children 16 years of age and over with parents in the age range of the military servicemembers to produce distributions of the number of children 16 years of age and over among servicemembers in each age range.

To calculate employment rates for parents and spouses who might need to take military family leave, CONSAD used the employment rates for age ranges expected to be associated with the age range of the military servicemembers.[84] CONSAD assumed that the employment rate of adult children who might need to take military family leave was 66 percent.[85] CONSAD also assumed that 60 percent of employed workers who might need to take military family leave would be FMLA covered and eligible.[86]

Impact of Leave to Care for Covered Servicemembers With Serious Injuries or Illnesses

Section 585(a) of H.R. 4986 amends the FMLA to permit an ''an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember'' to ''a total of 26 workweeks of leave during a 12-month period to care for the servicemember.'' This provision will be codified in the FMLA at 29 U.S.C. 2612(a)(3).

According to the President's Commission on Care for America's Returning Wounded Warriors, 3,082 servicemembers have been seriously injured since the beginning of hostilities in Iraq, or about 750 seriously injured servicemembers per year.[87] Assuming that an equal number of servicemembers have been seriously injured during preparation or training for combat, the total annual number is about 1,500.[88] Further, preliminary estimates from the Department of Defense suggest that the DOD Disability System separates (with benefits) 14,000 servicemembers annually. Consequently, at any one time the Department estimates that there are 1,500 to 14,000 seriously injured servicemembers whose potential caregivers may be eligible for FMLA leave under Section 585(a) of H.R. 4986.

Based on the assumption that the age distribution of seriously wounded servicemembers is the same as the age distribution of all military servicemembers deployed in Iraq or Afghanistan, the Department used CONSAD's model to compute the numbers of servicemembers with serious injuries or illnesses who will have no potential caregivers, and one, two, three, four, or five or more potential caregivers who may be eligible for FMLA leave.[89] The results of this analysis are presented in Table A–1.

TABLE A–1.—THE DISTRIBUTION OF SERVICEMEMBERS WITH SERIOUS INJURIES OR ILLNESSES BY AGE AND THE NUMBER OF POTENTIAL CAREGIVERS

Age of service-member	Number of service-members	Number of servicemembers with serious injuries or illnesses with n caregivers, where n =					
		0	1	2	3	4	5+
17–18	63	0	6	57	1	0	0

[82] CONSAD Report, 2007, available at: *http://www.wagehour.dol.gov.* CONSAD developed estimates for S. 1894 which did not include coverage of ''next of kin'' or ''nearest blood relative'' as H.R. 4986 does.

[83] The Department's estimates are based upon the dictionary definition of son and daughter rather than the definition in the FMLA. As was discussed in the Preamble above, this is an important distinction, since the FMLA defines ''son or daughter'' to mean a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under 18 years of age, or 18 years of age or older and incapable of self-care because of a mental or physical disability. Under the definition of ''son or daughter'' in FMLA, very few FMLA-eligible sons or daughters would be able to provide care to a covered servicemember with a serious injury or illness since, in order to meet the FMLA eligibility criteria, a son or daughter ages 18 and over must be incapable of self-care and would presumably be unable to care for a parent with a serious injury or illness. Further, very few parents would have FMLA-eligible sons or daughters who are called to active duty in the armed forces because, to be covered by the current FMLA definition of ''son or daughter,'' such sons or daughters must either be (1) under the age of 18 or (2) 18 years or older and incapable of self-care. (Only about 35,000 of the 1.4 million active duty servicemembers are under 18 years of age).

[84] For a more detailed explanation of the methodology see Appendix A in the CONSAD Report, 2007.

[85] According to the Bureau of Labor Statistics, the employment population ratio for civilians 16 years and over was 63% in 2007. CONSAD adjusted this upwards by 5% (3 percentage points) to 66% to account for the fact the working children of servicemembers are significantly younger than the overall workforce and the employment-population ratio of older workers is significantly lower than that of the overall workforce (*e.g.*, the employment population ratio of workers 55 years and over was 37.4 in 2007).

[86] The estimated 77.1 million FMLA eligible workers under Title I of the FMLA plus the 2.6 million Federal employees covered by Title 2 of the FMLA comprise about 60 percent of U.S. civilian employment.

[87] Department of Labor estimate based on 3,082 divided by 4.1 years (the elapsed time for the Commission's estimate).

[88] This assumption is based on preliminary discussions between the Departments of Defense and Labor.

[89] Based on the methodology in the CONSAD Report, 2007. It is possible for a seriously injured servicemember to have more than one caregiver such as a spouse, parent, and brother or sister.

TABLE A–1.—THE DISTRIBUTION OF SERVICEMEMBERS WITH SERIOUS INJURIES OR ILLNESSES BY AGE AND THE NUMBER OF POTENTIAL CAREGIVERS—Continued

Age of service-member	Number of service-members	Number of servicemembers with serious injuries or illnesses with n caregivers, where n =					
		0	1	2	3	4	5+
19–20	298	0	25	259	15	0	0
21–22	233	0	19	190	25	0	0
23–24	204	0	14	145	44	0	0
25–26	165	0	9	99	56	0	0
27–28	128	0	7	67	53	0	0
29–30	103	0	5	47	51	0	0
31–32	64	0	3	25	36	0	0
33–34	63	0	3	25	35	0	0
35–36	49	0	2	18	27	1	0
37–39	53	0	3	17	27	4	1
40–44	55	0	3	16	24	8	4
45–49	19	0	1	5	6	4	3
50+	7	0	1	2	2	2	2
Total	1,500	0	98	972	402	18	10

Note: Some numbers may not sum due to rounding.
Source: U.S. Department of Labor, based on CONSAD 2007.

Of the 1,500 servicemembers with serious injuries or illnesses, 98 are likely to have one caregiver, 972 are likely to have two caregivers, 402 are likely to have three caregivers, and 28 are likely to have four or more caregivers. Based upon Table A–1, the Department estimates that under the assumption of 1,500 servicemembers with serious injuries or illnesses each year, 3,370 caregivers would be available (i.e., $3{,}370 = 98 + 972 \times 2 + 402 \times 3 + 18 \times 4 + 10 \times 5$); however, not all of these caregivers are employed. Utilizing the CONSAD model described above, the Department estimates that there is about 1,900 potential FMLA covered and eligible caregivers for the 1,500 seriously injured and ill servicemembers under Section 585(a) of H.R. 4986.[90]

Alternatively, preliminary estimates from the Department of Defense suggest that the DOD Disability System separates (with benefits) or retires 14,000 servicemembers annually. Using CONSAD's model and assuming each seriously injured and ill servicemember would have at least one FMLA-eligible caregiver, the Department estimates there would be about 17,700 potential caregivers for servicemembers who are separated through the DOD Disability System every year.

Thus, the Department estimates that between 1,900 and 17,700 potential caregivers of servicemembers with serious injuries or illnesses would be eligible for protected FMLA leave under Section 585(a) of H.R. 4986.

Impact of Leave for Qualifying Exigency

Section 585(a) of H.R. 4986 also adds an additional qualifying reason to take FMLA leave: ''[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.'' This provision will be codified in the FMLA at 29 U.S.C. 2612(a)(1)(E).

Preliminary estimates from the Department of Defense suggest that there are approximately 339,000 servicemembers currently deployed on or activated for contingency operations. Based on these numbers, the Department used the model in the CONSAD Report to develop estimates of the number of FMLA covered and eligible workers who would take leave for a qualifying exigency.[91] Based on the age distribution of active duty servicemembers, the Department estimated the number of currently deployed or activated personnel in contingency operations by age and number of family members potentially eligible for qualifying exigency leave.[92] The results of this analysis are presented in Table A–2.

TABLE A–2.—DISTRIBUTION OF SERVICEMEMBERS DEPLOYED ON OR ACTIVATED FOR ACTIVE DUTY IN SUPPORT OF CONTINGENCY OPERATIONS BY AGE AND NUMBER OF COVERED FAMILY MEMBERS

Age of service-member	Thousands of service-members	Thousands of servicemembers with n family members, where n =					
		0	1	2	3	4	5+
17–18	9	0	1	8	0	0	0
19–20	39	0	3	34	2	0	0
21–22	49	0	4	40	5	0	0
23–24	43	0	3	31	9	0	0

[90] For a more detailed explanation of the methodology used to develop this estimate see Appendix A in the CONSAD Report, 2007. Further, since CONSAD's analysis did not account for the eligibility of next of kin, the Department also assumed each seriously injured and ill servicemember would be likely to have at least one FMLA-eligible caregiver.

[91] CONSAD Report, 2007, available at: *http://www.wagehour.dol.gov.*

[92] Based on the methodology in the CONSAD Report, 2007. It is possible for a servicemember on active duty or on call to active duty in support of a contingency operation to have more than one family member (such as a spouse, parent, and brother or sister) eligible for leave for a qualified exigency.

TABLE A–2.—DISTRIBUTION OF SERVICEMEMBERS DEPLOYED ON OR ACTIVATED FOR ACTIVE DUTY IN SUPPORT OF CONTINGENCY OPERATIONS BY AGE AND NUMBER OF COVERED FAMILY MEMBERS—Continued

Age of service-member	Thousands of service-members	Thousands of servicemembers with n family members, where n =					
		0	1	2	3	4	5+
25–26	35	0	2	21	12	0	0
27–28	27	0	1	14	11	0	0
29–30	22	0	1	10	11	0	0
31–32	19	0	1	8	11	0	0
33–34	19	0	1	7	11	0	0
35–36	18	0	1	6	10	1	0
37–39	23	0	1	8	12	2	0
40–44	25	0	1	7	11	3	2
45–49	8	0	1	2	3	2	1
50+	3	0	0	1	1	1	1
Total	339	0	21	197	108	8	4

Note: Some numbers may not sum due to rounding.
Source: U.S. DOL/Employment Standards Administration estimates based upon the model used in CONSAD 2007, and Department of Defense data.

Of the 339,000 servicemembers deployed on or activated for contingency operations, about 21,000 are likely to have one covered family member, 197,000 are likely to have two covered family members, 108,000 are likely to have three covered family members, and 12,000 are likely to have four or more covered family members. Based upon Table A–2, the Department estimates 792,000 adult family members would be impacted by servicemembers' call to active duty for a contingency operation (i.e., $792 = 21 + 197 \times 2 + 108 \times 3 + 8 \times 4 + 4 \times 5$); however, not all of these family members are employed. Utilizing the CONSAD model described above, the Department estimates that about 330,000 potential FMLA covered and eligible family members would be eligible to take leave for any qualifying exigency under Section 585(a) of H.R. 4986.[93]

Estimated Impacts

Based upon the preceding analyses, the Department estimates that the number of employees eligible to take FMLA leave under Section 585(a) of H.R. 4986 range from 332,000 to 348,000 workers. Although some of these workers may already be taking FMLA leave for other covered conditions, some may not. If the leave usage among the workers eligible to take FMLA leave under the new military family leave provisions of H.R. 4986 and the costs of such leave are similar to current FMLA leave takers, then one would expect the costs of the FMLA to potentially increase by as much as 5 percent based upon the potential increased number of FMLA eligible workers with qualifying reasons to take FMLA leave.[94] However, there are other factors that must be considered.

- H.R. 4986 does not change the scope of the FMLA in terms of the establishments covered or the eligibility of workers. Many of the costs of the FMLA are related to the coverage of the establishment or the eligibility of workers rather than the number of workers taking leave. Since the former will not change, assuming a 5 percent cost increase may be an over-estimate.
- The Department estimates that the number of employees eligible to take FMLA leave under the new military family leave provisions of H.R. 4986 range from 332,000 to 348,000 workers. However, just as all workers eligible to take FMLA leave do not take FMLA leave when they or a qualified family member have a serious health condition,[95] similarly, not all employees eligible to take FMLA leave under the new military family leave provisions of H.R. 4986 will take such leave. Therefore, assuming a 5 percent cost increase may be an over-estimate.

The Department requests information and data related to the impacts of workers taking FMLA leave and how these impacts might apply to workers taking FMLA under the additional qualifying circumstances permitted under Section 585(a) of H.R. 4986.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires that agencies prepare initial regulatory flexibility analyses for proposed rules unless they are not expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605(b).

The FMLA applies to public agencies and to private sector employers that employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. 29 U.S.C. 2611(4). In addition, the FMLA excludes employees from eligibility for FMLA leave if the total number of employees employed by that employer within 75 miles of that worksite is less than 50. 29 U.S.C. 2611(2)(B)(ii). As explained in the FMLA's legislative history, ''[t]he act exempts small businesses and limits coverage of private employers to employers who employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. * * * The employer must, in addition, employ at least 50 people within a 75-mile radius of the employee's worksite.'' S. Rep. No. 103–3, at 2 (1993).

The Department has examined the impact of these proposed revisions on all the firms covered under the FMLA, including those with 50 to 500 employees, and has estimated the net impact of the proposed changes would reduce the overall costs for all firms, both large and small. Most small businesses (establishments), 89.4 percent, were excluded from coverage under the FMLA by Congress. However, 6.3 percent of establishments with less

[93] For a more detailed explanation of the methodology used to develop this estimate see Appendix A in the CONSAD Report, 2007, available at: *http://www.wagehour.dol.gov.*

[94] The Department estimates that 7.0 million workers took FMLA leave under the current statute in 2005; 332,000 to 348,000 additional workers represents an increase of 4.7 to 5.0 percent.

[95] For example, only one family member may choose to act as the caregiver even though other family members are eligible to take family leave (e.g., two spouses may be eligible to take FMLA leave for a seriously ill child but only one may choose to do so).

than 50 employees are covered by the Act due to the ''75 mile'' provision in the statute. The Department estimates that 633,000 of the 1.1 million covered establishments, or 55.8 percent, have less than 50 employees. Another 481,000 establishments have 50 to 500 employees. Clearly, this is a substantial number (although small percentage—10.6%) of small employers.[96]

On average the proposed rule is estimated to have a net cost for these small businesses of $13 in the first year,[97] and a net recurring savings of $40 per small business every year after that.[98] Consequently, the Department has determined that because the proposed revisions primarily clarify the existing rules and reduce overall costs to all firms (both large and small), the proposed rule as drafted will not have a *significant economic impact* on a substantial number of small entities within the meaning of the Regulatory Flexibility Act and the Department has certified to this effect to the Chief Counsel for Advocacy of the SBA. Therefore, an initial regulatory flexibility analysis is not required for this proposed rule.

However, the new military family leave provisions of H.R. 4986 will result in an increase in the annual number of FMLA leaves taken. If these additional leaves significantly increase the economic impacts imposed by the FMLA regulation on a substantial number of small businesses, then a regulatory flexibility analysis will be required.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq,* requires agencies to prepare a written statement that identifies the: (1) Authorizing legislation; (2) cost-benefit analysis; (3) macro-economic effects; (4) summary of State, local, and tribal government input; and (5) identification of reasonable alternatives and selection, or explanation of non-selection, of the least costly, most cost-effective or least burdensome alternative; for proposed rules that include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more inflation adjusted in any one year, or approximately $135 million in 2007 dollars.

(1) Authorizing Legislation

This rule is issued pursuant to Family and Medical Leave Act of 1993 (FMLA), Public Law 103–3, 107 Stat. 6 (29 U.S.C. 2601 *et seq.*). The FMLA entitles eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve month period for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition. *See* 29 U.S.C. 2612.

Title I of the FMLA applies to private sector employers of fifty or more employees, public agencies and certain Federal employers and entities, such as the U.S. Postal Service and Postal Regulatory Commission. While Title I generally covers employers with 50 or more employees, public agencies are covered employers without regard to the number of workers employed.

The FMLA references the definition of employee in the Fair Labor Standards Act, 29 U.S.C. 203(e) so that most individuals employed by a State, political subdivision of a State, or interstate governmental agency meet the definition of employee.

(2) Cost-Benefit Analysis

Based upon Table 2.2 in the CONSAD Report, the Department estimates that approximately 90,000 State and local governmental entities will be affected by the proposed rule. Nationwide, these entities employ more than 19 million workers and their annual payrolls are $591 billion.[99]

The Department's Preliminary Regulatory Impact Analysis (PRIA) includes estimates of the net costs associated with the proposed rule. The Department estimates that the proposed revisions will result in a total first year net costs of about $26.1 million, and a net savings of about $33.9 million, each year thereafter. Moreover, this does not include the additional savings expected in the time-sensitive high-impact operations such as public safety.

On average the proposed rule is estimated to have a net cost per employer, including State and local governmental entities, of $13 in the first year,[100] and a net recurring savings of $40 per such entities every year after that.[101] Consequently, the Department concludes that the primary impact of the proposed revisions will be to reduce the burden of the FMLA regulations on employers, including State and local governmental entities.

The most significant costs associated with the proposed revisions will be the first year cost of reviewing and implementing the proposed revisions ($60 million) and the cost of providing employees with additional and more specific notifications ($139 million). Based upon their share of covered employment, the share of these first year costs for State and local governmental entities will be about $50 million, and the share of the first year costs for the private sector will be about $149 million.[102]

Under the worst case assumption that no offsetting savings will occur to the State and local entities during the first year, these $50 million first year costs would be equivalent to raising State and local payrolls by less than one-hundredth percent (0.01 percent) of the $591 billion in total payrolls[103] for those entities for a single year. Therefore, we have tentatively concluded that even under the worst case scenario, this rulemaking does not increase expenditures by State, local, and tribal governments above the current unfunded mandate threshold.

Under the worst case assumption that no offsetting savings will occur to the private sector during the first year, we estimate that the first year impacts do exceed the approximately $135 million threshold under the Act for the private sector. The Department feels that this scenario is very unlikely, however, and that the net expenditures of the private sector will be less than the Unfunded Mandates threshold. The Department specifically requests comment on this conclusion. Nevertheless, we believe the

[96] The Department of Labor based these estimates on the Westat 2000 establishment survey data.

[97] This estimate is based on the first year costs of $14.8 million (*see* Table 6 of the PRIA) and 1.1 million establishments (*see* Table 4 of the PRIA).

[98] This estimate is based on the recurring savings of $45.2 million (*see* Table 6 of the PRIA) and 1.1 million establishments (*see* Table 4 of the PRIA).

[99] Estimates based upon Table 2.2 on page 7 of the 2007 CONSAD Report available at: *http://www.wagehour.dol.gov.* Estimates presented above were developed by summing the CONSAD estimates for Public Utilities, Public Transit, Public Educational Services and Public Administration. Note, however that CONSAD did not have an estimate for the number of establishments in public utilities.

[100] This estimate is based on the first year costs for all covered establishments of $14.8 million (*see* Table 6 of the PRIA) and 1.1 million establishments (*see* Table 4 of the PRIA). [Note—these numbers are all employers, not just State and local government entities.]

[101] This estimate is based on the recurring savings for all covered establishments of $45.2 million (*see* Table 6 of the PRIA) and 1.1 million establishments (*see* Table 4 of the PRIA).

[102] State and local governmental entities employ about one-quarter (19 million) of the 77 million workers covered by Title I of the FMLA. One quarter of $200 million is $50 million.

[103] *See* Table 2.2 on page 7 of the 2007 CONSAD Report. The $591 billion estimate was the sum of the payrolls in Public Utilities, Public Transit, Public Educational Services and Public Administration.

cost-benefit analysis provided pursuant to the requirements under Executive Order 12866 for this economically significant rulemaking would meet the requirements for analysis under the Unfunded Mandates Reform Act.

The above analysis does not include an assessment of the impact of the new military family leave provisions of H.R. 4986. The Department anticipates that the new military family leave provisions of H.R. 4986 will increase the annual number of FMLA leaves taken. If these additional leaves increase the economic impacts imposed by the FMLA regulation on State and local entities, then the Department will appropriately revise this analysis for the final rule.

The FMLA does not provide for Federal financial assistance or other Federal resources to meet the requirements of its intergovernmental mandates. The Federal mandate imposed by this proposed rule is not expected to have a measurable effect on health, safety, or the natural environment.

(3) Macro-Economic Effects

Agencies are expected to estimate the effect of a regulation on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if accurate estimates are reasonably feasible and the effect is relevant and material. 5 U.S.C. 1532(a)(4). However, OMB guidance on this requirement notes that such macro-economic effects tend to be measurable in nationwide econometric models only if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of gross domestic product, or in the range of $1.5 billion to $3.0 billion.[104] A regulation with smaller aggregate effect is not likely to have a measurable impact in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's PRIA estimates that the total aggregate economic impact of this proposed rule ranges from total first year net costs of about $26.1 million to total net savings of about $33.9 million, each year thereafter. Therefore, the Department has determined that a full macro-economic analysis is not likely to show any measurable impact on the economy. However, the analysis in the PRIA does not include an assessment of the impact of the new military family leave provisions of H.R. 4986. The Department anticipates that the new military family leave provisions of H.R. 4986 will increase the annual number of FMLA leaves taken. If these additional leaves substantially increase the economic impacts imposed by the FMLA regulation, then the Department will appropriately reassess this conclusion for the final rule.

(4) Summary of State, Local, and Tribal Government Input

On December 1, 2006, the Department published a Request for Information (RFI) in the **Federal Register** (71 FR 69504). The RFI asked the public, including State, local, and tribal governments, to comment on their experiences with, and observations of, the Department's administration of the law and the effectiveness of the FMLA regulations. More than 15,000 comments were received from workers, family members, employers, academics, and other interested parties.[105] This input ranged from personal accounts, legal reviews, industry and academic studies, and surveys, to recommendations for regulatory and statutory changes to address particular areas of concern. The Department published a Report on the comments received in response to the Department's RFI in June 2007 (*see* 72 FR 35550).[106]

The Department received in response to the RFI a number of comments from various State and local government entities across the country, including the City of Philadelphia, the City of Gillette, the City of Portland , the City of New York, the City of Los Angeles, Ohio Department of Administrative Services, the Ohio Public Employer Labor Relations Association, the Commonwealth of Pennsylvania, the Indiana State Personnel Department, Spokane County, the University of Wisconsin-Milwaukee, Fairfax County Public Schools, the University of Minnesota, Washington Metropolitan Area Transit Authority, Metro Regional Transit Authority (Akron, Ohio), the Port Authority of Allegheny County (PA), the Transit Authority (Huntington, WV), and the Milwaukee Transport Services. Many of these entities provided input, for instance, on applying uniform call-in procedures and seeking medical re-certifications and return to work certifications. The comments by State and local government entities were considered by the Department in developing this proposed rule and are addressed above under the sections of the rule on which they commented (see, *e.g.*, preamble discussion of §§ 825.302, 825.303, 825.308, and 825.310).

(5) Least Burdensome Option or Explanation Required

The Department's consideration of various options is described in the preceding section in the preamble. The Department believes that it has chosen the least burdensome option that updates, clarifies, and simplifies the rule.

Executive Order 13132 (Federalism)

The proposed rule does not have federalism implications as outlined in Executive Order 13132 regarding federalism. The proposed rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Indian Tribal Governments

This proposed rule was reviewed under the terms of Executive Order 13175 and determined not to have ''tribal implications.'' The proposed rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' As a result, no tribal summary impact statement has been prepared.

Effects on Families

The undersigned hereby certify that this proposed rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

Executive Order 13045, Protection of Children

Executive Order 13045, dated April 23, 1997 (62 FR 19885), applies to any rule that (1) is determined to be ''economically significant'' as defined in Executive Order 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This proposal is not

[104] OMB Guidance on Implementing Title II of S.1, March 31, 1995 Memorandum from Sally Kazten to the Heads of Executive Departments and Agencies, available at *http://www.fws.gov/policy/library/rgkatze.pdf.*

[105] All comments are available for viewing via the public docket of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Many comments are also available on http://www.regulations.gov.

[106] Also available at *http://www.dol.gov/esa/whd/fmla2007report.htm.*

subject to Executive Order 13045 because, although this proposed rule addresses family and medical leave provisions of the FMLA including the rights of employees to take leave for the birth or adoption of a child and to care for a healthy newborn or adopted child, and to take leave to care for a son or daughter with a serious health condition, it has no environmental health or safety risks that may disproportionately affect children.

Environmental Impact Assessment

A review of this proposal in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the proposed rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211, Energy Supply

This proposed rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630, Constitutionally Protected Property Rights

This proposal is not subject to Executive Order 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

Executive Order 12988, Civil Justice Reform Analysis

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 825

Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Teachers.

Signed at Washington, DC, this 31st day of January 2008.

Victoria A. Lipnic,

Assistant Secretary, Employment Standards Administration.

Alexander J. Passantino,

Acting Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the DOL proposes to revise Title 29 part 825 of the Code of Federal Regulations as follows:

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Subpart A—Coverage Under the Family and Medical Leave Act

Sec.
825.100 The Family and Medical Leave Act.
825.101 Purpose of the Act.
825.102 [Reserved]
825.103 [Reserved]
825.104 Covered employer.
825.105 Counting employees for determining coverage.
825.106 Joint employer coverage.
825.107 Successor in interest coverage.
825.108 Public agency coverage.
825.109 Federal agency coverage.
825.110 Eligible employee.
825.111 Determining whether 50 employees are employed within 75 miles.
825.112 Qualifying reasons for leave, general rule.
825.113 Serious health condition.
825.114 Inpatient care.
825.115 Continuing treatment.
825.116 [Reserved]
825.117 [Reserved]
825.118 [Reserved]
825.119 Leave for treatment of substance abuse.
825.120 Leave for pregnancy or birth.
825.121 Leave for adoption or foster care.
825.122 Definitions of spouse, parent, son or daughter, adoption, and foster care.
825.123 Unable to perform the functions of the position.
825.124 Needed to care for a family member.
825.125 Definition of health care provider.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

825.200 Amount of leave.
825.201 Leave to care for a parent.
825.202 Intermittent leave or reduced leave schedule.
825.203 Scheduling of intermittent or reduced schedule leave.
825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.
825.205 Increments of leave for intermittent or reduced schedule leave.
825.206 Interaction with the FLSA.
825.207 Substitution of paid leave.
825.208 [Reserved]
825.209 Maintenance of employee benefits.
825.210 Employee payment of group health benefit premiums.
825.211 Maintenance of benefits under multi-employer health plans.
825.212 Employee failure to pay health plan premium payments.
825.213 Employer recovery of benefit costs.
825.214 Employee right to reinstatement.
825.215 Equivalent position.
825.216 Limitations on an employee's right to reinstatement.
825.217 Key employee, general rule.
825.218 Substantial and grievous economic injury.
825.219 Rights of a key employee.
825.220 Protection for employees who request leave or otherwise assert FMLA rights.

Subpart C—Employee and Employer Rights and Obligations Under the Act

825.300 Employer notice requirements.
825.301 Employer designation of FMLA leave.
825.302 Employee notice requirements for foreseeable FMLA leave.
825.303 Employee notice requirements for unforeseeable FMLA leave.
825.304 Employee failure to provide notice.
825.305 Medical certification, general rule.
825.306 Content of medical certification.
825.307 Authentication and clarification of medical certification.
825.308 Recertifications.
825.309 Intent to return to work.
825.310 Fitness-for-duty certification.
825.311 Failure to provide medical certification.

Subpart D—Enforcement Mechanisms

825.400 Enforcement, general rules.
825.401 Filing a complaint with the Federal Government.
825.402 Violations of the posting requirement.
825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.
825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

Subpart E—Recordkeeping Requirements

825.500 Recordkeeping requirements.

Subpart F—Special Rules Applicable to Employees of Schools

825.600 Special rules for school employees, definitions.
825.601 Special rules for school employees, limitations on intermittent leave.
825.602 Special rules for school employees, limitations on leave near the end of an academic term.
825.603 Special rules for school employees, duration of FMLA leave.
825.604 Special rules for school employees, restoration to ''an equivalent position.''

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

825.700 Interaction with employer's policies.
825.701 Interaction with State laws.
825.702 Interaction with Federal and State anti-discrimination laws.

Subpart H—Definitions

825.800 Definitions.

Appendix A to Part 825—Index [Reserved]
Appendix B to Part 825—Certification of Health Care Provider (Form WH–380)
Appendix C to Part 825—Notice to Employees of Rights Under FMLA (WH Publication 1420)
Appendix D to Part 825—Eligibility Notice to Employees Under FMLA (Form WH–381)
Appendix E to Part 825—Designation Notice Under FMLA (Form WH–382)

Authority: 29 U.S.C. 2654.

Subpart A—Coverage Under the Family and Medical Leave Act

§ 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows ''eligible'' employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (*see* § 825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer has a right to 30 days advance notice from the employee where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §§ 825.310 and 825.311(d)). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the 14th amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§ 825.102 [Reserved]

§ 825.103 [Reserved]

§ 825.104 Covered employer.

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (*See* § 825.600.)

(b) The terms ''commerce'' and ''industry affecting commerce'' are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142(1) and (3)), as set forth in the definitions at § 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the ''joint employment'' test discussed in § 825.106, or the ''integrated employer'' test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the ''integrated employer'' test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated

employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common ownership/financial control.

(d) An ''employer'' includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of ''employer'' in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers ''acting in the interest of an employer'' are individually liable for any violations of the requirements of FMLA.

§ 825.105 Counting employees for determining coverage.

(a) The definition of ''employ'' for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term ''employ'' as defined in the Act includes ''to suffer or permit to work.'' The courts have indicated that, while ''to permit'' requires a more positive action than ''to suffer,'' both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer/employee relationship under the Act; and that determination of the relation cannot be based on ''isolated factors'' or upon a single characteristic or ''technical concepts,'' but depends ''upon the circumstances of the whole activity'' including the underlying ''economic reality.'' In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who ''follows the usual path of an employee'' and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2007, subsequently dropped below 50 employees before the end of 2007 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2008, the employer would continue to be covered throughout calendar year 2008 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.*, 2007) calendar year.

§ 825.106 Joint employer coverage.

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(2) A type of company that is often called a ''Professional Employment Organization'' (PEO) or ''HR Outsourcing Vendor'' contracts with client employers merely to perform administrative functions—including payroll, benefits, regulatory paperwork, and updating employment policies. A PEO does not enter into a joint employment relationship with the employees of its client companies provided it merely performs these administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the ''primary'' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. *See* § 825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (*see* § 825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

§ 825.107 Successor in interest coverage.

(a) For purposes of FMLA, in determining whether an employer is covered because it is a ''successor in interest'' to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same plant;

(3) Continuity of the workforce;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products or services; and

(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a ''successor in interest'' exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a ''successor in interest,'' employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

§ 825.108 Public agency coverage.

(a) An ''employer'' under FMLA includes any ''public agency,'' as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines ''public agency'' as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. ''State'' is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a ''public'' agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.*, is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Where there is any question about whether a public entity is a public agency, as distinguished from a part of another public agency, the U.S. Bureau of the Census' ''Census of Governments'' will be determinative, except for new entities formed since the most recent publication of the ''Census.'' For new entities, the criteria used by the Bureau of the Census will be used to determine whether an entity is a public agency or a part of another agency, including existence as an organized entity, governmental character, and substantial autonomy of the entity.

(2) The Census Bureau takes a census of governments at 5-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St., NW., Washington, DC 20402.

(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.*, State) employ 50 employees at the worksite or within 75 miles.

§ 825.109 Federal agency coverage.

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. Employees of the Government Printing Office are covered by Title II. While employees of the Government Accountability Office and the Library of Congress are covered by Title I of the FMLA, the Comptroller General of the

United States and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees. Other legislative branch employees, such as employees of the Senate and House of Representatives, are covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Regulatory Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by these regulations.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

§ 825.110 Eligible employee.

(a) An ''eligible employee'' is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (*See* § 825.105(b) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months, *provided*

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of five years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than five years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation. The time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than five years when determining whether an employee has met the 12–month employment requirement. However, if an employer chooses to recognize such prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.

(c)(1) Except as provided in paragraph (c)(2) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. (*See* 29 CFR part 785.) The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) An employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours-of-service that would have been performed *but for* the period of military service in determining whether the employee worked the 1,250 hours of service. Accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (*see* § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave.

(d) The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on ''non-FMLA leave'' at the time he/she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be ''FMLA leave.'' (*See* § 825.300(b) for rules governing the content of the eligibility notice given to employees.)

(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in

response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

§ 825.111 Determining whether 50 employees are employed within 75 miles.

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the ''worksite'' is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their ''worksite.'' The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are ''maintained on the payroll'' during any portion of the year when school is not in session. *See* § 825.105(c).

§ 825.112 Qualifying reasons for leave, general rule.

(a) *Circumstances qualifying for leave.* Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (*see* § 825.120);

(2) For placement with the employee of a son or daughter for adoption or foster care (*see* § 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*see* §§ 825.113 and 825.122); and

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*see* §§ 825.113 and 825.123).

(b) *Equal application.* The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child.

(c) *Active employee.* In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

§ 825.113 Serious health condition.

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

(b) The term ''incapacity'' means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

(c) The term ''treatment'' includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye

examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress, or allergies may be serious health conditions, but only if all the conditions of this section are met.

§ 825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in § 825.113(b), or any subsequent treatment in connection with such inpatient care.

§ 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within a 30-day period unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.116 [Reserved]

§ 825.117 [Reserved]

§ 825.118 [Reserved]

§ 825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§ 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

§ 825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both the mother and father are entitled to FMLA leave for the birth of their child.

(2) Both the mother and father are entitled to FMLA leave to be with the healthy newborn child (*i.e.*, bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to leave for a birth expires at the end of the 12-month period beginning on the date of the birth, unless State law allows, or the employer permits, leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period. However, *see* § 825.701

regarding non-FMLA leave which may be available under applicable State laws. Under this section, both the mother and father are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.

(4) The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

(5) The father is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or for prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition. *See* § 825.124.

(6) Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and .122(c) are met. Thus, a husband and wife may each take their 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the mother or newborn child. *See* §§ 825.202-.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.121 for rules governing leave for adoption or foster care. *See* § 825.601 for special rules applicable to instructional employees of schools.

§ 825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement, unless State law allows, or the employer permits, leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period. However, see § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the

husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newly placed child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and .122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. *See* §§ 825.202 through 825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.120 for general rules governing leave for pregnancy and birth of a child. *See* § 825.601 for special rules applicable to instructional employees of schools.

§ 825.122 Definitions of spouse, parent, son or daughter, adoption and foster care.

(a) *Spouse.* Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(b) *Parent.* Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (c) of this section. This term does not include parents ''in law.''

(c) *Son or daughter.* Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

(1) ''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc.*

(2) ''Physical or mental disability'' means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) *Adoption.* ''Adoption'' means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *See* § 825.121 for rules governing leave for adoption.

(e) *Foster care.* Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. *See* § 825.121 for rules governing leave for foster care.

(f) *Documenting relationships.* For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a child's birth certificate, a court document, a sworn notarized statement, a submitted and signed tax return, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.,* but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.123 Unable to perform the functions of the position.

(a) *Definition.* An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions.* An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform. *See* § 825.306.

§ 825.124 Needed to care for a family member.

(a) The medical certification provision that an employee is ''needed to care for'' a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, *etc.* The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the qualified family member.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. *See* §§ 825.202 through 825.205 for rules governing the use of intermittent or reduced schedule leave.

§ 825.125 Definition of health care provider.

(a) The Act defines ''health care provider'' as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

§ 825.200 Amount of leave.

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employer is permitted to choose any one of the following methods for determining the ''12-month period'' in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month ''leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's ''anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or,

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave.

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2007, four weeks beginning June 1, 2007, and four weeks beginning December 1, 2007, the employee would not be entitled to any additional leave until February 1, 2008. However, beginning on February 1, 2008, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, *etc.*

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict

with the method chosen by the employer to determine ''any 12 months'' for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.*, a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do *not* count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205.

§ 825.201 Leave to care for a parent.

(a) *General rule.* An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. *See* § 825.122(b) for definition of parent.

(b) *''Same employer'' limitation.* A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a parent, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

§ 825.202 Intermittent leave or reduced leave schedule.

(a) *Definition.* FMLA leave may be taken ''intermittently or on a reduced leave schedule'' under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) *Medical necessity.* For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (*see* § 825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider. *See* § 825.113.

(c) *Birth or placement.* When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. *See* § 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. *See also* § 825.120 (pregnancy) and § 825.121 (adoption and foster care).

§ 825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a qualified family member

or the employee. *See* § 825.202. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations.

§ 825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment.* If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* § 825.601 for special rules applicable to instructional employees of schools.

(b) *Compliance.* Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave.

(c) *Equivalent pay and benefits.* The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) *Employer limitations.* An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) *Reinstatement of employee.* When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.205 Increments of leave for intermittent or reduced schedule leave.

(a) *Minimum increment.* When an employee takes leave on an intermittent or reduced leave schedule, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. The normal workweek is the basis of leave entitlement. Therefore, if an employee who normally works five days a week takes off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave.

(b) *Calculation of leave.* (1) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(2) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

§ 825.206 Interaction with the FLSA.

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee (under regulations issued by the Secretary), 29 CFR part 541, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. *See* 29 CFR 541.602(b)(7). This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR part 541.

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (*see* 29 CFR 778.114), the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be

determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis.

(c) This special exception to the ''salary basis'' requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as (one of the four types of) FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR part 541 or 29 CFR 778.114 may not be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by 29 CFR part 541 or 29 CFR 778.114 be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, *e.g.*, leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition; or for leave which is more generous than provided by FMLA, such as leave in excess of 12 weeks in a year. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an ''hourly'' employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Substitution of paid leave.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term ''substitute'' means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to use accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. Employers may not discriminate against employees on FMLA leave in the administration of their leave policies. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements and meet any additional qualifying standards of the paid leave policy only in connection with the receipt of such payment or benefit. If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to all the protections of unpaid FMLA leave.

(b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(d) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. Employers and employees also may agree, where State law permits, to have paid leave supplement the temporary disability benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The Act provides that a serious health condition may result from injury to the employee ''on or off'' the job. If the employer designates the leave as FMLA leave in accordance with § 825.301, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a ''light duty job.'' As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. *See also* §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702(d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). In addition, under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken off

for an FMLA reason may be counted against the employee's FMLA leave entitlement.

§ 825.208 [Reserved]

§ 825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of ''group health plan'' is set forth in § 825.800. For purposes of FMLA, the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, *etc.*, must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc. See* § 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for ''key'' employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.*, if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ''key employee'' (*see* § 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the end of the leave period, or FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

§ 825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer's group health plan, as described in § 825.209(a)(1), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employer's existing rules for payment by employees on ''leave without pay'' would be followed, provided that such rules do not require prepayment (*i.e.*, prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (*e.g.*, through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. (*See* § 825.300.)

(e) An employer may not require more of an employee using unpaid FMLA leave than the employer requires of other employees on ''leave without pay.''

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave. *See* § 825.207(e).

§ 825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use ''banked'' hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in § 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employer can show that the employee would have been laid off and the employment relationship terminated; or,

(3) The employee provides unequivocal notice of intent not to return to work.

§ 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a ''group health plan.'' *See* § 825.209(a).

(3) All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* § 825.215(d)(1) through (5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

§ 825.213 Employer recovery of benefit costs.

(a) In addition to the circumstances discussed in § 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of ''other circumstances beyond the employee's control'' are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a ''key employee'' who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work

to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. Such certification is not required unless requested by the employer. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL form developed for this purpose (*see* § 825.306(b) and Appendix B of this part). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.,* by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have ''returned'' to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable ''premiums'' as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

§ 825.214 Employee right to reinstatement.

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

§ 825.215 Equivalent position.

(a) *Equivalent position.* An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) *Conditions to qualify.* If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on ''leave without pay.'' In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, *etc.,* excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent non-FMLA leave status. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used vacation leave for an FMLA-protected purpose also must receive the payment.

(d) *Equivalent benefits.* ''Benefits'' include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the

period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.*, paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) *Other issues related to equivalent terms and conditions of employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) *De minimis exception.* The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to *de minimis*, intangible, or unmeasurable aspects of the job.

§ 825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

(b) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (''key employees,'' as defined in § 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in § 825.310.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers'

compensation, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). *See* § 825.702, State leave laws, or workers' compensation laws.

(d) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

§ 825.217 Key employee, general rule.

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(b) The term ''salaried'' means ''paid on a salary basis,'' as defined in 29 CFR 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be ''key employees.''

§ 825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the firm, that would constitute ''substantial and grievous economic injury.'' A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute ''substantial and grievous economic injury.''

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (*see also* § 825.702).

§ 825.219 Rights of a key employee.

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). ''Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against ''interference'' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ''no fault'' attendance policies. *See* § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot ''trade off'' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment while recovering from a serious health condition (*see* § 825.702(d)). Nor does it prevent the settlement of past FMLA claims by employees without the approval of the Department of Labor or a court.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

Subpart C—Employee and Employer Rights and Obligations Under the Act

§ 825.300 Employer notice requirements.

(a) *General notice.* (1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this subsection. An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $110 for each separate offense.

(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

(3) If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by either including the notice in employee handbooks distributed to all employees or distributing a copy of the general notice to each employee at least annually (distribution may be by electronic mail).

(4) To meet the general notice requirements of this section, employers may duplicate the text of the notice contained in Appendix C of this part. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the general notices in a language in which the employees are literate. Prototypes are available in several languages from the nearest office of the Wage and Hour Division or on the Internet at *http://www.wagehour.dol.gov.* Employers furnishing FMLA notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying condition, the employer must notify the employee within five business days of the employee's eligibility to take FMLA leave and any additional requirements for qualifying for such leave. This eligibility notice shall provide information regarding the employee's eligibility for FMLA leave, detail the specific responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. *See* § 825.110 for definition of an eligible employee.

(2) Specifically, the eligibility notice must state whether the employee is eligible for FMLA leave and whether the employee still has FMLA leave available in the current applicable 12-month FMLA leave period. If the employee is not eligible for FMLA leave, the notice must state the reasons why the employee is not eligible, including as applicable that the employee has no remaining FMLA leave available in the 12-month period, the number of months the employee has been employed by the employer, the number of hours of service during the 12-month period, and whether the employee is employed at a

worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

(3) If the employee is eligible for FMLA leave and has FMLA leave available, the eligibility notice must detail the specific expectations and obligations of the employee and explain any consequences of a failure to meet these obligations. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*see* §§ 825.300(c) and 825.301);

(ii) Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (*see* § 825.305);

(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not comply;

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*see* § 825.210), and the possible consequences of failure to make such payments on a timely basis (*i.e.*, the circumstances under which coverage may lapse);

(v) Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment and a list of the essential functions of the employee's position if the employer will require that the fitness-for-duty certification address those functions (*see* § 825.310);

(vi) The employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* § 825.218);

(vii) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*see* §§ 825.214 and 825.604); and

(viii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*see* § 825.213).

(4) The eligibility notice may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(5) The eligibility notice should be accompanied by any required medical certification form.

(6) Except as provided in this section, the eligibility notice must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within five business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(7) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within five business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in the eligibility notice which has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(8)(i) Except as provided in paragraph (b)(8)(ii) of this section, if the employer is requiring medical certification or a ''fitness-for-duty'' report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial eligibility notice in the six-month period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a ''fitness-for-duty'' report would be required (*e.g.*, by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a ''fitness-for-duty'' report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. *See* § 825.305(a).

(9) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(10) A prototype eligibility notice is contained in Appendix D of this part; the prototype may be obtained from local offices of the Wage and Hour Division or from the Internet at *http://www.wagehour.dol.gov.* Employers may adapt the prototype notice as appropriate to meet these notice requirements.

(c) *Designation notice.* (1) When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided every 30 days to the employee if leave is taken during the prior 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation.

(2) This designation notice must be in writing, but may be in any form, including a notation on the employee's pay stub. *See* § 825.301 for rules on leave designation. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(3) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, an employer may provide an employee with the designation notice immediately, and also must provide the employee with the information required in the eligibility notice as set forth in paragraph (b)(3) of this section.

(4) A prototype designation notice is contained in Appendix E of this part; the prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.wagehour.dol.gov.*

(d) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment,

reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)).

§ 825.301 Employer designation of FMLA leave.

(a) *Employer responsibilities.* In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in § 825.300. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether paid leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must notify the employee within five business days, absent extenuating circumstances, that the leave is designated and will be counted as FMLA leave.

(b) *Employee responsibilities.* As noted in §§ 825.302(c) and 825.303(b), an employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employer's established policy or practice—and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (*i.e.*, that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(c) *Disputes.* If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(d) *Retroactive designation.* If an employer does not designate leave as required by § 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies.* If an employer's failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented the employee from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward the employee's FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) *Timing of notice.* An employee must provide the employer at least 30 days' advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee does not provide at least 30 days notice of foreseeable leave, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

(b) *As soon as practicable* means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For example, where an employee learns

during the work day on Monday that a scheduled doctor appointment has been rescheduled from Friday to Wednesday of the same week, it would ordinarily be practicable for the employee to provide notice of the schedule change to the employer before the end of the work day. If the employee did not learn of the change in the scheduled appointment until after work hours, the employee should be able to provide the employer with notice the next business day.

(c) *Content of notice.* An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must provide sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (*see* § 825.305). An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(d) *Complying with employer policy.* An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to call in due to his/her medical condition and his/her spouse calls the direct supervisor to report the absence instead of calling the human resources department as required by the employer policy. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment.* When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* §§ 825.203 and 825.205.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements.

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice.* When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Where the need for leave is unforeseeable, it is expected that an employee will give notice to the employer promptly. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) *Content of notice.* An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. The employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must provide sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(c) *Complying with employer policy.* When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, except when extraordinary circumstances exist. For example, an

employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

§ 825.304 Employee failure to provide notice.

(a) *Waiver of notice.* An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

(b) *Foreseeable leave—30 days.* When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) *Foreseeable leave—less than 30 days.* When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA-protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (*i.e.*, a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) *Unforeseeable leave.* When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave promptly, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

(e) *Proper notice required.* In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or annual distribution, as required by § 825.300.

§ 825.305 Medical certification, general rule.

(a) *General.* An employer may require that an employee's leave to care for the employee's seriously ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.300(b). An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) *Timing.* In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) *Complete and sufficient certification.* The employee must provide a complete and sufficient medical certification to the employer if required by the employer in accordance with § 825.306. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with § 825.311. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) *Consequences.* At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient medical certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with § 825.311. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any

necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. *See* §§ 825.306, 825.307, 825.308, and 825.310.

(e) *Annual medical certification.* Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's spouse, son, daughter, or parent lasts beyond a single leave year (as defined in § 825.200), the employer may require the employee to provide a new medical certification in each subsequent leave year.

§ 825.306 Content of medical certification.

(a) *Required information.* An employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice, including pertinent specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the functions of the employee's job, as well as the nature of any other work restrictions, and the likely duration of such inability (*see* § 825.123(b) and (c));

(5) If the patient is a qualified family member, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee or a qualified family member, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a qualified family member, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) DOL has developed an optional form (Form WH–380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (*See* Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge. Form WH–380, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§ 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. If the employee fails to provide the information required for receipt of such payments or benefits, the employee's entitlement to take unpaid FMLA leave will not be affected. *See* § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization release or waiver allowing the employer to communicate directly with the employee's health care provider, the employee may not be required to provide such an authorization release or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

§ 825.307 Authentication and clarification of medical certification.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, the employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). For purposes of these regulations, ''authentication'' means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested and the employee's permission is not required. ''Clarification'' means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that

required by the certification form. Contact between the employer and the employee's health care provider for purposes of clarification must comply with the requirements of the Health Insurance Portability and Accountability Act (''HIPAA'') Privacy Rule (*see* 45 CFR parts 160 and 164). If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the employee's health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. *See* § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification or to provide the health care provider with sufficient authorization from the employee or the employee's family member to clarify the certification so that it is complete and sufficient.

(b) *Second opinion*. (1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (*e.g.*, a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion*. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions*. The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses*. If the employer requires the employee to obtain either a second or third opinion, the employer must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad*. In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

§ 825.308 Recertifications.

(a) *30-day rule*. Generally, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.

(b) *More than 30 days*. If the medical certification indicates that the minimum duration of incapacity is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification every six months in connection with an absence by the employee.

(c) *Less than 30 days*. An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his/her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his/her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) *Timing*. The employee must provide the requested recertification to

the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* § 825.305(d). As part of the information allowed to be obtained on recertification, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

§ 825.309 Intent to return to work.

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

§ 825.310 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. *See* § 825.305(d).

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. An employer may require that the certification address the employee's ability to perform the essential functions of the employee's job by providing a list of essential functions with the eligibility notice required by § 825.300(b). If the employer timely provides such a list, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) The eligibility notice required in § 825.300(b) shall advise the employee if the employer will require fitness-for-duty certification to return to work. No second or third fitness-for-duty certification may be required.

(f) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (e) of this section. If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* § 825.311(d).

(g) An employer is not entitled to certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule as set forth in §§ 825.203 through 825.205. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence.

§ 825.311 Failure to provide medical certification.

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA

protections for the 30 day period following the expiration of the 15 day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a medical certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification.* An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave.

(d) *Fitness-for-duty certification.* When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* § 825.310(a)) if the employer has provided the required notice (*see* § 825.300(c)); the employer may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* § 825.213(a)(3).

Subpart D—Enforcement Mechanisms

§ 825.400 Enforcement, general rules.

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

§ 825.401 Filing a complaint with the Federal Government.

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories or on the Department's website.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 Violations of the posting requirement.

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§ 825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§ 825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The

Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

Subpart E—Recordkeeping Requirements

§ 825.500 Recordkeeping requirements.

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or the DOL is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.*, available from time records, requests for leave, *etc.*, if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations (*see* § 825.300(b)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section.

(e) Covered employers in a joint employment situation (*see* § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) With respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Subpart F—Special Rules Applicable to Employees of Schools

§ 825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of ''local educational agencies,'' including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply. The usual requirements for employees to be ''eligible'' do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. ''Instructional employees'' are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it

include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. ''Periods of a particular duration'' means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (*see* § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

§ 825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of a term. The employer may require the employee to continue taking leave until the end of the term if —

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave for a purpose other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last more than five working days. The employer may require the employee to continue taking leave until the end of the term.

(b) For purposes of these provisions, ''academic term'' means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

§ 825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for ''periods of a particular duration'' in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 Special rules for school employees, restoration to ''an equivalent position.''

The determination of how an employee is to be restored to ''an equivalent position'' upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to ''an equivalent position'' must provide substantially the same protections as provided in the Act for reinstated employees. *See* § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an ''equivalent position'' with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

§ 825.700 Interaction with employer's policies.

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

§ 825.701 Interaction with State laws.

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) A shorter notice period under State law must be allowed by the employer unless an employer has already provided, or the employee is requesting, more leave than required under State law.

(4) If State law provides for only one medical certification, no additional certifications may be required by the employer unless the employer has already provided, or the employee is requesting, more leave than required under State law.

(5) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a ''spouse equivalent,'' and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or ''spouse equivalent.''

(6) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. (*See* Subpart F of this part.)

(b) [Reserved]

§ 825.702 Interaction with Federal and State anti-discrimination laws.

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*e.g.*, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 103–3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired (*Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978))).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employer must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee

who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an ''eligible employee'' entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the *same* job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, *require* an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. *See* § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a ''light duty'' position. If the employer offers such a position, the employee is permitted but not required to accept the position (*see* § 825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. *See* § 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an ''eligible'' employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301–4333 (USERRA), veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning service member would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employer during the period of military service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months and 1,250 hours of employment. *See* § 825.110(b)(2)(i) and .110(c)(2).

(h) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Subpart H—Definitions

§ 825.800 Definitions.

For purposes of this part:

Act or *FMLA* means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq.*)

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*)

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, As Amended (Pub. L. 99–272, title X, section 10002; 100 Stat 227; 29 U.S.C. 1161–1168).

Commerce and *industry or activity affecting commerce* mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'' and any ''industry affecting commerce'' as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

Continuing treatment by a health care provider means any one of the following:

(1) *Incapacity and treatment.* A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within a 30-day period unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(2) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(3) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(4) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Eligible employee means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than five years before the date of the most recent hiring of the employee, *unless:*

(i) The break in service is occasioned by the fulfillment of the employee's National Guard or Reserve military service obligation (the time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA)); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes); and

(2) Who, on the date on which any FMLA leave is to commence, has been employed for at least 1,250 hours of service with such employer during the previous 12-month period; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(5) Excludes any employee of the United States House of Representatives or the United States Senate covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

Employ means to suffer or permit to work.

Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term ''employee'' means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, ''employee'' means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or

an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(*1*) Holds a public elective office of that State, political subdivision, or agency,

(*2*) Is selected by the holder of such an office to be a member of his personal staff,

(*3*) Is appointed by such an officeholder to serve on a policymaking level,

(*4*) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(*5*) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

Employee employed in an instructional capacity. See the definition of *Teacher* in this section.

Employer means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an ''employee benefit plan'' as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (*See* § 825.209(a)).

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The Act defines ''health care provider'' as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Secretary to be capable of providing health care services.

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(iv) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of *Teacher* in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Mental disability: See the definition of *Physical or mental disability* in this section.

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

Regulations at 29 CFR part 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a ''person'' engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress, or allergies may be serious health conditions, but only if all the conditions of § 825.113 are met.

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

Appendix A to Part 825—Index [Reserved]

BILLING CODE 4510–27–P

Appendix B to Part 825 - Certification of Health Care Provider (Form WH-380)

Appendix B

Certification of Health Care Provider
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

DRAFT FOR COMMENT—NOT APPROVED FOR USE

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious health condition to submit a medical certification issued by the health care provider of the eligible employee or of the ill family member. Please complete Section I before giving this form to your employee. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.306-.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies. Employers must retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Employer name and contact:

Employee's job title: _____ Regular work schedule: _____

Essential job functions (if for employee's own serious health condition): _____

_____

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition or that of a qualified member of your family. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

If you are seeking leave to care for a family member, name of family member:

Family Member's Name: _____
First Middle Last

Relationship of family member to you: _____

Describe care you will provide to your family member and estimate leave needed to provide care: _____

_____

If family member is your son or daughter, date of birth: _____

CONTINUED ON NEXT PAGE

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 1 has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime", "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Page 4 provides space for additional information, should you need it.

Provider's Name and Business Address:_____

Type of practice: _____ Medical Specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

_____ _____

Signature of Health Care Provider Date

PART A: MEDICAL FACTS

1(a) Approximate date condition commenced: _____

(b) Probable duration of condition: _____

(c) Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility? ___No ___Yes. If so, dates of admission: _____

(d) Date(s) you treated the patient for condition: _____.

(e) Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

(f) Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? ____No ____Yes. If so, state the nature of such treatments and expected duration of treatment: _____

_____

_____

_____

2. Is the medical condition "pregnancy?" ___No ___Yes.

3. Describe any other relevant medical facts (e.g., symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment) related to the condition for which the employee seeks leave:

_____

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF LEAVE NEEDED

4. Will the employee need to be absent from work for a single continuous period of time due to his/her own medical condition or the need to care for the family member, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of absence: _____.

5. Will the employee need to be absent from work periodically to attend his/her own or the family member's follow-up treatment appointments or because the employee only will be able to work part-time or on a reduced schedule because of the employee's own condition or need to care for the family member? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, including the dates of any scheduled appointments: _____

   _____

   How long will the employee need to be absent for each appointment, including any necessary recovery period: _____ hour(s) _____ day(s)

   Estimate the part-time or reduced work schedule the employee needs, if any: _____ hour(s) per day; _____ days per week from _____ through _____

6. Will the condition cause episodic flare-ups periodically preventing the employee from performing the job duties or the family member from participating in normal daily activities? _____No _____Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups?

   _____ No _____ Yes. If so, explain _____

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (i.e., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours ___ day(s) per episode

PART C: ANSWER ONLY IF PATIENT IS THE EMPLOYEE

7(a) Based upon the brief description of the essential functions in Section I, or job description if attached, indicate whether the employee is unable to perform any of the functions of his/her job during the leave period stated in Part B: _____ No _____ Yes.

7(b) If so, identify the essential functions the employee is unable to perform: _____

_____

CONTINUED ON NEXT PAGE

PART D: ANSWER ONLY IF PATIENT IS THE EMPLOYEE'S FAMILY MEMBER

8(a) If the patient is a family member, indicate whether the employee is needed to participate in the on-going treatment, including the provision of physical or psychological care or assistance with basic personal safety or transportation needs, of the family member? ____No ____Yes

(b) Describe the patient's need for care: _____

_____

_____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

PUBLIC BURDEN STATEMENT

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

Form WH-380 Rev. XX-XXXX

Appendix C to Part 825- Notice to Employees of Rights under FMLA (WH Publication 1420)

Appendix C

EMPLOYEE RIGHTS AND RESPONSIBILITIES

UNDER THE FAMILY AND MEDICAL LEAVE ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons.

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work.

Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Qualifying Reasons for Taking Leave

- For pregnancy, prenatal visits or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either (1) an overnight stay in a hospital, hospice or residential medical care facility, or (2) continuing treatment by a health care provider for a condition that also causes incapacity, meaning that it either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive days combined with medical treatment including at least two visits to a health care provider for treatment within a 30-day period, unless extenuating circumstances exist, or one visit and a regimen of continuing treatment, incapacity due to pregnancy, or incapacity due to a chronic condition. Other medical conditions may also meet the definition of continuing treatment.

Limitations on Leave

An employee does not need to use the annual 12-week leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary.

Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations.

Leave to be with a healthy child or for placement for adoption or foster care must conclude within 12 months of the birth or placement. An employer's consent is required to take such leave intermittently or on a reduced schedule basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. Use of paid leave is governed by the employer's normal paid leave policies.

Employee Obligations

Employees must provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's standard call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the expected start date and duration of the leave.

Employees also may be required to provide:

- a medical certification supporting the need for leave due to a serious health condition;
- second or third medical opinions (at the employer's expense) and periodic recertification;
- periodic reports regarding the employee's status and intent to return to work; and
- a fitness for duty report to return to work.

Employer Obligations

Covered employers must inform employees of their rights and responsibilities under the FMLA through the poster and in either an employee handbook or an annual distribution to employees.

Covered employers also must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide the reason for the ineligibility.

Covered employers must inform employees of any leave designated as FMLA-protected. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

DRAFT FOR COMMENT—NOT APPROVED FOR USE

For Additional Information:
(1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD Publication 1420 (Rev. XX-XXXX)

Appendix D to Part 825 - Eligibility Notice to Employees Under FMLA (Form WH-381)

Appendix D

Eligibility Notice
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181

DRAFT FOR COMMENT—NOT APPROVED FOR USE

Expires: XX/XX/XXX

Instructions and use: Employers must provide employees with notice of their eligibility for FMLA protection. In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides an easy method of providing employees with the written information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. An employee who is eligible for FMLA leave may need to provide additional information in order for the employer to determine whether the FMLA applies to the leave. (See Part B). A separate notice informs employees whether their specific leave request is determined to be FMLA-protected. Employers must retain a copy of this disclosure in their records for three years in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[Part A]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition; or

_____ You are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

You notified us that you need leave beginning on _____ for this reason.

You further notified us that you need:

_____ A single period of leave and your expected return to work date is _____; or

_____ Leave intermittently or on a reduced leave schedule. If your need for leave is due to planned medical treatment, you have indicated that you will need the following leave: _____. If your leave is for flare-ups, the expected frequency (times per week, month, or year) and duration (hours or days per occurrence) is _____.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are **not** eligible for FMLA leave, because:

_____ You have not met the FMLA's 12-month length of service requirement. As of today's date, you have worked ___ months towards this requirement.

- _____ You have not met the FMLA's 1,250 hours worked requirement. As of today's date, you have worked _____ hours in the past 12-month period.
- _____ You do not work and/or report to a site with 50 or more employees within 75-miles.
- _____ You have exhausted your 12-week FMLA leave entitlement in the current 12-month period. Assuming the other eligibility requirements are met, you will once again be eligible for FMLA leave on _____.

If you have any questions, contact _____ or view the FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the current 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (Employers must allow at least 15 calendar days from receipt of this notice. An exception to the timely submission requirement applies when it is not practicable under the particular circumstances for the employee to do so despite the diligent, good faith efforts.) If sufficient information is not provided in a timely manner, the FMLA protections attached to your leave may be denied.

____ Sufficient medical certification to establish that you or your family member has a serious health condition. A medical certification form that sets forth the information necessary from your health care provider to support your request ____**is**/____ **is not** enclosed.

____ Sufficient documentation to establish that the family member is a parent, spouse, or child

____ Other information needed: _____.

____ No additional information requested

CONTINUED ON NEXT PAGE

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

____ You will be required to use your available paid _____ **sick,** _____ **vacation**, and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your 12 weeks of FMLA protection.

____ You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ___ **is** ___ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

____ Due to your status within the company, you are considered a "key employee" under the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ___**have**/____ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period.
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your 12 week FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or 2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have ____ **sick,** ____**vacation**, and/or ___ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Any applicable conditions related to the substitution of paid leave are set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

_____

_____

_____

_____

_____

_____

_____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your 12-week leave entitlement. If you have any questions, please do not hesitate to contact

_____ at _____.

PUBLIC BURDEN STATEMENT

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Form WH-381 Revised XX/XXXX

Appendix E to Part 825- Designation Notice Under FMLA (Form WH-382)

Appendix E

Designation Notice
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181

DRAFT FOR COMMENT—NOT APPROVED FOR USE

Expires: XX/XX/XXX

Instructions and use: Employers must inform employees in writing of whether a Family and Medical Leave Act (FMLA) leave will be designated as counting against the 12-week entitlement and the number of hours, days, or weeks to be counted as FMLA leave. In addition, when an employee provides a medical certification that is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), -.301, and -.305(c), which must be provided within five business days of the employer receiving sufficient information to determine the leave is covered by the FMLA. Employers must retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

To: _____

Date: _____

We have reviewed your request for leave under the Family and Medical Leave Act (FMLA) and any supporting documentation that you have provided.

We received your most recent documents on _____, and decided:

Approved:

_____ To designate your leave as "FMLA leave;" consequently,

► We will charge _____ against your FMLA entitlement, provided there is no deviation from your
Number of hours, days, or weeks
anticipated leave schedule. The FMLA generally provides that an employee may take up to 12 weeks of unpaid job protected leave within a 12-month period. We will notify you of any changes to the time charged.

Or

► We will notify you at least once in every 30-day period during which you take FMLA leave of how much leave you have used. The FMLA provides that you must notify us promptly of a need for FMLA leave and that you must adhere to our internal notification requirements that would not otherwise violate the FMLA.

Or

► Within the past thirty days you have used _____ of your FMLA entitlement.
Number of hours, days, or weeks

Or

► _____ This leave will count against your FMLA entitlement.

And (check if applicable):

_____ We are requiring you to substitute or use paid leave during you FMLA leave.

_____ You have requested to use paid leave during your FMLA leave. The leave will count against your leave entitlement unless we have notified you to the contrary.

Additional information needed to determine that the FMLA definition of a "serious health condition" is met:

_____ The medical certification you have provided is not complete and sufficient to make a designation of whether, or not, the FMLA applies to your leave request. You must provide the following information no later than _____,
Provide at least seven calendar days
unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or we may deny your FMLA leave.

_____
Specify information needed to make the certification complete and sufficient

_____

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

Not approved:

_____ Not to designate your leave as FMLA leave; consequently, the FMLA does not apply to the absences for which you have requested leave.

PUBLIC BURDEN STATEMENT

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division,

U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Form WH-382 XX-XXXX

[FR Doc. E8–2062 Filed 2–8–08; 8:45 am]
BILLING CODE 4510–27–C

Reader Aids

Federal Register

Vol. 73, No. 28

Monday, February 11, 2008

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives.gov/federal__register**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, FEBRUARY

6007–6418 1
6419–6570 4
6571–6832 5
6833–7186 6
7187–7460 7
7461–7656 8
7657–8002 11

CFR PARTS AFFECTED DURING FEBRUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
6867 (See Notice of February 6, 2008) 7459
7757 (See Notice of February 6, 2008) 7459
8220 6831

Executive Orders:
13396 (See Notice of February 5, 2008) 7185
13457 6415
13458 7181

Administrative Orders:
Notices:
Notice of February 6, 2008 7459
Presidential Determinations:
No. 2008-8 of January 22, 2008 6567
No. 2008-9 of January 28, 2008 6571
No. 2008-10 of January 29, 2008 6569

5 CFR

315 7187
550 7188
752 7187
892 7188
1201 6833
1207 6833

Proposed Rules:
300 6857

7 CFR

246 6577
301 6577
319 7189
457 7190
915 6834
932 7199

Proposed Rules:
301 7679
1260 7226

9 CFR

78 6007

Proposed Rules:
201 .....7482, 7686

10 CFR

Proposed Rules:
50 7690

12 CFR

201 7202
630 7461

14 CFR

25 7203
39 .....6008, 6419, 6578, 6582, 6584, 6586, 6590, 6592, 6594, 6596, 6598, 6601, 6838, 7657, 7659, 7661, 7663, 7666
61 7034
71 .....6424, 6425, 7667, 7668
91 7034
97 .....6841, 7461
135 7034

Proposed Rules:
39 .....6618, 6620, 6622, 6627, 6629, 6631, 6634, 6636, 6638, 6640, 7484, 7486, 7488, 7489, 7492, 7494, 7690
71 .....6056, 6057, 6058, 6060, 7228

15 CFR

742 6603
744 6603
748 6603
774 6603

16 CFR

1633 6842

17 CFR

200 7205
202 6011
230 6011
240 6011
260 6011
270 6011

Proposed Rules:
210 7450
228 7450
229 7450
249 7450

18 CFR

40 7368

19 CFR

Proposed Rules:
4 6061
12 6061
18 6061
101 6061
103 6061
113 6061
122 6061
123 6061
141 6061
143 6061
149 6061
192 6061

21 CFR

347 6014
520 6607

522 6017
558 6018
606 7463
607 7463
610 7463
640 7463
1312 6843
Proposed Rules:
133 7692
880 7498

22 CFR

42 7670

24 CFR

Proposed Rules:
5 7170

25 CFR

502 6019
522 6019
559 6019
573 6019

26 CFR

1 7464
Proposed Rules:
1 7503

28 CFR

Proposed Rules:
58 ....6062, 6447

29 CFR

Proposed Rules:
29 7693
825 7876

30 CFR

49 7636
75 7636
100 7206
Proposed Rules:
256 6073

33 CFR

110 6607
165 6610
Proposed Rules:
100 6859
138 6642
165 ....6861, 7229, 7231

36 CFR

1253 6030
Proposed Rules:
1190 6080
1191 6080

38 CFR

36 6294

39 CFR

20 6031
111 ....6032, 6033
3020 6426
Proposed Rules:
3001 6081

40 CFR

52 ....6034, 6427, 7465, 7468
63 7210
70 7468
97 6034
180 ....6851, 7472
300 6613
Proposed Rules:
52 ....6451, 6657, 7234, 7504
70 7504
81 6863
180 6867
300 6659

41 CFR

102-42 7475

42 CFR

Proposed Rules:
400 6451
405 6451
410 6451
412 6451
413 6451
414 6451
488 6451
494 6451

43 CFR

3130 6430

44 CFR

65 7476

45 CFR

261 6772
262 6772
263 6772
265 6772

46 CFR

Proposed Rules:
401 6085

47 CFR

64 ....6041, 6444
73 7671
76 6043
Proposed Rules:
1 ....6879, 6888
73 7694
76 6099

49 CFR

223 6370
238 6370

50 CFR

223 7616
226 7616
229 7674
622 ....7223, 7676
635 7479
679 ....6055, 7224, 7480
Proposed Rules:
17 ....6660, 6684, 7236, 7237
223 6895
226 6895
665 6101

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 FEBRUARY 11, 2008

ENVIRONMENTAL PROTECTION AGENCY

Acquisition Regulation:
- Use of Award Term Incentives; Amendments; published 1-11-08

Air quality implementation plans; approval and promulgation; various States:
- Illinois; published 12-13-07

Hazardous waste program authorizations:
- Rhode Island; published 12-11-07

HOMELAND SECURITY DEPARTMENT

U.S. Customs and Border Protection

Automated Commercial Environment Truck Manifest System:
- Advance electronic truck cargo information; ports of entry—
  - Alaska; published 11-13-07

SOCIAL SECURITY ADMINISTRATION

Methods for Conducting Personal Conferences When Waiver of Recovery Title II or XVI Overpayment Cannot Be Approved; published 1-11-08

STATE DEPARTMENT

Visas: Documentation of immigrants under the Immigration and Nationality Act, as Amended; published 2-11-08

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:
- BAE Systems (Operations) Limited Model BAE 146 and Avro 146-RJ Airplanes; published 1-7-08
- Boeing Model 747 Airplanes; published 1-7-08

Airworthiness directives:
- Rolls-Royce Deutschland Ltd & Co KG Tay 611-8, Tay 611-8C, Tay 620-15, Tay 650-15, and Tay 651-54 Turbofan Engines; published 1-7-08

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Forest Service

Environmental Impact Statement:
- Hiawatha National Forest, MI; Niagara; comments due by 2-17-08; published 1-30-08 [FR E8-01607]

DEFENSE DEPARTMENT

Civilian health and medical program of the uniformed services (CHAMPUS):
- TRICARE program—
  - Overpayment recovery; comments due by 2-19-08; published 12-20-07 [FR E7-24707]

Federal Acquisition Regulation (FAR):
- Travel costs; allowable contractor airfare costs limitation application; comments due by 2-19-08; published 12-20-07 [FR E7-24730]

Freedom of Information Act; implementation; comments due by 2-19-08; published 12-19-07 [FR E7-24359]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Pipeline Posting Requirements under Section 23 of the Natural Gas Act; comments due by 2-21-08; published 1-7-08 [FR E7-25435]

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans; Designation of Areas for Air Quality Planning Purposes:
- Arizona; San Manuel Sulfur Dioxide State Implementation Plan and Request for Redesignation to Attainment; comments due by 2-19-08; published 1-18-08 [FR E8-00804]

Approval and Promulgation of Air Quality Implementation Plans; Designation of Areas for Air Quality Planning Purposes:
- Arizona; San Manuel Sulfur Dioxide State Implementation Plan and Request for Redesignation to Attainment; comments due by 2-19-08; published 1-18-08 [FR E8-00803]

Approval and Promulgation of Air Quality Implementation Plans:
- California; Revisions; comments due by 2-19-08; published 1-17-08 [FR E8-00192]

Approval and Promulgation of Air Quality Implementation Plans:
- California; Revisions; comments due by 2-19-08; published 1-17-08 [FR E8-00161]
- Maryland; Revisions to Stage II Requirements; comments due by 2-19-08; published 1-17-08 [FR E8-00577]
- Nevada; Washoe County 8-Hour Ozone Maintenance Plan; comments due by 2-19-08; published 1-18-08 [FR E8-00746]
- Pennsylvania; Revisions to Stage II Requirements in Allegheny County; comments due by 2-19-08; published 1-17-08 [FR E8-00595]

Environmental Statements; Notice of Intent:
- Coastal Nonpoint Pollution Control Programs; States and Territories—
  - Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]

Final 8-hour Ozone National Ambient Air Quality Standards:
- Designations for Early Action Compact Areas; comments due by 2-21-08; published 2-6-08 [FR E8-02187]

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
- Bifenazate, etc.; comments due by 2-19-08; published 12-19-07 [FR E7-24345]
- Glufosinate-ammonium; comments due by 2-19-08; published 12-21-07 [FR E7-24841]

GENERAL SERVICES ADMINISTRATION

Federal Acquisition Regulation (FAR):
- Travel costs; allowable contractor airfare costs limitation application; comments due by 2-19-08; published 12-20-07 [FR E7-24730]

HEALTH AND HUMAN SERVICES DEPARTMENT

Centers for Medicare & Medicaid Services

Medicaid Program:
- Self-Directed Personnel Assistance Services Program State Plan Option (Cash and Counseling); comments due by 2-19-08; published 1-18-08 [FR 08-00115]

Medicare:
- Revisit User Fee Program; Medicare Survey and certification activities; comments due by 2-19-08; published 12-18-07 [FR 07-06093]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Human drugs:
- Current good manufacturing practices—
  - Finished pharmaceuticals; comments due by 2-19-08; published 12-4-07 [FR E7-23294]
  - Finished pharmaceuticals; comments due by 2-19-08; published 12-4-07 [FR E7-23292]

HEALTH AND HUMAN SERVICES DEPARTMENT

Inspector General Office, Health and Human Services Department

Medicare and State health care programs; fraud and abuse:
- New safe harbors and special fraud alerts; solicitations; comments due by 2-19-08; published 12-19-07 [FR E7-24579]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Migratory bird permits:
- Import and export regulations; revisions; comments due by 2-19-08; published 11-19-07 [FR E7-22182]

INTERIOR DEPARTMENT

Minerals Management Service

Outer Continental Shelf; oil, gas, and sulphur operations:
- Plans, applications, and permits; processing fees; electronic payment; comments due by 2-19-08; published 12-21-07 [FR 07-06173]

Royalty management:
- Deepwater Outer Continental Shelf oil and gas leases; royalty relief;

regulations conformed to court decision; comments due by 2-19-08; published 12-21-07 [FR 07-06161]

INTERIOR DEPARTMENT

Surface Mining Reclamation and Enforcement Office

Kansas Regulatory Program; comments due by 2-22-08; published 1-23-08 [FR E8-01113]

INTERNATIONAL TRADE COMMISSION

Practice and procedure:

General application, adjudication, and enforcement rules; technical corrections, clarification, etc.; comments due by 2-19-08; published 12-20-07 [FR E7-24591]

LABOR DEPARTMENT

Employee Benefits Security Administration

Employee Retirement Income Security Act:

Civil penalties assessment procedures; comments due by 2-19-08; published 12-19-07 [FR E7-24386]

LIBRARY OF CONGRESS

Copyright Office, Library of Congress

Recordation of Notices of Termination of Transfers and Licenses:

Clarifications; comments due by 2-22-08; published 1-23-08 [FR E8-00888]

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation (FAR):

Travel costs; allowable contractor airfare costs limitation application; comments due by 2-19-08; published 12-20-07 [FR E7-24730]

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Organization, functions, and authority delegations:

Presidential library facilities; architectural and design standards; comments due by 2-19-08; published 12-20-07 [FR E7-24746]

PERSONNEL MANAGEMENT OFFICE

Prevailing Rate Systems:

North American Industry Classification System Based Federal Wage System Wage Area; comments due by 2-19-08; published 1-17-08 [FR E8-00657]

POSTAL SERVICE

Implementation of Intelligent Mail Barcodes; comments due by 2-21-08; published 1-7-08 [FR E7-25635]

SECURITIES AND EXCHANGE COMMISSION

Securities:

Oil and gas reserves; disclosure requirements revisions; concept release; comments due by 2-19-08; published 12-18-07 [FR E7-24384]

SOCIAL SECURITY ADMINISTRATION

Supplemental security income:

Aged, blind, and disabled—

Parent-to-child deeming from stepparents; comments due by 2-19-08; published 12-21-07 [FR E7-24787]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:

Airbus Model A310 and A300-600 Series Airplanes; comments due by 2-21-08; published 1-22-08 [FR E8-00977]

Bell Helicopter Textron Canada (BHTC) Models 206A, 206B, 206L, 206L-1, 206L-3, and 206L-4 Helicopters; comments due by 2-22-08; published 1-23-08 [FR E8-01025]

British Aerospace Regional Aircraft Model HP.137 Jetstream Mk.1 et al.; comments due by 2-19-08; published 1-18-08 [FR E8-00824]

Eurocopter Deutschland GMBH Model MBB-BK 117C-2 Helicopters; comments due by 2-22-08; published 1-23-08 [FR E8-01023]

Eurocopter France Model AS 355 N Helicopters; comments due by 2-22-08; published 1-23-08 [FR E8-01027]

General Electric Company CF6-45 and CF6-50 Series Turbofan Engines; comments due by 2-19-08; published 1-2-08 [FR E7-25458]

Pacific Aerospace Limited Model 750XL Airplanes; comments due by 2-19-08; published 1-18-08 [FR E8-00827]

Various Transport Category Airplanes Equipped with Auxiliary Fuel Tanks Installed in Accordance with Certain Supplemental Type Certificates; comments due by 2-19-08; published 1-2-08 [FR E7-25482]

Proposed Airworthiness Design Standards for Acceptance Under the Primary Category Rule:

Cubcrafters, Inc., Model PC18-160; comments due by 2-21-08; published 1-22-08 [FR E8-00852]

Special Conditions:

Embraer S.A., Model EMB-500; High Fuel Temperature; comments due by 2-22-08; published 1-23-08 [FR E8-01075]

Embraer S.A.; Model EMB-500; Brakes-Designation of Applicable Regulations; comments due by 2-22-08; published 1-23-08 [FR E8-01077]

Embraer S.A.; Model EMB-500; Static Pressure System; comments due by 2-22-08; published 1-23-08 [FR E8-01076]

TRANSPORTATION DEPARTMENT

National Highway Traffic Safety Administration

Motor vehicle safety standards:

Platform lifts and platform lift installations; comments due by 2-19-08; published 12-20-07 [FR 07-06146]

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.

S. 2110/P.L. 110–184

To designate the facility of the United States Postal Service located at 427 North Street in Taft, California, as the "Larry S. Pierce Post Office". (Feb. 6, 2008; 122 Stat. 612)

Last List February 7, 2008

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.

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.

A checklist of current CFR volumes comprising a complete CFR set, also appears in the latest issue of the LSA (List of CFR Sections Affected), which is revised monthly.

The CFR is available free on-line through the Government Printing Office's GPO Access Service at http://www.gpoaccess.gov/cfr/index.html. For information about GPO Access call the GPO User Support Team at 1-888-293-6498 (toll free) or 202-512-1530.

The annual rate for subscription to all revised paper volumes is $1499.00 domestic, $599.60 additional for foreign mailing.

Mail orders to the Superintendent of Documents, Attn: New Orders, P.O. Box 371954, Pittsburgh, PA 15250–7954. All orders must be accompanied by remittance (check, money order, GPO Deposit Account, VISA, Master Card, or Discover). Charge orders may be telephoned to the GPO Order Desk, Monday through Friday, at **(202) 512–1800** from 8:00 a.m. to 4:00 p.m. eastern time, or FAX your charge orders to **(202) 512-2250**.

Title	Stock Number	Price	Revision Date
1	(869–062–00001–4)	5.00	[4] Jan. 1, 2007
2	(869–062–00002–2)	5.00	Jan. 1, 2007
3 (2006 Compilation and Parts 100 and 102)	(869–062–00003–1)	35.00	[1] Jan. 1, 2007
4	(869–062–00004–9)	10.00	[5] Jan. 1, 2007
5 Parts:			
1–699	(869–062–00005–7)	60.00	Jan. 1, 2007
700–1199	(869–062–00006–5)	50.00	Jan. 1, 2007
1200–End	(869–062–00007–3)	61.00	Jan. 1, 2007
6	(869–062–00008–1)	10.50	Jan. 1, 2007
7 Parts:			
1–26	(869–062–00009–0)	44.00	Jan. 1, 2007
27–52	(869–062–00010–3)	49.00	Jan. 1, 2007
53–209	(869–062–00011–1)	37.00	Jan. 1, 2007
210–299	(869–062–00012–0)	62.00	Jan. 1, 2007
300–399	(869–062–00013–8)	46.00	Jan. 1, 2007
400–699	(869–062–00014–6)	42.00	Jan. 1, 2007
700–899	(869–062–00015–4)	43.00	Jan. 1, 2007
900–999	(869–062–00016–2)	60.00	Jan. 1, 2007
1000–1199	(869–062–00017–1)	22.00	Jan. 1, 2007
1200–1599	(869–062–00018–9)	61.00	Jan. 1, 2007
1600–1899	(869–062–00019–7)	64.00	Jan. 1, 2007
1900–1939	(869–062–00020–1)	31.00	Jan. 1, 2007
1940–1949	(869–062–00021–9)	50.00	[5] Jan. 1, 2007
1950–1999	(869–062–00022–7)	46.00	Jan. 1, 2007
2000–End	(869–062–00023–5)	50.00	Jan. 1, 2007
8	(869–062–00024–3)	63.00	Jan. 1, 2007
9 Parts:			
1–199	(869–062–00025–1)	61.00	Jan. 1, 2007
200–End	(869–062–00026–0)	58.00	Jan. 1, 2007
10 Parts:			
1–50	(869–062–00027–8)	61.00	Jan. 1, 2007
51–199	(869–062–00028–6)	58.00	Jan. 1, 2007
200–499	(869–062–00029–4)	46.00	Jan. 1, 2007
500–End	(869–066–00030–8)	62.00	Jan. 1, 2007
11	(869–062–00031–6)	41.00	Jan. 1, 2007
12 Parts:			
1–199	(869–062–00032–4)	34.00	Jan. 1, 2007
200–219	(869–062–00033–2)	37.00	Jan. 1, 2007
220–299	(869–062–00034–1)	61.00	Jan. 1, 2007
300–499	(869–062–00035–9)	47.00	Jan. 1, 2007
500–599	(869–062–00036–7)	39.00	Jan. 1, 2007
600–899	(869–062–00037–5)	56.00	Jan. 1, 2007
900–End	(869–062–00038–3)	50.00	Jan. 1, 2007
13	(869–062–00039–1)	55.00	Jan. 1, 2007
14 Parts:			
1–59	(869–062–00040–5)	63.00	Jan. 1, 2007
60–139	(869–062–00041–3)	61.00	Jan. 1, 2007
140–199	(869–062–00042–1)	30.00	Jan. 1, 2007
200–1199	(869–062–00043–0)	50.00	Jan. 1, 2007
1200–End	(869–062–00044–8)	45.00	Jan. 1, 2007
15 Parts:			
0–299	(869–062–00045–6)	40.00	Jan. 1, 2007
300–799	(869–062–00046–4)	60.00	Jan. 1, 2007
800–End	(869–062–00047–2)	42.00	Jan. 1, 2007
16 Parts:			
0–999	(869–062–00048–1)	50.00	Jan. 1, 2007
1000–End	(869–062–00049–9)	60.00	Jan. 1, 2007
17 Parts:			
1–199	(869–062–00051–1)	50.00	Apr. 1, 2007
200–239	(869–062–00052–9)	60.00	Apr. 1, 2007
240–End	(869–062–00053–7)	62.00	Apr. 1, 2007
18 Parts:			
1–399	(869–062–00054–5)	62.00	Apr. 1, 2007
400–End	(869–062–00055–3)	26.00	Apr. 1, 2007
19 Parts:			
1–140	(869–062–00056–1)	61.00	Apr. 1, 2007
141–199	(869–062–00057–0)	58.00	Apr. 1, 2007
200–End	(869–062–00058–8)	31.00	Apr. 1, 2007
20 Parts:			
1–399	(869–062–00059–6)	50.00	Apr. 1, 2007
400–499	(869–062–00060–0)	64.00	Apr. 1, 2007
500–End	(869–062–00061–8)	63.00	Apr. 1, 2007
21 Parts:			
1–99	(869–062–00062–6)	40.00	Apr. 1, 2007
100–169	(869–062–00063–4)	49.00	Apr. 1, 2007
170–199	(869–062–00064–2)	50.00	Apr. 1, 2007
200–299	(869–062–00065–1)	17.00	Apr. 1, 2007
300–499	(869–062–00066–9)	30.00	Apr. 1, 2007
500–599	(869–062–00067–7)	47.00	Apr. 1, 2007
600–799	(869–062–00068–5)	17.00	Apr. 1, 2007
800–1299	(869–062–00069–3)	60.00	Apr. 1, 2007
1300–End	(869–062–00070–7)	25.00	Apr. 1, 2007
22 Parts:			
1–299	(869–062–00071–5)	63.00	Apr. 1, 2007
300–End	(869–062–00072–3)	45.00	Apr. 1, 2007
23	(869–062–00073–7)	45.00	Apr. 1, 2007
24 Parts:			
0–199	(869–062–00074–0)	60.00	Apr. 1, 2007
200–499	(869–062–00075–8)	50.00	Apr. 1, 2007
500–699	(869–062–00076–6)	30.00	Apr. 1, 2007
700–1699	(869–062–00077–4)	61.00	Apr. 1, 2007
1700–End	(869–062–00078–2)	30.00	Apr. 1, 2007
25	(869–062–00079–1)	64.00	Apr. 1, 2007
26 Parts:			
§§ 1.0–1–1.60	(869–062–00080–4)	49.00	Apr. 1, 2007
§§ 1.61–1.169	(869–062–00081–2)	63.00	Apr. 1, 2007
§§ 1.170–1.300	(869–062–00082–1)	60.00	Apr. 1, 2007
§§ 1.301–1.400	(869–062–00083–9)	47.00	Apr. 1, 2007
§§ 1.401–1.440	(869–062–00084–7)	56.00	Apr. 1, 2007
§§ 1.441–1.500	(869–062–00085–5)	58.00	Apr. 1, 2007
§§ 1.501–1.640	(869–062–00086–3)	49.00	Apr. 1, 2007
§§ 1.641–1.850	(869–062–00087–1)	61.00	Apr. 1, 2007
§§ 1.851–1.907	(869–062–00088–0)	61.00	Apr. 1, 2007
§§ 1.908–1.1000	(869–062–00089–8)	60.00	Apr. 1, 2007
§§ 1.1001–1.1400	(869–062–00090–1)	61.00	Apr. 1, 2007
§§ 1.1401–1.1550	(869–062–00091–0)	58.00	Apr. 1, 2007
§§ 1.1551–End	(869–062–00092–8)	50.00	Apr. 1, 2007
2–29	(869–062–00093–6)	60.00	Apr. 1, 2007
30–39	(869–062–00094–4)	41.00	Apr. 1, 2007
40–49	(869–062–00095–2)	28.00	[7] Apr. 1, 2007
50–299	(869–062–00096–1)	42.00	Apr. 1, 2007

Title	Stock Number	Price	Revision Date
300–499	(869–062–00097–9)	61.00	Apr. 1, 2007
500–599	(869–062–00098–7)	12.00	[6] Apr. 1, 2007
600–End	(869–062–00099–5)	17.00	Apr. 1, 2007
27 Parts:			
1–39	(869–062–00100–2)	64.00	Apr. 1, 2007
40–399	(869–062–00101–1)	64.00	Apr. 1, 2007
400–End	(869–062–00102–9)	18.00	Apr. 1, 2007
28 Parts:			
0–42	(869–062–00103–7)	61.00	July 1, 2007
43–End	(869–062–00104–5)	60.00	July 1, 2007
29 Parts:			
0–99	(869–062–00105–3)	50.00	[9] July 1, 2007
100–499	(869–062–00106–1)	23.00	July 1, 2007
500–899	(869–062–00107–0)	61.00	[9] July 1, 2007
900–1899	(869–062–00108–8)	36.00	July 1, 2007
1900–1910 (§§ 1900 to 1910.999)	(869–062–00109–6)	61.00	July 1, 2007
1910 (§§ 1910.1000 to end)	(869–062–00110–0)	46.00	July 1, 2007
1911–1925	(869–062–00111–8)	30.00	July 1, 2007
1926	(869–062–00112–6)	50.00	July 1, 2007
1927–End	(869–062–00113–4)	62.00	July 1, 2007
30 Parts:			
1–199	(869–062–00114–2)	57.00	July 1, 2007
200–699	(869–062–00115–1)	50.00	July 1, 2007
700–End	(869–062–00116–9)	58.00	July 1, 2007
31 Parts:			
0–199	(869–062–00117–7)	41.00	July 1, 2007
200–499	(869–062–00118–5)	46.00	July 1, 2007
500–End	(869–062–00119–3)	62.00	July 1, 2007
32 Parts:			
1–39, Vol. I		15.00	[2] July 1, 1984
1–39, Vol. II		19.00	[2] July 1, 1984
1–39, Vol. III		18.00	[2] July 1, 1984
1–190	(869–062–00120–7)	61.00	July 1, 2007
191–399	(869–062–00121–5)	63.00	July 1, 2007
400–629	(869–062–00122–3)	61.00	July 1, 2007
630–699	(869–062–00123–1)	37.00	July 1, 2007
700–799	(869–062–00124–0)	46.00	July 1, 2007
800–End	(869–062–00125–8)	47.00	July 1, 2007
33 Parts:			
1–124	(869–062–00126–6)	57.00	July 1, 2007
125–199	(869–062–00127–4)	61.00	July 1, 2007
200–End	(869–062–00128–2)	57.00	July 1, 2007
34 Parts:			
1–299	(869–062–00129–1)	50.00	July 1, 2007
300–399	(869–062–00130–4)	40.00	July 1, 2007
400–End & 35	(869–062–00131–2)	61.00	[8] July 1, 2007
36 Parts:			
1–199	(869–062–00132–1)	37.00	July 1, 2007
200–299	(869–062–00133–9)	37.00	July 1, 2007
300–End	(869–062–00134–7)	61.00	July 1, 2007
37	(869–062–00135–5)	58.00	July 1, 2007
38 Parts:			
0–17	(869–062–00136–3)	60.00	July 1, 2007
18–End	(869–062–00137–1)	62.00	July 1, 2007
39	(869–062–00138–0)	42.00	July 1, 2007
40 Parts:			
1–49	(869–062–00139–8)	60.00	July 1, 2007
50–51	(869–062–00140–1)	45.00	July 1, 2007
52 (52.01–52.1018)	(869–062–00141–0)	60.00	July 1, 2007
52 (52.1019–End)	(869–062–00142–8)	64.00	July 1, 2007
53–59	(869–062–00143–6)	31.00	July 1, 2007
60 (60.1–End)	(869–062–00144–4)	58.00	July 1, 2007
60 (Apps)	(869–062–00145–2)	57.00	July 1, 2007
61–62	(869–062–00146–1)	45.00	July 1, 2007
63 (63.1–63.599)	(869–062–00147–9)	58.00	July 1, 2007
63 (63.600–63.1199)	(869–062–00148–7)	50.00	July 1, 2007
63 (63.1200–63.1439)	(869–062–00149–5)	50.00	July 1, 2007
63 (63.1440–63.6175)	(869–062–00150–9)	32.00	July 1, 2007
63 (63.6580–63.8830)	(869–062–00151–7)	32.00	July 1, 2007
63 (63.8980–End)	(869–062–00152–5)	35.00	July 1, 2007
64–71	(869–062–00153–3)	29.00	July 1, 2007
72–80	(869–062–00154–1)	62.00	July 1, 2007
81–84	(869–062–00155–0)	50.00	July 1, 2007
85–86 (85–86.599–99)	(869–062–00156–8)	61.00	July 1, 2007
86 (86.600–1–End)	(869–062–00157–6)	61.00	July 1, 2007
87–99	(869–062–00158–4)	60.00	July 1, 2007
100–135	(869–062–00159–2)	45.00	July 1, 2007
136–149	(869–062–00160–6)	61.00	July 1, 2007
150–189	(869–062–00161–4)	50.00	July 1, 2007
190–259	(869–062–00162–2)	39.00	[9] July 1, 2007
260–265	(869–062–00163–1)	50.00	July 1, 2007
266–299	(869–062–00164–9)	50.00	July 1, 2007
300–399	(869–062–00165–7)	42.00	July 1, 2007
400–424	(869–062–00166–5)	56.00	[9] July 1, 2007
425–699	(869–062–00167–3)	61.00	July 1, 2007
700–789	(869–062–00168–1)	61.00	July 1, 2007
790–End	(869–062–00169–0)	61.00	July 1, 2007
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	(869–062–00170–3)	24.00	July 1, 2007
101	(869–062–00171–1)	21.00	July 1, 2007
102–200	(869–062–00172–0)	56.00	July 1, 2007
201–End	(869–062–00173–8)	24.00	July 1, 2007
42 Parts:			
1–399	(869–062–00174–6)	61.00	Oct. 1, 2007
400–413	(869–062–00175–4)	32.00	Oct. 1, 2007
414–429	(869–062–00176–2)	32.00	Oct. 1, 2007
430–End	(869–060–00176–0)	64.00	Oct. 1, 2006
43 Parts:			
1–999	(869–060–00177–8)	56.00	Oct. 1, 2006
1000–end	(869–062–00179–7)	62.00	Oct. 1, 2007
44	(869–060–00179–4)	50.00	Oct. 1, 2006
45 Parts:			
1–199	(869–062–00181–9)	60.00	Oct. 1, 2007
200–499	(869–060–00181–6)	34.00	Oct. 1, 2006
500–1199	(869–062–00183–5)	56.00	Oct. 1, 2007
1200–End	(869–062–00184–3)	61.00	Oct. 1, 2007
46 Parts:			
1–40	(869–062–00185–1)	46.00	Oct. 1, 2007
41–69	(869–062–00186–0)	39.00	Oct. 1, 2007
70–89	(869–060–00186–7)	14.00	Oct. 1, 2006
90–139	(869–062–00188–6)	44.00	Oct. 1, 2007
140–155	(869–062–00189–4)	25.00	Oct. 1, 2007
156–165	(869–062–00190–8)	34.00	Oct. 1, 2007
166–199	(869–060–00190–5)	46.00	Oct. 1, 2006
200–499	(869–062–00192–4)	40.00	Oct. 1, 2007
500–End	(869–062–00193–2)	25.00	Oct. 1, 2007
47 Parts:			
0–19	(869–062–00194–1)	61.00	Oct. 1, 2007
20–39	(869–060–00194–8)	46.00	Oct. 1, 2006
40–69	(869–062–00196–7)	40.00	Oct. 1, 2007
70–79	(869–060–00196–4)	61.00	Oct. 1, 2006
80–End	(869–062–00198–3)	61.00	Oct. 1, 2007
48 Chapters:			
1 (Parts 1–51)	(869–062–00199–1)	63.00	Oct. 1, 2007
1 (Parts 52–99)	(869–062–00200–9)	49.00	Oct. 1, 2007
2 (Parts 201–299)	(869–062–00201–7)	50.00	Oct. 1, 2007
3–6	(869–062–00202–5)	34.00	Oct. 1, 2007

Title	Stock Number	Price	Revision Date
7–14	(869–062–00203–3)	56.00	Oct. 1, 2007
15–28	(869–062–00204–1)	47.00	Oct. 1, 2007
29–End	(869–060–00204–9)	47.00	Oct. 1, 2006
49 Parts:			
*1–99	(869–062–00206–8)	60.00	Oct. 1, 2007
100–185	(869–062–00207–6)	63.00	Oct. 1, 2007
186–199	(869–062–00208–4)	23.00	Oct. 1, 2007
200–299	(869–062–00208–1)	32.00	Oct. 1, 2007
300–399	(869–062–00210–6)	32.00	Oct. 1, 2007
400–599	(869–062–00210–3)	64.00	Oct. 1, 2007
600–999	(869–062–00212–2)	19.00	Oct. 1, 2007
1000–1199	(869–062–00213–1)	28.00	Oct. 1, 2007
1200–End	(869–062–00214–9)	34.00	Oct. 1, 2007
50 Parts:			
1–16	(869–060–00214–6)	11.00	[10] Oct. 1, 2006
17.1–17.95(b)	(869–060–00215–4)	32.00	Oct. 1, 2006
17.95(c)–end	(869–062–00217–3)	32.00	Oct. 1, 2007
17.96–17.99(h)	(869–062–00218–1)	61.00	Oct. 1, 2007
17.99(i)–end and 17.100–end	(869–060–00218–9)	47.00	[10] Oct. 1, 2006
*18–199	(869–062–00226–3)	50.00	Oct. 1, 2007
200–599	(869–062–00221–1)	45.00	Oct. 1, 2007
*600–659	(869–062–00222–0)	31.00	Oct. 1, 2007
660–End	(869–062–00223–8)	31.00	Oct. 1, 2007
CFR Index and Findings Aids	(869–062–00050–2)	62.00	Jan. 1, 2007
Complete 2007 CFR set		1,389.00	2007
Microfiche CFR Edition:			
Subscription (mailed as issued)		332.00	2007
Individual copies		4.00	2007
Complete set (one-time mailing)		332.00	2006
Complete set (one-time mailing)		325.00	2005

[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 January 1, 2006, through January 1, 2007. The CFR volume issued as of January 6, 2006 should be retained.

[6] 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.

[7] No amendments to this volume were promulgated during the period April 1, 2006 through April 1, 2007. The CFR volume issued as of April 1, 2006 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 July 1, 2006, through July 1, 2007. The CFR volume issued as of July 1, 2006 should be retained.

[10] 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.