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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, May 20, 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

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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.

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Presidential Documents

Title 3—

The President

Proclamation 8251 of May 2, 2008

National Charter Schools Week, 2008

By the President of the United States of America

A Proclamation

Education is the cornerstone of a hopeful tomorrow. During National Charter Schools Week, we highlight the contributions of charter schools to ensuring that our Nation's future leaders have the skills and knowledge necessary for a lifetime of achievement.

Charter schools are educational alternatives that empower families with additional choices for their children. By providing flexibility to educators while insisting on results, charter schools are helping foster a culture of educational innovation, accountability, and excellence. Charter schools also encourage parental involvement and help contribute to the national effort to close the achievement gap.

The No Child Left Behind Act has played a central role in America's efforts to improve our public schools and expand the opportunities available to our children. In 2007, American students reached record achievement levels on reading and math tests, and the achievement gap is beginning to close. Charter schools have been an important part of this success. National Charter Schools Week is an opportunity to recognize the strength, vitality, and excellence of outstanding schools.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim May 4 through May 10, 2008, as National Charter Schools Week. I applaud our Nation's charter schools and all those who make them a success, and I call on parents of charter school students to share their success stories and help Americans understand more about the important work of charter schools.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of May, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-second.

[FR Doc. 08–1236
Filed 5–6–08; 8:45 am]
Billing code 3195–01–P

Rules and Regulations

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

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.

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

7 CFR Part 319

Foreign Quarantine Notices

CFR Correction

In title 7 of the Code of Federal Regulations, parts 300 to 399, revised as of January 1, 2008, on page 401, in § 319.56–13, in the table in paragraph (a), under Thailand, the entries for Litchi and Longan are removed.

[FR Doc. E8–9962 Filed 5–6–08; 8:45 am]
BILLING CODE 1505–01–D

FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A]

Extensions of Credit by Federal Reserve Banks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has adopted final amendments to its Regulation A to reflect the Board's approval of a decrease in the primary credit rate at each Federal Reserve Bank. The secondary credit rate at each Reserve Bank automatically decreased by formula as a result of the Board's primary credit rate action.

DATES: The amendments to part 201 (Regulation A) are effective May 7, 2008. The rate changes for primary and secondary credit were effective on the dates specified in 12 CFR 201.51, as amended.

FOR FURTHER INFORMATION CONTACT: Jennifer J. Johnson, Secretary of the Board (202/452–3259); for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263–4869.

SUPPLEMENTARY INFORMATION: The Federal Reserve Banks make primary and secondary credit available to depository institutions as a backup source of funding on a short-term basis, usually overnight. The primary and secondary credit rates are the interest rates that the twelve Federal Reserve Banks charge for extensions of credit under these programs. In accordance with the Federal Reserve Act, the primary and secondary credit rates are established by the boards of directors of the Federal Reserve Banks, subject to the review and determination of the Board.

The Board approved requests by the Reserve Banks to decrease by 25 basis points the primary credit rate in effect at each of the twelve Federal Reserve Banks, thereby decreasing from 2.50 percent to 2.25 percent the rate that each Reserve Bank charges for extensions of primary credit. As a result of the Board's action on the primary credit rate, the rate that each Reserve Bank charges for extensions of secondary credit automatically decreased from 3.00 percent to 2.75 percent under the secondary credit rate formula. The final amendments to Regulation A reflect these rate changes.

The 25-basis-point decrease in the primary credit rate was associated with a similar decrease in the target for the federal funds rate (from 2.25 percent to 2.00 percent) approved by the Federal Open Market Committee (Committee) and announced at the same time. A press release announcing these actions indicated that:

> Recent information indicates that economic activity remains weak. Household and business spending has been subdued and labor markets have softened further. Financial markets remain under considerable stress, and tight credit conditions and the deepening housing contraction are likely to weigh on economic growth over the next few quarters.
>
> Although readings on core inflation have improved somewhat, energy and other commodity prices have increased, and some indicators of inflation expectations have risen in recent months. The Committee expects inflation to moderate in coming quarters, reflecting a projected leveling-out of energy and other commodity prices and an easing of pressures on resource utilization. Still, uncertainty about the inflation outlook remains high. It will be necessary to continue to monitor inflation developments carefully.
>
> The substantial easing of monetary policy to date, combined with ongoing measures to foster market liquidity, should help to promote moderate growth over time and to mitigate risks to economic activity. The Committee will continue to monitor economic and financial developments and will act as needed to promote sustainable economic growth and price stability.

Regulatory Flexibility Act Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the new primary and secondary credit rates will not have a significantly adverse economic impact on a substantial number of small entities because the final rule does not impose any additional requirements on entities affected by the regulation.

Administrative Procedure Act

The Board did not follow the provisions of 5 U.S.C. 553(b) relating to notice and public participation in connection with the adoption of these amendments because the Board for good cause determined that delaying implementation of the new primary and secondary credit rates in order to allow notice and public comment would be unnecessary and contrary to the public interest in fostering price stability and sustainable economic growth. For these same reasons, the Board also has not provided 30 days prior notice of the effective date of the rule under section 553(d).

List of Subjects in 12 CFR Part 201

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

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR Chapter II to read as follows:

PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

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

Authority: 12 U.S.C. 248(i)–(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461.

■ 2. In § 201.51, paragraphs (a) and (b) are revised to read as follows:

§ 201.51 Interest rates applicable to credit extended by a Federal Reserve Bank.[1]

(a) *Primary credit.* The interest rates for primary credit provided to depository institutions under § 201.4(a) are:

Federal Reserve Bank	Rate	Effective
Boston	2.25	May 1, 2008.
New York	2.25	April 30, 2008.
Philadelphia	2.25	May 1, 2008.
Cleveland	2.25	April 30, 2008.
Richmond	2.25	May 1, 2008.
Atlanta	2.25	April 30, 2008.
Chicago	2.25	April 30, 2008.
St. Louis	2.25	May 1, 2008.
Minneapolis	2.25	May 1, 2008.
Kansas City	2.25	April 30, 2008.
Dallas	2.25	May 1, 2008.
San Francisco	2.25	April 30, 2008.

(b) *Secondary credit.* The interest rates for secondary credit provided to depository institutions under § 201.4(b) are:

Federal Reserve Bank	Rate	Effective
Boston	2.75	May 1, 2008.
New York	2.75	April 30, 2008.
Philadelphia	2.75	May 1, 2008.
Cleveland	2.75	April 30, 2008.
Richmond	2.75	May 1, 2008.
Atlanta	2.75	April 30, 2008.
Chicago	2.75	April 30, 2008.
St. Louis	2.75	May 1, 2008.
Minneapolis	2.75	May 1, 2008.
Kansas City	2.75	April 30, 2008.
Dallas	2.75	May 1, 2008.
San Francisco	2.75	April 30, 2008.

* * * * *

By order of the Board of Governors of the Federal Reserve System, May 1, 2008.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E8–10021 Filed 5–6–08; 8:45 am]

BILLING CODE 6210–01–P

[1] The primary, secondary, and seasonal credit rates described in this section apply to both advances and discounts made under the primary, secondary, and seasonal credit programs, respectively.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0059; Airspace Docket No. 08–ANE–90]

Establishment of Class E Airspace; Fort Kent, ME

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, confirmation of effective date.

SUMMARY: This action confirms the effective date of a direct final rule published in the **Federal Register** (73 FR 9451) that establishes Class E Airspace at Fort Kent, ME to support a new Area Navigation (RNAV) Global Positioning System (GPS) Special Instrument Approach Procedure (IAP) that has been developed for medical flight operations into the Northern Maine Medical Center.

DATES: Effective 0901 UTC, June 5, 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.

FOR FURTHER INFORMATION CONTACT: Melinda Giddens, System Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5610.

SUPPLEMENTARY INFORMATION:

Confirmation of Effective Date

The FAA published this direct final rule with a request for comments in the **Federal Register** on February 21, 2008 (73 FR 9451), Docket No. FAA–2008–0059; Airspace Docket No. 08–ANE–90. The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on June 5, 2008. No adverse comments were received, and thus this notice confirms that effective date.

Issued in College Park, Georgia, on April 18, 2008.

John D. Haley,

Acting Manager, System Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E8–9831 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

Crewmember and Dispatcher Training Programs

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment.

SUMMARY: The FAA is issuing this technical amendment to reserve subparts BB and CC in 14 CFR part 121. The FAA is engaged in rulemaking and anticipates codifying the new regulations in part 121 subparts BB and CC.

DATES: This rule is effective on May 7, 2008.

FOR FURTHER INFORMATION CONTACT: Cindy Nordlie, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9677.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA is engaged in rulemaking to revise regulations for crewmember and dispatcher training programs in domestic, flag, and supplemental operations. The FAA anticipates codifying the revised training regulations for crewmembers in subpart BB of part 121 and regulations for dispatchers in subpart CC of part 121. The FAA is issuing this technical amendment to reserve subparts BB and CC in 14 CFR part 121 to ensure that these subparts will be available for this future rulemaking.

List of Subjects 14 CFR Part 121

Air carriers, Aircraft, Aviation safety, Reporting and recordkeeping requirements, Safety, Transportation.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends part 121 of Title 14, Code of Federal Regulations, as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

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

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 46105.

Subpart BB—[Reserved]

■ 2. Add and reserve subpart BB, consisting of §§ 121.1200 through 121.1399.

Subpart CC—[Reserved]

■ 3. Add and reserve subpart CC, consisting of §§ 121.1400 through 121.1499.

Issued in Washington, DC on May 1, 2008.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. E8–10205 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 401 and 402

[Docket No. SSA–2007–0067]

RIN 0960–AG14

Privacy and Disclosure of Official Records and Information

AGENCY: Social Security Administration (SSA).

ACTION: Final rule.

SUMMARY: We are issuing this final rule to adopt without change the final rules with request for comment published on December 10, 2007, at 72 FR 69616. This final rule amends the regulation at 20 CFR Part 401, Appendix A, which requires us to release an employee's location of duty station upon request. This final rule also revises the regulation at 20 CFR 402.45 that describes the availability of records.

DATES: *Effective Date:* This rule is effective May 7, 2008.

FOR FURTHER INFORMATION CONTACT: Edie McCracken, Social Insurance Specialist, Office of Public Disclosure, 3–A–6 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–6117. For information on eligibility or filing for benefits, call our national toll-free numbers, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet Web site, Social Security Online, at *http://www.socialsecurity.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html*.

Background

We are implementing a nationwide program to enhance the safety and security of our employees who are victims, or potential victims, of domestic violence. In order to safeguard their anonymity we will not disclose their work location and/or phone number to individuals who pose a threat to their personal safety. This final rule will strengthen our privacy and disclosure rules to better safeguard at-risk employees by amending 20 CFR Part 401, Appendix A (c)(4) to remove the sentence, ''Location of duty station, including room number and telephone number.'' We are also revising 20 CFR 402.45 to add a new paragraph (e) describing the rules governing the release of personally identifiable information. The changes in our rule will allow us to implement the Identity Protection Program (IPP). The IPP enhances the safety and security of our employees who reasonably believe that they are at risk of injury or other harm if certain employment information about them is disclosed. As it is a national program, the IPP ensures uniform application of the policy for at-risk employees.

Public Comments

The final rule with request for public comments that was published on December 10, 2007, and effective January 9, 2008, provided the public with a 60-day comment period. We received no comments.

Regulatory Procedures

Executive Order 12866, as Amended

We have consulted with the Office of Management and Budget (OMB) and determined that this final rule does not meet the criteria for a significant regulatory action under Executive Order (E.O.) 12866, as amended. Thus, it is not subject to OMB review.

Regulatory Flexibility Act

We certify that this final rule does not have a significant economic impact on a substantial number of small entities because it affects individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

This final rule imposes no reporting or record keeping requirements subject to OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects 20 CFR Parts 401 and 402

Administrative practice and procedure, Freedom of information, Privacy.

Dated: April 30, 2008.

Michael J. Astrue,

Commissioner of Social Security.

■ Accordingly, the final rule with request for comments, amending parts 401 and 402 of chapter III of title 20 of the Code of Federal Regulations that was published at 72 FR 69616 on December 10, 2007, is adopted as a final rule without change.

[FR Doc. E8–9998 Filed 5–6–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 529

Certain Other Dosage Form New Animal Drugs; Sevoflurane

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an abbreviated new animal drug application (ANADA) filed by Minrad, Inc. The ANADA provides for the use of sevoflurane inhalant anesthetic in dogs.

DATES: This rule is effective May 7, 2008.

FOR FURTHER INFORMATION CONTACT: John K. Harshman, Center for Veterinary Medicine (HFV–104), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8197, e-mail: *john.harshman@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Minrad, Inc., 836 Main St., 2nd floor, Buffalo, NY 14202, filed ANADA 200–438 that provides for use of PETREM (sevoflurane) inhalant anesthetic in dogs. Minrad, Inc.'s PETREM is approved as a generic copy of SEVOFLO, sponsored by Abbott Laboratories, under NADA 141–103. The ANADA is approved as of April 3, 2008, and the regulations are amended in § 529.2150 to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application

may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

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

List of Subjects in 21 CFR Part 529

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 529 is amended as follows:

PART 529—CERTAIN OTHER DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 529 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. In § 529.2150, revise paragraphs (a) and (b) to read as follows:

§ 529.2150 Sevoflurane.

(a) *Specifications.* Sevoflurane liquid.

(b) *Sponsors.* See Nos. 000074 and 060307 in § 510.600(c) of this chapter.

* * * * *

Dated: April 28, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–10153 Filed 5–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2008–0313]

National Maritime Week Tugboat Races

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the National Maritime Week Tugboat Races Special Local Regulations in Elliott Bay from 12 p.m. through 4:30 p.m. on May 10, 2008. This action is necessary to ensure the safety of participants and spectators during the National Maritime Week Tugboat Races. During the enforcement period, entry into, transit through, mooring, or anchoring within the regulated area is prohibited unless authorized by the Captain of the Port, Puget Sound or his designated representatives.

DATES: The regulations in 33 CFR Part 100.1306 will be enforced from 12 p.m. through 4:30 p.m. on May 10, 2008.

FOR FURTHER INFORMATION CONTACT: Lieutenant James M. Dupureur, c/o Captain of the Port Puget Sound, Coast Guard Sector Seattle, 1519 Alaskan Way South, Seattle, WA 98134 at (206) 217–6045.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations for the annual National Maritime Week Tugboat Races in 33 CFR Part 100.1306 on May 10, 2008, from 12 p.m. to 4:30 p.m.

Under the provisions of 33 CFR 100.1306, entry into, transit through, mooring, or anchoring within the regulated area is prohibited unless authorized by the Captain of the Port, Puget Sound or his designated representatives. Spectator vessels may safely transit outside the regulated area but may not anchor, block, loiter in, or impede the transit of race participants or official patrol vessels. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 100.1306(c) and 5 U.S.C. 552(a).

Dated: April 23, 2008.

Stephen P. Metruck,

Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.

[FR Doc. E8–10240 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–15–P

POSTAL SERVICE

39 CFR Part 111

General Information on Postal Service

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service announces the issuance of Issue 300, dated January 8, 2006; Issue 300, dated March 15, 2007; and Issue 300, dated May 14, 2007, of the Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM), and their incorporation by reference in the Code of Federal Regulations.

DATES: *Effective Date:* This final rule is effective on May 7, 2008. The incorporation by reference of Issue 300, dated January 8, 2006, of the DMM and Issue 300 dated July 15, 2007, of the DMM is approved by the Director of the Federal Register as of May 7, 2008.

FOR FURTHER INFORMATION CONTACT: Sharon Daniel, (202) 268–7304.

SUPPLEMENTARY INFORMATION: The most recent Issue 300 of the Domestic Mail Manual was issued on July 15, 2007. It replaced the previous Issue 300 of the DMM and contained all DMM revisions from January 8, 2006 through July 15, 2007. The Issue 300 of the DMM that preceded that issue, was issued on January 8, 2006 and contained all DMM revisions from January 5, 2005 through January 8, 2006.

These new Issues of the DMM contain all USPS domestic mailing standards, organized in a way that is more intuitive to the user. These new issues continue to (1) increase the user's ability to find information, (2) increase confidence that users have found all the information they need, and (3) reduce the need to consult multiple chapters of the Manual to locate necessary information. Issue 300, dated July 15, 2007, set forth specific changes, such as new standards throughout the DMM to support the pricing changes recommended by the Postal Regulatory Commission in Docket No. R2006–1 and approved by the Governors of the United States Postal Service. New prices were implemented on May 14, 2007 for all classes of mail except Periodicals. Issue 300, dated January 8, 2006, also set forth specific changes such as new prices throughout the DMM to adopt the postal rates and fees resulting from the R2005–1 rate case.

Changes to mailing standards will continue to be published through **Federal Register** notices and the Postal Bulletin, and will appear in the next printed version of Mailing Standards of the United States Postal Service, Domestic Mail Manual, and in the online version available via Postal Explorer *http://pe.usps.com*.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Incorporation by reference.

■ In view of the considerations discussed above, the Postal Service hereby amends 39 CFR part 111 as follows:

PART 111—GENERAL INFORMATION ON POSTAL SERVICE

■ 1. The authority citation for part 111 continues to read as follows:

Authority: 39 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, 5001.

■ 2. Amend § 111.3(f) by adding the following new entries at the end of the table:

§ 111.3 Amendment to the Mailing Standards of the United States Postal Service, Domestic Mail Manual.

* * * * *

(f) * * *

Transmittal letter for issue	Dated	Federal Register publication
* *	* *	* * *
Issue 300	January 8, 2006	[Insert FR citation for this Final Rule].
Issue 300	July 15, 2007	[Insert FR citation for this Final Rule].

■ 3. Amend § 111.4 by removing ''March 23, 2005'' and adding ''May 7, 2008.''

Neva R. Watson,

Attorney, Legislative.

[FR Doc. E8–9498 Filed 5–6–08; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

39 CFR Part 111

New Address Requirements for Automation, Presorted, and Carrier Route Flat-Size Mail

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service adopts new address placement and formatting requirements for Periodicals, Standard Mail®, Bound Printed Matter, Media Mail®, and Library Mail flat-size pieces sent at automation, presorted, or carrier route prices. We also adopt related revisions for automation and presorted First-Class Mail® flats.

DATES: *Effective Date:* March 29, 2009.

FOR FURTHER INFORMATION CONTACT: Carrie Witt, 202–268–7279.

SUPPLEMENTARY INFORMATION: The Postal Service is implementing a new technology, the Flats Sequencing System (FSS), to automate delivery sequencing for flat-size mail. Currently, flat-size mail is sorted mechanically only to the 9-digit ZIP Code™ or carrier level, and then manually sorted into delivery order by carriers. FSS can sort flat-size mailpieces into delivery sequence, increasing efficiency by reducing carriers' time sorting mail, and allowing carriers to begin delivering mail earlier in the day.

Similar technology boosted postal efficiencies in processing and delivering letter mail in the 1990s. We can significantly increase efficiency and reduce delivery costs for flat-size mail with FSS technology. FSS can sequence flat mail at a rate of approximately 16,500 pieces per hour. Scheduled to operate 17 hours per day, each machine will be capable of sequencing 280,500 mailpieces daily to more than 125,000 delivery addresses.

As we move toward national deployment of FSS, we are working closely with the mailing industry to make the most of this investment and achieve the lowest combined costs for handling flat-size mail, including developing new standards for optimal addressing. Unlike letter mail, which is fairly uniform in size and address location, flat mail covers a broad range of sizes and has highly variable address placement. We need new mailing standards for this diverse mailstream to promote consistent addressing for all flat-size pieces and increase efficiency in flats processing and delivery operations.

Toward this goal, we are adopting new standards to require the delivery address in the upper portion of all Periodicals, Standard Mail, Bound Printed Matter, Media Mail, and Library Mail flat-size pieces mailed at automation, presorted, or carrier route prices. Mailers may place the address parallel or perpendicular to the top edge, but not upside down as read in relation to the top edge. The new standards define ''upper portion'' as the top half of a mailpiece, but we encourage mailers to place the address as close to the top edge as possible (while still maintaining a ⅛-inch clearance from the edge).

Mailers must also address all presorted, carrier route, and automation flat-size mailpieces using a minimum of 8-point type or, if the mailpiece bears a POSTNET™ or Intelligent Mail® barcode with a delivery point routing code, a minimum of 6-point type in all capital letters. In addition, for all automation price pieces, the characters in the address must not overlap, the address lines must not touch or overlap, and each address element may be separated by no more than five blank character spaces.

The new standards will enable FSS to process flat-size pieces in delivery sequence at high speeds and output the pieces in vertical bundles that are optimized for carrier delivery. The new placement criteria will take advantage of the vertical bundle output and significantly reduce the time carriers spend reorienting pieces to read the address—whether the mail is held, pulled from a mailbag, or removed from a tray. The new standards for type size and line spacing will ensure carriers can read the addresses and delineate delivery stops. With over a quarter million carriers delivering mail six days a week, there are substantial opportunities to gain efficiency.

As we transition to the new addressing standards, mailers can take advantage of the Intelligent Mail barcode to save space within the address block. For example, the Intelligent Mail barcode can include tracking and routing information that currently requires human-readable ACS™ codes and keylines. We also reduced the amount of clear space required under the Intelligent Mail barcode to 0.028 inch (mailers can access the full technical specification for the Intelligent Mail barcode at *http://ribbs.usps.gov/onecodesolution*).

The Intelligent Mail barcode will be required on all pieces claiming automation prices in the future. Mailers can find more information in the **Federal Register** notice, ''Implementation of Intelligent Mail Barcodes,'' published on January 7, 2008 (available on Postal Explorer® at *http://pe.usps.com;* click ''Federal Register Notices'' in the left frame). Because the new barcode requirements are laid out in a separate **Federal Register** proceeding, we removed them from this final rule.

Summary of Comments

We published a proposal for comment in the **Federal Register** (72 FR 57507) on October 10, 2007. We received comments from 24 mailers, seven associations, four presort bureaus, three

large printers, and two consultants. We appreciate the time these commenters took to detail their questions, concerns, and suggestions. We also appreciate the sample mailpieces that many mailers included to illustrate their feedback.

Comments on Address Placement

Twenty-eight commenters objected to the proposed standards for address placement that would require the delivery address to be 3 inches (for horizontal addresses) or 2.5 inches (for vertical addresses) from the top of a mailpiece. These commenters objected for creative reasons, financial reasons, or both.

Twenty-five of these commenters cited a loss of design options, on a mailpiece cover or coverwrap, or on an insert showing through polywrap. These commenters said the new address placement would compromise their cover designs and result in mailpieces that look ''tacky'' or ''cheap.''

We did not intend to compromise mailpiece design. In response to these concerns, we revised our standards to allow mailers to place the delivery address within the top half of their mailpieces. While we strongly prefer the address as close to the top as possible, the top half provides additional design options for most mailpieces. For example, on a typical 8- by 11-inch magazine with an address positioned parallel to the top edge, our proposal would have required the address within the top 3 inches. The revised standards allow this address anywhere within the top half—5.5 inches in this example—providing an additional 2.5-inch band for the address.

For pieces addressed vertically, we will allow the delivery address to run into the bottom half of the mailpiece if the address is placed within 1 inch of the top edge. This caveat will ensure that mailers can use vertical addresses on shorter pieces, where the delivery address might not fit entirely within the top half, and provides many design options overall for these types of flats.

We note that many mailpieces already comply with the new address placement standards. We have also received publications from mailers who successfully moved their addresses into compliance with our proposal. These mailers did not indicate that the design of their mailpieces had been compromised as a result.

Several commenters objected to the standards that prohibit a horizontal address from appearing upside-down as read in relation to the top edge. These commenters point out that the address would be upside down on an unenveloped piece when the spine is to the left, as a publication is normally held. They raise concerns about response cards that appear on the front of a publication (usually on a cover wrap) that include the delivery address and solicit a reply. These commenters foresee a loss of revenue from decreased subscriber renewal rates and decreased advertising response rates if they place the address upside down on their reply cards.

We note that the new standards still provide mailers with the option to position a response card vertically on a mailpiece, with the address reading either to the left or to the right. A horizontal address, which would appear upside down when the spine is positioned on the left, is not required.

A total of 21 commenters objected to the address placement standards for financial reasons, stating that the new requirements would adversely affect their costs or their ability to generate revenue. In addition to the concerns about response rates noted above, these commenters explained that the new requirements would add costs for spot-glue on inserts and onserts; new or reconfigured equipment and mailing software; and larger address labels or new window envelopes.

The revised standards, which allow the delivery address within the top half of a mailpiece, provide additional options for many mailpieces and should lessen the impact of the change across the flats mailstream. We are providing a year-long implementation timeframe to allow mailers to prepare for the new standards, adjust mailpiece design if needed, and obtain any new mailing supplies and equipment. We are committed to working with mailers to reduce the total cost of the flats mailstream. Matching mail preparation requirements to processing and delivery needs will help the Postal Service and the mailing industry achieve a lowest-combined-cost system.

Flats mail volume exceeded 52 billion pieces in 2007 and represented about one-quarter of the total volume. The new address standards provide a significant opportunity to improve efficiency and save costs for both mailers and the Postal Service.

Four commenters objected to placing delivery addresses over their magazine titles. Our standards do not require or encourage mailers to place the delivery address over their publication titles. To clarify, publications mailed in polybags have three options to avoid covering the title: at the foot of the front cover, the foot of the back cover, or at the head of the back cover. For publications that are not mailed in polybags, our standards specifically prevent mailers from placing an address in the traditional title area of a magazine or catalog (the head of the front cover). See illustration titled, ''Front of Flat-Size Mailpiece.'' Existing mailing standards for Periodicals publications specify that the publication title must be displayed prominently on the publication and any protective cover. Our new address standards do not change this practice.

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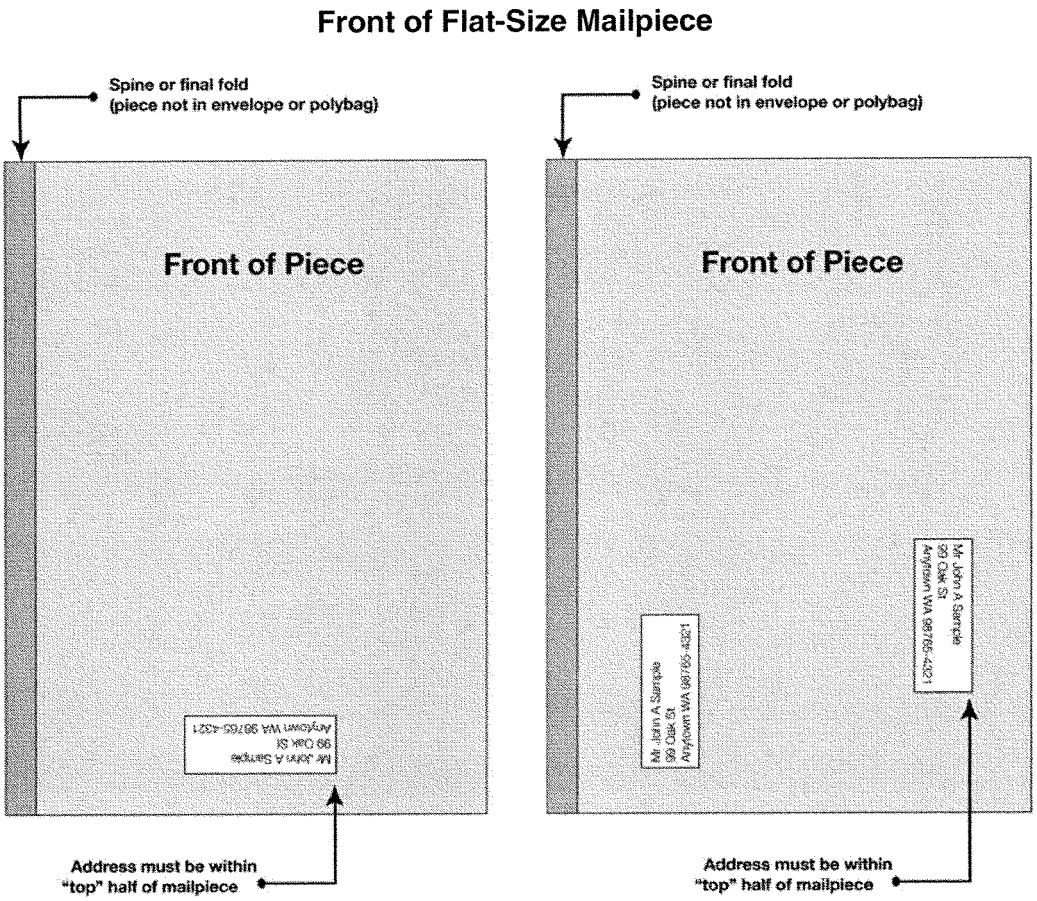

Two commenters explained that their addresses may not comply on letter-size pieces that become flats if filled to more than ¼-inch thick. While some mailers may need to adjust their mailpieces if they are used for mailing at both the letter and the flats prices, major changes are not needed in many instances. The new standards allow the delivery address in all but the center of a letter-size piece, and many mailers might make an adjustment by moving the address area to the right or the left (the ''top'' is either of the shorter edges on an enveloped piece, meaning the right or left edge on a typical letter). The postage and return address areas are not affected by our new standards. For mailers who must make adjustments, we are providing a year to meet the new standards and exhaust existing mailpiece stock.

Comments on Address Characteristics

Thirteen commenters objected to the 8-point type size requirement because it will require larger address labels than the labels they are currently using. In response to these concerns, we reduced the requirement to 6-point type (using all capital letters) on pieces that bear a POSTNET or an Intelligent Mail barcode that contains a delivery point routing code. In our models, we were able to place an Intelligent Mail barcode, the barcode clear zone, and at least six lines of text on a 1-inch label.

We are also shortening optional endorsement lines and allowing mailers to place mailer-specified information (such as customer numbers) to the left of the optional endorsement line when OneCode ACS™ is used. We will publish more information about these initiatives in a separate DMM® revision. In addition, the Intelligent Mail barcode will give mailers new opportunities to save space in the address block.

Six commenters objected to addressing automation pieces with individual characters and address lines that do not touch or overlap. These commenters said that the proposed standards would exclude handwriting and script fonts from automation pricing.

We developed these standards on the basis of engineering tests of our optical character reader systems, which showed a significant drop in read rates for addresses with elements that touch or overlap. Some results showed as much as a 50 percent drop in read rates when the characters and lines are not clearly separated. Our processing systems must be able to read the recipient name in addition to the address (or barcode) to accurately route mailpieces.

We do agree that many machine-printed script fonts will process adequately on our systems, even though these addresses will not achieve the highest read rates. To assist mailers who need these types of fonts to personalize or stylize their mailpieces, we changed the standard to specify that the individual characters in the address can touch, but cannot overlap. This standard will allow machine-printed script addresses. While we strongly prefer a sans-serif type of font, two script fonts that we have observed with adequate read rates are Monotype Corsiva and Bradley Hand ITC.

Our revised standards still exclude most handwritten addresses, because we cannot process pieces with overlapping

characters and undelineated address lines with acceptable read rates. In addition, our carriers rely on legible addresses to accurately sort their mail and delineate delivery stops on their routes. Handwriting is often difficult to read and impacts delivery efficiency.

Five commenters objected to the requirement that each address element be separated by no more than three blank character spaces. These commenters stated that this standard is too limiting for software systems that use fixed field lengths. We revised the standard to allow mailers to separate address elements by a maximum of five blank spaces. The new standard will ensure readability and routing accuracy by keeping all address elements associated to the core address block, and not mistaken for extraneous information.

Five commenters asked us to clarify our measurements for type size. We revised the standards to specify that each character in the delivery address must be at least 0.080 inch tall (0.065 inch for pieces bearing a POSTNET or an Intelligent Mail barcode that contains a delivery point routing code). These minimums apply to the height of the actual printed letter or figure (sometimes referred to as the ''figure set'' or ''font set''). Four commenters asked us to clarify our definition of ''blank character spaces.'' We specify that a ''blank'' character space can equal the width of the widest character in the address.

Two commenters objected to our preferred Arial font. We agree that many sans-serif fonts are similar to Arial and will process with acceptable read rates. We expanded our preference to ''a sans-serif font.'' We also added a preference for all capital letters to further define best addressing practices.

Two commenters asked us to clarify indicia placement, and one commenter asked us to allow additional options. The new address standards do not change the existing four options for indicia placement listed in DMM 604.5.3.4, and we are not considering new options at this time. We will continue to evaluate indicia placement and modify the standards as needed.

Comments Related to Implementation

Ten commenters objected to the implementation date, stating that FSS volumes will be minimal next year and the new rules should coincide with fuller deployment. We disagree with these commenters. We need the new address standards as FSS is deployed across the country, not after, and we need new standards for carrier readability today. We can capture these efficiencies as soon as these changes are implemented, and we will continually evaluate the requirements and work with mailers to ensure that mail processing and mail preparation are aligned in the future.

Nine commenters asked for information about acceptance procedures, tolerances, and penalties. We are still developing the policies that will apply to mailpieces that do not comply. We clarified the standards to specify a minimum measurement for type size, simplified the address placement standards, and broadened the spacing requirements. These changes eliminate uncertainty about these issues at acceptance and give mailers as much latitude as possible as they design and print their mailpieces.

Five commenters asked for a second proposal to clarify the requirements, extend the implementation timeframe, and specify acceptance procedures and penalties. We do not agree that a second proposal is needed. Our final rule gives more options for most mailpieces, clarifies the new standards, and provides a full year for mailers to prepare for the changes. We will continue to work with mailers during this time to ensure a smooth transition to the new standards. We will also re-evaluate the new address criteria as the mailstream changes, and strengthen or lessen the requirements if needed, as we do with all of our mailing standards.

Presort Bureau Comments

Four commenters sent similar letters on behalf of presort bureaus that use multi-line optical character reader (MLOCR) technology, explaining that they consolidate mailpieces from many mailers into large mailings that may be mailed at discounted prices. These mailpieces are addressed before they reach the presort bureau, and commenters stated that they cannot ensure that all pieces are addressed correctly. We note that presort bureaus consolidate mailings that must meet many standards for the postage prices claimed.

These commenters also stated that, if their MLOCR technology can read an address and spray a barcode, postal technology should also be able to read the address and the resulting barcode. We agree that pieces bearing an accurate POSTNET or Intelligent Mail barcode with a delivery point routing code can use a smaller address type size. We lessened the requirement to 6-point type (using all capital letters) for these pieces. We cannot eliminate the other address requirements. For acceptable read rates, our tests indicate that we need delivery addresses in 8-point type, with distinguishable characters and address lines, and with each element associated to the core address block.

These commenters also raised concerns about how we will verify address format and the penalties for noncompliance in a combined mailing. They explained that sampling a consolidated mailing might reveal a disproportionate number of noncompliant addresses, since a given customer's mailpieces may not be randomly distributed throughout a mailing. We plan to verify addressing the same way we verify other standards in a combined mailing today. When an error is discovered, we attempt to trace the error back to an individual mailing and assess any additional postage on that portion only.

Five commenters assert that the new address placement and formatting requirements should not apply to mail entered by presort bureaus and other mailers with similar business models. The new standards will apply to all flats mailed at automation, presorted, or carrier route prices.

Summary of Changes From Proposed to Final Rule

We specified in DMM 302.1.2 and 2.4 that each character in the address must be at least 0.080 inch high. We changed our font preference to ''sans-serif'' and added another preference for using all capital letters.

We revised the standards for automation pieces in DMM 302.2.4 to allow the individual characters in the address to touch but not overlap, to allow up to five blank character spaces between each address element, and to allow addresses in 6-point type (using all capital letters) when a POSTNET or an Intelligent Mail barcode with a delivery point routing code is used. We also defined a ''blank'' space as equal to the width of the widest character in the address.

We changed the terminology in DMM 302.2.0 from ''address block'' to ''delivery address'' for clarity. We revised the address placement standards in DMM 302.2.2 and 2.3 to require the entire delivery address within the top half of the mailpiece. We made related changes to the illustrations. We added a caveat that vertical addresses may cross the midline of a mailpiece if they are placed within 1 inch of the top edge.

We revised DMM 302.2.2 to specify that when the delivery address is placed on an insert and polywrapped with the host piece, the address ''must meet the placement standards throughout processing and delivery.'' We removed the word ''secured'' because some inserts may meet this standard without

being affixed. We revised DMM 707.3.2.3 and 3.3.10 for clarity.

We removed the proposed barcode standards for automation pieces, because those standards are now handled in a separate **Federal Register** proceeding.

We adopt the following amendments to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the *Code of Federal Regulations.* See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

■ Accordingly, 39 CFR Part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), as follows:

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300 Discount Mail: Flats

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302 Elements on the Face of a Mailpiece

1.0 All Mailpieces

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[Revise 1.2 as follows:]

1.2 Delivery Address

The delivery address specifies the location to which the USPS is to deliver a mailpiece. Except for mail prepared with detached address labels under 602.4.0, the mailpiece must have the address of the intended recipient, visible and legible, only on the side of the piece bearing postage (periodicals do not display postage and the address may appear on either side). Use at least 8-point type (each character must be at least 0.080 inch high). A sans-serif font is preferred. Addresses printed in all capital letters are also preferred. Additional standards apply to presorted, automation-compatible, and carrier route flats mailed at First-Class Mail, Periodicals, Standard Mail, Bound Printed Matter, Media Mail, and Library Mail prices (see 2.0).

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[Renumber 2.0 through 4.0 as 3.0 through 5.0. Insert new 2.0 as follows:]

2.0 Address Placement

2.1 Basic Standards

On all Periodicals, Standard Mail, Bound Printed Matter, Media Mail, and Library Mail flats mailed at presorted, automation, or carrier route prices, mailers must place the delivery address at least ⅛ inch from any edge of the mailpiece. For the purposes of these standards, the ''delivery address'' is defined as the recipient's name or other identification; the company information line; the street and number, and any necessary secondary information; and the city, state, and ZIP Code. The delivery address may appear on the front or the back of the mailpiece (but must be on the side bearing postage, except for Periodicals), parallel or perpendicular to the top edge, but it cannot be upside down as read in relation to the top edge. See 2.2 for additional standards for enveloped or polywrapped pieces, and 2.3 for bound or folded pieces not in envelopes or polywrap.

2.2 Address Placement on Enveloped or Polywrapped Pieces

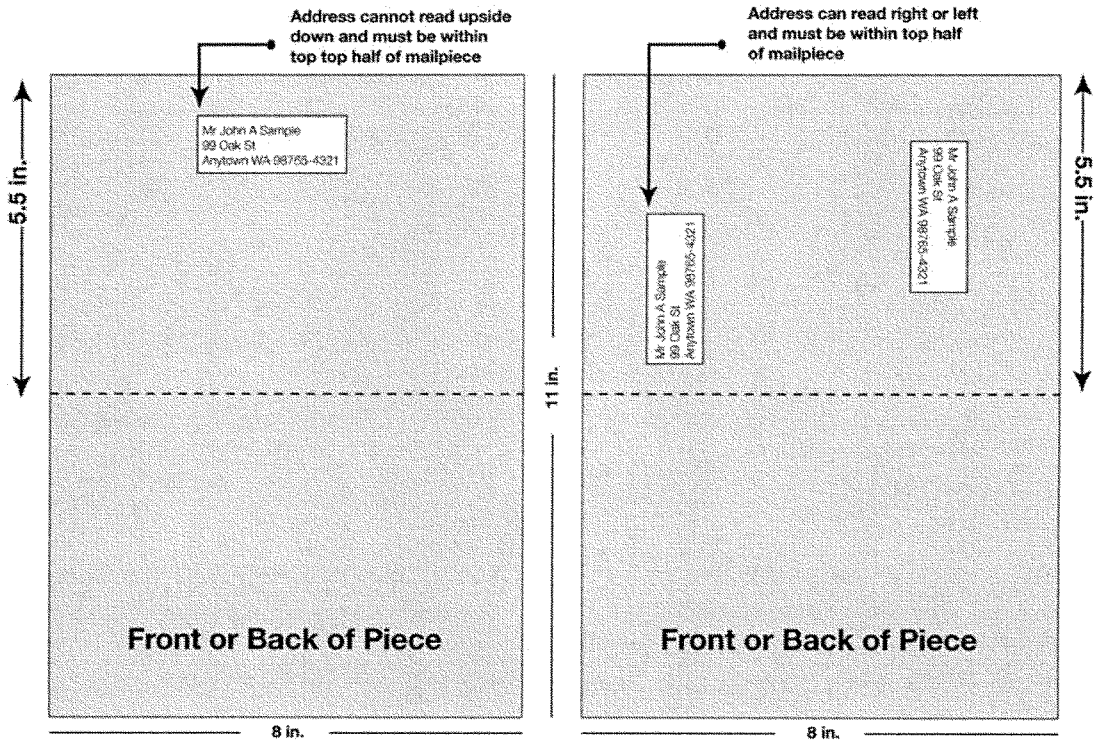
The following standards apply to enveloped or polywrapped Periodicals, Standard Mail, Bound Printed Matter, Media Mail, and Library Mail flats mailed at presorted, automation, or carrier route prices:

■ a. The ''top'' of the mailpiece is either of the shorter edges.

■ b. The entire delivery address must be within the top half of the mailpiece (see Exhibit 2.2). Optimal placement is at the top edge (while maintaining the ⅛-inch clearance requirement). If a vertical address will not fit entirely within the top half, the address may cross the midpoint if it is placed within 1 inch of the top edge.

■ c. When the delivery address is placed on an insert polywrapped with the host piece, the address must meet the placement standards throughout processing and delivery.

Exhibit 2.2 Delivery Address on Enveloped or Polywrapped Pieces



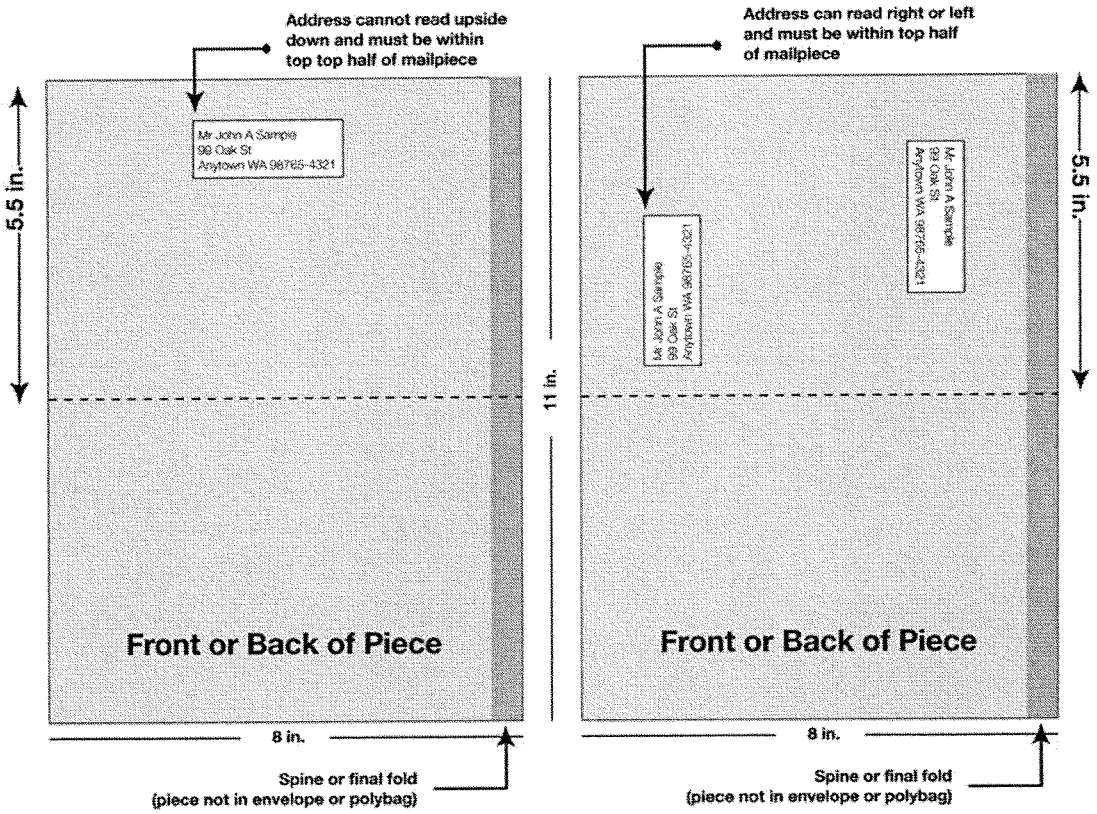
2.3 Address Placement on Bound or Folded Pieces

The following standards apply to bound or folded Periodicals, Standard Mail, Bound Printed Matter, Media Mail, and Library Mail flats mailed at presorted, automation, or carrier route prices not in envelopes or polywrap:

■ a. The ''top'' is the upper edge of the mailpiece when the bound or final folded edge is vertical and on the right side of the piece. Exception: For Carrier Route (or Enhanced Carrier Route) saturation pieces, the ''top'' of the mailpiece is either of the shorter edges.

■ b. The entire delivery address must be within the top half of the mailpiece (see Exhibit 2.3). Optimal placement is at the top edge (while maintaining the ⅛-inch clearance requirement). If a vertical address will not fit entirely within the top half, the address may cross the midpoint if it is placed within 1 inch of the top edge.

Exhibit 2.3 Delivery Address on Bound or Folded Pieces



2.4 Type Size and Line Spacing

On all First-Class Mail, Periodicals, Standard Mail, Bound Printed Matter, Media Mail, and Library Mail flats mailed at presorted, automation, or carrier route prices, mailers must print the delivery address using at least 8-point type (each character must be at least 0.080 inch high). A sans serif font is preferred. Addresses printed in all capital letters are also preferred. These additional standards apply to automation price pieces:

■ a. The individual characters in the address cannot overlap. The individual lines in the address cannot touch or overlap. A minimum 0.028-inch clear space between lines is preferred.

■ b. Each element on each line of the address may be separated by no more than five blank character spaces. One or two blank spaces is preferred. For example, ''ANYTOWN US 12345,'' not ''ANYTOWN US 12345.'' A ''blank'' character space can equal the width of the widest character in the address.

■ c. For pieces that bear a POSTNET barcode with a delivery point routing code under 708.4.2 or an Intelligent Mail barcode with a delivery point routing code under 708.4.3, mailers may print the delivery address in a minimum of 6-point type (each character must be at least 0.065 inch high) when all capital letters are used.

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330 First-Class Mail

333 Prices and Eligibility

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3.0 Eligibility Standards for First-Class Mail Flats

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3.3 Additional Basic Standards for First-Class Mail

All presorted First-Class Mail must:

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[Revise introductory text in item f to reference the new address standards as follows (no change to items 1, 2, or 3):]

■ f. Bear a delivery address formatted according to 302.2.4 that includes the correct ZIP Code or ZIP+4 code and that meets these address quality standards:

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340 Standard Mail

343 Prices and Eligibility

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3.0 Basic Standards for Standard Mail Flats

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3.3 Additional Basic Standards for Standard Mail

Each Standard Mail mailing is subject to these general standards:

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[Revise item e to reference the new address standards as follows:]

■ e. Each mailpiece must bear the addressee's name and delivery address, including the correct ZIP Code or ZIP+4 code, except as allowed when using alternative addressing formats under 602.3.0 or detached address labels under 602.4.0. Format and position the delivery address according to 302.2.0.

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360 Bound Printed Matter

363 Prices and Eligibility

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2.0 Basic Eligibility Standards for Bound Printed Matter

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2.3 Delivery and Return Addresses

[Revise 2.3 to reference the new address standards as follows:]

All BPM mail must bear a delivery address formatted and positioned according to 302.2.0. The delivery address must include the correct ZIP Code or ZIP+4 code. Alternative addressing formats under 602.3.0 may be used. Except for unendorsed BPM, each mailpiece must bear the sender's return address.

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370 Media Mail

373 Prices and Eligibility

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3.0 Price Eligibility for Media Mail Flats

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3.3 Delivery and Return Addresses

[Revise 3.3 to reference the new address standards as follows:]

All Media Mail must bear a delivery address formatted and positioned according to 302.2.0. The delivery address must include the correct ZIP Code or ZIP+4 code. Alternative addressing formats under 602.3.0 or detached address labels under 602.4.0 may be used. Each mailpiece must bear the sender's return address.

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380 Library Mail

383 Prices and Eligibility

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3.0 Price Eligibility for Library Mail Flats

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3.3 Delivery and Return Addresses

[Revise 3.3 to reference the new address standards as follows:]

All Library Mail must bear a delivery address formatted and positioned according to 302.2.0. The delivery address must include the correct ZIP Code or ZIP+4 code. Alternative addressing formats under 602.3.0 or detached address labels under 602.4.0 may be used. Each mailpiece must bear the sender's return address.

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700 Special Standards

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707 Periodicals

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3.0 Physical Characteristics and Content Eligibility

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3.2 Addressing

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3.2.3 Address Placement

[Revise 3.2.3 to reference the new address standards as follows:]

The delivery address must be clearly visible on or through the outside of the mailpiece, whether placed on a label or directly on the host publication, a component, or the mailing wrapper. The following standards apply:

■ a. For flat-size pieces, mailers must follow the additional address placement and formatting standards in 302.2.0.

■ b. If the address is placed on the mailing wrapper, the address must be on a flat side, not on a fold.

■ c. If a polybag is used:

■ 1. The address must not appear on a component that rotates within the bag.

■ 2. The address must remain visible throughout the addressed component's range of motion.

■ 3. The address must maintain placement according to 302.2.0 throughout processing and delivery. The address must not shift into a noncompliant position.

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[Delete Exhibit 3.2.4, Address Placement for Periodicals.]

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3.3 Permissible Mailpiece Components

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3.3.10 Label Carrier

A label carrier may be used to carry the delivery address for the mailpiece and must consist of a single unfolded, uncreased sheet of card or paper stock, securely affixed to the cover of the publication or large enough so that it does not rotate inside the wrapper, subject to these conditions:

* * * * *

[Insert new item e as follows:]

■ e. For flat-size pieces, the label carrier must maintain address placement according to 302.2.0 throughout processing and delivery. The address on the label carrier must not shift into a noncompliant position.

* * * * *

Neva R. Watson,

Attorney, Legislative.

[FR Doc. E8–8621 Filed 5–6–08; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2007–0452; A–1–FRL–8562–9]

Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Interstate Transport of Pollution

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Connecticut. The SIP revision addresses the provisions of the Clean Air Act that require each state to address emissions that may adversely affect another state's air quality through interstate transport. The Connecticut Department of Environmental Protection has adequately addressed the four distinct elements related to the impact of interstate transport of air pollutants. These include prohibiting significant contribution to downwind nonattainment of the National Ambient Air Quality Standards (NAAQS), interference with maintenance of the NAAQS, interference with plans in another state to prevent significant deterioration of air quality, and interference with efforts of other states to protect visibility. This action is being taken under the Clean Air Act.

DATES: *Effective Date:* This rule is effective on June 6, 2008.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2007–0452. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are

Monday through Friday, 8:30 to 4:30, excluding legal holidays

Copies of the documents relevant to this action are also available for public inspection during normal business hours, by appointment at the Bureau of Air Management, Department of Environmental Protection, State Office Building, 79 Elm Street, Hartford, CT 06106–1630.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (CAQ), Boston, MA 02114–2023, telephone number (617) 918–1664, fax number (617) 918–0664, e-mail *Burkhart.Richard@epa.gov* .

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. Background and Purpose

On November 5, 2007 (72 FR 62420), EPA published a Notice of Proposed Rulemaking (NPR) for the State of Connecticut. The NPR proposed approval of Connecticut's Clean Air Act (CAA) section 110(a)(2)(D)(i) transport SIP that was submitted by the Connecticut Department of Environmental Protection on March 13, 2007. Connecticut's SIP submittal addresses the CAA section 110(a)(2)(D)(i) requirements for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. Section 110(a)(2)(D)(i) of the CAA requires each state to submit a SIP that prohibits emissions that could adversely affect another state. The SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to downwind nonattainment of the NAAQS; (2) interfere with maintenance of the NAAQS; (3) interfere with provisions to prevent significant deterioration of air quality; and (4) interfere with efforts to protect visibility. EPA issued guidance on August 15, 2006, relating to SIP submissions to meet the requirements of section 110(a)(2)(D)(i).[1]

As noted in the NPR, EPA has found that Connecticut has adequately addressed the four distinct elements related to the impact of interstate transport of air pollutants. The specific details of Connecticut's transport SIP and the rationale for EPA's approval are explained in the NPR and will not be restated here. No comments were received on the NPR.

II. Final Action

EPA is approving Connecticut's March 13, 2007 Clean Air Act section 110(a)(2)(D)(i) transport SIP submittal for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS as a revision to the Connecticut SIP. This SIP submittal addresses the provisions of the Clean Air Act that require each state to submit a SIP to address emissions that may adversely affect another state's air quality through interstate transport. Connecticut has adequately addressed the four distinct elements related to the impact of interstate transport of air pollutants. These include prohibiting significant contribution to downwind nonattainment of the NAAQS, interference with maintenance of the NAAQS, interference with plans in another state to prevent significant deterioration of air quality, and interference with efforts of other states to protect visibility. Therefore, EPA is approving Connecticut's SIP submittal as meeting the Clean Air Act section 110(a)(2)(D)(i) requirements for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.

As a consequence of this approval, EPA is no longer obligated to prepare a Federal Implementation Plan (FIP) for Connecticut for this CAA requirement. The FIP was due on May 25, 2007, pursuant to a finding of failure to submit issued by EPA on April 25, 2005 (70 FR 21147).

III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children From Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must

[1] ''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8–Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' Memorandum from William T. Harnett, EPA OAQPS, to EPA Regional Air Division Directors, August 15, 2006.

submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 7, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 22, 2008.

Robert W. Varney,

Regional Administrator, EPA New England.

■ Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart H—Connecticut

■ 2. Section 52.387 is added to read as follows:

§ 52.387 Interstate Transport for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.

On March 13, 2007, the State of Connecticut submitted a State Implementation Plan (SIP) revision addressing the Section 110(a)(2)(D)(i) interstate transport requirements of the Clean Air Act for the 1997 8-hour ozone and $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). There are four distinct elements related to the impact of interstate transport of air pollutants. These include prohibiting significant contribution to downwind nonattainment of the NAAQS, interference with maintenance of the NAAQS, interference with plans in another state to prevent significant deterioration of air quality, and interference with efforts of other states to protect visibility. EPA has found that Connecticut's March 13, 2007 submittal adequately addresses these four distinct elements and has approved the submittal as meeting the requirements of Section 110(a)(2)(D)(i) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.

[FR Doc. E8–9964 Filed 5–6–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0275; FRL–8357–3]

Chlorantraniliprole; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of chlorantraniliprole in or on apple, wet pomace; brassica, head and stem, subgroup 5A; brassica, leafy greens, subgroup 5B; cotton, gin byproduct; cotton, hulls; cotton undelinted seed; fruit, pome, group 11; fruit, stone, group 12; grape; grape, raisin; potato; vegetable, cucurbit, group 9; vegetable, fruiting, group 8; vegetable, leafy, except brassica, group 4; milk; meat; meat byproduct; fat. E.I. DuPont de Nemours and Company requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA). This regulation also removes existing time-limited tolerances for residues of chlorantraniliprole in or on apple; apple, wet pomace; celery; cucumber; lettuce, head; lettuce, leaf; pear; pepper; spinach; squash; tomato and watermelon and modifies 40 CFR 180.628 by removing the third column (Expiration/Revocation Date) from the table in paragraph (a), since it is no longer applicable. In addition, this action establishes a time-limited tolerance for residues of chlorantraniliprole in or on rice in response to the approval of a specific exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing the use the insecticide on rice to control rice water weevil, *Lissorhoptrus oryzophilus*. This regulation establishes a maximum permissible level of residues of chlorantraniliprole in this food commodity. The time-limited tolerance expires and is revoked on December 31, 2011.

DATES: This regulation is effective May 7, 2008. Objections and requests for hearings must be received on or before July 7, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0275. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Kable Bo Davis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 306–0415; e-mail address: *davis.kable @epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

• Crop production (NAICS code 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.

• Animal production (NAICS code 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.

• Food manufacturing (NAICS code 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.

• Pesticide manufacturing (NAICS code 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0275 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before July 7, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–0275, by one of the following methods:

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

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of April 30, 2007 (72 FR 21263) (FRL–8124–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7F7181) by E.I. DuPont de Nemours and Company, DuPont Crop Protection, 1090 Elkton Road, Newark, DE 19711. The petition requested that 40 CFR 180.628 be amended by exempting the requirement of tolerances for residues of the insecticide chlorantraniliprole, 3-bromo-*N*-[4-chloro-2-methyl-6-[(methylamino) carbonyl]phenyl]-1-(3-chloro-2-pyridinyl)-1 H-pyrazole-5-carboxamide, in or on commodities. That notice referenced a summary of the petition prepared by E.I. DuPont de Nemours and Company, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, the Agency concluded that the request for exemption of tolerances for chlorantraniliprole is not appropriate. The appropriate tolerance levels for chlorantraniliprole residues in or on pending crops should be established as follows: Apple, wet pomace at 0.60 ppm, brassica, head and stem, subgroup 5A at 4.0 ppm, brassica, leafy greens, subgroup 5B at 11 ppm, cotton, gin byproduct at 30 ppm, cotton, hulls at 0.40 ppm, cotton, undelinted seed at 0.30 ppm, fruit, pome, group 11 at 0.30 ppm, fruit, stone, group 12 at 1.0 ppm, grape at 1.2 ppm, grape, raisin at 2.5 ppm, potato at 0.01 ppm, vegetable, cucurbit, group 9 at 0.25 ppm, vegetable, fruiting, group 8 at 0.70 ppm, vegetable, leafy, except brassica, group 4 at 13 ppm, milk at 0.01 ppm, meat at 0.01 ppm, meat byproducts at 0.01 ppm and fat at 0.01 ppm.

EPA is also establishing a time-limited tolerance for residues of the insecticide chlorantraniliprole in or on rice, grain at 0.10 ppm and rice, straw at 0.25 ppm. This tolerance expires and is revoked on December 31, 2011. The Agency is establishing this time-limited tolerance in response to two specific exemption requests under FIFRA section 18 on behalf of the Louisiana Department of Agriculture and Forestry and the Texas Department of Agriculture for emergency use of chlorantraniliprole on rice seed to control rice water weevil, *Lissorhoptrus oryzophilus*.

According to Louisiana, the current emergency situation with respect to rice water weevil management has arisen primarily from the continuing, and probably increasing, practice of cultivating crawfish in ponds in close proximity to rice fields in southern Louisiana and the phase-out of pyrethroid seed treatments as an alternative for control. All of the alternative insecticides, the liquid and fertilizer impregnated pyrethroid formulations, currently registered and available for use against weevil in Louisiana are toxic to crawfish and have a very short treatment window which frequently precludes their timely use due to unfavorable weather and insufficient availability of aerial applicators. Another constraint is that these insecticides only offer protection for 4 to 7 days, while adult weevil movement into flooded rice fields may occur over a several week period. Additionally, drift of foliar applied liquid insecticide alternatives to adjacent crawfish ponds have resulted in numerous crawfish kills. The Applicant claims that rice water weevil populations have historically plagued the state and that registered insecticides for this use and/or cultural practices are inadequate.

According to Texas, the current emergency situation with respect to rice water weevil management has arisen primarily from the continuing, and probably increasing, practice of cultivating fish (catfish and hybrid stripped bass) and crawfish for

commercial production in ponds in close proximity to rice fields and the loss of a registered seed treatment as an alternative for control. A great majority of the fish and crawfish ponds are close enough to rice fields to be affected by the management practices used in rice. All insecticides currently registered for use against weevil in Texas are toxic to fish and crawfish, and also are subject to the same timing and logistical challenges noted by Louisiana. The Applicant claims that the registered insecticides for this use and/or cultural practices are inadequate to control rice water weevil.

As part of its assessment of the emergency exemption request, EPA assessed the potential risks presented by the residues of chlorantraniliprole in or on rice. In doing so, EPA considered the safety standard in section 408(b)(2) of FFDCA, and EPA decided that the necessary time-limited tolerance under section 408(l)(6) of FFDCA would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address the urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing this time-limited tolerance without notice and opportunity for public comment as provided in section 408(l)(6) of FFDCA. Although, this time-limited tolerance expires and is revoked on December 31, 2011, under section 408(l)(5) of FFDCA, residues of the pesticide not in excess of the amount specified in the tolerance remaining in or on rice after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by this time-limited tolerance at the time of application. EPA will take action to revoke this time-limited tolerance earlier if any experience with, scientific data, or other relevant information on this pesticide indicates that the residues are not safe.

Because this time-limited tolerance is being approved under emergency conditions, EPA has not made any decisions about whether chlorantraniliprole meets EPA's registration requirements for use on rice or whether a permanent tolerance for this use would be appropriate. Under this circumstance, EPA does not believe that the time-limited tolerance serves as a basis for registration of chlorantraniliprole by a State for special local needs under FIFRA section 24(c). Nor does the time-limited tolerance serve as the basis for any State other than Louisiana and Texas to use this pesticide on this crop under section 18 of FIFRA without following all provisions of EPA's regulations implementing FIFRA section 18 as identified in 40 CFR part 166.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....'' These provisions were added to FFDCA by the Food Quality Protection Act (FQPA) of 1996.

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerance for residues of chlorantraniliprole on apple, wet pomace at 0.60 ppm, brassica, head and stem, subgroup 5A at 4.0 ppm, brassica, leafy greens, subgroup 5B at 11 ppm, cotton, gin byproduct at 30 ppm, cotton, hulls at 0.40 ppm, cotton, undelinted seed at 0.30 ppm, fruit, pome, group 11 at 0.30 ppm, fruit, stone, group 12 at 1.0 ppm, grape at 1.2 ppm, grape, raisin at 2.5 ppm, potato at 0.01 ppm, vegetable, cucurbit, group 9 at 0.25 ppm, vegetable, fruiting, group 8 at 0.70 ppm, vegetable, leafy, except brassica, group 4 at 13 ppm, milk at 0.01 ppm, meat at 0.01 ppm, meat byproducts at 0.01 ppm and fat at 0.01 ppm as well as the time-limited tolerance for residues of chlorantraniliprole on rice, grain at 0.10 pp and rice, straw at 0.25 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Chlorantraniliprole has no significant acute toxicity via the oral, dermal, and inhalation routes of exposure. The LD_{50} for oral and dermal acute exposure is ≤5,000 mg/kg/day and the LC_{50} for acute inhalation exposure is ≤5.1 mg/L. This substance is not an eye or skin irritant and does not cause skin sensitization. In short-term studies, the most consistent effects are those associated with non adverse pharmacological response to the xenobiotic, induction of liver enzymes and subsequent increase in liver weights. Chlorantraniliprole is not genotoxic, neurotoxic, immunotoxic, carcinogenic, or teratogenic. Furthermore, it is not uniquely toxic to the conceptus as there were no maternal or fetal effects in studies conducted in rats and rabbits. Based on the results of a 28-day dermal study in rats, as well as the dermal LD_{50} study, chlorantraniliprole has relatively low dermal toxicity.

Overall, chlorantraniliprole exhibits minimal mammalian toxicity after long-term exposure. The only consistent observation in the mammalian toxicology studies is an increased degree of microvesiculation of the adrenal cortex after dermal or dietary administration of chlorantraniliprole. Based on the lack of adverse effect on the function of the adrenal gland, this observation was considered treatment related, but not ''adverse.''

In addition to the adrenal effects, liver effects (*e.g.*, increased liver weight and induction of Cytochrome P450 enzymes) were reported in the 90-day oral subchronic studies across species and only at the highest dose tested (HDT) (<1,000 mg/kg/day). While in the subchronic studies, these effects were considered adaptive, the liver effects were more pronounced in the 18-month chronic mouse study at the HDT. Increased *eosinophilic foci* (preneoplastic foci) were noted in male mice at 935 mg/kg/day and liver hypertrophy and weight increase were evident at the next lower dose (158 mg/kg/day), but progression to tumors was not apparent for these effects. Therefore, the eosinophilic foci appear to be an adverse effect only seen in the HDT and was graded minimal in severity.

Specific information on the studies received and the nature of the adverse effects caused by chlorantraniliprole as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov*. The referenced document is available in the docket established by this action, which is described under **ADDRESSES**, and is identified as EPA–HQ–OPP–2007–0275 in that docket.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, the toxicological level of concern (LOC) is derived from the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the LOC to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the LOC by all applicable UFs. Short-, intermediate-, and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded.

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk and estimates risk in terms of the probability of occurrence of additional adverse cases. Generally, cancer risks are considered non-threshold. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/fedrgstr/EPA-PEST/1997/November/Day-26/p30948.htm*.

A summary of the toxicological endpoints for chlorantraniliprole used for human risk assessment can be found at *http://www.regulations.gov* in document *Chlorantraniliprole (DPX-E2Y45): Human Health Risk Assessment for Proposed Uses on Pome fruit, Stone fruit, Leafy vegetables, Brassica leafy vegetables, Cucurbit vegetables, Fruiting vegetables, Cotton, Grapes, Potatoes, Rice, Turf and Ornamentals* at pages 22-24 in docket ID number EPA–HQ–OPP–2007–0275.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to chlorantraniliprole, EPA considered exposure under the petitioned-for tolerances as well as all existing chlorantraniliprole tolerances in (40 CFR 180.628). EPA assessed dietary exposures from chlorantraniliprole in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. No such effects were identified in the toxicological studies for chlorantraniliprole; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed all foods for which there are tolerances were treated and contain tolerance-level residues.

iii. *Cancer*. Because chlorantraniliprole has been classified as a ''not likely human carcinogen'', a quantitative exposure assessment relative to cancer risk is not required.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring data to complete a comprehensive dietary exposure analysis and risk assessment for chlorantraniliprole in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the environmental fate characteristics of chlorantraniliprole. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated environmental concentrations (EECs) of chlorantraniliprole for acute exposures are estimated to be 26.862 parts per billion (ppb) for surface water and 1.06 ppb for ground water. The EECs for chronic exposures are estimated to be 3.650 ppb for surface water and 1.06 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. Because no acute hazard, attributable to a single dose, was identified; acute dietary risk was not assessed. For chronic dietary risk assessment, the water concentration value 3.650 ppb was used to access the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Chlorantraniliprole is proposed for use on the following residential non-dietary sites: Turfgrass and ornamental plants. Although residential exposure could occur, due to the lack of toxicity identified for short- and intermediate-term durations via the relevant routes of exposure, no risk is expected from these exposures.

Additional information on residential exposure assumptions can be found at *www.regulations.gov* (Docket ID EPA–HQ–OPP–2007–0275, pages 36 through 37).

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to chlorantraniliprole and any other substances and chlorantraniliprole does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that chlorantraniliprole has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408 of FFDCA provides that EPA shall apply an

additional tenfold (''10X'') margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional FQPA safety factor value based on the use of traditional UFs and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity*. There were no effects on fetal growth or post-natal development up to the limit dose of 1,000 mg/kg/day in rats or rabbits in the developmental or 2-generation reproduction studies. Additionally, there were no treatment related effects on the numbers of litters, fetuses (live or dead), resorptions, sex ratio, or post-implantation loss and no effects on fetal body weights, skeletal ossification, and external, visceral, or skeletal malformations or variations.

3. *Conclusion*. EPA has determined that reliable data show that it would be safe for infants and children to reduce the FQPA safety factor to 1X. That decision is based on the following findings:

i. The toxicology database for chlorantraniliprole is complete for the purposes of this risk assessment and the characterization of potential pre- and postnatal risks to infants and children.

ii. No susceptibility was identified in the toxicological database, and there are no residual uncertainties re: pre-and/or postnatal exposure.

iii. There are no treatment-related neurotoxic findings in the acute and subchronic oral neurotoxicity studies in rats.

iv. The exposure assessment is protective: The dietary food exposure assessment utilizes tolerance level residues and 100% crop treated information for all commodities; the drinking water assessment utilizes values generated by models and associated modeling parameters which are designed to provide conservative, health protective, high-end estimates of water concentrations. By using these screening-level exposure assessments, the chronic dietary (food and drinking water) risk is not underestimated.

v. Although residential exposure is expected over the short- and possibly intermediate-term (via the dermal and/or incidental oral route), there is no hazard expected via these routes/durations, and therefore no risk for these scenarios.

E. Aggregate Risks and Determination of Safety

Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the aPAD and cPAD. The aPAD and cPAD are calculated by dividing the LOC by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given aggregate exposure. Short-, intermediate-, and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. No acute risk is expected because no acute hazard, attributable to a single dose, was identified.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to chlorantraniliprole from food and water will utilize <1% of the cPAD for the population group children 1-2 years (the highest exposed subpopulation). Based on the use pattern, chronic residential exposure to residues of chlorantraniliprole is not expected.

3. *Short-term/intermediate risk*. Short-term aggregate and intermediate-term exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

There is potential for short- and intermediate-term postapplication dermal (adults and children) and incidental oral (children only) exposure to chlorantrantiliprole. However, due to the lack of toxicity via dermal route, as well as the lack of toxicity over the acute, short- and intermediate-term via the oral route – no risk is expected from these exposures. Inhalation exposure is not expected due to the low vapor pressure of chlorantraniliprole (so applied/deposited residues are not expected to volatilize into the air).

4. *Aggregate cancer risk for U.S. population*. Chlorantraniliprole has been classified as a ''not likely human carcinogen.'' It is not expected to pose a cancer risk to humans.

5. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to chlorantraniliprole residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology liquid chromatography/mass spectrometry (LC/MS/MS) is available to enforce the tolerance expression. The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no international residue limits that affect the Agency's recommendations at this time. There are no Canadian, CODEX or Mexican maximum residue limits (MRLs) for chlorantraniliprole.

Secondary reasons that contribute to harmonization difficulties include use pattern differences (for one crop, application rates and formulations may be different in different countries due to different pest pressures/conditions).

C. Response to Comments

There were no comments received in response to the notice of filing.

V. Conclusion

Therefore, the tolerance is established for residues of chlorantraniliprole, 3-bromo-*N*-[4-chloro-2-methyl-6-[(methylamino) carbonyl]phenyl]-1-(3-chloro-2-pyridinyl)-1 H-pyrazole-5-carboxamide, in or on apple, wet pomace at 0.60 ppm, brassica, head and stem, subgroup 5A at 4.0 ppm, brassica, leafy greens, subgroup 5B at 11 ppm, cotton, gin byproduct at 30 ppm, cotton, hulls at 0.40 ppm, cotton, undelinted seed at 0.30 ppm, fruit, pome, group 11 at 0.30 ppm, fruit, stone, group 12 at 1.0 ppm, grape at 1.2 ppm, grape, raisin at 2.5 ppm, potato at 0.01 ppm, vegetable, cucurbit, group 9 at 0.25 ppm, vegetable, fruiting, group 8 at 0.70 ppm, vegetable, leafy, except brassica, group 4 at 13 ppm, milk at 0.01 ppm, meat at 0.01 ppm, meat byproducts at 0.01 ppm and fat at 0.01 ppm. In addition, this regulation establishes a time-limited tolerance for residues of chlorantraniliprole in or on rice, grain at 0.10 ppm and rice, straw at 0.25 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735,

October 4, 1993). Because this rule has been exempted from review under Executive Order 12866, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 24, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.628 is amended by revising the table in paragraph (a) and by adding text to paragraph (b) to read as follows:

§ 180.628 Chlorantraniliprole; tolerances for residues.

(a) * * *

Commodity	Parts per million
Apple, wet pomace	0.60
Brassica, head and stem, subgroup 5A	4.0
Brassica, leafy greens, subgroup 5B	11
Cattle, fat	0.01
Cattle, meat	0.01
Cattle, meat byproducts	0.01
Cotton, gin byproduct	30
Cotton, hulls	0.40
Cotton, undelinted seed	0.30
Fruit, pome, group 11	0.30
Fruit, stone, group 12	1.0
Goat, fat	0.01
Goat, meat	0.01
Goat, meat byproduct	0.01
Grape	1.2
Grape, raisin	2.5
Horse, fat	0.01
Horse, meat	0.01
Horse, meat byproduct	0.01
Milk	0.01
Potato	0.01
Sheep, fat	0.01
Sheep, meat	0.01
Sheep, meat byproduct	0.01
Vegetable, cucurbit, group 9	0.25
Vegetable, fruiting, group 8	0.70
Vegetable, leafy, except brassica, group 4	13

(b) *Section 18 emergency exemptions.* A time-limited tolerance is established for the residues of the insecticide chlorantraniliprole, 3-bromo-*N*-[4-chloro-2-methyl-6-[(methylamino) carbonyl]phenyl]-1-(3-chloro-2-pyridinyl)-1 H-pyrazole-5-carboxamide, in connection with use of the pesticide under a section 18 emergency exemption granted by EPA. This tolerance will expire and is revoked on the date specified in the following table.

Commodity	Parts per million	Expiration/Revocation Date
Rice, grain	0.10	12/31/11
Rice, straw	0.25	12/31/11

* * * * *

[FR Doc. E8–9950 Filed 5–6–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0159; FRL–8362–7]

Bacillus firmus isolate 1582; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the *Bacillus firmus* isolate 1582 or *Bacillus firmus* I-1582 on all food/feed commodities when applied/used as soil applications and seed treatments. AgroGreen submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Bacillus firmus* I-1582.

DATES: This regulation is effective May 7, 2008. Objections and requests for hearings must be received on or before July 7, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0159. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Shanaz Bacchus, Biopesticides and Pollution Prevention Division (7511P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8097; e-mail address: *bacchus.shanaz@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicable provisions. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this ''**Federal Register**'' document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, as amended by FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0159 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before July 7, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2007–0159, by one of the following methods.

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

In the **Federal Register** of March 21, 2007 (72 FR 13277) (FRL–8117–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 6F7111) by AgroGreen, Biological Division, Minrav Infrastructures (1993) Ltd., 3 Habossem Str, P.O. Box 153, Ashdod

77101, Israel. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of *Bacillus* firmus isolate I-1582 when used as a soil application or seed treatment. This notice included a summary of the petition prepared by the petitioner RegWest Company, LLC, 30856 Rocky Road, Greeley, CO 80631–9375, United States Department of Agriculture (USDA) and submitted on behalf of AgroGreen. The current representative for AgroGreen is SciReg, Inc. 12733 Director's Loop, Woodbridge, VA 22192, USA. There were no comments received in response to the notice of filing.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to section 408(c)(2)(B) of FFDCA, in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C) of FFDCA, which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . . '' Additionally, section 408(b)(2)(D) of FFDCA requires that the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues '' and ''other substances that have a common mechanism of toxicity.''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Bacillus firmus isolate 1582 (called *B.* firmus I-1582) (U.S. Patent No. 6,406,690) is a Microbial Pesticide Control Agent (MPCA). It is intended to be used as a biological nematode suppressant on fruits, vegetables, field crops, and on such non-food crops as turf, and ornamentals. Further information regarding this MPCA can be found in the Biopesticide Registration Action Document (BRAD) on the Biopesticides and Pollution and Prevention Division website *http://www.epa.gov/pesticides/biopesticides*.

Studies submitted to the agency were issued Master Record Identification numbers (MRIDs) and then reviewed by the Biopesticides and Pollution Prevention Division (BPPD). The Agency also considered these submissions in light of the new microbial pesticides data requirements, which became final on December 26, 2007 (72 FR 61002). The following summaries of the toxicological profile of *Bacillus firmus* isolate I-1582 are based on Agency reviews or Data Evaluation Records (DERs) dated March 05, 2008. These reviews include the following acute toxicity/pathogenicity studies; oral, dermal, pulmonary and injection.

a. *Acute oral toxicity/pathogenicity - rats (OPPTS 885.3050; MRID #46933007; DER 03/05/2008).* Nineteen male and 19 female Sprague-Dawley rats were each treated by a single oral gavage dose of 0.1 mL per animal (>10^8 colony forming unit (cfu) animal) of *Bacillus firmus* I-1582 spores. The presented data showed no clinical signs and no weight loss related to test substance in rats. *Bacillus firmus* I-1582 was detected in brain, blood, cecum content, kidneys, lungs, lymph nodes, and spleen of the treated animals with clearance from the blood by day 7 and from all other organs by day 14. Necropsy was not conducted. Based on the presented/submitted data, *Bacillus firmus* I-1582 does not appear to be toxic, infective, and/or pathogenic in rats, when dosed orally at >10^8 cfu/animal. This study was classified as ''acceptable'' and the pesticide considered Toxicity Category IV for acute oral effects.

b. *Acute dermal toxicity/pathogenicity - rabbits (OPPTS 885.3100; MRID #46933008; DER 03/05/2008).* Five male and five female New Zealand White rabbits were each treated with 5,050 milligrams/kilogram/bodyweight (mg/kg/bwt) *Bacillus firmus* I-1582 spore suspension applied to the clipped dorsal trunk in an area of approximately 10% of the body surface in a dermal occlusion test according to standard laboratory procedures. Animals were observed for dermal irritation 60 minutes after patch removal. The test animals were observed for mortality and clinical signs of toxicity at least three times on the day of treatment and once daily thereafter for 14 days. The rabbits were euthanized on day 14 and necropsies were performed. With the exception of one female that lost weight during the first week, all animals had normal body weight gain. All rabbits appeared normal during the study and all survived the study. Very slight to well defined erythema was observed on day 1 with clearance by day 4. No observable abnormalities were noted at necropsy. The dermal LD_{50} for males, females, and combined was greater than 5,050 mg/kg. Thus, *Bacillus firmus* I-1582 is not toxic, infective, or pathogenic via the dermal route of exposure, and the active ingredient is placed in Toxicity Category IV for acute dermal effects.

c. *Acute pulmonary toxicity/pathogenicity - rats (OPPTS 885.3150; MRID #46933009; DER 03/05/2008).* Thirty male and 30 female Sprague-Dawley rats received 0.1 mL per animal (>10^8 cfu/animal) *Bacillus firmus* I-1582 by intratracheal instillation. The presented data show no adverse abnormal clinical signs in rats. No test organisms were detected in any sample from the control rats. All six animals sacrificed on day 3 had significant cfus (686 to 30,731 cfu/g) in their lungs. The test organism was detected in brain, blood, cecum content, kidneys, lungs, lymph nodes, and spleen of the treated animals. Clearance was observed from the blood, kidneys, and liver by day 7 and from all other organs by day 14. Necropsy studies were not conducted. Based on the presented/submitted data, the test organisms were not toxic, infective and/or pathogenic to rats and the active ingredient was placed in Toxicity Category IV for acute pulmonary effects.

d. *Acute inhalation toxicity (OPPTS 870.1300; MRID # 46933009; DER 03/05/2008).* An acute inhalation study was not required for this non-volatile active ingredient. The Agency also considered the acute pulmonary study in Unit III.c., the nature of the inert ingredients, the label requirements for Personal Protective Equipment for workers, and the potential low exposure associated

with the proposed application methods. Based on its non-volatile nature, if the pesticide is used as labeled, it will pose minimal to non-existent risk to non-occupationally-exposed populations via inhalation.

e. *Acute injection toxicity/ pathogenicity - rats (OPPTS 885.3200; MRID # 46933010; DER 03/05/2008).* Twenty six male and 26 female Sprague-Dawley rats each received a dose of 0.1 mL per animal (>10^7 cfu/animal), by injection into the tail vein. The presented data showed no observable clinical signs in treated rats. No test organisms were recovered in any samples from the control rats. The test organism was detected in the blood, kidneys, liver, lungs, lymph nodes, and spleen of the treated rats. Clearance from the brain, blood, kidneys, lymph nodes, and spleen was established by day 21 after dosing. Clearance from the cecum and liver was established by day 14 after dosing. Necropsy studies showed no abnormal findings. *Bacillus firmus* spores did not appear to be toxic, infective, and/or pathogenic in rats, when dosed at >107 cfu/animal. The submission is classified as acceptable.

f. *Cell culture (OPPTS 885.3500).* This data requirement is only required for active ingredients that are viruses and not for this type of bacterial pesticide.

g. *Waiver request: Hypersensitivity incidents technical-grade active ingredient (TGAI) (OPPTS 885.3400; DER 03/05/2008).* In addition to the rationales in Unit III.h., the applicant requested that hypersensitivity incidents be waived based on there being no adverse effects of *Bacillus firmus* or its metabolites to humans or mammals in literature searches. The request to waive this requirement is not granted. As required for all pesticides, the Agency requires that hypersensitivity incidents, should adverse effects occur, must be reported to comply with section 6(a)(2) 40CFR159.152.

h. *Waiver requests for Tiers II and Tier III (OPPTS 885.3550); MRID #s 46933011; 47024806; DER 03/05/2008).* The registrant requested that the Agency waive the requirement for submission of data to support Tier II and Tier III requirements for the TGAI.

The following rationales were provided to support requests to waive submission of the studies

1. The active ingredient, *Bacillus firmus* strain I-1582, is a naturally occurring microorganism.

2. No reports of adverse effects of *Bacillus firmus* or its metabolites to humans or mammals were found in literature searches.

3. The proposed uses of the proposed End-use Product (EP) are not expected to result in increased exposure or adverse effects to humans or mammals.

4. The bacteria count falls to sub-effective levels in the environment within 90 days of treatment.

5. The submitted studies, MRIDs 46933007, 46933008, 46933009, and 46933010, did not show pathogenicity to animals treated by oral gavage, dermal application, pulmonary instillation, or intravenous injection.

6. *Bacillus firmus* was not found on any of eleven lists of pathogens searched.

Based on these acceptable rationales and there being no toxicological, infectivity or pathogenicity concerns in the Tier I mammalian toxicity data submitted, the Agency granted the request to waive studies required for Tier II and Tier III testing.

i. *Waiver requests: EP and hypersensitivity incidents (OPPTS 885.3400; DER 03/05/2008).* The applicant has submitted rationales to waive data for acute oral toxicity/ pathogenicity, acute pulmonary toxicity/pathogenicity, acute dermal, primary eye, hypersensitivity study, acute inhalation, and primary dermal, primary eye studies. These rationales were based on the results of tests for the TGAI discussed in the toxicological profile in Unit III of this document. In addition to the rationales in Unit III.h., the applicant reiterated that there were no reports of adverse effects of *Bacillus firmus* or its metabolites to humans or mammals in literature searches.

The request to waive toxicity testing for the EP was based on acceptable data reviews of the TGAI and the nature of the inert ingredients which are exempt from the requirement of a tolerance. The Agency decided to grant the request to waive the test for primary eye irritation based on the acceptable low acute dermal toxicity category IV classification of the pesticide. Any potential primary eye irritation to this low toxcity pesticide can be mitigated by goggles or personal protective eye equipment. In addition the application rate and types of soil application and seed treatments indicate minimal to non-existent risk via eye exposure. The request to waive the requirement for hypersensitivity incidents for the EP is not granted. As required for all pesticides, the Agency requires that hypersensitivity incidents, should adverse effects occur, must be reported to comply with section 6(a)(2) (40 CFR 159.152).

IV. Aggregate Exposures

In examining aggregate exposure, section 408 of FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

1. *Food.* Dietary exposure to the microbial pesticide is likely to occur to this ubiquitous microbe. The lack of acute oral toxicity/pathogenicity, based on the toxicology test in rats, supports the exemption from the requirement of a tolerance for this active ingredient. The pesticide is intended to be applied to the soil or to be used as seed treatments, mainly for control of nematodes. It is not systemic. Thus, dietary exposure by direct contact with food is not expected. The acute oral study described in Unit III indicates that the active ingredient is not toxic, infective or pathogenic when administered to mammals (rats) via the oral route. In addition to this acute oral study, other toxicology studies indicated that the microbe cleared all organs within the time allotted for the studies.

There is no direct post-harvest treatment of food commodities with *Bacillus firmus* I-1582. Thus, detectable residues of *Bacillus firmus* I-1582 are not expected on agricultural crops or food commodities as a result of the proposed use of this active ingredient. All inerts in the proposed EP are exempt from the requirement of a tolerance. Based on these observations, the Agency concluded that dietary exposure to *Bacillus firmus* I-1582 is not expected to cause harm to human adults, infants and children.

2. *Drinking water exposure.* Drinking water is not being screened for *Bacillus firmus* I-1582 as a potential indicator of microbial contamination. The pesticide is not intended for application to aquatic agricultural crops. In the unlikely event that *Bacillus firmus* I-1582 was transferred to ground water, the microbe would not survive the conditions of drinking water treatment, such as chlorination, pH adjustments, and other water processing conditions. However, because of the lack of mammalian toxicity, even if negligible oral exposure should occur through drinking water, the Agency concludes that such exposure would present no risk.

B. Other Non-Occupational Exposure

The Agency expects non-occupational dermal and inhalation exposure to pose no harm if the pesticide is used as labeled. The proposed product is anEP that is intended to be used commercially for seed and soil treatments of agricultural crops. Other homeowner and residential uses are also for soil applications outdoors at very low rates. No indoor residential, school, or daycare uses are currently permitted for this active ingredient. Even if there is non-occupational residential, school or day care exposure from the proposed uses of *Bacillus firmus* I-1582, the risk posed by this low toxicity microbe is likely to be minimal.

1. *Dermal exposure*. As discussed in Unit III. *Bacillus firmus* I-1582 is not toxic, infective, or pathogenic via the dermal route of exposure, and the active ingredient is placed in Toxicity Category IV for acute dermal effects. The pesticide is proposed for use as soil and seed treatments to agricultural crops. For these exposure scenarios, non-occupational dermal exposure is not expected. The potential for non-occupational exposure exists for residential and home and garden use. However, low application rates, soil applications and the low toxicity potential of the active ingredient indicate that non-occupational exposure through these uses is not likely to cause harm to the exposed population if the pesticide is used as labeled.

2. *Inhalation exposure*. A similar rationale supports the Agency's conclusion that non-occupational inhalation exposure is not likely to cause harm to the exposed population if the pesticide is used as labeled. The active ingredient is placed in Toxicity Category IV on the basis of the acute pulmonary study (see Unit III.) and is non-volatile.

V. Cumulative Effects

Section 408(b)(2)(D)(v) of the FFDCA requires the Agency to consider the cumulative effect of exposure to *Bacillus firmus* I-1582 and to other substances that have a common mechanism of toxicity. These considerations include the possible cumulative effects of such residues on infants and children. *Bacillus firmus* I-1582 is not toxic or pathogenic to mammals via several routes of exposure (Unit III.) There are no other *Bacillus firmus* strains registered. Consequently, no cumulative effects from the residues of this product with other related microbial pesticides are anticipated.

VI. Determination of Safety for U.S. Population, Infants and Children

See Unit III. for acute toxicological evaluations of *Bacillus firmus* I-1582. Further, FFDCA section 408(b)(2)(C) provides that EPA shall apply an additional tenfold margin of exposure (safety) for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure, unless EPA determines that a different margin of exposure (MOE) (safety) will be safe for infants and children. Margins of exposure (safety), which often are referred to as uncertainty factors, are incorporated into EPA risk assessment either directly or through the use of a margin of exposure analysis or by using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk. Actual exposures to adults and children through diet are expected to be several orders of magnitude less than the doses used in the toxicity and pathogenicity tests referenced in Unit III. Thus, the Agency has determined that an additional margin of safety for infants and children is unnecessary.

VII. Other Considerations

A. Endocrine Immunotoxicity

EPA is required under section 408(p) of the FFDCA, as amended by FQPA, to develop a screening program to determine whether certain substances (including all pesticide active and other ingredients) ''may have an effect in humans that is similar to an effect produced by a naturally-occurring estrogen, or other such endocrine effects as the Administrator may designate.'' Following the recommendations of its Endocrine Disruptor Screening and Testing Advisory Committee (EDSTAC), EPA determined that there was a scientific basis for including, as part of the program, androgen and thyroid hormone systems, in addition to the estrogen hormone system. EPA also adopted EDSTAC's recommendation that it include evaluations of potential effects in wildlife.

The Agency has no knowledge of *Bacillus firmus* I-1582 being an endocrine disruptor, nor if this microbe is related to any class of known endocrine disruptors. Consequently, endocrine-related concerns did not impact the Agency's safety finding for these *Bacillus firmus* I-1582 strains. Additional data specifically on the endocrine effects of this microbial pesticide are not required at this time. When the appropriate screening and/or testing protocols being considered under the Agency's Endocrine Disrupter Screening Program (EDSP) have been developed and implemented, *Bacillus firmus* I-1582 may be subject to additional screening and/or testing to better characterize effects related to endocrine disruption.

As discussed in this document in Unit III. Tier I toxicology data evaluated for this active ingredient showed clearance in a variety of tissues and did not trigger Tier III data requirements for immunotoxicity testing.

B. Analytical Methods

The acute oral studies discussed in Unit III. demonstrate that the active ingredient does not pose a dietary risk. In addition, the active ingredient is not likely to come into contact with the treated food commodities. Furthermore, the low application rate and non-persistence on food during applications suggests very low exposure potential via the dietary route. Since residues are not expected on treated commodities, the Agency has concluded that an analytical method to detect residues of this pesticide on treated food commodities for enforcement purposes is not needed.

Nevertheless, the Agency has concluded that for analysis of the pesticide itself, microbiological and biochemical methods exist and are acceptable for enforcement purposes for product identity of *Bacillus firmus* I-1582. Other appropriate methods are required for quality control to assure that product characterization, the control of human pathogens and other unintentional metabolites or ingredients are within regulatory limits, and to ascertain storage stability and viability of the pesticidal active ingredient.

C. Codex Maximum Residue Level

There is no Codex maximum residue level for residues of *Bacillus firmus* I-1582.

VIII. Conclusions

The results of the studies discussed in Unit III. meet the safety standards of the 1996 FQPA. They support an exemption from the requirement of a tolerance for residues of *Bacillus firmus* I-1582, on treated food or feed commodities. In addition, the Agency is of the opinion that, if the microbial active ingredient is used as allowed, aggregate and cumulative exposures are not likely to harm the adult human U.S. population, children and infants. Therefore, an exemption from tolerance is granted for residues of *Bacillus firmus* I-1582 when used as soil and seed treatments in/on all food/feed commodities in response to pesticide petition 6F7111.

IX. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, *entitled Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, *entitled Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

X. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 23, 2008.

Debra Edwards,

Director, Office of Pesticide Programs

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.1282 is added to read as follows:

§ 180.1282 Bacillus firmus I-1582; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established in/on all food/feed commodities, for residues of *Bacillus firmus* I-1582 when used as a soil application or seed treatment.

[FR Doc. E8–10121 Filed 5–6–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2004–0306; FRL–8361–4]

Pyridalyl; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of pyridalyl in or on vegetables, leafy, except *Brassica*, group 4; *Brassica*, head and stem, subgroup 5A; vegetables, fruiting, group 8; mustard greens; and turnip greens. Valent U.S.A. Corporation and the International Research Project Number 4 (IR-4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective May 7, 2008. Objections and requests for hearings must be received on or before July 7, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2004–0306. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Olga Odiott, Registration Division (7505P),

Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9369; e-mail address: *odiott.olga@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2004–0306 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before July 7, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2004–0306, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of December 5, 2003 (68 FR 68044) (FRL–7344–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (PP 2F6459 and 3E6592) (petition 3E6592 was inadvertently referred to as 2E6592 in the December, 2003 FR notice) by Valent U.S.A. Corporation, 1600 Riviera Ave., Suite 200, Walnut Creek, California 94596–8025 and the International Research Project Number 4 (IR-4), 681 U.S Highway #1 South, North Brunswick, NJ, 08902–3390. Petition 2F6459 requested that 40 CFR 180 be amended by establishing tolerances for residues of the insecticide pyridalyl, (pyridine, 2-[3-[2,6-dichloro-4-[(3,3-dichloro-2-propenyl)oxy]phenoxy]propoxy]-5-(trifluoromethyl), in or on vegetables, leafy, except *Brassica*, group 4, at 20.0 parts per million (ppm); vegetables, fruiting, group 8, at 1.1 ppm; *Brassica*, head and stem, subgroup 5A, at 5.0 ppm; cotton seed at 0.4 ppm; meat at 0.04 ppm; meat by-products at 0.05 ppm; animal fat at 1.0 ppm; and whole milk at 0.1 ppm; and to establish tolerances for residues of pyridalyl plus the metabolite 3,5-dichloro-4-[3-(5-trifluoromethyl-2-pyridyloxy)]propoxy phenol (S-1812-DP) in or on the raw agricultural commodity cotton, gin byproducts at 23.0 ppm. Petition 3E6592 requested that 40 CFR 180 Part be amended by establishing tolerances for residues of pyridalyl in or on the raw agricultural commodities: *Brassica*, leafy greens, subgroup 5B, at 30 ppm; and turnip greens at 30 ppm. That notice referenced a summary of the petition prepared by Valent U.S.A. Corporation, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petitions, EPA has determined that the proposed tolerances for *Brassica*, head and stem, subgroup 5A, and vegetables, fruiting, group 8, should be reduced to 3.5 ppm; and 1.0 ppm respectively; that a tolerance for mustard greens at 30 ppm; should be proposed; and that the proposed tolerance for *Brassica*, leafy greens, subgroup 5B should be deleted. The reasons for these changes are explained in Unit IV.C. The Agency is evaluating additional environmental fate data and has not yet made a decision to register the outdoor uses associated with the proposed tolerances for cotton and related commodities. A decision to establish these tolerances will be made at such time when the Agency makes the determination to register these outdoor uses.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a

reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the following petitioned-for tolerances for residues of pyridalyl *per se* in or on vegetables, leafy, except *Brassica*, group 4, at 20 ppm; *Brassica*, head and stem, subgroup 5A at 3.5 ppm; vegetables, fruiting, group 8, at 1.0 ppm; mustard greens at 30 ppm; and turnip greens at 30 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Pyridalyl has low acute toxicity via the oral, dermal and inhalation routes of exposure but is a dermal sensitizer. There was no evidence of neurotoxicity seen in either the sub-chronic and chronic toxicity studies or the developmental and reproductive studies. There is low concern for prenatal and/or postnatal toxicity resulting from exposure to pyridalyl. Pyridalyl is classified as ''Not Likely to be Carcinogenic to Humans'' based on lack of carcinogenicity in mice and rats and overall negative findings in various mutagenicity studies.

Specific information on the studies received and the nature of the adverse effects caused by pyridalyl as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document pyridalyl in/on cotton, fruiting vegetables, leafy vegetables, head and stem *Brassica* vegetables, *Brassica* leafy greens, and turnip greens, shrubs, ornamentals and non-bearing trees. HED Risk Assessment on page number 26 in docket ID number EPA–HQ–OPP–2004–0306.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-term, intermediate-term, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for pyridalyl used for human risk assessment is shown in Table 1 of this unit.

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR PYRIDALYL FOR USE IN HUMAN RISK ASSESSMENT

Exposure/Scenario	Point of Departure and Uncertainty/Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Acute dietary (females 13–50 years of age) Acute dietary (general population including infants and children)	An effect of concern attributable to a single exposure (dose) was not identified from the oral toxicity studies, including the developmental toxicity studies in rats and rabbits.		
Chronic dietary (All populations)	NOAEL= 3.4 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	cPAD = 0.034 mg/kg/day	Combined chronic toxicity/carcinogenicity study-rats LOAEL = 17.1 miligrams/kilogram/day (mg/kg/day) on males and 21.1 mg/kg/day on females based on decreased body weights, weight gain, and food efficiency.
Cancer (oral, dermal, inhalation)	Classified as ''Not likely to be Carcinogenic to Humans''		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). FQPA SF = FQPA Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. LOC = level of concern.

C. Exposure Assessment

Pyridalyl residues of concern for tolerance expression and risk assessment were determined to be: 3,5-dichloro-4-[3-(5-trifluoromethyl-2-pyridyloxy)]propoxy phenol (S-1812-DP), 2-hydroxy-5-trifluoromethylpyridine (HTFP), and 3-hydroxy-5-trifluoromethylpyridone (HPDO).

Pyridalyl is the predominant residue in crops and livestock. S-1812-DP is the only major metabolite observed in any of the metabolism studies and is found at significant levels in the cotton gin byproduct field trials. The toxicity of S-1812-DP is assumed to be comparable to the parent compound.

Rotational crops did not take up parent pyridalyl or its metabolite S-1812-DP from the soil, but did take up metabolite HTFP. HTFP was then metabolized in rotational crops via oxidation to HPDO. Metabolites HTFP and HPDO are assumed to be of equivalent toxicity to the parent compound and are included as residues of concern.

Pyridalyl is expected to be persistent in both soil and aquatic environments. However, S-1812-DP and HTFP, the major metabolites in the terrestrial field-dissipation studies, are expected to be more soluble and mobile than the parent compound, and therefore are included in the drinking water assessment.

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to pyridalyl, EPA considered exposure under the petitioned-for tolerances for pyridalyl. EPA assessed dietary exposures from pyridalyl in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure.

No such effects were identified in the toxicological studies for pyridalyl; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the United States Department of Agricuulture (USDA) 1994–1996 and 1998 Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA used tolerance level residues and 100 percent crop treated (PCT) information for all commodities. In addition, Dietary Exposure Evaluation (DEEM/™) (version 7.76) default processing factors were used for all processed commodities.

iii. *Anticipated residue and PCT information*. EPA did not use anticipated residue and/or PCT information in the dietary assessment for pyridalyl.

2. *Dietary exposure from drinking water*. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for pyridalyl in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of pyridalyl. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

The Agency used estimated environmental concentrations (EECs), which are the model estimates of a pesticide's concentration in water, to quantify pyridalyl drinking water exposure and risk as a Percent Reference Dose (%RfD) or %PAD. Drinking water levels of comparison (DWLOCs) were calculated and used as a point of comparison against the model estimates of the pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. Since DWLOCs address total aggregate exposure to pyridalyl they are further discussed in the aggregate risk sections in Unit E.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW) models the EECs of pyridalyl for chronic exposures are estimated to be 1.64 parts per billion (ppb) for surface water and 3.4 ppb for ground water

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Pyridalyl is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found pyridalyl to share a common mechanism of toxicity with any other substances, and pyridalyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that pyridalyl does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(c) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. There was low concern for the quantitative susceptibility in the 2-generation reproduction study, since there was clear NOAEL for the offspring toxicity, the effects of concern were well defined and used for risk assessment. Therefore, there are no concerns and no residual uncertainties with regard to prenatal and/or postnatal toxicity.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for pyridalyl is complete.

ii. There is no indication that pyridalyl is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There are no concerns and no residual uncertainties with regard to prenatal and/or postnatal toxicity.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% CT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to pyridalyl in drinking water. These

assessments will not underestimate the exposure and risks posed by pyridalyl.

E. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to pyridalyl from food, drinking water, and residential uses, the Agency calculated DWLOCs which are used as a point of comparison against EECs. DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water [e.g., allowable chronic water exposure (mg/kg/day) = cPAD - (average food + residential exposure)]. This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the EPA's Office of Water are used to calculate DWLOCs: 2 liter (L)/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: Acute, short-term, intermediate-term, chronic term, and cancer.

When EECs for surface water and ground water are less than the calculated DWLOCs, EPA concludes with reasonable certainty that exposures to the pesticide in drinking water (when considered along with other sources of exposure for which EPA has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because EPA considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, EPA will reassess the potential impacts of residues of the pesticide in drinking water as a part of the aggregate risk assessment process.

1. *Acute risk*. An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effect resulting from a single-oral exposure was identified and no acute dietary endpoint was selected. Therefore, pyridalyl is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to pyridalyl from food will utilize 35% of the cPAD for the U.S. population, 20% of the cPAD for all infants, and 59% of the cPAD for children 1-2 years old, the children subpopulation at greatest exposure. There are no residential uses for pyridalyl. There is potential for chronic dietary exposure to pyridalyl and its metabolites in drinking water. After calculating DWLOCs and comparing them to the EECs for surface water and ground water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, as shown in the following Table:

TABLE 2.—AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO PYRIDALYL

Population Sub-group	cPAD mg/kg/day	%cPAD (Food)	Surface Water EEC[a](ppb)	Ground Water EEC[b](ppb)	Chronic DWLOC (ppb)
U.S. population	0.034	35	1.64	3.4	780
All infants (< 1 yr)	0.034	20	1.64	3.4	270
Children 1-2 yrs.	0.034	59	1.64	3.4	140

[a] Tier II PRZM-EXAMS - Index reservoir model, pyridalyl plus HTFP and S-1812-DP.
[b] Tier 1 SCI-GROW model, HTFP (highest value).

3. *Short-term risk*. Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Pyridalyl is not registered for any use patterns that would result in residential exposure. Therefore, the short-term aggregate risk is the sum of the risk from exposure to pyridalyl through food and water and will not be greater than the chronic aggregate risk.

4. *Intermediate-term risk*. Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Pyridalyl is not registered for any use patterns that would result in intermediate-term residential exposure. Therefore, the intermediate-term aggregate risk is the sum of the risk from exposure to pyridalyl through food and water, which has already been addressed, and will not be greater than the chronic aggregate risk.

5. *Aggregate cancer risk for U.S. population*. Pyridalyl is classified as ''not likely to be carcinogenic to humans'' by all relevant routes of exposure based on adequate studies in mice and rats and overall negative findings in various mutagenicity assays. Therefore, pyridalyl is not expected to pose a cancer risk.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to pyridalyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (gas chromatography/nitrogen-phosphorus detector (GC/NPD) methods RM-38P-1-1, RM-38M-1, and RM-38M-1-1 for plant commodities; and RM-38P-2 and RM-38P-3-1 for livestock commodities) is available to enforce the tolerance expression. The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*. FDA multiresidue methods (protocols B, D, E, and F) are also available for enforcement of the tolerances (PAM Vol.I, Appendix II, 1/94).

B. International Residue Limits

There are currently no U.S. or international Codex tolerances established for pyridalyl.

C. Revisions to Petitioned-For Tolerances

Based on its review of submitted crop field trial data, EPA determined that the proposed tolerances for *Brassica* head and stem, subgroup 5A; and for fruiting vegetables, group 8 should be reduced to 3.5 and 1.0 ppm, respectively. The Agency determined also that the data were not sufficient to support the proposed tolerance for Brassica leafy greens, subgroup 5B; although a mustard green tolerance at 30 ppm was supported by the data.

V. Conclusion

Therefore, tolerances are established for residues of pyridalyl *per se*, in or on vegetables, leafy, except *Brassica*, group 4 at 20 ppm; *Brassica*, head and stem, subgroup 5A at 3.5 ppm; vegetables, fruiting, group 8 at 1.0 ppm; mustard greens at 30 ppm; and turnip greens at 30 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 23, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.640 is added to read as follows:

180.640 Pyridalyl; tolerances for residues.

(a) *General*. Tolerances are established for residues of pyridalyl, pyridine,2-[3-[2,6-dichloro-4-[(3,3-dichloro-2-propenyl)oxy]phenoxy]propoxy]-5-(trifluoromethyl, in or on the following raw agricultural commodities:)

Commodity	Parts per million
Brassica, head and stem, subgroup 5A	3.5
Mustard greens	30
Turnip greens	30
Vegetable, fruiting, group 8	1.0
Vegetables, leafy, except *Brassica*, group 4	20

(b) *Section 18 emergency exemption*. [Reserved]

(c) *Tolerances with regional registration*. [Reserved]

(d) *Indirect or inadvertent residues*. [Reserved]

[FR Doc. E8–9823Filed 5–6–08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0398; FRL–8362–2]

Spirodiclofen; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of spirodiclofen in or on hop, dried cones. Interregional Research Project Number 4 (IR–4) requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective May 7, 2008. Objections and requests for hearings must be received on or before July 7, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also

Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0398. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Susan Stanton, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5218; e-mail address: *stanton.susan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0398 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before July 7, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–0398, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of June 27, 2007 (72 FR 35237) (FRL–8134–9), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7E7204) by Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.608 be amended by establishing tolerances for residues of the insecticide/miticide spirodiclofen, 3-(2,4-dichlorophenyl)-2-oxo-1-oxaspiro[4,5]dec-3-en-4-yl 2,2-dimethylbutanoate, in or on hop, dried cones at 30 parts per million (ppm). That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has

reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for residues of spirodiclofen on hop, dried cones at 30 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Spirodiclofen has a low acute toxicity via oral, dermal or inhalation routes. It is not an eye or dermal irritant; however, it is a potential skin sensitizer. Following oral administration, spirodiclofen is rapidly absorbed, metabolized and excreted via urine and feces. The most sensitive target organ of spirodiclofen is the adrenal gland. Adrenal effects (e.g., increased adrenal weights, increased incidence and severity of small cytoplasmic vacuolation in the cortex of adrenal glands) were observed in rats, dogs and mice with the dog being the most sensitive species.

There was no evidence of neurotoxicity in the acute neurotoxicity study in rats. In the subchronic neurotoxicity study in rats, functional-observational-battery (FOB) effects and decreased motor and locomotor activities were observed in females at the high dose only. The effects were considered to be due to the large decrease in body weight in these animals. In one of two developmental neurotoxicity (DNT) studies in rats, a decrease in retention (memory) was observed in the postnatal day (PND) 60 females only. These effects were not seen in a repeated DNT study conducted using the same doses and experimental conditions.

There was no evidence (qualitative or quantitative) of increased susceptibility in the rabbit developmental toxicity study or the rat reproduction toxicity study following *in utero* or postnatal exposure to spirodiclofen. However, evidence of quantitative susceptibility was observed in a rat developmental toxicity study where an increased incidence of slight dilatation of the renal pelvis was observed at a dose (1,000 milligrams/kilogram/day (mg/kg/day)) which did not cause any maternal toxicity. The results of the two DNT studies for spirodiclofen also suggest increased susceptibility. In the first study, memory and brain morphometric differences were observed at doses that did not result in maternal toxicity. While these effects were not seen in the second DNT study, body weight changes were seen at non-maternally toxic doses.

EPA has classified spirodiclofen as ''likely to be carcinogenic to humans'' by the oral route of exposure, based on evidence of testes Leydig cell adenomas in male rats, uterine adenomas and/or adenocarcinoma in female rats, and liver tumors in mice. EPA has determined that quantification of human cancer risk using a linear low-dose extrapolation approach is appropriate.

Specific information on the studies received and the nature of the adverse effects caused by spirodiclofen as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document *Spirodiclofen. Petition No. 7E7204. Human Health Risk Assessment for Use on Hops* at pages 45–48 in docket ID number EPA–HQ–OPP–2007–0398.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-term, intermediate-term, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for spirodiclofen used for human risk assessment can be found at *http://www.regulations.gov* in the document *Spirodiclofen. Petition No. 7E7204. Human Health Risk Assessment for Use on Hops* at page 34 in docket ID number EPA–HQ–OPP–2007–0398.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to spirodiclofen, EPA considered exposure under the petitioned-for tolerances as well as all existing spirodiclofen tolerances in 40 CFR 180.608. EPA assessed dietary exposures from spirodiclofen in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. No such effects were identified in the toxicological studies for spirodiclofen; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed that all food commodities contain residues at the average field trial level. EPA also assumed average field trial residues for feed commodities in calculating anticipated livestock dietary burdens and anticipated residues in meat and milk. Residue estimates were further refined using available experimentally-derived processing factors as well as projected percent crop treated (PPCT) information for several crops.

iii. *Cancer*. EPA has classified spirodiclofen as ''likely to be carcinogenic to humans'' by the oral route of exposure and determined that quantification of human cancer risk

using a linear low-dose extrapolation approach is appropriate. Cancer risk was assessed using the same exposure assumptions as discussed in Unit III.C.1.ii. above.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency used projected percent crop treated (PPCT) information for the new crop (hops) as well as several currently registered crops (apples, grapes, oranges and peaches). Since spirodiclofen has only been registered on these crops since 2005, PCT estimates based on actual usage data were not deemed sufficient indicators of potential usage on currently registered crops. The Agency used PPCT information as follows: Hops 92%; apples 15%; grapes 7%; oranges (except temple) 14%; peaches 10%.

EPA estimates PPCT for spirodiclofen use by assuming that the PCT during the pesticide's initial 5 years of use on a specific use site will not exceed the average PCT of the dominant or market leader pesticide (i.e. the one with the greatest PCT) on that site over the three most recent surveys. Comparisons are only made among pesticides of the same pesticide types (i.e., the dominant insecticide on the use site is selected for comparison with the new insecticide/miticide). Since spirodiclofen is a miticide, EPA identified miticides that are the market leaders to project PCT. Petroleum distillate and petroleum oil were excluded as market leaders and the next miticide market leader was chosen. The PCTs included in the average may be for the same pesticide or for different pesticides, since the same or different pesticides may dominate for each year selected. Typically, EPA uses U.S. Department of Agriculture/National Agricultural Statistics Service (USDA/NASS) as the source for raw PCT data, because it is publicly available and does not have to be calculated from available data sources. When a specific use site is not surveyed by USDA/NASS, EPA uses proprietary data and calculates the estimated PCT.

These estimated PPCTs, based on the average PCT of the market leaders, are appropriate for use in chronic dietary risk assessment. This method of estimating PPCT for a new use of a registered pesticide or a new pesticide produces a high-end estimate that is unlikely, in most cases, to be exceeded during the initial five years of actual use. The predominant factors that bear on whether the PPCT could be exceeded are whether the new pesticide use or new pesticide is more efficacious or controls a broader spectrum of pests than the dominant pesticide(s). All relevant information currently available regarding the predominant factors has been considered for the use of spirodiclofen on hops; oranges, except temple; grapes, all; peaches; and apples; and it is unlikely that these spirodiclofen uses will exceed the estimated PPCTs during the next 5 years, because the target pest range of the market leaders is generally broader than spirodiclofen's, often including both insect and mite pests. Furthermore, the Agency has received no Section 18 emergency exemption requests for spirodiclofen and there are no readily discernible resistance issues with target pest mites, which might indicate an increased need for spirodiclofen on these crops.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which spirodiclofen may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for spirodiclofen in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of spirodiclofen. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of spirodiclofen for chronic exposures for non-cancer assessments are estimated to be 4.99 parts per billion (ppb) for surface water and 0.44 ppb for ground water; the EDWCs of spirodiclofen for chronic exposures for cancer assessments are estimated to be 1.67 ppb for surface water and 0.44 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 4.99 ppb was used to assess the contribution to drinking water. For cancer dietary risk assessment, the water concentration of value 1.67 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Spirodiclofen is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found spirodiclofen to share a common mechanism of toxicity with any other substances, and spirodiclofen does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that spirodiclofen does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(c) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. The prenatal and postnatal toxicity database for spirodiclofen includes prenatal developmental toxicity studies in rats and rabbits, a 2–generation reproduction toxicity study in rats and two developmental neurotoxicity (DNT) studies in rats. There was no evidence (qualitative or quantitative) of increased susceptibility in the rabbit developmental toxicity study or the rat reproduction toxicity study following *in utero* or postnatal exposure to spirodiclofen. However, evidence of quantitative susceptibility was observed in the rat developmental toxicity study where an increased incidence of slight dilatation of the renal pelvis was observed at a dose (1,000 mg/kg/day) which did not cause any maternal toxicity. The results of the two available DNT studies for spirodiclofen also suggest increased susceptibility. In the first study, memory and brain morphometric differences were observed at doses that did not result in maternal toxicity. While these effects were not seen in the second DNT study, body weight changes were seen at non-maternally toxic doses.

The degree of concern is low for the quantitative susceptibility seen in the prenatal developmental and DNT studies in the rat for the following reasons:

The renal pelvic dilation seen in the rat developmental toxicity study was slight and observed only at the limit dose without statistical significance or dose response. Renal pelvic dilation was considered to be a developmental delay and not a severe developmental effect. The low background incidence of renal pelvic dilations seen in this study may be idiosyncratic to this strain (Wistar) of rats, since they are commonly seen at higher incidences in other strains (Sprague-Dawley or Fisher). In addition, doses selected for risk assessment of spirodiclofen are much lower than the dose that caused these developmental delays.

The degree of concern for the increased susceptibility seen in the second DNT study is also low, because there is a well established NOAEL, the toxicity is marginal (slight changes in body weights) and all developmental/functional parameters were comparable to controls. In addition, doses selected for risk assessment of spirodiclofen are much lower than the dose that caused these marginal changes in the body weights of offspring in the second DNT study.

In the first DNT study, no significant differences were noted between treated and control groups in reproductive parameters (litter size, sex ratio, number of deaths, live birth, viability and lactation), and no treatment-related clinical signs were observed at any dose in either sex. No treatment-related differences in functional observational battery (FOB), motor activity or locomotor activity were observed during the pre-weaning and post-weaning periods; and no treatment-related differences in the passive avoidance tests were observed at any dose. The trials to criterion for the memory phase of the water maze test showed a treatment-related effect at all doses for postnatal day (PND) 60 females. The memory effects occurred only in adults and were not seen in younger animals; therefore, these effects do not raise a concern for susceptibility.

On postmortem examination, differences in certain morphometric measurements (caudate putamen, parietal cortex, hippocampal gyrus and dentate gyrus) were observed at the high dose, the only dose for which morphometric measurements were made. The magnitude of these effects was minute but statistically significant. The lack of measurements at the mid- and low doses precluded establishment of a clear NOAEL or a determination as to the toxicological significance of these minor changes at the high dose. Therefore, EPA requested similar morphometric analyses at the mid- and low doses in both sexes. Since inappropriate preservation of brain tissues from the first study precluded additional morphometric analyses, the registrant elected to conduct a second DNT study using the same doses and experimental conditions. The morphometric differences observed in the first DNT study were not seen in the second study. EPA has no concern for the increased susceptibility seen in the first DNT study because:

- The magnitude of the morphometric changes was minor.
- They occurred at the high dose; the doses selected for risk assessment are significantly lower than the dose at which these effects were seen.
- No other neurotoxic effects were observed in young pups in the first DNT study.
- The results were not reproduced in the second study conducted using identical doses and experimental conditions. The results of the second study suggest that the findings in the first study are spurious and not toxicologically significant.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X for chronic dietary exposures, the only exposures considered in this risk assessment, since an acute dietary endpoint has not been identified for spirodiclofen and there are no residential uses that would result in short-term or intermediate-term non-dietary exposures. The decision to reduce the FQPA SF to 1X for chronic dietary exposures is based on the following findings:

i. The toxicity database for spirodiclofen is complete.

ii. Based on the results of acute, subchronic and developmental neurotoxicity studies in rats (see units III.A. and III.D.2.), EPA has concluded that spirodiclofen is unlikely to be a neurotoxic or developmentally

neurotoxic compound and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There was no evidence (qualitative or quantitative) of increased susceptibility in the rabbit developmental toxicity study or the rat reproduction toxicity study following *in utero* or postnatal exposure to spirodiclofen. The degree of concern is low for the quantitative susceptibility seen in the prenatal developmental and DNT studies in the rat, and the Agency did not identify any residual uncertainties after establishing toxicity endpoints and traditional uncertainty factors to be used in the risk assessment of spirodiclofen.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were refined using reliable PPCT information and anticipated residue values calculated from residue field trial results. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to spirodiclofen in drinking water. Residential exposures are not expected. These assessments will not underestimate the exposure and risks posed by spirodiclofen.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-term, intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effect resulting from a single-oral exposure was identified and no acute dietary endpoint was selected. Therefore, spirodiclofen is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to spirodiclofen from food and water will utilize 3.2% of the cPAD for infants less than 1 year old, the population group receiving the greatest exposure. There are no residential uses for spirodiclofen.

3. *Short-term and intermediate-term risk*. Short-term and intermediate-term aggregate exposures take into account short-term and intermediate-term residential exposures plus chronic exposure to food and water (considered to be a background exposure level). Spirodiclofen is not registered for any use patterns that would result in residential exposure. Therefore, the short-term/intermediate-term aggregate risk is the sum of the risk from exposure to spirodiclofen through food and water and will not be greater than the chronic aggregate risk.

4. *Aggregate cancer risk for U.S. population*. Using the exposure assumptions described in Unit III.C.1.iii. for cancer, EPA has concluded that exposure to spirodiclofen from food and water will result in a lifetime cancer risk of 3×10^{-6} for the U.S. population.

EPA generally considers cancer risks in the range of 10^{-6} or less to be negligible. The precision which can be assumed for cancer risk estimates is best described by rounding to the nearest integral order of magnitude on the log scale; for example, risks falling between 3.16×10^{-7} and 3.16×10^{-6} are expressed as risks in the range of 10^{-6}. Considering the precision with which cancer hazard can be estimated, the conservativeness of low-dose linear extrapolation, and the rounding procedure described above, cancer risk should generally not be assumed to exceed the benchmark LOC of the range of 10^{-6} until the calculated risk exceeds approximately 3×10^{-6}. Since the calculated cancer risk for spirodiclofen does not exceed this level, estimated cancer risk is considered to be negligible.

5. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to spirodiclofen residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (a liquid chromatography (LC)/mass spectrometry (MS)/MS method) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

No maximum residue limits (MRLs) have been established by Canada, Mexico or Codex for spirodiclofen on hops.

V. Conclusion

Therefore, a tolerance is established for residues of spirodiclofen, 3-(2,4-dichlorophenyl)-2-oxo-1-oxaspiro[4,5]dec-3-en-4-yl 2,2-dimethylbutanoate, in or on hop, dried cones at 30 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of

power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 24, 2008.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.608 is amended by alphabetically adding the following commodity to the table in paragraph (a)(1) to read as follows:

§ 180.608 Spirodiclofen; tolerances for residues.

(a) * * *.

(1) * * *

Commodity	Parts per million
* * *	* *
Hop, dried cones	30
* * *	* *

* * * * * *

[FR Doc. E8–9826 Filed 5–6–08; 8:45 am]

BILLING CODE 6560–50–S

GENERAL SERVICES ADMINISTRATION

41 CFR Part 302–17

[FTR Amendment 2008–03; FTR Case 2008–302; Docket 2008–002, Sequence 1]

RIN 3090–AI48

Federal Travel Regulation; Relocation Income Tax (RIT) Allowance Tax Tables—2008 Update

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: This rule updates the Federal, State, and Puerto Rico tax tables for calculating the relocation income tax (RIT) allowance, to reflect changes in Federal, State, and Puerto Rico income tax brackets and rates. The Federal, State, and Puerto Rico tax tables contained in this rule are for use in calculating the 2008 RIT allowance for tax year 2007 to be paid to relocating Federal employees.

DATES: Effective Date: This final rule is effective on May 7, 2008.

Applicability date: January 1, 2008.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat (VIR), Room 4035, GSA Building, Washington, DC 20405, telephone (202)208–7312, for information pertaining to status or publication schedules. For clarification of content, contact Ed Davis, Office of Governmentwide Policy, Travel Management Policy (MTT), Washington, DC 20405, telephone (202) 501–4755. Please cite FTR Amendment 2008–03, FTR case 2008–302.

SUPPLEMENTARY INFORMATION:

A. Background

Section 5724b of Title 5, United States Code, provides for reimbursement of substantially all Federal, State, and local income taxes incurred by a transferred Federal employee on taxable moving expense reimbursements. Policies and procedures for the calculation and payment of the RIT allowance are contained in the Federal Travel Regulation (41 CFR part 302–17). GSA updates Federal, State, and Puerto Rico tax tables for calculating RIT allowance payments yearly to reflect changes in Federal, State, and Puerto Rico income tax brackets and rates.

This amendment also provides a tax table necessary to compute the RIT allowance for employees who received reimbursement for relocation expenses in previous years.

B. Executive Order 12866

This regulation is excepted from the definition of ''regulation'' or ''rule'' under Section 3(d)(3) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993 and, therefore, was not subject to review under Section 6(b) of that Executive Order.

C. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for notice and comment as per the exemption specified in 5 U.S.C. 553(a)(2); therefore, the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., does not apply.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501 et seq.

E. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Part 302–17

Government employees, Income taxes, Relocation allowances and entitlements, Transfers, Travel and transportation expenses.

Dated: May 1, 2008.

David L. Bibb,

Acting Administrator of General Services.

■ For the reasons set forth in the preamble, under 5 U.S.C. 5738, GSA amends 41 CFR Part 302–17 as set forth below:

PART 302–17—RELOCATION INCOME TAX (RIT) ALLOWANCE

■ 1. The authority citation for 41 CFR Part 302–17 is revised to read as follows:

Authority: 5 U.S.C. 5738; 20 U.S.C. 905(a); E.O. 11609, as amended, 36 FR 13747, 3 CFR, 1971–1975 Comp., p. 586.

■ 2. Revise Appendixes A, B, C, and D to part 302–17 to read as follows:

Appendix A to Part 302–17—Federal Tax Tables For RIT Allowance

FEDERAL MARGINAL TAX RATES BY EARNED INCOME LEVEL AND FILING STATUS—TAX YEAR 2007

[Use the following table to compute the RIT allowance for Federal taxes, as prescribed in 302–17.8(e)(1), on Year 1 taxable reimbursements received during calendar year 2007.]

Marginal tax rate	Single taxpayer		Head of household		Married filing jointly/qualifying widows & widowers		Married filing separately	
Percent	Over	But not over	Over	But not over	Over	But not over	Over	But not over
10	$ 9,597	$18,107	$18,364	$30,153	$27,463	$42,942	$14,203	$21,913
15	18,107	44,461	30,153	64,200	42,942	94,016	21,913	46,764
25	44,461	95,997	64,200	142,780	94,016	167,442	46,764	84,076
28	95,997	191,453	142,780	225,385	167,442	243,961	84,076	124,354
33	191,453	390,566	225,385	405,567	243,961	404,547	124,354	205,412
35	390,566	.....	405,567	.....	404,547	.....	205,412	.....

Appendix B to Part 302–17—State Tax Tables For RIT Allowance

STATE MARGINAL TAX RATES BY EARNED INCOME LEVEL—TAX YEAR 2007

(Use the following table to compute the RIT allowance for State taxes, as prescribed in 302–17.8(e)(2), on taxable reimbursements received during calendar year 2007. The rates on the first line for each State are for employees who are married and file jointly; if there is a second line for a State, it displays the rates for employees who file as single. For more additional information, such as State rates for other filing statuses, please see the 2008 State Tax Handbook, pp. 259–274, available from CCH Inc., *http://tax.cchgroup.com/Books/default#S.*)

	Marginal tax rates (stated in percents) for the earned income amounts specified in each column.[1 2 3]			
State (or district)	$20,000–$24,999	$25,000–$49,999	$50,000–$74,999	$75,000 & Over[4]
Alabama	5.00	5.00	5.00	5.00
Alaska	0.00	0.00	0.00	0.00
Arizona	2.88	3.36	3.36	3.36
If single status, married filing separately[5]	2.88	3.36	4.24	4.24
Arkansas	6.00	7.00	7.00	7.00
California	2.00	4.30	9.30	9.30
If single status, married filing separately[5]	2.00	9.30	9.30	9.30
Colorado	4.63	4.63	4.63	4.63
Connecticut	5.00	5.00	5.00	5.00
Delaware	5.20	5.55	5.95	5.95
District of Columbia	6.00	8.50	8.50	8.50
Florida	0.00	0.00	0.00	0.00
Georgia	6.00	6.00	6.00	6.00
Hawaii	6.40	7.60	7.90	8.25
If single status, married filing separately[5]	7.60	7.90	8.25	8.25
Idaho	7.40	7.80	7.80	7.80
If single status, married filing separately[5]	7.80	7.80	7.80	7.80
Illinois	3.00	3.00	3.00	3.00
Indiana	3.40	3.40	3.40	3.40
Iowa	6.48	7.92	8.98	8.98
Kansas	6.25	6.45	6.45	6.45
If single status, married filing separately[5]	6.25	6.45	6.45	6.45
Kentucky	5.80	5.80	5.80	6.00
Louisiana	2.00	4.00	6.00	6.00
If single status, married filing separately[5]	4.00	6.00	6.00	6.00
Maine	7.00	8.50	8.50	8.50
If single status, married filing separately[5]	8.50	8.50	8.50	8.50
Maryland	4.75	4.75	4.75	4.75
Massachusetts	5.30	5.30	5.30	5.30
Michigan	3.90	3.90	3.90	3.90
Michigan on or after October 1, 2007	4.35	4.35	4.35	4.35
Minnesota	5.35	7.05	7.05	7.05
If single status, married filing separately[5]	7.05	7.05	7.85	7.85
Mississippi	5.00	5.00	5.00	5.00
Missouri	6.00	6.00	6.00	6.00
Montana	6.90	6.90	6.90	6.90
Nebraska	3.57	6.84	6.84	6.84
If single status, married filing separately[5]	5.12	6.84	6.84	6.84
Nevada	0.00	0.00	0.00	0.00
New Hampshire	0.00	0.00	0.00	0.00

STATE MARGINAL TAX RATES BY EARNED INCOME LEVEL—TAX YEAR 2007—Continued

(Use the following table to compute the RIT allowance for State taxes, as prescribed in 302–17.8(e)(2), on taxable reimbursements received during calendar year 2007. The rates on the first line for each State are for employees who are married and file jointly; if there is a second line for a State, it displays the rates for employees who file as single. For more additional information, such as State rates for other filing statuses, please see the 2008 State Tax Handbook, pp. 259–274, available from CCH Inc., *http://tax.cchgroup.com/Books/default#S.*)

Marginal tax rates (stated in percents) for the earned income amounts specified in each column.[1 2 3]				
State (or district)	$20,000–$24,999	$25,000–$49,999	$50,000–$74,999	$75,000 & Over[4]
New Jersey	1.75	1.75	3.50	5.525
If single status, married filing separately[5]	1.75	5.525	5.525	6.370
New Mexico	5.30	5.30	5.30	5.30
New York	5.25	6.85	6.85	6.85
If single status, married filing separately[5]	6.85	6.85	6.85	6.85
North Carolina	7.00	7.00	7.00	7.00
If single status, married filing separately[5]	7.00	7.00	7.75	7.75
North Dakota	2.10	2.10	3.92	3.92
If single status, married filing separately[5]	2.10	3.92	3.92	4.34
Ohio	3.895	4.546	4.546	5.194
Oklahoma	5.650	5.650	5.650	5.650
Oregon	9.00	9.00	9.00	9.00
Pennsylvania	3.07	3.07	3.07	3.07
Rhode Island[6]	3.75	3.75	7.00	7.00
If single status, married filing separately[5]	3.75	7.00	7.00	7.75
South Carolina	7.00	7.00	7.00	7.00
South Dakota	0.00	0.00	0.00	0.00
Tennessee	0.00	0.00	0.00	0.00
Texas	0.00	0.00	0.00	0.00
Utah	6.98	6.98	6.98	6.98
Vermont	3.60	7.20	7.20	7.20
If single status, married filing separately[5]	3.60	7.20	8.50	8.50
Virginia	5.75	5.75	5.75	5.75
Washington	0.00	0.00	0.00	0.00
West Virginia	4.00	6.00	6.50	6.50
Wisconsin	6.50	6.50	6.50	6.50
Wyoming	0.00	0.00	0.00	0.00

[The above table/column headings established by IRS.]

[1] Earned income amounts that fall between the income brackets shown in this table (e.g., $24,999.45, $49,999.75) should be rounded to the nearest dollar to determine the marginal tax rate to be used in calculating the RIT allowance.

[2] If the earned income amount is less than the lowest income bracket shown in this table, the employing agency shall establish an appropriate marginal tax rate as provided in § 302–17.8(e)(2)(ii).

[3] If two or more marginal tax rates of a State overlap an income bracket shown in this table, then the highest of the two or more State marginal tax rates is shown for that entire income bracket. For more specific information, see the 2008 State Tax Handbook, pp. 259–274, CCH, Inc., *http://tax.cchgroup.com/Books/default#S.*

[4] This is an estimate. For earnings over $100,000, and for filing statuses other than those above, please consult actual tax tables. See 2008 State Tax Handbook, pp. 259–274, CCH, Inc., *http://tax.cchgroup.com/Books/default#S.*

[5] This rate applies only to those individuals certifying that they will file under a single or married filing separately status within the states where they will pay income taxes.

[6] The income tax rate for Rhode Island is 25 percent of Federal income tax rates, including capital gains rates and any other special rates for other types of income. Rates shown as a percent of Federal income tax liability must be converted to a percent of income as provided in § 302–17.8(e)(2)(iii). Effective for the 2007 tax year, taxpayers may elect to compute income tax liability based on a graduated rate schedule or an alternative flat tax equal to 7.5%.

Appendix C to Part 302–17—Federal Tax Tables For RIT Allowance—Year 2

ESTIMATED RANGES OF WAGE AND SALARY INCOME CORRESPONDING TO FEDERAL STATUTORY MARGINAL INCOME TAX RATES BY FILING STATUS IN 2007

[The following table is to be used to determine the Federal marginal tax rate for Year 2 for computation of the RIT allowance as prescribed in 301–17.8(e)(1). This table is to be used for employees whose Year 1 occurred during calendar years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006 or 2007.]

Marginal tax rate	Single taxpayer		Head of household		Married filing jointly/ qualifying widows & widowers		Married filing separately	
Percent	Over	But not over	Over	But not over	Over	But not over	Over	But not over
10	$8,739	16,560	$16,538	$27,374	$24,163	$38,534	$12,036	$19,194
15	16,560	41,041	27,374	59,526	38,534	86,182	19,194	43,330
25	41,041	88,541	59,526	128,605	86,182	154,786	43,330	79,441
28	88,541	175,222	128,605	203,511	154,786	224,818	79,441	114,716
33	175,222	360,212	203,511	375,305	224,818	374,173	114,716	188,184

ESTIMATED RANGES OF WAGE AND SALARY INCOME CORRESPONDING TO FEDERAL STATUTORY MARGINAL INCOME TAX RATES BY FILING STATUS IN 2007—Continued

[The following table is to be used to determine the Federal marginal tax rate for Year 2 for computation of the RIT allowance as prescribed in 301–17.8(e)(1). This table is to be used for employees whose Year 1 occurred during calendar years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006 or 2007.]

Marginal tax rate	Single taxpayer		Head of household		Married filing jointly/ qualifying widows & widowers		Married filing separately	
Percent	Over	But not over	Over	But not over	Over	But not over	Over	But not over
35	360,212		375,305		374,173		188,184	

Appendix D to Part 302–17—Puerto Rico Tax Tables for RIT Allowance

PUERTO RICO MARGINAL TAX RATES BY EARNED INCOME LEVEL—TAX YEAR 2007

(Use the following table to compute the RIT allowance for Puerto Rico taxes, as prescribed in 302–17.8(e)(4)(i), on taxable reimbursements received during calendar year 2007.)

Marginal tax rate	For married person living with spouse and filing jointly, married person not living with spouse, single person, or head of household	
	Percent	Over
7%	$2,000	17,000
14% + 1,190	17,000	30,000
25% + 3,010	30,000	50,000
33% + 8,010	50,000	

Marginal tax rate	For married person living with spouse and filing separately	
	Percent	Over
7%	$1,000	8,500
14% + $595	8,500	15,000
25% + 1,505	15,000	
	25,000	
33% + 4,005	25,000	

Source: Individual Income Tax Return 2007—Long Form; Commonwealth of Puerto Rico, Department of the Treasury,P.O. Box 9022501, San Juan, PR 00902–2501;*http://www.hacienda.gobierno.pr/.*

[FR Doc. E8–10022 Filed 5–6–08; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Assistant Administrator of the Mitigation Directorate has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has

developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Chowan County, North Carolina and Incorporated Areas Docket Nos.: FEMA–D–7820, FEMA–D–7578, and FEMA–B–7736			
Burnt Mill Creek	At a point just upstream of Burnt Mill Road	+6	Unincorporated Areas of Chowan County.
	Approximately 1,000 feet upstream of U.S. Highway 17	+13	
Filberts Creek	Approximately 250 feet downstream of Virginia Road/NC Highway 32.	+7	Town of Edenton.
	Approximately 1,120 feet upstream of Virginia Road/NC Highway 32.	+14	
Goodwin Mill Creek	Approximately 1.7 miles upstream of Center Hill Road	+14	Unincorporated Areas of Chowan County.
	At Center Hill Road	+14	
Northeast Tributary of Queen Anne Creek.	At the confluence with Queen Anne Creek	+7	Unincorporated Areas of Chowan County.
	Approximately 920 feet upstream of the confluence with Northeast Tributary of Queen Anne Creek Tributary 1.	+12	
Northeast Tributary of Queen Anne Creek Tributary 1.	At the confluence with Northeast Tributary of Queen Anne Creek.	+8	Unincorporated Areas of Chowan County.
	Approximately 1,150 feet upstream of the confluence with Northeast Tributary of Queen Anne Creek.	+14	
Northwest Tributary of Queen Anne Creek.	At the confluence with Queen Anne Creek	+7	Unincorporated Areas of Chowan County, Town of Edenton.
	Approximately 80 feet downstream of Railroad	+16	
Pembroke Creek	At Wildcat Road (State Road 1208)	+7	Unincorporated Areas of Chowan County.
	Approximately 1.2 miles upstream of the confluence with Pembroke Creek Tributary 8.	+13	
Pembroke Creek Tributary 1	Approximately 0.5 mile upstream of the confluence with Pembroke Creek.	+8	Unincorporated Areas of Chowan County.
	Approximately 330 feet downstream of VS Road/NC Highway 32.	+16	
Pembroke Creek Tributary 2	At the confluence with Pembroke Creek	+7	Unincorporated Areas of Chowan County.
	Approximately 0.4 mile upstream of the confluence with Pembroke Creek.	+8	
Pembroke Creek Tributary 3	At the confluence with Pembroke Creek	+7	Unincorporated Areas of Chowan County.
	Approximately 0.5 mile upstream of the confluence with Pembroke Creek.	+8	
Pembroke Creek Tributary 4	At the confluence with Pembroke Creek	+7	Unincorporated Areas of Chowan County.
	Approximately 1.4 miles upstream of Greenhall Road (State Road 1316).	+15	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Pembroke Creek Tributary 5	At the confluence with Pembroke Creek	+8	Unincorporated Areas of Chowan County.
	Approximately 0.6 mile upstream of Greenhall Road (State Road 1316).	+13	
Pembroke Creek Tributary 6	At the confluence with Pembroke Creek	+10	Unincorporated Areas of Chowan County.
	Approximately 1,620 feet upstream of the confluence with Pembroke Creek.	+11	
Pembroke Creek Tributary 7	At the confluence with Pembroke Creek	+11	Unincorporated Areas of Chowan County.
	Approximately 1,700 feet upstream of the confluence with Pembroke Creek.	+11	
Pembroke Creek Tributary 8	At the confluence with Pembroke Creek	+12	Unincorporated Areas of Chowan County.
	Approximately 0.5 mile upstream of the confluence with Pembroke Creek Tributary 8A.	+12	
Pembroke Creek Tributary 8A	At the confluence with Pembroke Creek Tributary 8	+12	Unincorporated Areas of Chowan County.
	Approximately 0.5 mile upstream of the confluence with Pembroke Creek Tributary 8.	+12	
Queen Anne Creek	Just downstream of Paxton Lane	+6	Unincorporated Areas of Chowan County, Town of Edenton.
	Approximately 490 feet upstream of U.S. 17 BYP	+15	
Rockyhock Creek	At Rocky Hock Road (State Road 1222)	+7	Unincorporated Areas of Chowan County.
	Approximately 0.8 mile upstream of NC Highway 32	+29	
Rockyhock Creek Tributary 1	At the confluence with Rockyhock Creek	+7	Unincorporated Areas of Chowan County.
	Approximately 0.6 mile upstream of the confluence with Rockyhock Creek.	+9	
Rockyhock Creek Tributary 2	At the confluence with Rockyhock Creek	+8	Unincorporated Areas of Chowan County.
	Approximately 0.9 mile upstream of the confluence with Rockyhock Creek.	+9	
Rockyhock Creek Tributary 3	At the confluence with Rockyhock Creek	+11	Unincorporated Areas of Chowan County.
	Approximately 0.8 mile upstream of Rocky Hock Landing Road (State Road 1224).	+15	
Rockyhock Creek Tributary 3A.	At the confluence with Rockyhock Creek Tributary 3	+11	Unincorporated Areas of Chowan County.
	Approximately 0.6 mile upstream of the confluence with Rockyhock Creek Tributary 3.	+15	
Rockyhock Creek Tributary 4	At the confluence with Rockyhock Creek	+11	Unincorporated Areas of Chowan County.
	Approximately 100 feet downstream of Nixon Road (State Road 1225).	+14	
Rockyhock Creek Tributary 5	At the confluence with Rockyhock Creek	+11	Unincorporated Areas of Chowan County.
	Approximately 350 feet downstream of Cisco Road (State Road 1314).	+36	
Rockyhock Creek Tributary 5A.	At the confluence with Rockyhock Creek Tributary 5	+20.	Unincorporated Areas of Chowan County.
	Approximately 0.5 mile upstream of the confluence with Rockyhock Creek Tributary 5.	+25	
Rockyhock Creek Tributary 6	At the confluence with Rockyhock Creek	+12	Unincorporated Areas of Chowan County.
	Approximately 0.4 mile upstream of Rocky Hock Landing Road (State Road 1224).	+15	
Rockyhock Creek Tributary 7	At the confluence with Rockyhock Creek	+15	Unincorporated Areas of Chowan County.
	Approximately 0.8 mile upstream of the confluence with Rockyhock Creek.	+18	
Rockyhock Creek Tributary 8	At the confluence with Rockyhock Creek	+15	Unincorporated Areas of Chowan County.
	Approximately 150 feet downstream of NC Highway 32	+22	

* National Geodetic Vertical Datum.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected

+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

Town of Edenton
Maps are available for inspection at Edenton Town Hall, 400 South Broad Street, Edenton, North Carolina.

Unincorporated Areas of Chowan County
Maps are available for inspection at Chowan County Planning Department, 108 East King Street, Edenton, North Carolina.

Union County, North Carolina and Incorporated Areas
Docket No.: FEMA–D–7668 and FEMA–D–7808

Adams Branch	At the confluence with Richardson Creek	+540	Unincorporated Areas of Union County.
	Approximately 0.5 mile upstream of Richardson Road (SR 2158).	+629	
Adams Branch Tributary 1	At the confluence with Adams Branch	+569	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of the confluence with Adams Branch.	+602	
Austin Branch	At the confluence with Salem Creek	+486	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Austin Grove Church Road (SR 1751).	+580	
Barkers Branch	At the confluence with Lanes Creek	+430	Unincorporated Areas of Union County.
	Approximately 1,990 feet upstream of Tanner Road (SR 1935).	+531	
Bates Branch	At the confluence with East Fork Twelvemile Creek	+526	Unincorporated Areas of Union County, Town of Mineral Springs.
	Approximately 150 feet downstream of McNeely Road	+603	
Bearskin Creek	Approximately 1,900 feet upstream of the confluence with Richardson Creek.	+485	Unincorporated Areas of Union County, City of Monroe.
	Approximately 360 feet upstream of Price Short Cut Road (SR 1351).	+636	
Beaverdam Creek	At the confluence with Lanes Creek	+413	Unincorporated Areas of Union County.
	Approximately 1.2 miles upstream of Russell Pope Road (SR 1948).	+571	
Beaverdam Creek (West)	At the confluence with Richardson Creek	+520	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Parks McCorkle Road (SR 1152).	+651	
Beaverdam Creek Tributary 1	At the confluence with Beaverdam Creek	+460	Unincorporated Areas of Union County.
	Approximately 0.8 mile upstream of Doctor Blair Road (SR 1902).	+498	
Beaverdam Creek Tributary 1A.	At the confluence with Beaverdam Creek Tributary 1	+462	Unincorporated Areas of Union County.
	Approximately 0.5 mile upstream of the confluence with Beaverdam Creek Tributary 1.	+492	
Beaverdam Creek Tributary 1B.	At the confluence with Beaverdam Creek Tributary 1	+464	Unincorporated Areas of Union County.
	Approximately 1,570 feet upstream of the confluence of Beaverdam Creek Tributary 1B1.	+484	
Beaverdam Creek Tributary 1B1.	At the confluence with Beaverdam Creek Tributary 1B	+473	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of the confluence with Beaverdam Creek Tributary 1B.	+483	
Beaverdam Creek Tributary 2	At the confluence with Beaverdam Creek	+467	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of the confluence with Beaverdam Creek.	+503	
Becky Branch	At the confluence with Salem Creek	+440	Unincorporated Areas of Union County.
	Approximately 0.9 mile upstream of the confluence of Becky Branch Tributary 2.	+500	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Becky Branch Tributary 1	At the confluence with Becky Branch	+440	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of Old Lawyers Road (SR 1736).	+491	
Becky Branch Tributary 2	At the confluence with Becky Branch	+465	Unincorporated Areas of Union County.
	Approximately 280 feet upstream of Old Lawyers Road (SR 1736).	+510	
Blue Branch	At the confluence with Cane Creek	+510	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of Bud Huey Road (State Route 115).	+549	
Blythe Creek	At the confluence with East Fork Twelvemile Creek	+510	Unincorporated Areas of Union County.
	Approximately 1.0 mile upstream of Waxhaw Highway	+607	
Blythe Creek Tributary	At the confluence with Blythe Creek	+554	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of the confluence with Blythe Creek.	+564	
Booger Branch	At the confluence with Cane Creek	+514	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of the confluence with Booger Branch Tributary 2.	+577	
Booger Branch Tributary 1	At the confluence with Booger Branch	+514	Unincorporated Areas of Union County.
	Approximately 0.8 mile upstream of Bud Huey Road (State Route 1115).	+561	
Booger Branch Tributary 2	At the confluence with Booger Branch	+550	Unincorporated Areas of Union County.
	Approximately 1.4 miles upstream of the confluence with Booger Branch.	+611	
Brandon Branch	At the confluence with Gold Branch	+439	Unincorporated Areas of Union County.
	Approximately 950 feet upstream of Sugar and Wine Road (SR 1649).	+518	
Brown Creek	Approximately 0.5 mile downstream of the Anson/Union County boundary.	+326	Unincorporated Areas of Union County, City of Monroe.
	Approximately 1.1 miles upstream of Canal Road (SR 1919).	+374	
Brown Creek Tributary 5	At the confluence with Brown Creek	+331	Unincorporated Areas of Union County.
	Approximately 640 feet upstream of Zion Church Road	+354	
Brown Creek Tributary 6	At the confluence with Brown Creek	+337	Unincorporated Areas of Union County.
	Approximately 980 feet upstream of Zion Church Road	+379	
Buck Branch	At the confluence with Little Richardson Creek	+503	Unincorporated Areas of Union County.
	Approximately 950 feet downstream of Magnum Dairy Road (SR 2108).	+599	
Buffalo Creek	At the North Carolina/South Carolina State boundary	+501	Unincorporated Areas of Union County.
	Approximately 0.9 mile upstream of Jack Davis Road (SR 2125).	+631	
Buffalo Creek Tributary 1	At the confluence with Buffalo Creek	+502	Unincorporated Areas of Union County.
	Approximately 1,370 feet upstream of Trinity Church Road (SR 2153).	+594	
Bull Branch	At the confluence with Richardson Creek	+425	Unincorporated Areas of Union County.
	Approximately 1.2 miles upstream of Olive Branch Road (SR 1006).	+510	
Camp Branch	At the confluence with Bearskin Creek	+585	Unincorporated Areas of Union County, City of Monroe.
	Approximately 1,500 feet upstream of Weddington Road	+611	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Cane Creek	Approximately 300 feet downstream of the Lancaster County, South Carolina/Union County, North Carolina State boundary.	+502	Unincorporated Areas of Union County.
	Approximately 250 feet upstream of Rocky River Road (State Route 522).	+647	
Cane Creek Tributary 1	At the confluence with Cane Creek	+562	Unincorporated Areas of Union County.
	Approximately 1.1 miles upstream of Cane Creek Road (State Route 1221).	+612	
Cane Creek Tributary 2	At the confluence with Cane Creek	+580	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of the confluence with Cane Creek.	+607	
Cane Creek Tributary 3	At the confluence with Cane Creek	+586	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of the confluence with Cane Creek.	+604	
Carolina Creek	At the confluence with Lanes Creek	+469	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of Van Sneed Road (SR 1925).	+548	
Cedar Branch	At the confluence with Lanes Creek	+446	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of the confluence with Lanes Creek.	+485	
Chinkapin Creek	At the confluence with Stewarts Creek	+492	Unincorporated Areas of Union County, Town of Unionville.
	Approximately 820 feet upstream of Tom Helms Road	+551	
Chinkapin Creek Tributary 1	At the confluence with Chinkapin Creek	+505	Town of Unionville.
	Approximately 0.8 mile upstream of the confluence with Chinkapin Creek.	+550	
Chinkapin Creek Tributary 2	At the confluence with Chinkapin Creek	+515	Town of Unionville.
	Approximately 900 feet upstream of Skies Mill Road	+570	
Chinkapin Creek Tributary 2A	At the confluence with Chinkapin Creek Tributary 2	+523	Town of Unionville.
	Approximately 0.5 mile upstream of Unionville Road	+568	
Clear Creek	At the confluence with Rocky River	+469	Town of Fairview.
	Approximately 1,400 feet upstream of the confluence of Long Branch.	+486	
Cool Spring Branch	At the confluence with Lanes Creek	+437	Unincorporated Areas of Union County.
	Approximately 1.4 miles upstream of White Store Road (SR 1003).	+476	
Cowhorn Branch	At the confluence with Tarkill Branch	+552	Unincorporated Areas of Union County, Village of Marvin.
	Approximately 0.4 mile upstream of Waxhaw Marvin Road (State Route 1307).	+572	
Cowpens Branch	At the confluence with Wicker Branch	+539	Unincorporated Areas of Union County.
	Approximately 0.9 mile upstream of Medlin Road (SR 2102).	+608	
Crisco Branch	At the confluence with Rocky River	+348	Unincorporated Areas of Union County.
	Approximately 1.5 miles upstream of the confluence with Rocky River.	+436	
Crooked Creek	At the confluence with Rocky River	+426	Unincorporated Areas of Union County, Town of Fairview.
	At the confluence of North Fork Crooked Creek and South Fork Crooked Creek.	+570	
Crooked Creek Tributary 1	At the confluence with Crooked Creek	+565	Town of Fairview, Town of Unionville.
	Approximately 0.4 mile upstream of Clontz Long Road	+592	
Culvert Branch	Approximately 700 feet upstream of the confluence with West Fork Twelvemile Creek.	+558	Unincorporated Areas of Union County.
	Approximately 1,000 feet upstream of Timber Lane	+647	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Davis Branch	At the confluence with Waxhaw Creek	+512	Unincorporated Areas of Union County.
	Approximately 1.5 miles upstream of the confluence with Davis Branch Tributary 1.	+584	
Davis Branch Tributary 1	At the confluence with Davis Branch	+535	Unincorporated Areas of Union County.
	Approximately 1.5 miles upstream of the confluence with Davis Branch.	+614	
Davis Mine Creek	Approximately 120 feet downstream of Waxhaw-Indian Trail Road.	+601	Unincorporated Areas of Union County, Village of Wesley Chapel, Town of Indian Trail, Town of Stallings, Town of Weddington.
	Approximately 650 feet upstream of Lakewood Drive	+722	
Davis Mine Creek Tributary 1	At the confluence with Davis Mine Creek	+649	Town of Indian Trail.
	Approximately 1,500 feet upstream of McLendon Road	+682	
Dry Fork	At the confluence with Bearskin Creek	+581	City of Monroe.
	Approximately 1,300 feet upstream of North Rocky Road (SR 1007).	+638	
Duck Creek	At the confluence with Goose Creek	+468	Unincorporated Areas of Union County, Town of Fairview.
	Approximately 0.8 mile upstream of the confluence with Duck Creek Tributary 3.	+575	
Duck Creek Tributary 1	At the confluence with Duck Creek	+483	Town of Fairview.
	Approximately 0.4 mile upstream of the confluence with Duck Creek.	+496	
Duck Creek Tributary 2	At the confluence with Duck Creek	+509	Town of Fairview.
	Approximately 60 feet downstream of Crowell Dairy Road	+560	
Duck Creek Tributary 3	At the confluence with Duck Creek	+537	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of Rock Hill Church Road (SR 1539).	+614	
East Fork Stewarts Creek	Approximately 110 feet upstream of the confluence with Stewarts Creek.	+537	Unincorporated Areas of Union County, Town of Unionville.
	Approximately 1.2 miles upstream of the confluence of East Fork Stewarts Creek Tributary 1.	+597	
East Fork Stewarts Creek Tributary 1.	At the confluence with East Fork Stewarts Creek	+572	Unincorporated Areas of Union County, Town of Unionville.
	Approximately 1,840 feet upstream of the confluence of East Fork Stewarts Creek Tributary 1A.	+586	
East Fork Stewarts Creek Tributary 1A.	At the confluence with East Fork Stewarts Creek Tributary 1.	+578	Unincorporated Areas of Union County.
	Approximately 680 feet upstream of the confluence with East Fork Stewarts Creek Tributary 1.	+590	
East Fork Twelvemile Creek	Approximately 0.4 mile upstream of the confluence with Twelvemile Creek and West Fork Twelvemile Creek.	+510	Unincorporated Areas of Union County, Village of Wesley Chapel, Town of Indian Trail, Town of Mineral Springs, Town of Waxhaw.
	Approximately 1,710 feet upstream of Grayson Parkway	+621	
East Fork Twelvemile Creek Tributary 1.	At the confluence with East Fork Twelvemile Creek	+520	Unincorporated Areas of Union County, Village of Wesley Chapel.
	Approximately 735 feet upstream of Farm Creek Road	+560	
East Fork Twelvemile Creek Tributary 2.	At the confluence with East Fork Twelvemile Creek	+522	Unincorporated Areas of Union County, Village of Wesley Chapel.
	Approximately 1.1 miles upstream of the confluence with East Fork Twelvemile Creek.	+545	
East Fork Twelvemile Creek Tributary 3.	At the confluence with East Fork Twelvemile Creek	+562	Unincorporated Areas of Union County, City of Monroe, Village of Wesley Chapel.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 1,300 feet upstream of Sanford Lane (State Route 1394).	+650	
East Fork Twelvemile Creek Tributary 4.	At the confluence with East Fork Twelvemile Creek	+583	Village of Wesley Chapel, Town of Indian Trail.
	Approximately 1.2 miles upstream of Mayflower Trail	+620	
East Fork Twelvemile Creek Tributary 5.	At the confluence with East Fork Twelvemile Creek	+597	Unincorporated Areas of Union County, City of Monroe, Town of Indian Trail.
	Approximately 725 feet downstream of Capital Drive	+639	
East Fork Twelvemile Creek Tributary 6.	At the confluence with East Fork Twelvemile Creek	+610	Unincorporated Areas of Union County, Town of Indian Trail.
	Approximately 0.5 mile upstream of the confluence with East Fork Twelvemile Creek.	+629	
Flag Branch	At the confluence with Chinkapin Creek	+494	Unincorporated Areas of Union County, Town of Unionville.
	Approximately 180 feet upstream of Morgan Mill Road	+524	
Gibbs Branch	At the confluence with Mill Creek (South)	+519	Unincorporated Areas of Union County.
	Approximately 230 feet upstream of Arant Road (SR 2117)	+555	
Glen Branch	At the confluence with Waxhaw Creek	+592	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Nesbit Road (State Route 1131).	+633	
Gold Branch	At the confluence with Richardson Creek	+396	Unincorporated Areas of Union County.
	Approximately 0.9 mile upstream of New Salem Road (SR 1627).	+506	
Gold Branch (East)	At the confluence with Grapevine Creek	+449	Unincorporated Areas of Union County.
	Approximately 0.5 mile upstream of Marshville Olive Branch Road (SR 1719).	+503	
Goose Creek	At the confluence with Rocky River	+466	Unincorporated Areas of Union County, Town of Fairview, Town of Indian Trail, Town of Stallings.
	At the Mecklenburg/Union County boundary	+626	
Goose Creek Tributary 1	At the confluence with Goose Creek	+468	Town of Fairview.
	Approximately 50 feet downstream of Roy Kindley Road	+524	
Goose Creek Tributary 2	At the confluence with Goose Creek	+520	Town of Fairview.
	Approximately 0.6 mile upstream of the confluence with Goose Creek.	+536	
Goose Creek Tributary 3	Approximately 800 feet upstream of the confluence with Goose Creek.	+540	Unincorporated Areas of Union County, Town of Indian Trail.
	Approximately 0.7 mile upstream of the confluence with Goose Creek.	+556	
Goose Creek Tributary 4	Approximately 350 feet upstream of the confluence with Goose Creek.	+593	Town of Indian Trail, Town of Stallings.
	Approximately 1.4 miles upstream of the confluence with Goose Creek.	+660	
Grapevine Creek	At the confluence with Richardson Creek	+360	Unincorporated Areas of Union County.
	Approximately 1.3 miles upstream of the confluence of Gold Branch (East).	+495	
Grapevine Creek Tributary 1	At the confluence with Grapevine Creek	+418	Unincorporated Areas of Union County.
	Approximately 530 feet upstream of Lucy Short Cut Road (SR 1745).	+459	
Grapevine Creek Tributary 2	At the confluence with Grapevine Creek	+434	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of the confluence with Grapevine Creek.	+479	
Grassy Branch	At the confluence with Crooked Creek	+518	Unincorporated Areas of Union County, Town of Fairview, Town of Unionville.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 390 feet upstream of West Lawyers Road (SR 1675).	+614	
Grassy Branch Tributary 1	At the confluence with Grassy Branch	+549	Town of Unionville.
	Approximately 1,520 feet upstream of Unionville Road	+569	
Grassy Creek	At the confluence with Rocky River	+374	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Braswell-Rushing Road	+566	
Grassy Creek Tributary 1	At the confluence with Rocky River	+459	Unincorporated Areas of Union County.
	Approximately 550 feet upstream of Morgan Mill Road	+502	
Grassy Creek Tributary 2	At the confluence with Grassy Creek	+498	Unincorporated Areas of Union County.
	Approximately 0.5 mile upstream of the confluence with Grassy Creek.	+516	
Gum Log Branch	At the confluence with Lanes Creek	+522	Unincorporated Areas of Union County.
	Approximately 0.8 mile upstream of Jack Davis Road (SR 2125).	+586	
Half Way Branch	At the confluence with Meadow Branch	+506	Unincorporated Areas of Union County, Town of Wingate.
	Approximately 160 feet upstream of West Elm Street	+563	
Haney Branch	At the confluence with Beaverdam Creek	+483	Unincorporated Areas of Union County.
	Approximately 630 feet upstream of Old Pageland Marshville Road (SR 1937).	+520	
Jacks Branch	At the confluence with Salem Creek	+412	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of Henry Ellis Drive	+531	
Jacks Branch Tributary 1	At the confluence with Jacks Branch	+481	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of the confluence with Jacks Branch.	+492	
Keener Branch	At the confluence with Waxhaw Creek	+513	Unincorporated Areas of Union County.
	Approximately 0.9 mile upstream of Farmbrook Drive (State Route 1271).	+539	
Lacey Branch	At the Union/Anson County boundary	+445	Unincorporated Areas of Union County.
	Approximately 0.8 mile upstream of the confluence of Lacey Branch Tributary 2.	+506	
Lacey Branch Tributary 1	At the confluence with Lacey Branch	+479	Unincorporated Areas of Union County.
	Approximately 1,610 feet upstream of the confluence with Lacey Branch.	+496	
Lacey Branch Tributary 2	At the confluence with Lacey Branch	+481	Unincorporated Areas of Union County.
	Approximately 650 feet upstream of Brice Griffin Road (SR 1727).	+502	
Lanes Creek	Approximately 0.7 mile upstream of Hasty Road (SR 1901)	+412	Unincorporated Areas of Union County.
	Approximately 1,310 feet upstream of Jack Davis Road (SR 2125).	+624	
Lanes Creek Tributary 6	At the confluence with Lanes Creek	+438	Unincorporated Areas of Union County.
	Approximately 1,770 feet upstream of the confluence with Lanes Creek.	+442	
Lanes Creek Tributary 7	At the confluence with Lanes Creek	+444	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of the confluence with Lanes Creek.	+482	
Lanes Creek Tributary 8	At the confluence with Lanes Creek	+455	Unincorporated Areas of Union County.
	Approximately 1.1 miles upstream of the confluence with Lanes Creek.	+514	
Lanes Creek Tributary 9	At the confluence with Lanes Creek	+461	Unincorporated Areas of Union County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 0.4 mile upstream of Smith Town Road (SR 1915).	+483	
Lee Branch	At the confluence with Bates Branch	+541	Unincorporated Areas of Union County, Town of Mineral Springs.
	Approximately 375 feet downstream of Waxhaw-Monroe Road (State Route 1111).	+618	
Lee Branch Tributary 1	At the confluence with Lee Branch	+603	Town of Mineral Springs.
	Approximately 0.5 mile upstream of the confluence with Lee Branch.	+625	
Lee Branch Tributary 1A	At the confluence with Lee Branch Tributary 1	+603	Town of Mineral Springs.
	Approximately 1,250 feet upstream of the confluence with Lee Branch Tributary 1.	+617	
Lick Branch (East)	At the confluence with Lanes Creek	+413	Unincorporated Areas of Union County, Town of Marshville.
	Approximately 410 feet upstream of West Main Street	+557	
Lick Branch (East) Tributary 1	At the confluence with Lick Branch (East)	+493	Unincorporated Areas of Union County, Town of Marshville.
	Approximately 1.0 mile upstream of the confluence with Lick Branch (East).	+517	
Lick Branch (East) Tributary 1A.	At the confluence with Lick Branch (East) Tributary 1	+496	Unincorporated Areas of Union County, Town of Marshville.
	Approximately 0.3 mile upstream of Traywick Road	+517	
Lick Branch (West)	Approximately 230 feet upstream of the confluence with Stewarts Creek.	+535	City of Monroe.
	Approximately 170 feet upstream of U.S. Highway 74	+586	
Lick Branch (West) Tributary 1.	At the confluence with Lick Branch (West)	+576	City of Monroe.
	Approximately 710 feet upstream of the confluence with Lick Branch (West).	+582	
Little Brown Creek	At the confluence with Brown Creek	+351	Unincorporated Areas of Union County.
	Approximately 190 feet upstream of the confluence of Wallace Branch.	+396	
Little Mill Creek	At the confluence with Mill Creek	+466	Unincorporated Areas of Union County, Town of Unionville.
	Approximately 120 feet upstream of Lark Trail	+551	
Little Richardson Creek	At the confluence with Richardson Creek	+495	Unincorporated Areas of Union County, City of Monroe.
	Approximately 1,980 feet upstream of Bruce Thomas Road (SR 2132).	+604	
Little Richardson Creek Tributary 1.	At the confluence with Little Richardson Creek	+495	Unincorporated Areas of Union County, City of Monroe.
	Approximately 0.8 mile upstream of the confluence with Little Richardson Creek.	+533	
Little Richardson Creek Tributary 2.	At the confluence with Little Richardson Creek	+556	Unincorporated Areas of Union County.
	Approximately 620 feet upstream of Troy Medlin Road (SR 2131).	+606	
Little Richardson Creek Tributary 3.	At the confluence with Little Richardson Creek	+581	Unincorporated Areas of Union County.
	Approximately 1.6 miles upstream of the confluence with Richardson Creek.	+624	
Little Twelvemile Creek	At the confluence with East Fork Twelvemile Creek	+527	Unincorporated Areas of Union County, Town of Mineral Springs.
	Approximately 0.9 mile upstream of Crow Road	+635	
Little Twelvemile Creek Tributary 1.	At the confluence with Little Twelvemile Creek	+563	Unincorporated Areas of Union County.
	Approximately 925 feet upstream of Porter Drive (State Route 2552).	+600	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Little Twelvemile Creek Tributary 2.	At the confluence with Little Twelvemile Creek	+588	Unincorporated Areas of Union County, Town of Mineral Springs.
	Approximately 1,500 feet upstream of Old Waxhaw-Monroe Road (State Route 1149).	+626	
Little Watson Branch	At the confluence with Water Branch	+314	Unincorporated Areas of Union County.
	Approximately 250 feet downstream of NC 218 Highway	+437	
Little Watson Branch Tributary 1.	At the confluence with Little Watson Branch	+341	Unincorporated Areas of Union County.
	Approximately 360 feet upstream of Burnsville Road (SR 1714).	+418	
Long Branch	At the confluence with Clear Creek	+483	Town of Fairview.
	Approximately 0.9 mile upstream of the confluence with Clear Creek.	+533	
Lynches Creek	At the confluence with Rays Fork	+492	Unincorporated Areas of Union County, City of Monroe.
	Approximately 1.1 miles upstream of Old Pageland-Monroe Road (SR 1941).	+603	
Lynches River	At the North Carolina/South Carolina State boundary	+483	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of Circle Ranch Road (SR 2161).	+641	
Lynches River Tributary 1	At the confluence with Lynches River	+546	Unincorporated Areas of Union County.
	Approximately 1,640 feet upstream of Trinity Church Road (SR 2166).	+583	
Lynches River Tributary 2	At the confluence with Lynches River	+609	Unincorporated Areas of Union County.
	Approximately 0.5 mile upstream of the confluence with Lynches River.	+619	
Machine Branch	At the confluence with East Fork Twelvemile Creek	+517	Unincorporated Areas of Union County.
	Approximately 780 feet downstream of Waxhaw-Indian Trail Road (State Route 1008).	+573	
Maness Branch	Approximately 400 feet downstream of the Union/Anson County boundary.	+436	Unincorporated Areas of Union County.
	Approximately 1,020 feet upstream of Nance Tarlton Road (SR 1724).	+493	
Maple Springs Branch	At the confluence with Beaverdam Creek	+490	Unincorporated Areas of Union County.
	Approximately 0.9 mile upstream of Faulks Church Road (SR 1947).	+518	
Marvin Branch	At the confluence with Sixmile Creek	+577	Village of Marvin.
	Approximately 1,150 feet upstream of Saddle Avenue	+605	
McBride Branch	At the confluence with Sixmile Creek	+583	Unincorporated Areas of Union County, Village of Marvin.
	Approximately 385 feet upstream of Kentucky Derby Drive (State Route 3248).	+652	
McBride Branch Tributary 1	At the confluence with McBride Branch	+601	Unincorporated Areas of Union County.
	Approximately 950 feet upstream of Beckford Glen Drive (State Route 2679).	+624	
McNeely Branch	At the confluence with Blythe Creek	+571	Unincorporated Areas of Union County, Town of Waxhaw.
	Approximately 1.6 miles upstream of Waxhaw Highway	+616	
Meadow Branch	At the confluence with Richardson Creek	+433	Unincorporated Areas of Union County, Town of Wingate.
	Approximately 970 feet downstream of Old Highway Road (SR 1740).	+553	
Meadow Branch Tributary 1	At the confluence with Meadow Branch	+490	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of McIntyre Road (SR 1631).	+550	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Meadow Branch Tributary 2 ..	At the confluence with Meadow Branch	+503	Unincorporated Areas of Union County.
	Approximately 180 feet downstream of Austin Chaney Road (SR 1758).	+565	
Meadow Branch Tributary 3 ..	At the confluence with Meadow Branch	+505	Unincorporated Areas of Union County.
	Approximately 240 feet downstream of Wade Rorie Road (SR 1788).	+549	
Middle Fork	At the confluence with Rays Fork	+492	Unincorporated Areas of Union County, City of Monroe.
	Approximately 450 feet upstream of Old Monroe Marshville Road (SR 1957).	+560	
Mill Creek	At the confluence with Richardson Creek	+443	Unincorporated Areas of Union County, Town of Unionville.
	Approximately 300 feet upstream of Supreme Drive	+516	
Mill Creek (South)	At the confluence with Lanes Creek	+495	Unincorporated Areas of Union County.
	Approximately 700 feet upstream of Budyler Road (SR 2116).	+545	
Missouri Branch	At the confluence with Davis Branch	+533	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Shady Oak Drive	+599	
Molly Branch	At the confluence with East Fork Twelvemile Creek	+549	Unincorporated Areas of Union County.
	Approximately 30 feet downstream of Willoughby Road (State Route 1334).	+613	
Mountain Springs Branch	At the confluence with Wicker Branch	+561	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of Joe Griffin Road (SR 1945).	+593	
Mundys Run	At the confluence with West Fork Twelvemile Creek	+535	Unincorporated Areas of Union County, Town of Weddington.
	Approximately 0.5 mile upstream of the confluence of Mundys Run Tributary 3.	+635	
Mundys Run Tributary 1	At the confluence with Mundys Run	+562	Town of Weddington.
	Approximately 1,130 feet upstream of Skytop Road	+613	
Mundys Run Tributary 2	At the confluence with Mundys Run	+573	Town of Weddington.
	Approximately 0.8 mile upstream of the confluence with Mundys Run.	+605	
Mundys Run Tributary 3	At the confluence with Mundys Run	+614	Town of Weddington.
	Approximately 1,460 feet upstream of Weddington Road	+638	
Norkett Branch	At the confluence with Lanes Creek	+439	Unincorporated Areas of Union County.
	Approximately 1,510 feet downstream of Lansford Road (SR 1005).	+482	
North Fork Crooked Creek	At the confluence with Crooked Creek	+570	Unincorporated Areas of Union County, Town of Fairview, Town of Hemby Bridge, Town of Indian Trail, Town of Stallings.
	Approximately 850 feet upstream of Stevens Mill Road	+676	
North Fork Crooked Creek Tributary.	At the confluence with North Fork Crooked Creek	+632	Unincorporated Areas of Union County, Town of Hemby Bridge, Town of Stallings.
	Approximately 0.7 mile upstream of Stevens Mill Road (SR 1524).	+658	
North Fork Crooked Creek Tributary 1.	Approximately 0.4 mile upstream of the confluence with North Fork Crooked Creek.	+590	Unincorporated Areas of Union County, Town of Indian Trail.
	Approximately 0.5 mile upstream of Poplin Road (SR 1508)	+617	
North Fork Crooked Creek Tributary 3.	At the confluence with North Fork Crooked Creek	+622	Unincorporated Areas of Union County, Town of Hemby Bridge, Town of Indian Trail.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 1.0 mile upstream of Stinson Hartis Road	+657	
North Fork Crooked Creek Tributary 4.	At the confluence with North Fork Crooked Creek	+650	Unincorporated Areas of Union County, Town of Indian Trail, Town of Stallings.
	Approximately 210 feet downstream of Union West Boulevard.	+667	
North Fork Crooked Creek Tributary 5.	At the confluence with North Fork Crooked Creek	+663	Town of Stallings.
	Approximately 1,740 feet upstream of the confluence with North Fork Crooked Creek.	+674	
North Fork Crooked Creek Tributary 6.	At the confluence with North Fork Crooked Creek	+643	Unincorporated Areas of Union County, Town of Stallings.
	Approximately 1,850 feet upstream of Stallings Road	+720	
North Fork Crooked Creek Tributary A.	At the confluence with North Fork Crooked Creek	+598	Unincorporated Areas of Union County, Town of Indian Trail.
	At the downstream side of Secrest Short Cut Road (State Road 1501).	+622	
North Fork Crooked Creek Tributary B.	At the confluence with North Fork Crooked Creek Tributary A.	+602	Unincorporated Areas of Union County, Town of Indian Trail.
	Approximately 850 feet upstream of Secrest Short Cut Road.	+619	
Paddle Branch	Approximately 800 feet upstream of the confluence with Goose Creek.	+526	Unincorporated Areas of Union County, Town of Indian Trail, Town of Stallings.
	Approximately 0.6 mile upstream of Flagstick Drive	+635	
Polecat Creek	At the North Carolina/South Carolina State boundary	+534	Unincorporated Areas of Union County.
	Approximately 360 feet upstream of Irby Road (SR 2170) ..	+630	
Polecat Creek Tributary 1	At the confluence with Polecat Creek	+588	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Carl Belk Road (SR 2168).	+610	
Price Mill Creek	At the confluence with East Fork Twelvemile Creek	+548	Unincorporated Areas of Union County, Town of Indian Trail, Village of Wesley Chapel.
	Approximately 650 feet upstream of Kennerly Drive	+650	
Price Mill Creek Tributary 1 ...	At the confluence with Price Mill Creek	+599	Unincorporated Areas of Union County, Town of Indian Trail.
	Approximately 100 feet upstream of Old Charlotte Highway	+646	
Price Mill Creek Tributary 2 ...	At the confluence with Price Mill Creek	+633	Town of Indian Trail.
	Approximately 1,400 feet upstream of the confluence with Price Mill Creek.	+646	
Racoon Branch	At the confluence with Buffalo Creek	+573	Unincorporated Areas of Union County.
	Approximately 1.4 miles upstream of Trinity Church Road (SR 2166).	+623	
Rays Fork	At the confluence with Richardson Creek	+461	Unincorporated Areas of Union County, City of Monroe, Town of Wingate.
	Approximately 1,680 feet upstream of White Store Road (SR 1003).	+607	
Reason Branch	At the confluence with Rocky River	+362	Unincorporated Areas of Union County.
	Approximately 1.3 miles upstream of Morgan Academy Road (SR 1661).	+461	
Reedy Branch	At the confluence with Beaverdam Creek	+515	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Camden Road (SR 1934).	+554	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Richardson Creek	Approximately 650 feet downstream of the Anson/Union County boundary.	+294	Unincorporated Areas of Union County, City of Monroe.
	Approximately 2.0 miles upstream of Griffith Road (SR 2139).	+635	
Richardson Creek Tributary 1	At the confluence with Richardson Creek	+377	Unincorporated Areas of Union County.
	Approximately 180 feet upstream of Dusty Lane (SR 1718)	+394	
Richardson Creek Tributary 2	At the confluence with Richardson Creek	+377	Unincorporated Areas of Union County.
	Approximately 1,390 feet upstream of the confluence with Richardson Creek.	+399	
Richardson Creek Tributary 3	At the confluence with Richardson Creek	+382	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of the confluence with Richardson Creek.	+397	
Richardson Creek Tributary 4	At the confluence with Richardson Creek	+384	Unincorporated Areas of Union County.
	Approximately 1,050 feet upstream of the confluence with Richardson Creek.	+395	
Richardson Creek Tributary 5	At the confluence with Richardson Creek	+403	Unincorporated Areas of Union County.
	Approximately 830 feet upstream of New Salem Road (SR 1627).	+506	
Richardson Creek Tributary 6	At the confluence with Richardson Creek	+407	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of Tarlton Mill Road (SR 1649).	+441	
Richardson Creek Tributary 7	At the confluence with Richardson Creek	+416	Unincorporated Areas of Union County.
	Approximately 1.2 miles upstream of the confluence with Richardson Creek.	+495	
Richardson Creek Tributary A	At the confluence with Richardson Creek	+298	Unincorporated Areas of Union County.
	Approximately 850 feet upstream of Fish Road (SR 1706) ..	+335	
Robin Branch	At the confluence with Booger Branch	+522	Unincorporated Areas of Union County.
	Approximately 500 feet upstream of Shaw Avenue	+568	
Rocky River	At the Anson/Stanly/Union County boundary	+302	Unincorporated Areas of Union County, Town of Fairview.
	At the confluence of Clear Creek	+469	
Rocky River Tributary 5	At the confluence with Rocky River	+306	Unincorporated Areas of Union County.
	Approximately 1.5 miles upstream of the confluence with Rocky River.	+364	
Rocky River Tributary 6	At the confluence with Rocky River	+329	Unincorporated Areas of Union County.
	Approximately 1,180 feet upstream of Old Kennedy Ford Road.	+400	
Rocky River Tributary 7	At the confluence with Rocky River	+343	Unincorporated Areas of Union County.
	Approximately 500 feet downstream of Old Kennedy Ford Road (SR 1711).	+429	
Rone Branch	Approximately 200 feet downstream of the Lancaster County, South Carolina/Union County, North Carolina, State boundary.	+507	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Rehobeth Road (State Route 1107).	+591	
Rone Branch Tributary 1	At the confluence with Rone Branch	+515	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of the confluence with Rone Branch.	+560	
Salem Creek	At the confluence with Richardson Creek	+387	Unincorporated Areas of Union County.
	Approximately 880 feet upstream of U.S. Highway 74	+519	
Salem Creek Tributary 1	At the confluence with Salem Creek	+465	Unincorporated Areas of Union County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 840 feet upstream of Angel Desse Road	+516	
Salem Creek Tributary 2	At the confluence with Salem Creek	+472	Unincorporated Areas of Union County, Town of Marshville.
	Approximately 900 feet downstream of Austin Grove Church Road.	+510	
Simpson Branch	Approximately 500 feet upstream of the confluence with Cane Creek.	+502	Unincorporated Areas of Union County.
	Approximately 250 feet downstream of Huey Drive	+518	
Sixmile Creek	At the Lancaster County, South Carolina/Mecklenburg and Union County, North Carolina, State boundary.	+575	Unincorporated Areas of Union County, Town of Weddington, Village of Marvin.
	Approximately 500 feet upstream of the Mecklenburg/Union County boundary.	+626	
Sixmile Creek Tributary 1	At the confluence with Sixmile Creek	+579	Unincorporated Areas of Union County, Village of Marvin.
	Approximately 920 feet upstream of Marvin Weddington Road (State Route 1316).	+630	
Sixmile Creek Tributary 2	At the confluence with Sixmile Creek	+597	Unincorporated Areas of Union County.
	Approximately 1.2 miles upstream of the confluence with Sixmile Creek.	+633	
Small Branch	At the confluence with South Fork Crooked Creek	+639	Town of Indian Trail.
	Approximately 270 feet upstream of Waxhaw-Indian Road	+668	
Small Drain	At the confluence with Small Branch	+657	Town of Indian Trail.
	Approximately 50 feet upstream of Unionville-Indian Trail Road.	+669	
Smith Branch	At the confluence with Grapevine Creek	+415	Unincorporated Areas of Union County.
	Approximately 930 feet upstream of Marshville Olive Branch Road (SR 1719).	+466	
South Fork Crooked Creek	At the confluence with Crooked Creek	+570	Unincorporated Areas of Union County, City of Monroe, Town of Fairview, Town of Indian Trail, Town of Stallings, Town of Unionville.
	Approximately 1,900 feet upstream of Kelly Drive	+759	
South Fork Crooked Creek Tributary 1.	At the confluence with South Fork Crooked Creek	+574	Town of Unionville.
	Approximately 930 feet upstream of Unionville-Indian Trail Road.	+602	
South Fork Crooked Creek Tributary 2.	At the confluence with South Fork Crooked Creek	+589	Unincorporated Areas of Union County.
	Approximately 900 feet upstream of Unionville-Indian Trail Road.	+603	
South Fork Crooked Creek Tributary 3.	At the confluence with South Fork Crooked Creek	+614	Unincorporated Areas of Union County, Town of Indian Trail.
	Approximately 610 feet upstream of the railroad	+640	
South Fork Crooked Creek Tributary 4.	Approximately 750 feet upstream of the confluence with South Fork Crooked Creek.	+623	Unincorporated Areas of Union County, Town of Indian Trail.
	Approximately 190 feet upstream of Sun Valley Drive	+629	
South Fork Crooked Creek Tributary 5.	At the confluence with South Fork Crooked Creek	+629	Town of Indian Trail, Village of Lake Park.
	Approximately 700 feet upstream of Brooktree Lane	+638	
South Fork Crooked Creek Tributary 5A.	At the confluence with South Fork Crooked Creek Tributary 5.	+631	Town of Indian Trail, Village of Lake Park.
	Approximately 1,050 feet upstream of Lake Park Road	+643	
South Fork Crooked Creek Tributary 6.	At the confluence with South Fork Crooked Creek	+631	Town of Indian Trail.
	Approximately 0.4 mile upstream of Unionville-Indian Trail Road.	+640	
Stegall Branch	At the confluence with Richardson Creek	+357	Unincorporated Areas of Union County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 1.1 miles upstream of the confluence with Richardson Creek.	+416	
Stewart Branch	At the confluence with Cane Creek Tributary 1	+562	Unincorporated Areas of Union County.
	Approximately 1,125 feet upstream of the dam	+661	
Stewart Branch Tributary 1	At the confluence with Stewart Branch	+562	Unincorporated Areas of Union County.
	Approximately 250 feet downstream of Tom Green Road	+607	
Stewarts Creek	At the confluence with Richardson Creek	+454	Unincorporated Areas of Union County, City of Monroe.
	Approximately 280 feet downstream of Myers Road	+625	
Stewarts Creek Tributary 1	Approximately 1,000 feet upstream of the confluence with Stewarts Creek.	+526	City of Monroe.
	Approximately 650 feet upstream of Sunnybrook Drive	+567	
Stewarts Creek Tributary 2	Approximately 575 feet upstream of the confluence with Stewarts Creek.	+545	Unincorporated Areas of Union County, City of Monroe.
	Approximately 480 feet upstream of Rolling Hills Drive	+561	
Stewarts Creek Tributary 3	Approximately 550 feet upstream of the confluence with Stewarts Creek.	+549	City of Monroe.
	Approximately 230 feet downstream of Fox Hunt Drive	+572	
Stewarts Creek Tributary 4	Approximately 600 feet upstream of the confluence with Stewarts Creek.	+606	City of Monroe.
	Approximately 0.5 mile upstream of the confluence with Stewarts Creek.	+619	
Still Branch	At the confluence with Richardson Creek	+514	City of Monroe.
	Approximately 0.5 mile upstream of the confluence with Richardson Creek.	+521	
Stumplick Branch	Approximately 250 feet upstream of the confluence with Stewarts Creek.	+507	Unincorporated Areas of Union County, Town of Unionville.
	Approximately 560 feet downstream of C. J. Thomas Road	+596	
Stumplick Branch Tributary 1	At the confluence with Stumplick Branch	+573	Town of Unionville.
	Approximately 0.5 mile upstream of Hillcrest Church Road	+600	
Tarkill Branch	At the Lancaster County, South Carolina/Union County, North Carolina, State boundary.	+545	Unincorporated Areas of Union County, Town of Weddington, Village of Marvin.
	Approximately 1.4 miles upstream of New Town Road	+644	
Twelvemile Creek Tributary 1	Approximately 500 feet upstream of the confluence with Twelvemile Creek.	+502	Unincorporated Areas of Union County, Town of Waxhaw.
	Approximately 0.5 mile upstream of Fox Hound Lane	+537	
Twelvemile Creek Tributary 2	Approximately 800 feet upstream of the confluence with Twelvemile Creek.	+504	Unincorporated Areas of Union County, Town of Waxhaw.
	Approximately 0.8 mile upstream of the confluence with Twelvemile Creek.	+523	
Twelvemile Creek Tributary 3	Approximately 1,600 feet upstream of the confluence with Twelvemile Creek.	+507	Unincorporated Areas of Union County, Town of Waxhaw, Village of Marvin.
	Approximately 0.5 mile upstream of Rainbow Drive	+558	
Twelvemile Creek Tributary 4	Approximately 1,650 feet upstream of the confluence with Twelvemile Creek.	+508	Unincorporated Areas of Union County, Town of Waxhaw.
	Approximately 300 feet upstream of Waxhaw Parkway	+574	
Underwood Creek	Approximately 1,500 feet upstream of the confluence with Little Twelvemile Creek.	+547	Unincorporated Areas of Union County.
	Approximately 0.8 mile upstream of New Town Road	+619	
Wallace Branch	At the confluence with Little Brown Creek	+393	Unincorporated Areas of Union County.
	Approximately 1.2 miles upstream of Cheraw Road (SR 1929).	+496	
Water Branch	At the confluence with Richardson Creek	+310	Unincorporated Areas of Union County.
	Approximately 0.8 mile upstream of NC Highway 218	+462	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Water Branch Tributary 1	At the confluence with Water Branch	+372	Unincorporated Areas of Union County.
	Approximately 0.5 mile upstream of the confluence with Water Branch.	+395	
Watson Creek	At the confluence with Richardson Creek	+412	Unincorporated Areas of Union County.
	Approximately 1,410 feet upstream of Baucom Road	+516	
Waxhaw Branch	At the confluence with Lanes Creek	+456	Unincorporated Areas of Union County.
	Approximately 0.9 mile upstream of Synder Store Road (SR 1945).	+593	
Waxhaw Branch Tributary 1 ..	At the confluence with Waxhaw Branch	+505	Unincorporated Areas of Union County.
	Approximately 0.5 mile upstream of Edwards Road (SR 1943).	+534	
Waxhaw Creek	Approximately 1,650 feet downstream of Maggie Robinson Road (State Route 1103).	+487	Unincorporated Areas of Union County.
	Approximately 100 feet downstream of Lancaster Highway/ State Highway 200.	+609	
Waxhaw Creek Tributary 1 ...	At the confluence with Waxhaw Creek	+491	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of Mini-Ranch Road (State Route 1102).	+526	
Waxhaw Creek Tributary 2 ...	At the confluence with Waxhaw Creek	+499	Unincorporated Areas of Union County.
	Approximately 2.8 miles upstream of the confluence with Waxhaw Creek.	+705	
Waxhaw Creek Tributary 3 ...	At the confluence with Waxhaw Creek	+516	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of Winslow Drive	+539	
Waxhaw Creek Tributary 4 ...	At the confluence with Waxhaw Creek	+555	Unincorporated Areas of Union County.
	Approximately 1.4 miles upstream of Morrison Avenue	+616	
Waxhaw Creek Tributary 5 ...	At the confluence with Waxhaw Creek	+559	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of the confluence with Waxhaw Creek.	+597	
Waxhaw Creek Tributary 6 ...	At the confluence with Waxhaw Creek	+560	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of the confluence with Waxhaw Creek.	+583	
Waxhaw Creek Tributary 7 ...	At the confluence with Waxhaw Creek	+565	Unincorporated Areas of Union County.
	Approximately 1,750 feet upstream of the dam	+658	
Waxhaw Creek Tributary 7A	At the confluence with Waxhaw Creek Tributary 7	+578	Unincorporated Areas of Union County.
	Approximately 0.4 mile upstream of Nesbit Road (State Route 1131).	+609	
Waxhaw Creek Tributary 7B	At the confluence with Waxhaw Creek Tributary 7	+583	Unincorporated Areas of Union County.
	Approximately 0.6 mile upstream of the confluence with Waxhaw Creek Tributary 7.	+610	
Waxhaw Creek Tributary 7C	At the confluence with Waxhaw Creek Tributary 7	+591	Unincorporated Areas of Union County, Town of Waxhaw.
	Approximately 0.5 mile upstream of Parkwood School Road	+613	
West Fork Twelvemile Creek	At the upstream side of Cuthbertson Road (State Route 1321).	+514	Unincorporated Areas of Union County, Village of Wesley Chapel, Town of Indian Trail, Town of Stallings, Town of Waxhaw, Town of Weddington.
	Approximately 1,070 feet upstream of the confluence of West Fork Twelvemile Creek Tributary 4.	+680	
West Fork Twelvemile Creek Tributary 1.	At the confluence with West Fork Twelvemile Creek	+526	Unincorporated Areas of Union County, Town of Waxhaw, Town of Weddington.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 0.4 mile upstream of New Town Road (State Route 1315).	+634	
West Fork Twelvemile Creek Tributary 1A.	At the confluence with West Fork Twelvemile Creek Tributary 1.	+536	Unincorporated Areas of Union County, Town of Waxhaw.
	Approximately 0.8 mile upstream of the confluence with West Fork Twelvemile Creek Tributary 1.	+576	
West Fork Twelvemile Creek Tributary 2.	At the confluence with West Fork Twelvemile Creek	+587	Unincorporated Areas of Union County, Town of Weddington.
	Approximately 700 feet upstream of the dam	+681	
West Fork Twelvemile Creek Tributary 2A.	At the confluence with West Fork Twelvemile Creek Tributary 2.	+638	Town of Weddington.
	Approximately 1,790 feet upstream of the confluence with West Fork Twelvemile Creek Tributary 2.	+653	
West Fork Twelvemile Creek Tributary 2B.	At the confluence with West Fork Twelvemile Creek Tributary 2.	+661	Town of Weddington.
	Approximately 960 feet upstream of the confluence with West Fork Twelvemile Creek Tributary 2.	+673	
West Fork Twelvemile Creek Tributary 3.	At the confluence with West Fork Twelvemile Creek	+657	Unincorporated Areas of Union County, Town of Indian Trail, Town of Stallings.
	Approximately 520 feet upstream of Fairforest Drive	+684	
West Fork Twelvemile Creek Tributary 4.	At the confluence with West Fork Twelvemile Creek	+672	Unincorporated Areas of Union County, Town of Indian Trail, Town of Stallings.
	At the Mecklenburg/Union County boundary	+690	
Wicker Branch	At the confluence with Lanes Creek	+475	Unincorporated Areas of Union County.
	Approximately 0.7 mile upstream of U.S. Highway 601	+597	
Wide Mouth Branch	At the Anson/Union County boundary	+406	Unincorporated Areas of Union County.
	Approximately 510 feet upstream of Old Peachland Street (SR 1735).	+493	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

City of Monroe
Maps are available for inspection at City of Monroe Planning Department, 300 West Crowell Street, Monroe, North Carolina.

Town of Fairview
Maps are available for inspection at Fairview Town Hall, 7608 Concord Highway, Monroe, North Carolina.

Town of Hemby Bridge
Maps are available for inspection at Hemby Bridge Town Hall, 5811 Fairview-Indian Trail Road, Hemby Bridge, North Carolina.

Town of Indian Trail
Maps are available for inspection at Indian Trail Planning Department, 109 Navejo Trail Road, Indian Trail, North Carolina.

Town of Marshville
Maps are available for inspection at Marshville Town Hall, 201 West Main Street, Marshville, North Carolina.

Town of Mineral Springs
Maps are available for inspection at Town of Mineral Springs Volunteer Fire and Rescue Department, 5804 Waxhaw Highway, Mineral Springs, North Carolina.

Town of Stallings
Maps are available for inspection at Stallings Town Hall, 315 Stallings Road, Stallings, North Carolina.

Town of Unionville
Maps are available for inspection at Unionville Town Hall, 1102 Unionville Church Road, Monroe, North Carolina.

Town of Waxhaw
Maps are available for inspection at Waxhaw Town Hall, 317 North Broome Street, Waxhaw, North Carolina.

Town of Weddington
Maps are available for inspection at Weddington Town Hall, 1924 Weddington Road, Weddington, North Carolina.

Town of Wingate
Maps are available for inspection at Wingate Town Hall, 3918 Highway 74 East, Wingate, North Carolina.

Village of Lake Park
Maps available for inspection at the Union County Planning Office, 407 North Main Street, Monroe, North Carolina.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Village of Marvin			
Maps available for inspection at the Marvin Village Hall, 10004 New Town Road, Marvin, North Carolina.			
Village of Wesley Chapel			
Maps available for inspection at the Village of Wesley Chapel Town Hall, 1101 A Airport Road, Monroe, North Carolina.			
Unincorporated Areas of Union County			
Maps are available for inspection at Union County Planning Department, 407 North Main Street, Room 149, Monroe, North Carolina.			

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: April 29, 2008.

David I. Maurstad,

Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–10114 Filed 5–6–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community may be obtained by contacting the office where maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for Imperial County are available for inspection at Imperial County Planning & Development Services Department, 801 West Main Street, El Centro, California 92243.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3151.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. In proposed rule FR Doc. E7–18260 published on March 27, 2006 (71 FR 15115–15116), several modified elevations were not depicted as being located below sea level. The symbology for these elevations has been corrected and is shown in the table below. The Assistant Administrator of the Mitigation Directorate has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NAVD) #Depth in feet above ground (−) Feet below sea level modified	Communities affected
Imperial County, California and Incorporated Areas Docket No.: FEMA–B–7456			
Amerosa Wash	Approximately 152 feet above confluence with Anza Ditch	*(−)50	Imperial County (Unincorporated Areas).
	Approximately 2.75 miles above confluence with Anza Ditch	*153	
Anza Ditch	Approximately 1694 feet downstream of Marina Drive	*(−)224	Imperial County (Unincorporated Areas).
	Approximately 3.4 miles upstream of State Route 86	*136	
Arroyo Salada	Approximately 630 feet above confluence with Salton Sea	*(−)223	Imperial County (Unincorporated Areas).
	Approximately 2.36 miles upstream of State Route 86	*(−)72	
Colorado River	Approximately 10.6 miles downstream of confluence with Gila River.	*121	Imperial County (Unincorporated Areas).
	Approximately 1.65 miles upstream of Neighbors Boulevard	*243	
Coolidge Springs Ditch	Approximately 447 feet upstream of confluence with Salton Sea.	*(−)225	Imperial County (Unincorporated Areas).
	Approximately 0.69 mile upstream of confluence with Coolidge Tributary.	*(−)14	
Coolidge Tributary	Approximately 272 feet above confluence with Coolidge Springs Ditch.	*(−)192	Imperial County (Unincorporated Areas).
	Approximately 0.81 mile above confluence with Coolidge Springs Ditch.	*(−)97	
Coral Wash	Approximately 314 feet above confluence with Palm Wash	*(−)187	Imperial County (Unincorporated Areas).
	Approximately 2.79 miles upstream of State Route 86	*72	
Iberia Wash	Approximately 296 feet above confluence with Salton Sea	*(−)222	Imperial County (Unincorporated Areas).
	Approximately 1.89 miles upstream of State Route 86	*104	
Incienso Ditch	Approximately 450 feet above confluence with Salton Sea	*(−)221	Imperial County (Unincorporated Areas).
	Approximately 1.86 miles upstream of State Route 86	*64	
Gravel Wash	Approximately 439 feet above confluence with Salton Sea	*(−)222	Imperial County (Unincorporated Areas).
	Approximately 2.32 miles upstream of State Route 86	*51	
Palm Wash	Approximately 46 feet above confluence with Salton Sea	*(−)224	Imperial County (Unincorporated Areas).
	Approximately 3.86 mile upstream of State Route 86	*150	
Romney Ditch	Approximately 1382 feet downstream of State Route 86	*(−)211	Imperial County (Unincorporated Areas).
	Approximately 1517 feet upstream of State Route 86	*(−)157	
Shoreline Ditch	Approximately 250 feet downstream of Thomas Avenue	*(−)225	Imperial County (Unincorporated Areas).
	Approximately 0.50 mile upstream of Coolidge Springs Road	*(−)94	
Surprise Wash	Approximately 656 feet above confluence with Tule Wash	*(−)187	Imperial County (Unincorporated Areas).
	Approximately 1.2 miles upstream of State Route 86	*(−)89	
Surprise Wash Tributary	Approximately 500 feet above confluence with Surprise Wash.	*(−)151	Imperial County (Unincorporated Areas).
	Approximately 0.83 mile upstream of State Route 86	*(−)110	
Surprise Wash Diversion	Approximately 1610 feet above confluence with Arroyo Salada.	*(−)102	Imperial County (Unincorporated Areas).
	Approximately 2.24 miles above confluence with Arroyo Salada.	*(−)37	
Tesla Wash	Approximately 386 feet above confluence with Salton Sea	*(−)222	Imperial County (Unincorporated Areas).
	Approximately 1.61 miles upstream of State Route 86	*39	
Tortif Ditch	Approximately 0.87 mile downstream of State Route 86	*(−)219	Imperial County (Unincorporated Areas).
	Approximately 1.92 miles upstream of State Route 86	*78	
Verbena Wash	Approximately 450 feet above confluence with Virgo Ditch	*(−)186	Imperial County (Unincorporated Areas).
	Approximately 1.17 miles upstream of State Route 86	*2	
Virgo Ditch	Approximately 641 feet above confluence with Salton Sea	*(−)222	Imperial County (Unincorporated Areas).
	Approximately 2.14 miles upstream of State Route 86	*95	
Zenas Wash	Approximately 637 feet above confluence with Arroyo Salada	*(−)179	Imperial County (Unincorporated Areas).

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NAVD) #Depth in feet above ground (−) Feet below sea level modified	Communities affected
	Approximately 0.59 mile upstream of State Route 86	*(−)88	
Arroyo Salada	Shallow Flooding—Approximately 1.38 miles above confluence with Salton Sea to Salton Sea.	#1	Imperial County (Unincorporated Areas).
Calyx Ditch	Shallow Flooding—State Route 86 to confluence with Salton Sea.	#1	Imperial County (Unincorporated Areas).
	Shallow Flooding—150 feet upstream of State Route 86 to State Route 86.	#2	
Farmosa Ditch	Shallow Flooding—State Route 86 to confluence with Salton Sea.	#1	Imperial County (Unincorporated Areas).
Parosa Ditch	Shallow Flooding—State Route 86 to confluence with Salton Sea.	#1	Imperial County (Unincorporated Areas).
	Shallow Flooding—150 feet upstream of State Route 86 to State Route 86.	#2	
Salton Sea	West shoreline of Salton Sea from approximately 0.78 miles southeast of confluence with Arroyo Salada to approximately 0.66 miles north of confluence with Shoreline Ditch.	*(−)224	Imperial County (Unincorporated Areas).
Tonalee Ditch	Shallow Flooding—1,000 feet upstream of State Route 86 to confluence with Salton Sea.	#1	Imperial County (Unincorporated Areas).

* North American Vertical Datum.
# Depth in feet above ground.
(−) Feet below sea level.

ADDRESSES

Imperial County (Unincorporated Areas)

Maps available for inspection at: Imperial County Planning & Development Services Department; 801 West Main Street, El Centro, California 92243

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: April 29, 2008.

David I. Maurstad,

Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–10140 Filed 5–6–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 101, 104, 105, and 106

46 CFR Parts 10, 12, and 15

Transportation Security Administration

49 CFR Part 1572

[Docket Nos. TSA–2006–24191; USCG–2006–24196]

RIN 1652–AA41

Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License

AGENCY: United States Coast Guard, Transportation Security Administration; DHS.

ACTION: Final rule; extension of compliance date.

SUMMARY: The Department of Homeland Security (DHS), through the United States Coast Guard (Coast Guard) and the Transportation Security Administration (TSA), issues this final rule to realign the compliance date set forth in the Transportation Worker Identification Credential (TWIC) final rule. Under the new final compliance date mariners must obtain a TWIC no later than April 15, 2009. This final rule also extends to April 15, 2009, the final date by which owners and operators of vessels, facilities, and outer continental shelf facilities, who have not otherwise been required to implement access control procedures utilizing TWIC on an earlier date, must implement those procedures.

DATES: This final rule is effective May 7, 2008.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of dockets TSA–2006–24191 and USCG–2006–24196, and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, 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. You may also find this docket on the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on the TSA portions

of this rule, call Christine Beyer, telephone (571) 227–2657. If you have questions on the Coast Guard portions of this rule, call LCDR Jonathan Maiorine, telephone 1–877–687–2243. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–493–0402.

SUPPLEMENTARY INFORMATION:

I. Background and Regulatory History

On May 22, 2006, the Department of Homeland Security (DHS) through the United States Coast Guard (Coast Guard) and the Transportation Security Administration (TSA) published a joint notice of proposed rulemaking (NPRM) entitled ''Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License'' in the **Federal Register** (71 FR 29396) (hereinafter referred to as the ''TWIC NPRM''). The TWIC NPRM proposed requirements related to the TWIC program, including compliance dates for mariners to obtain and possess a TWIC, and for vessels, facilities and outer continental shelf facilities to operate in accordance with TWIC provisions. Specifically, DHS proposed that vessels and facilities would be required to be in compliance with the requirements of a TWIC final rule between twelve (12) and eighteen (18) months following the publication date of the final rule, depending on whether enrollment for the port in which the vessel or facility is operating had been completed. 71 FR at 29409, 29412.

On January 25, 2007, after a 45-day comment period and four public meetings, the Coast Guard and TSA published a joint final rule under the same title (72 FR 3492) (hereinafter referred to as the ''TWIC joint final rule''). The TWIC joint final rule discussed the comments received on the proposed rule, including a discussion of all comments related to the proposed TWIC implementation timeline and the requirements for mariners, vessels, facilities and outer continental shelf facilities to comply with TWIC procedures. It also made changes to the rule text in response to those comments. The TWIC joint final rule, at 33 CFR 104.115, revised the compliance dates for vessel owners and operators to provide vessel owners or operators 20 months from the publication date of the final rule, up to and including September 25, 2008, to implement the TWIC access control provisions. 72 FR 3492, 3499. The rule tied the compliance date for facilities and outer continental shelf facilities to completion of the initial enrollment in the Captain of the Port (COTP) zone where the facility is located. *See* 33 CFR 105.115 and 106.110. This date would vary for each COTP zone as announced by the Coast Guard through publication of a notice in the **Federal Register**. Under the final rule, the Coast Guard would publish these notices at least 90 days in advance of the compliance date, but the final compliance date for all COTPs would not be later than September 25, 2008. Finally, the latest date by which mariners would be expected to obtain and possess a TWIC, as set forth in 33 CFR 101.514, would also be September 25, 2008. 72 FR at 3499.

II. Discussion of Change

With this final rule, DHS is realigning the deadline for final compliance with the requirements of the TWIC final rule to provide 18 months from the date the initial enrollment centers became operational for regulated entities to come into compliance with the requirements of the TWIC final rule. As discussed above, when DHS set the final compliance date by the final rule published in January of 2007, the Coast Guard and TSA estimated that all TWIC enrollment centers would be operational within 18 months of the beginning of the enrollment rollout. See 72 FR at 3539. Accordingly, the Coast Guard and TSA set the final compliance date for vessels for 20 months after the publication date of the final rule to allow TSA two months to finalize a contract with the entity that would operate the enrollment centers, as well as to ensure that the underlying TWIC system could operate as intended. This schedule was intended to allow mariners and other regulated entities up to 18 months to enroll before the September 25, 2008 compliance date.

TSA contracted with Lockheed Martin to operate TWIC enrollment centers on January 29, 2007. The first TWIC enrollment center opened in Wilmington, Delaware on October 16, 2007. See 72 FR 57342 (Oct. 9, 2007). Since that time, TSA has opened over 100 TWIC enrollment centers. TSA currently estimates that the final enrollment centers will be opened and operational in September of 2008. Because TSA did not open the initial enrollment centers until approximately six months after the initial estimated start date, TSA and Coast Guard have provided the additional time to allow for the full 18 months of enrollment intended under the TWIC final rule.

Accordingly, to ensure that every individual who requires a TWIC will have the opportunity to enroll for one, and to ensure that TSA will have time to complete the security threat assessments on all applicants, DHS is extending the compliance date from September 25, 2008 to April 15, 2009, to realign the final compliance date with the original intent of the TWIC final rule. Under this final rule, by no later than April 15, 2009, mariners must obtain a TWIC, and owners and operators of vessels, facilities, and outer continental shelf facilities, who have not otherwise been required to implement access control procedures utilizing TWIC, must implement those procedures. Owners and operators of facilities that must comply with 33 CFR part 105 will still be subject to earlier, rolling compliance dates, as laid out in 33 CFR 105.115(e). As provided in that regulation, the Coast Guard will announce those dates at least 90 days in advance via notices published in the **Federal Register**. The final compliance date will not be later than April 15, 2009. In a separate notice published in today's edition of the **Federal Register**, we provide this notice for the first three COTP Zones: Boston, Northern New England, and Southeastern New England.

The TWIC final rule also did not require that mariners obtain or possess a TWIC for access to secure areas of vessels, facilities, and OSC facilities until September 25, 2008. With this amendment, mariners holding a Merchant Mariner's License (License), Merchant Mariner's Document (MMD), Certificate of Registry, or an International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) Endorsement, will not need to have a TWIC until April 15, 2009. Until that date, they may continue to use their mariner credentials, along with a photo ID, to gain unescorted access to facilities and vessels, per 33 CFR 101.514. Amendments in 46 CFR 10.113, 12.01–11, and 15.415 will also reflect the date change to April 15, 2009. Additionally, owners and operators of vessels and outer continental shelf facilities regulated by 33 CFR parts 104 and 106, respectively, will not need to incorporate TWIC into their security measures for access control until April 15, 2009.

Finally, the applicable dates for mariners wishing to purchase a reduced fee TWIC, by relying upon the security threat assessment done by the Coast Guard when they applied for their License or their MMD have been realigned to cover those mariners who obtain or renew their credential between September 25, 2008 and April 15, 2009.

These amendments may be found at 33 CFR 101.514, 104.115, 105.115, 106.110; 46 CR 10.113, 12.01–11, and 15.415; and 49 CFR 1572.19.

III. Regulatory Requirements

A. Administrative Procedure Act

DHS is issuing this final rule, for immediate implementation, without providing the public prior notice and the opportunity for comment. Sections 553(b) and (d) of the Administrative Procedure Act (APA) (5 U.S.C. 553) authorize agencies to dispense with certain notice procedures for rules when they find good cause to do so. Under section 553(b), the requirements of notice and opportunity for comment do not apply when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Section 553(d) allows an agency, upon finding good cause, to make a rule effective immediately upon publication in the **Federal Register**.

Providing an opportunity for prior notice and public comment on the extensions of the compliance dates in the TWIC final rule would be unnecessary and contrary to the public interest. As discussed above, without the change in the full compliance date, it would not be possible for all regulated parties to comply with the TWIC regulations. Even if it were possible for all persons to enroll by the current compliance date (which, as noted above, is not realistically possible), it would not be possible for TSA to complete full security threat assessments on all of those individuals in advance of the September 25, 2008 date.

Further, because this final rule relieves a restriction by providing regulated entities more time to comply with the regulatory requirements, DHS finds that this rule shall become effective immediately upon publication of this final rule in the **Federal Register**. 5 U.S.C. 553(d).

B. Executive Order 12866 (Regulatory Planning and Review)

This final rule is not a significant regulatory action under section 3(f) of Executive Order 12866. This rule, therefore, is not subject to review by the Office of Management and Budget. We expect the economic impact of this rule to be minimal and a full regulatory analysis unnecessary.

This rule realigns the final compliance date for implementing TWIC. To the extent that deadlines have changed, affected parties may incur some TWIC-related costs later rather than sooner.

We anticipate that these changes will not substantially increase TWIC-related compliance costs to the affected entities and in most cases will provide advantages through deadline extensions.

C. Small Entities

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

We do not expect this rule to substantially increase TWIC-related compliance costs, as it realigns a deadline. The Coast Guard and TSA certify under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

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

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

E. Collection of Information

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

F. Federalism

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

G. Unfunded Mandates Reform Act

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

H. Taking of Private Property

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

I. Civil Justice Reform

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

J. Protection of Children

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

K. Indian Tribal Governments

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

L. Energy Effects

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

require a Statement of Energy Effects under Executive Order 13211.

M. Technical Standards

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

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

N. Environment

The provisions of this rule have been analyzed under the Department of Homeland Security (DHS) Management Directive (MD) 5100.1, Environmental Planning Program, which is the DHS policy and procedures for implementing the National Environmental Policy Act (NEPA), and related Executive Orders and requirements. The changes being made by this final rule have no effect on the environmental analysis that accompanied the promulgation of the original TWIC final rule. That analysis can be found at 72 FR 3576–3577.

Accordingly, there are no extraordinary circumstances presented by this rule that would limit the use of a CATEX under MD 5100.1, Appendix A, paragraph 3.2. The implementation of this rule, like the implementation of the original TWIC final rule, is categorically excluded under the following categorical exclusions (CATEX) listed in MD 5100.1, Appendix A, Table 1: CATEX A1 (personnel, fiscal, management and administrative activities); CATEX A3 (promulgation of rules, issuance of rulings or interpretations); and CATEX A4 (information gathering, data analysis and processing, information dissemination, review, interpretation and development of documents). CATEX B3 (proposed activities and operations to be conducted in an existing structure that would be compatible with and similar in scope to ongoing functional uses) and CATEX B 11 (routine monitoring and surveillance activities that support law enforcement or homeland security and defense operations) would also be applicable.

List of Subjects

33 CFR Part 101

Harbors, Maritime security, Reporting and recordkeeping requirements, Security measures, Vessels, Waterways.

33 CFR Part 104

Incorporation by reference, Maritime security, Reporting and recordkeeping requirements, Security measures, Vessels.

33 CFR Part 105

Facilities, Maritime security, Reporting and recordkeeping requirements, Security measures.

33 CFR Part 106

Facilities, Maritime security, Outer Continental Shelf, Reporting and recordkeeping requirements, Security measures.

46 CFR Part 10

Penalties, Reporting and recordkeeping requirements, Schools, Seamen.

46 CFR Part 12

Penalties, Reporting and recordkeeping requirements, Seamen.

46 CFR Part 15

Reporting and recordkeeping requirements, Seamen, Vessels.

49 CFR Part 1572

Appeals, Commercial drivers license, Criminal history background checks, Explosives, Facilities, Hazardous materials, Incorporation by reference, Maritime security, Motor carriers, Motor vehicle carriers, Ports, Seamen, Security measures, Security threat assessment, Vessels, Waivers.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 101, 104, 105, and 106, and 46 CFR parts 10, 12, and 15 and the Transportation Security Administration amends 49 CFR part 1572 as follows:

Title 33—Navigation and Navigable Waters

CHAPTER I—COAST GUARD

PART 101—MARITIME SECURITY: GENERAL

■ 1. The authority citation for part 101 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 192; Executive Order 12656, 3 CFR 1988 Comp., p. 585; 33 CFR 1.05–1, 6.04–11, 6.14, 6.16, and 6.19; Department of Homeland Security Delegation No. 0170.1.

§ 101.514 [Revised]

■ 2. Revise § 101.514(e) by removing the date ''September 25, 2008'' and adding in its place the date ''April 15, 2009''.

PART 104—MARITIME SECURITY: VESSELS

■ 3. The authority citation for part 104 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–11, 6.14, 6.16, and 6.19; Department of Homeland Security Delegation No. 0170.1.

§ 104.115 [Revised]

■ 4. Revise § 104.115(d) by removing the date ''September 25, 2008'' and adding in its place the date ''April 15, 2009''.

PART 105—MARITIME SECURITY: FACILITIES

■ 5. The authority citation for part 105 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. 70103; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–11, 6.14, 6.16, and 6.19; Department of Homeland Security Delegation No. 0170.1.

§ 105.115 [Revised]

■ 6. Revise § 105.115(e) by removing the date ''September 25, 2008'' and adding in its place the date ''April 15, 2009''.

PART 106—MARITIME SECURITY: OUTER CONTINENTAL SHELF (OCS) FACILITIES

■ 7. The authority citation for part 106 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–11, 6.14, 6.16, and 6.19; Department Of Homeland Security Delegation No. 0170.1.

§ 106.110 [Revised]

■ 8. Revise § 106.110(e) by removing the date ''September 25, 2008'' and adding in its place the date ''April 15, 2009''.

Title 46—Shipping

CHAPTER I—COAST GUARD

Subchapter B—Merchant Marine Officers and Seamen

PART 10—LICENSING OF MARITIME PERSONNEL

■ 9. The authority citation for part 10 continues to read as follows:

Authority: 14 U.S.C. 633; 31 U.S.C. 9701; 46 U.S.C. 2101, 2103, and 2110; 46 U.S.C. chapter 71; 46 U.S.C. 7502, 7505, 7701, and 8906; Executive Order 10173; Department of Homeland Security Delegation No. 0170.1. Section 10.107 is also issued under the authority of 44 U.S.C. 3507.

§ 10.113 [Revised]

■ 10. Revise § 10.113 by removing the date ''September 25, 2008'' and adding in its place the date ''April 15, 2009''.

PART 12—CERTIFICATION OF SEAMEN

■ 11. The authority citation for part 12 continues to read as follows:

Authority: 31 U.S.C. 9701; 46 U.S.C. 2101, 2103, 2110, 7301, 7302, 7503, 7505, 7701, and 70105; Department of Homeland Security Delegation No. 0170.1.

§ 12.01–11 [Revised]

■ 12. Revise § 12.01–11 by removing the date ''September 25, 2008'' and adding in its place the date ''April 15, 2009''.

PART 15—MANNING REQUIREMENTS

■ 13. The authority citation for part 15 continues to read as follows:

Authority: 46 U.S.C. 2101, 2103, 3306, 3703, 8101, 8102, 8104, 8105, 8301, 8304, 8502, 8503, 8701, 8702, 8901, 8902, 8903, 8904, 8905(b), 8906, 9102, and 8103; and Department of Homeland Security Delegation No. 0170.1.

§ 15.415 [Revised]

■ 14. Revise § 15.415 by removing the date ''September 25, 2008'' and adding in its place the date ''April 15, 2009''.

Title 49—Transportation

CHAPTER XII—TRANSPORTATION SECURITY ADMINISTRATION

Subchapter D—Maritime and Land Transportation Security

PART 1572—CREDENTIALING AND SECURITY THREAT ASSESSMENTS

■ 15. The authority citation for part 1572 continues to read as follows:

Authority: 46 U.S.C. 70105; 49 U.S.C. 114, 5103a, 40113, and 46105; 18 U.S.C. 842, 845; 6 U.S.C. 469.

§ 1572.19 [Revised]

■ 16. Revise § 1572.19(b) by removing the date ''September 25, 2008'' in the two places where it appears, and adding in each place the date ''April 15, 2009''.

Dated: May 2, 2008.

Brian M. Salerno,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security & Stewardship.

Gale Rossides,

Deputy Administrator, Transportation Security Administration.

[FR Doc. E8–10232 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 20, 68

[WT Docket No. 07–250; FCC 08–68; FCC 08–117]

Hearing Aid-Compatible Mobile Handsets, Petition of American National Standards Institute Accredited Standards Committee C63 (EMC) ANSI ASC C63™

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Communications Commission (Commission) adopts various proposals to amend its hearing aid compatibility policies and requirements pertaining to wireless services, including modifications and other requirements along the framework proposed in a consensus plan (Joint Consensus Plan) developed jointly by industry and representatives for the deaf and hard of hearing community. The Commission anticipates that these rule changes, taken together and largely supported by manufacturers, service providers, and consumers with hearing loss, will meet statutory obligations to ensure reasonable access to telephone service by persons with impaired hearing. These requirements are intended to benefit wireless users in the deaf and hard of hearing community, including the most disadvantaged who are more likely to rely on telecoil-equipped hearing aids, as well as to ensure that these consumers have a variety of handsets available to them, including handsets with innovative features.

DATES: Effective June 6, 2008, except for §§ 20.19(f)(2), 20.19(h), and 20.19(i) which contains information collection requirements that are not effective until approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date for those sections. The Commission will send a copy of the *First Report & Order* and *Order on Reconsideration and Erratum* 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 incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of June 6, 2008. Public and agency comments on Information Collection Requirements are due on or before July 7, 2008.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith Boley, Federal Communications Commission, Room 1–B441, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Thomas McCudden, Room 6118, Michael Rowan, Room 6603, or Peter Trachtenberg, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW., Portals I, Room 6119, Washington, DC 20554. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith Boley, (202) 418–0214, or via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *First Report & Order (R&O)* in WT Docket No. 07–250 released February 28, 2008, and the Commission's *Order on Reconsideration and Erratum (Recon)* in WT Docket No. 07–250 released April 17, 2008. The complete text of the *R&O* and *Recon* are available for public inspection and copying from 8 a.m. to 4:30 p.m. Monday through Thursday or from 8 a.m. to 11:30 a.m. on Friday at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. [The *R&O* and *Recon* may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, FCC 08–68 for the *R&O,* and FCC 08–117 for the *Recon.* The *R&O* and *Recon* are also available on the Internet at the Commission's Web site through its Electronic Document Management System (EDOCS): *http://hraunfoss.fcc.gov/edocs_public/SilverStream/Pages/edocs.html.*]

Paperwork Reduction Act of 1995 Analysis

This document contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget

(OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding.

In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' In this present document, the Commission has assessed the effects of the reporting requirements that it has imposed on manufacturers and service providers, and finds that the information required should be readily available even to businesses with fewer than 25 employees, and that it is important to obtain this information in order to monitor compliance with the hearing aid compatibility requirements and to provide consumers with adequate information regarding the handsets available from particular service providers. Similarly, the Commission has assessed the effects of requiring manufacturers and service providers to post certain information regarding the hearing aid-compatible handsets they offer on their Web sites. The Commission notes that this requirement would apply only to entities that maintain a public Web site and is further subject to the *de minimis* exception. Both restrictions should limit, to some extent, the application of the requirement to small businesses with fewer than 25 employees. Moreover, the Commission has concluded that maintaining the limited information required, primarily a list of currently offered hearing aid-compatible handsets along with the associated ratings, will not be unduly burdensome, and that this requirement will significantly benefit consumers by ensuring convenient access to up-to-date information regarding compliant handset availability. Finally, the Commission has determined that requiring manufacturers to provide hearing aid compatibility contact information directly to the Commission will impose little if any additional burden on businesses with fewer than 25 employees. This requirement may even decrease these burdens, to the extent that it will allow consumers wishing to file a complaint to obtain that information from the Commission's Web site rather than contacting the Administrative Council for Terminal Attachment to obtain it from the service provider.

Public and agency comments on Information Collection Requirements are due on or before July 7, 2008. Comments should address: (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 estimates; (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. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198 (*see* 44 U.S.C. 3506(c)(4)), the Commission seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission notes, however, that section 213 of the Consolidated Appropriations Act 2000, Public Law 106–113, provides that rules governing frequencies in the 746–806 MHz Band become effective immediately upon publication in the **Federal Register** without regard to certain sections of the Paperwork Reduction Act. The Commission is therefore not inviting comment on any information collections that concern frequencies in the 746–806 MHz Band.

I. Introduction

1. In the *R&O,* the Commission revises the hearing aid compatibility requirements applicable to providers of public mobile services and manufacturers of digital wireless handsets used in the delivery of those services. Specifically, the Commission adopts benchmark requirements for future deployment of hearing aid-compatible handsets, and related requirements, based on the proposals in a Joint Consensus Plan developed by an Alliance for Telecommunications Industry Solutions (ATIS) working group that included nationwide (Tier I) carriers, handset manufacturers, and several organizations representing the interests of consumers with hearing loss. The Commission also adopts certain other rule changes to better promote the accessibility of hearing aid-compatible handsets to deaf and hard of hearing consumers, including rules for the approval of future versions of the hearing aid compatibility technical standard. In the *Recon,* the Commission revises the procedures adopted in the *R&O* for approval of the use of future versions of the hearing aid compatibility technical standard that do not raise major compliance issues. The Commission intends to address other issues raised in its *Notice of Proposed Rulemaking (NPRM),* 72 FR 65494, November 21, 2007, in this proceeding but not addressed here in a subsequent report and order.

2. As a preliminary matter, the Commission takes this opportunity to express its deep appreciation for the efforts of the many parties involved in the development of the Joint Consensus Plan, whose recommendations the Commission substantially adopts today. The broad support for the Plan among both industry and consumer advocacy groups, as reflected in the record of this proceeding, testifies to the success of the proffered proposals in meeting the goals of the Hearing Aid Compatibility Act, and in addressing the concerns of manufacturers and service providers while still advancing the interests of consumers with hearing loss in having greater access to advanced digital wireless communications. The Commission strongly encourages the wireless industry, including new entrants, and consumer groups to continue their collaborative efforts in order to ensure the successful implementation of the measures adopted.

3. The changes the Commission adopts to the handset deployment requirements include (1) modifying the requirement, presently stayed until April 18, 2008, that manufacturers and service providers ensure that 50 percent of their digital wireless handset models meet established standards for radio frequency (RF) interference reduction, and (2) increasing the obligation on manufacturers and service providers to offer handset models that meet an established standard for inductive coupling capability. The Commission adopts a handset ''refresh'' requirement for manufacturers, obligating manufacturers to ensure annually that a certain percentage of their hearing aid-compatible handset models are newly issued that year, and it requires service providers to offer hearing aid-compatible handsets with different levels of functionality.

4. In addition to these modifications to the handset deployment requirements, the Commission adopts an updated version of the technical standard for measuring hearing aid compatibility in both acoustic coupling and inductive coupling modes, provides a phase-in period for its application as the exclusive standard, and creates a streamlined mechanism for adopting

future revisions of the standard. Because the Commission finds that the established technical standard, including the most recent version of that standard adopted, provides tests for measuring hearing aid compatibility for wireless services operating over a broader range of frequencies than is currently subject to hearing aid compatibility requirements, the Commission extends the scope of these requirements to the full range of frequencies covered by the established standard. To assist the Commission in monitoring the implementation of the new requirements and to provide information to the public, the Commission also requires manufacturers and service providers to continue to file annual reports on the status of their compliance with these requirements, and the Commission requires manufacturers and service providers to publish up-to-date information on their Web sites regarding their hearing aid-compatible handset models.

5. The Commission anticipates that these inter-related changes, taken together and largely supported by manufacturers, service providers, and consumers with hearing loss, will further ''ensure reasonable access to telephone service by persons with impaired hearing'' as required by the Communications Act. 47 U.S.C. 610(a). The increased requirements to offer handsets with inductive coupling capability will particularly benefit the most disadvantaged wireless users in the deaf and hard of hearing community, who are more likely to rely on telecoil-equipped hearing aids. The Commission also anticipates that the requirements that manufacturers refresh their products annually and that service providers offer handset models at differing functionality levels will help to ensure that consumers with hearing loss have a variety of handsets available to them, including handsets with innovative features, a goal that the Commission has sought to encourage since 2003. At the same time, the Commission concludes that the level of obligations and the flexibility provided in the new benchmarks satisfy its obligation to ''ensure that regulations adopted to implement [the Hearing Aid Compatibility Act] encourage the use of currently available technology and do not discourage or impair the development of improved technology.'' 47 U.S.C. 610(e). In particular, these changes help to resolve the technical issues that have been raised regarding the difficulty of producing a wide variety of Global System for Mobile Communications (GSM) handsets that both meet the requisite rating for acoustic coupling capability and include certain popular features, and thereby ensure that the impact of the rules remains as technology-impartial as possible while also ensuring the availability of hearing aid-compatible handsets to consumers.

II. Background

6. Comments were due December 21, 2007, and reply comments were due January 7, 2008. The Commission received 19 comments and 16 reply comments. Comments came from a wide range of interests, including handset manufacturers, national, regional and small service providers, hearing loss advocacy groups, retail interests, and hearing aid manufacturers. While commenters generally support adoption of the Joint Consensus Plan, the record reveals differences regarding certain aspects of its implementation, as well as issues that are not addressed in the Plan.

III. Discussion

A. Hearing Aid-Compatible Handset Deployment Requirements

7. In order to promote its objective of furthering the availability of hearing aid-compatible handsets to the deaf and hard-of-hearing community, the Commission adopts several interrelated benchmarks, deadlines, and other requirements governing the deployment of hearing aid-compatible handsets. These actions, which are based largely on the Joint Consensus Plan and the proposals in the *NPRM,* balance several different approaches to improving wireless services for deaf and hard-of-hearing consumers. Based on the record, the Commission concludes that these requirements, as a whole, will offer great benefits to those consumers with hearing loss, without imposing undue costs on handset manufacturers, service providers, or consumers generally.

8. As proposed in the Joint Consensus Plan and the *NPRM,* the Commission first adopts new benchmarks and deadlines for 2008 through 2011 regarding deployment of handsets rated M3 (or higher) under American National Standards Institute (ANSI) Standard C63.19 for RF interference reduction and handsets rated T3 (or higher) under ANSI Standard C63.19 for inductive coupling capability. As regards the requirements for RF interference reduction, the Commission recognizes the difficulties that handset manufacturers and service providers with large product lines face with respect to the 50 percent benchmark originally scheduled to go into effect on February 18, 2008, and the Commission modifies the benchmark in the near term while at the same time ensuring that consumers will have significant and increasing choices of acoustic coupling-compatible models over the next several years. At the same time, the Commission increases the upcoming benchmarks for handset models that have inductive coupling capability. In this regard, to ensure that all consumers will have options regardless of where they reside or from which carrier they obtain service, the Commission adopts the same deployment benchmarks for all service providers, although the Commission extends the compliance deadlines for service providers other than Tier I carriers in recognition of their more limited handset options and their difficulty obtaining the newest offerings. Second, as an integral part of the handset deployment objectives the Commission sets forth, the Commission adopts requirements to ensure the availability of not just more handset models, but also a range of compatible handset models throughout the manufacturer-to-consumer supply and distribution channels. The Commission thus requires all manufacturers to ''refresh'' their hearing aid-compatible handset product offerings annually, and all service providers to offer consumers handset models with differing levels of functionality. Third, the Commission addresses several implementation issues, including the definition of what constitutes a distinct model, the treatment of handset models that operate over multiple frequency bands and/or air interfaces, and the application of the *de minimis* rule. Finally, while the Commission encourages manufacturers and service providers, including new entrants, to deploy handset models that meet the higher hearing aid compatibility standards denoted by M4 and T4 ratings, the Commission determines consistent with the record not to adopt any requirements in this regard at this time.

1. M3 / T3 Standards

9. The parties in this proceeding are nearly unanimous in supporting the *NPRM's* tentative conclusions on the appropriate M3 and T3 benchmarks and deadlines insofar as they apply to manufacturers and Tier I carriers offering nationwide services, referencing the compromise and agreement that culminated in the Joint Consensus Plan. However, six commenting parties representing regional or smaller service providers that are not Tier I carriers—MetroPCS

Communications, Inc. (MetroPCS), SouthernLINC Wireless (SouthernLINC), Virgin Mobile, USA, L.P. (Virgin Mobile), Rural Cellular Association (RCA), Chinook Wireless (Chinook), and Iowa Wireless Services, LLC (i wireless)—argue that they should not be subject to the same benchmarks or any new requirements beyond the existing mandates to offer two M3- and T3-rated (or higher) handset models per air interface. If any new requirements must apply, they argue that the benchmarks in these provisions should be reduced, proposing levels that would be approximately one-half of the Tier I levels. These commenters state that they would be forced to reduce their total product lines in order to meet the Tier I percentage benchmarks. They further contend that they have less access to hearing aid-compatible handsets than Tier I carriers, and that as a practical matter they would essentially be subject to more difficult requirements than Tier I carriers under the Joint Consensus Plan. On the other side of this issue, two advocates for the deaf and hard-of-hearing disagree, and argue that these service providers should be held to the same compatible handset deployment benchmarks as Tier I carriers because, with proper planning, these service providers can meet these benchmarks in the same, or perhaps slightly extended, timeframes.

10. For both RF interference reduction and inductive coupling capability, the Commission adopts the tentative conclusions in the *NPRM* for manufacturers and Tier I carriers, and hereby amends § 20.19(c) and (d) of the Commission's rules to adopt the benchmarks and deadlines proposed in the *NPRM*. For service providers that are not Tier I carriers, the Commission adopts these same benchmarks, but the Commission extends their deadlines for compliance by three months in order to afford these entities additional flexibility to obtain and deploy the requisite numbers of compatible handset models. In consideration of the need for certainty, and in order to provide appropriate notification to manufacturers and service providers as regards the hearing aid compatibility obligations, the Commission had stayed enforcement of the 50 percent benchmark for deployment of handsets meeting an M3 (or higher) rating for RF interference reduction that would have become effective on February 18, 2008, for 60 days, until April 18, 2008. However, given the rule changes adopted in the *R&O*, the need for a stay is moot and it need not be extended.

11. In terms of RF interference reduction for acoustic coupling compatibility, manufacturers as of the effective date of this rule will have to meet a rating of M3 (or higher) for a minimum of one-third of their non-*de minimis* portfolio models offered to service providers per air interface in the United States. If one-third of the total number of models offered over an air interface is a fraction, manufacturers may round this number down, except that manufacturers offering four or five handset models over an air interface must offer at least two models meeting an M3 (or higher) rating. Tier I carriers, as of the effective date of this rule, will have to meet an M3 rating (or higher) for the lesser of 50 percent of their handset models per air interface (rounding fractions up) or a specific number of handset models pursuant to a schedule. For both manufacturers and service providers, these percentage and numerical obligations will remain in effect until such time as they may be changed by future Commission rulemaking action. This schedule requires Tier I carriers to provide an increasing number of handset models per air interface over which they offer service by future dates as follows: Before February 15, 2009: eight M3-rated (or higher) handset models; beginning February 15, 2009: nine M3-rated (or higher) handset models; and beginning February 15, 2010: ten M3-rated (or higher) handset models. The Joint Consensus Plan proposed that these and other deadlines would fall on the 18th of the month. For ease of administration, the Commission changes these deadlines to the 15th. Service providers not in Tier I will be subject to the same requirements, but only beginning three months after the effective date of the rules. As a result, the aforementioned requirements will take effect for such service providers as of May 15 of the respective year, rather than February 15. The Commission notes that under the revisions that it is adopting to § 20.19 of the Commission's rules, these service providers remain required to offer two handset models per air interface rated M3 or higher until the new requirements become effective to them.

12. With respect to inductive coupling capability, the new requirements establish benchmarks for both manufacturers and service providers that combine percentage and numerical measures. For both manufacturers and service providers, these percentage and numerical obligations will remain in effect until such time as they may be changed by future Commission rulemaking action. First, manufacturers will be required to meet the greater of two measures for each air interface for which they offer handsets beginning February 15, 2009: (1) A minimum of two T3-rated (or higher) models for each air interface for which the manufacturer offers four or more handset models to service providers; or (2) at least 20 percent / 25 percent / one-third of models that the manufacturer offers to service providers over each air interface rated T3 (or higher) beginning February 15, 2009 / 2010 / 2011 respectively. These percentage calculations will be rounded down to the nearest whole number in determining the minimum number of handsets to be produced. Each manufacturer that is not subject to the *de minimis* exception (discussed later in this summary) will thus still be required to maintain production of at least two or more T3-rated (or higher) handset models per air interface for which it offers handsets. Prior to February 15, 2009, manufacturers remain subject to the current requirement to offer at least two models rated T3 or higher per air interface.

13. Second, as of the effective date of this rule, Tier I carriers must meet the lesser of the two following measures for each air interface over which they offer service: (1) One-third of digital wireless handset models are T3-rated (or higher) (rounding fractions up); or (2) a schedule as follows: before February 15, 2009: three T3-rated (or higher) handsets; beginning February 15, 2009: five T3-rated (or higher) handsets; beginning February 15, 2010: seven T3-rated (or higher) handsets; and beginning February 15, 2011: ten T3-rated (or higher) handsets.

14. Third, service providers other than Tier I carriers will also be required to meet the same benchmarks as Tier I carriers, but only beginning three months after the effective date of these rules. Again, the scheduled rollout dates will be May 15 of the respective years, rather than February 15. The Commission notes that under the revisions that it is adopting to § 20.19, these service providers remain required to offer two handset models per air interface rated T3 or higher until the new requirements become effective to them.

15. Given the unanimous support in the record, the Commission finds that these benchmarks for both equipment manufacturers and Tier I carriers to deploy M3-rated and T3-rated handsets are in the public interest. The combination, two-option approach for deploying M3-rated handsets provides needed flexibility for Tier I carriers with large product lines to deploy new and additional models over time while still ensuring that substantial numbers of

compatible handset models will be available to consumers. These rule changes are supported by consumer advocates, and the Commission agrees that the balance they achieved with industry representatives in the Joint Consensus Plan represents a beneficial compromise between technological constraints and the needs of hard-of-hearing consumers. No commenting party has argued that these benchmarks for manufacturers and Tier I carriers would be detrimental to consumers. This approach also is more technology-impartial than a single 50 percent requirement, reflecting the uncontroverted technological impediments to meeting the M3 rating standard for many handset models that employ a GSM air interface. Moreover, the Commission adopts this modification in conjunction with new rules requiring manufacturers to ''refresh'' their compatible offerings with new products annually and requiring service providers to make hearing aid-compatible models available with different levels of functionality. These requirements will directly benefit consumers needing handsets with acoustic coupling capabilities.

16. The Commission also makes its decisions regarding the benchmarks for RF interference reduction and inductive coupling capability as an integrated whole. The Commission agrees with Hearing Loss Association of America and Telecommunications for the Deaf and Hard of Hearing, Inc. (HLAA/TDI) that increased requirements for deployment of T3-rated handset models comprise a beneficial trade-off for reducing, in certain circumstances, the thresholds for deploying M3-rated handset models that would have taken effect under the existing § 20.19(c). The record supports the conclusion that customers' options for handsets that enable inductive coupling with hearing aids' telecoils have been more limited than for acoustic coupling compatibility. The current two-model rule for these entities was set in 2003 and has become out-dated, as it does not provide for an expansion of T3-rated handset options. Expanded requirements of this nature should benefit some of the most disadvantaged wireless users in the deaf and hard-of-hearing community, who are more likely to rely on telecoil-equipped hearing aids. The Commission agrees with HLAA/TDI that it is generally in the public interest to increase the benchmarks for manufacturers' and Tier I carriers' deployment of handsets meeting a T3 rating for inductive coupling capability. The Commission agrees as well with Gallaudet University Technology Access program and Rehabilitation Engineering Research Center on Telecommunications Access (Gallaudet/RERC) that additional requirements of this nature will ''significantly benefit individuals with severe to profound hearing loss.'' Thus, the Commission finds that an additional focus of its resources should be on making available additional T3-rated handset models.

17. The Commission also concludes that the same deadlines are appropriate for manufacturers and Tier I carriers. The Commission agrees with ATIS that a single, unified deadline as proposed in the *NPRM* and Joint Consensus Plan will improve compliance and make the rules simpler to administer. Moreover, unlike service providers not in Tier I, Tier I carriers have in the past not submitted waiver requests stating that they have experienced significant problems meeting deployment deadlines in the same time frame as manufacturers. Furthermore, unlike the initial deployment deadlines where manufacturers may have had no models certified as hearing aid-compatible until shortly before the date, Tier I carriers now need only to increase their selection from among available stock. Although AT&T, Inc. (AT&T) states that it prefers a staggering of the compliance deadlines after 2008, AT&T only cites generally the lag time for service providers to obtain handsets from manufacturers and does not provide more specific support evidencing a problem (current or past) with a unified date. The Commission also notes that ATIS, while supporting a unified deadline, states that it ''would not be opposed'' to a six week interval between deadlines for manufacturers and service providers. ATIS Comments at 6. The Commission therefore declines to extend the compliance deadlines for Tier I carriers.

18. The record raises separate questions regarding whether to apply the same handset deployment benchmarks to service providers other than Tier I carriers. As stated in the *NPRM,* the Joint Consensus Plan's proposals consider appropriate modifications only to the rules for manufacturers and nationwide, Tier I carriers, and they do not address the Commission's hearing aid compatibility benchmarks for regional or smaller service providers, including Tier II and Tier III carriers, or other service providers like resellers and mobile virtual network operators (MVNOs). In addition, none of the equipment manufacturers or Tier I carriers that have participated in this proceeding submitted comments on this issue. The only record the Commission has before it is comprised of the comments of six parties representing regional or smaller service providers not in Tier I—MetroPCS, SouthernLINC, Virgin Mobile, RCA, Chinook and i wireless—and two consumer advocate representatives, each group disagreeing with the other on this question.

19. After carefully considering this record in light of its past experience with non-nationwide service providers, and the costs and benefits of several possible rule change proposals, the Commission concludes that the same deployment benchmark alternatives should apply to all service providers, but it delays the compliance deadlines by three months for service providers that are not Tier I carriers. The Commission is not persuaded that service providers with small product lines will be unable to meet the 50 percent and one-third targets for handset models meeting RF interference reduction and inductive coupling capability targets, respectively. Moreover, the Commission finds that any burdens these requirements impose are necessary to ensure reasonable handset options for all hearing-impaired consumers regardless of where they reside or who they may receive service from, not just the 90 or so percent that may receive their service from Tier I carriers. Nonetheless, in recognition of the stated difficulties smaller service providers face in obtaining the latest handset models, the Commission delays each of their compliance deadlines by three months.

20. The Commission rejects the argument that the proposed benchmarks impose a ''greater'' burden on smaller carriers because they offer too few handset models to take advantage of the numerical alternatives, and will therefore be forced to meet the percentage benchmarks. The Commission does not accept that smaller service providers are subject to greater burdens simply because their percentages are higher: service providers with smaller product lines will be required to offer fewer hearing aid-compatible handset models than service providers with larger product lines. The alternative of offering eight to 10 handset models per air interface that meet an M3 or higher rating for RF interference reduction recognizes that carriers with large product lines may have difficulty obtaining sufficient compatible handset models to meet a 50 percent requirement, particularly since the manufacturer production benchmark is one-third going forward. In addition, the Commission finds that the

availability of eight to 10 M3-rated models will provide substantial choice to hard-of-hearing consumers, especially in light of its other requirements, and therefore the Commission is not requiring service providers with large product lines to offer more models. The incremental benefits to consumers of requiring more than eight to 10 compatible models are diminished, and are outweighed by the burdens on the service provider.

21. The Commission finds that the availability of percentage benchmarks is necessary to ensure that smaller service providers are not overly burdened. Even though eight to 10 M3-rated models provide consumers with substantial choice, the Commission does not believe it reasonable to require that eight to 10 compatible models be offered by service providers with smaller product lines, including many non-nationwide service providers. Therefore, the Commission permits these service providers instead to meet the compatibility standard for 50 percent of their product lines, ranging from two to seven models per air interface depending on the total number of models offered. Similar reasoning underlies the alternative benchmarks for inductive coupling capability. The rule is designed to permit each service provider to meet the benchmark that is less burdensome for it depending on its particular situation, while providing consumers with significant choice no matter which service provider they may use.

22. The Commission is also not persuaded by arguments that service providers other than Tier I carriers will be unable to obtain sufficient hearing aid-compatible handset models to meet the benchmark percentages and therefore will have to reduce their product lines. These service providers argue that they have less access to hearing aid-compatible models than Tier I carriers, among other reasons because they must purchase handsets through third-party vendors and because the larger carriers sometimes have exclusive arrangements to obtain certain handset models. The Commission notes, however, that the number of hearing aid-compatible models these service providers must obtain to meet the percentage benchmarks is not large. For example, a service provider that offers 10 handset models over an air interface would need to offer five that meet an M3 (or higher) rating and four that meet a T3 (or higher) rating. Moreover, the percentage requirement for T3-rated (or higher) models would not become effective for such a provider until May 2009. Until then, the service provider could satisfy the rule by offering the numerical alternative of three models meeting this standard. The Commission acknowledges that many smaller service providers' offerings of compatible handsets may currently fall short of these levels. Given the substantial and increasing number of hearing aid-compatible models that are currently available, however, the Commission is convinced that, with reasonable effort, even the smallest non-*de minimis* providers can obtain enough compatible models to satisfy the particular benchmarks that are applicable to them. Commenters offer no evidence that so many hearing aid-compatible models are subject to exclusivity arrangements as to significantly diminish the number that they are able to obtain, or that large numbers of compatible models are unavailable through vendors. As it has stated in the past, the Commission expects that, if a service provider's usual vendors cannot supply appropriate handset models, it will make arrangements with other suppliers. The Commission also remains unpersuaded by Virgin Mobile's general argument that few hearing aid-compatible models are available in the lower price ranges that its customers demand. Although Virgin Mobile may reasonably select the hearing aid-compatible models that are most likely to appeal to its customer base, the Commission continues to believe it should not be relieved of its duty to make hearing aid-compatible options available to its customers simply due to its prediction that customers will not choose to purchase these models. In addition, the Commission anticipates that in the future, manufacturers may produce more hearing aid-compatible models in lower price ranges in order to facilitate carriers' fulfillment of their obligation to offer phones with multiple levels of functionality.

23. Moreover, to the extent the deployment benchmarks that the Commission adopts do impose increased burdens on small carriers, these burdens are outweighed by the benefits to consumers. Commenters representing people with hearing loss support the universal application of these benchmarks, stating that this would assist a great number of hearing aid users. These additional benchmarks, especially the new benchmarks for inductive coupling capability, should provide valuable benefits to affected consumers with profound hearing loss. Regardless of size and product line, every service provider has customers who need hearing aid-compatible phones, and it is incumbent upon each wireless service provider to make arrangements and allocate the resources that are necessary to meet their needs.

24. The Commission concludes that a three-month extension of deadlines for meeting these benchmarks, however, is appropriate with regard to service providers that are not Tier I nationwide providers, including regional and smaller providers, such as Tier II and Tier III carriers, and other service providers such as resellers and MVNOs. Five non-Tier I commenting parties argue that if they are subjected to new deployment benchmarks, they should receive extended deadlines of six months to one year following Tier I carriers' deadlines. The Commission agrees with the position of consumer advocate groups, however, that a three-month delay is more appropriate. While the Commission recognizes that smaller service providers may reasonably require some additional time to obtain up-to-date compliant products through vendors, the Commission is concerned that a longer delay would unnecessarily and unacceptably deny the benefits of its rules to consumers. Moreover, a three-month delay is consistent with past instances where the Commission has recognized that waivers of up to approximately three months for non-Tier I service providers have often been justified, but has generally denied requests for longer periods. The Commission finds that an extension beyond three months may only serve to excuse poor planning, inferior oversight, or some other factor within a service provider's control. Indeed, given that service providers have known for years that they would likely become subject to a 50 percent benchmark for handset models with RF interference reduction, which will remain the operative requirement for many of them, and at most they will have to obtain one additional handset model to satisfy the first new benchmark for inductive coupling capability, the Commission would arguably be justified, at least for the 2008 benchmarks, to afford no extension at all beyond that granted Tier I service providers. The Commission therefore concludes that a three-month delay will provide ample time for service providers not in Tier I to obtain the compliant handset models that they need to satisfy both the 2008 and future benchmarks.

2. New Requirements for Handset Deployment

25. As an integral part of the handset deployment objectives the Commission sets forth today, the Commission also adopts two new rules that together will

facilitate the offering of not just more handsets, but also a range of compatible handset models throughout the manufacturer-to-consumer supply and distribution channels. The annual product refresh rule for manufacturers and the requirement that service providers offer handset models with different functionality levels should provide consumers with access to hearing aid-compatible handsets with the newest features, as well as more economical models. These proposals are an essential part of the Joint Consensus Plan, and they are broadly supported in the record. Indeed, the record demonstrates that hard-of-hearing consumers demand an increased selection of popular and innovative handsets. While requirements to deploy minimum numbers or percentages of hearing aid-compatible handset models are essential to ensure that such phones will be available to consumers, the Commission finds, based on the record and experience under the existing rules, that these additional requirements are necessary to enable consumers to select a wireless phone that is not only compatible with a given hearing aid, but that also meets their other needs as a consumer, such as offering the latest features. Accordingly, the Commission adopts the product refresh rule for manufacturers and the functionality level rule for service providers.

a. Product Refresh Rule for Manufacturers

26. Every commenter to address the issue supports adoption of the proposed product refresh requirement without modification. The Commission therefore adopts this rule as set forth in § 20.19(c)(1)(ii) of the rules (set forth at the end of this summary). The Commission finds that this rule is necessary to ensure that service providers will be able to offer to consumers a selection of hearing aid-compatible models including those with the latest features. The Commission further finds that the rule will not cause undue costs to manufacturers. Indeed, all commenters representing equipment manufacturers supported the rule on grounds that it would permit them to provide consumers with a variety of devices. The Commission also corrects an apparent typographical error in the rule as proposed in the Joint Consensus Plan. As reproduced in the *NPRM,* the Joint Consensus Plan states that the number of new models to be produced is to be determined by ''multiplying the total number of new [hearing aid-compatible] models offered in the United States by fifty percent.'' 22 FCC Rcd 19670, 19712 App. B (2007). The Commission corrects this to clarify that the relevant figure is 50 percent of the total required number of hearing aid-compatible models.

b. Rule Requiring Service Providers To Offer Models With Differing Levels of Functionality

27. Upon consideration of the record, the Commission adopts the handset functionality rule as proposed and applies it to all service providers. As applied to Tier I carriers, all commenters representing Tier I carriers support a handset functionality rule. The Commission therefore adopts the rule in order to ensure that hearing aid users can select from a variety of compliant handset models, with varying features and prices. Moreover, these commenters agree that service providers should have flexibility to define their product levels because, as ATIS states, ''[i]t is not feasible to identify a uniform set of 'tiers' for all carriers that will appropriately apply to each carrier's unique set of product offerings.'' ATIS Comments at 7–8. The Commission concurs that given the great variety and continual development in handset features, any effort on its part to define criteria of functionality would be infeasible and might deter innovation, and the Commission therefore prescribes no criteria. The Commission does, however, stand by its guidance that a handset's level of functionality may include its capability to operate over multiple frequency bands. While Research in Motion Limited (RIM) objects that the availability or unavailability of a particular frequency band does not represent anything of value to a consumer, the Commission disagrees on the ground that the ability to access additional frequency bands may increase the circumstances under which the consumer can use the phone. The Commission clarifies that no service provider is required to offer phones that operate over multiple bands, and that this is simply one factor a service provider may use to distinguish the functionality of its handset models. In addition, the Commission adopts Gallaudet/RERC's suggestion to require service providers to disclose their functionality criteria in their reports to the Commission and on their Web sites, in order that both the Commission and the public may understand the basis for their distinctions.

28. Finally, the Commission determines to apply the rule to all service providers, not only nationwide Tier I carriers. Several regional and smaller service providers do not support such a requirement, arguing, for example, that such a requirement would be intrusive and that the statute does not require the Commission to ensure that hearing aid users have feature-rich phones. Other commenters, however, contend that the functionality level rule should be applied universally. For the same reasons discussed with respect to the handset deployment benchmarks, the Commission concludes that consumers with hearing loss should not be deprived of a choice of handset features based simply on their place of residence or their service provider. Moreover, given flexibility to define levels, even service providers with relatively small product lines should be able to distinguish among their handset models in a manner that permits them to define levels of functionality appropriate to their situation. The Commission does not expect a provider with four hearing aid-compatible models, for example, necessarily to offer as many levels of functionality or as broad a range of product offerings as a Tier I carrier with eight or more models, but the Commission does expect such a provider to draw some distinctions.

3. Implementation Issues

a. Definition of a Model

29. RIM supports the proposal to accept a manufacturer's determination of whether a device is a distinct model. PerrineCrest Radio Consulting (PerrineCrest Radio) asserts that the Commission should further define a model, or that at a minimum, manufacturers should explain how they distinguish their models. PerrineCrest Radio argues that this would help in monitoring the effectiveness of its requirements. It does not offer any suggestion regarding how the Commission should define a model, however.

30. The Commission concludes that its proposal represents the right approach to determinations of what constitutes a ''model'' under its rule. Consistent with its proposal, the Commission determines that, for purposes of the hearing aid compatibility rules, a manufacturer may not characterize as separate models any devices that do not in fact possess any distinguishing variation in form, features, or capabilities. Thus, under some circumstances, handsets assigned different model numbers by the manufacturer may count as a single model under the rules, such as where multiple model numbers are assigned to the same handset to distinguish units sold to different carriers, or are used to designate other distinctions that do not relate to either form, features, or

capabilities. Otherwise, the Commission finds it appropriate to defer to manufacturers regarding which devices constitute distinct models, consistent with how those devices are marketed to the public, because manufacturers are best positioned to determine when and how to market their own devices as distinct models. The Commission notes that it has, to date, deferred to manufacturer designation of distinct model lines and has not come across any instance in which such designations were made in bad faith to escape hearing aid compatibility obligations or did not otherwise reflect legitimate differences between devices. The Commission has no reason to believe that manufacturers will not continue to act in good faith in this regard. Accordingly, the Commission will accept manufacturers' determination of whether a device is a distinct model, subject only to these aforementioned restrictions.

31. While the Commission does not generally establish specific requirements regarding model distinctions, the Commission specifies one circumstance in which the Commission requires a device to be given a distinct model designation. Specifically, where changes are made to a device that result in a change in the hearing aid compatibility rating, the Commission requires manufacturers, and service providers down the distribution chain, to provide the altered device a model name/number that is distinct from the original device's designation. Based on its previous experience and the need for service providers and consumers to determine easily the compatibility of particular handset models, manufacturers and service providers should not be simultaneously offering two or more identically designated models with different hearing aid compatibility ratings.

32. The Commission will not require a new model designation where a change in rating is not the product of a change in the device but is simply the result of certifying for hearing aid compatibility a model that was not previously so certified. The Commission further clarifies that in such an instance, once the model has been certified, service providers offering that model may offer it to satisfy their deployment obligations, even if the particular units they offer were obtained from the manufacturer prior to date of certification. They must, however, ensure that such models comply with hearing aid compatibility labeling obligations, if necessary by contacting the manufacturer and requesting appropriate external labeling and inserts. Further, they may not count any model as hearing aid-compatible for periods prior to the date on which the model was certified for hearing aid compatibility.

b. Multi-Mode and Multi-Band Handsets

33. Commenters generally support the proposal that a handset be considered hearing aid-compatible only if it is compatible in all frequency bands and modes over which it operates and for which there are established standards. RCA, however, opposes the proposal, arguing that it will reduce availability of hearing aid-compatible handsets, and will particularly harm small service providers whose access to such handsets is already limited.

34. In addition, although most manufacturers and service providers support the basic multi-band/mode proposal where hearing aid compatibility technical standards already exist, they oppose the proposal in the *NPRM* to automatically treat multi-band and multi-mode handsets as non-compatible if they operate over frequency bands or modes without established standards. They assert that the proposal may inhibit or delay deployment of new technologies and converged devices, and that there is no evidence that new frequency bands or air interfaces will cause interference problems. In particular, some commenters express concerns regarding the effect of such a rule on deployment of multi-mode handsets that offer Wi-Fi capability. Commenters further assert that the proposal will mislead consumers with hearing loss into concluding that all handsets operating over new frequency bands or using new technology are incompatible with hearing aid use, even if the handsets can be certified compatible in all operating modes and frequency bands that have established standards. Finally, they argue that the proposal violates the Commission's statutory obligation to ''ensure that regulations adopted to implement this section encourage the use of currently available technology and do not discourage or impair the development of improved technology,'' 47 U.S.C. 610(e), and would also exceed its statutory authority by effectively imposing hearing aid compatibility requirements in the absence of established standards for such compatibility. Instead of the proposed rule, they recommend that the Commission provide ANSI time to identify actual interference concerns and offer specific standards or recommendations, and otherwise permit handsets to be designated hearing aid-compatible so long as they have been certified to meet hearing aid compatibility standards in all frequency bands and operating modes that have established standards.

35. Gallaudet/RERC supports the proposal in the *NPRM*, arguing that consumers who purchase handsets labeled hearing aid-compatible have an expectation that such phones are compatible in all of their operations, and that the proposed rule will therefore prevent consumer confusion regarding hearing aid compatibility when the phone is operating over frequency bands or air interfaces that do not have standards. Gallaudet/RERC further argues that the rule will provide incentives to the wireless industry to establish standards in a timely fashion. Commenters in opposition respond that the Commission can address confusion concerns with disclosure requirements, and that there is no reason to believe that the rule will hasten development of standards. These commenters also disagree that the rule is justified to induce more rapid adoption of new standards.

36. A filing on behalf of both industry and consumer group representatives asked that the Commission hold the record open to enable them to develop a consensus proposal regarding multi-mode and multi-band phones that operate in part over air interfaces or frequency bands for which no hearing aid compatibility standards exist. As set forth in this filing, members of ATIS' Incubator Solutions #4 (AISP.4–HAC) state that they have agreed with representatives of consumers with hearing loss to develop such a proposal. The filing also states that AISP.4–HAC anticipates filing general principles regarding this consensus plan within three months of the release of the Commission's Order, with more specific information regarding this proposal to be filed within six months of the release of the Order. ATIS states that, with the exception of devices incorporating Wi-Fi capability, it is unaware of any phones currently available that operate over multiple air interfaces or frequency bands, some of which have hearing aid compatibility standards and some of which do not. Finally, with regard to devices that incorporate Wi-Fi capability, the filing states that the members of AISP.4–HAC support allowing such devices to be labeled as hearing aid-compatible if they satisfy hearing aid compatibility standards for all other frequency bands and air interfaces over which they operate.

37. In order to both protect consumers and provide clarity to industry with respect to handset offerings that already

exist, while allowing further consideration of the longer-term issues, the Commission takes the following steps at this time. First, the Commission adopts the Joint Consensus Plan's proposal to clarify that, to be counted as compatible, a handset model must be hearing aid-compatible for each air interface and frequency band it uses as long as standards exist for each of those bands and interfaces. Second, the Commission leaves the record open for further submissions in the near term, including an anticipated consensus proposal, regarding whether a phone that operates in part in bands or air interfaces for which no standards exist should be counted as compatible, if it is compatible in all bands and air interfaces for which hearing aid compatibility standards exist. Finally, because there already exist a large number of handset models that operate over the Wi-Fi air interface as well as in bands and air interfaces for which there are hearing aid compatibility standards, the Commission will allow such phones on an interim basis to be counted as hearing aid-compatible if they otherwise qualify as hearing aid-compatible under its rules, but will require consumers to be informed that those phones have not been rated for hearing aid compatibility with respect to their Wi-Fi operations.

38. The Commission first adopts the Joint Consensus Plan's proposal and establishes that, to be offered as hearing aid-compatible, a handset must be hearing aid-compatible for every frequency band and air interface that it uses for which standards have been adopted by the Commission. As indicated in the *NPRM*, the Commission finds that requiring a hearing aid-compatible handset to be hearing aid-compatible in all such frequencies and modes of operation will better conform to the expectations of consumers that purchase such handsets. Conversely, allowing manufacturers and carriers to satisfy their deployment requirements with partially-compatible handsets where hearing aid compatibility standards exist, would likely cause significant confusion to consumers who purchase handsets that are labeled and offered as hearing aid-compatible, and who perhaps experience compatibility when the handset is tested in-store, only to discover later that the handset's compatibility varies depending on which of its frequency bands or air interfaces is in use at any particular moment. The Commission notes that it emphasized the benefits to hard-of-hearing consumers of being able to rely on a full range of functionality in their hearing aid-compatible handsets and of not having to learn all the technical details, such as the frequencies on which their phones operate. Further, although RCA expresses concern that the rule will discourage the manufacture of hearing aid-compatible multi-mode handsets, the Commission notes that those manufacturers to comment on the issue all support the rule as proposed in the Joint Consensus Plan, some expressly indicating that the rule will not impede the development of technology.

39. Second, except for its interim ruling with respect to the Wi-Fi air interface, the Commission does not here resolve whether, or to what extent, multi-band and multi-mode handsets should be counted as hearing aid-compatible if they operate in part over frequency bands or air interfaces for which technical standards have not yet been established. The record contains arguments both in favor of and against treating such handsets as hearing aid-compatible. Moreover, according to industry representatives, no such handsets currently exist, with the exception of devices incorporating Wi-Fi capability. The Commission accepts the proposal endorsed by both industry and consumer representatives to leave the record open so that they may develop a consensus plan on this issue in the near term. When the Commission subsequently addresses the application of hearing aid compatibility requirements to Wi-Fi operations, it will consider an appropriate transition regime to bring any requirements into effect.

40. Finally, the Commission adopts an interim rule to allow handsets with Wi-Fi capability that otherwise meet hearing aid compatibility standards to be certified as hearing aid-compatible. Unlike the situation with future air interfaces and anticipated frequencies (*e.g.*, the 700 MHz band), many handset models are already being produced and offered to consumers with Wi-Fi capability, including a significant proportion of the newest handset models. Moreover, the Commission has not yet addressed the extent to which hearing aid compatibility requirements should apply to handset models in various configurations incorporating Wi-Fi capability (which was not originally developed for voice transmissions), an issue on which the Commission sought comment in the *NPRM*. Therefore, the Commission adopts an interim measure to provide certainty and avoid discouraging the use of currently-available Wi-Fi technology during the period until the Commission addresses the status of Wi-Fi. Specifically, the Commission will not at present preclude a handset model that incorporates a Wi-Fi air interface from being offered as hearing aid-compatible so long as the handset otherwise qualifies as hearing aid-compatible under its rules.

41. To reduce consumer confusion as much as possible, however, the Commission also will require manufacturers and service providers, where they provide hearing aid compatibility ratings for handset models that incorporate operations using a Wi-Fi air interface, to clearly disclose to consumers that the handset has not been rated for hearing aid compatibility with respect to its Wi-Fi operation. This includes phones that may be used to provide Voice over Internet Protocol using a Wi-Fi air interface. The Commission recognizes that such disclosure is not likely to fully relieve potential customer confusion regarding handsets that meet established hearing aid compatibility standards for all of their operations except Wi-Fi. Given the current circumstances, however, the Commission believes the better course is to require disclosure of the lack of a hearing aid compatibility rating over the Wi-Fi air interface rather than preclude handset models that incorporate a Wi-Fi air interface from being considered hearing aid-compatible. In addition, the Commission expects service providers to train the sales staff at their owned or operated retail outlets regarding the lack of a rating for Wi-Fi operations and its implications. To give manufacturers and service providers sufficient time to develop and implement effective means to disclose this information (*e.g.*, inclusion of call-out cards or other media, revisions to their packaging materials, supplying of information on Web sites) where hearing aid compatibility ratings are provided, this requirement will become effective six months after the effective date of the rules adopted in the *R&O*. The Commission also notes that Working Group 6 of the ATIS incubator is developing language to inform consumers when otherwise hearing aid-compatible phones operate in part over frequency bands or air interfaces that do not have hearing aid compatibility standards.

c. *De minimis* Rule

42. Most commenters addressing the issue support the Joint Consensus Plan proposal to retain the *de minimis* exception to hearing aid compatibility requirements and to codify that the exception applies on a per air interface basis. HLAA/TDI and Gallaudet/RERC propose, however, that the exception be modified so that it not apply on a

permanent basis to large businesses that produce only one or two handsets with mass appeal, such as Apple's iPhone. Gallaudet/RERC argues that, if the exception applied to companies like Apple that do not routinely manufacture handsets, their handsets might be subject to the exception indefinitely, and consumers with hearing loss might never have the opportunity to use such devices. It further argues that the exception was not intended to permanently relieve large and prosperous companies whose handsets produce large profits from the obligations of § 20.19. It therefore suggests that the exception be applicable in such cases only for a certain period of time. HLAA/TDI similarly argues that the exception was only intended to protect small businesses, and should therefore be limited in its application to large businesses like Apple. In response, several commenters oppose the limitations suggested by Gallaudet/RERC and HLAA/TDI, arguing that the exception was not intended to be limited to small businesses, and that the proposed limitations risk undermining the rule's objective of preserving competition and innovation from new entrants.

43. The Commission adopts the proposal of the Joint Consensus Plan to retain the existing *de minimis* exception, which in most of its applications was not opposed in the record. The Commission further adopts the proposal to codify that the exception applies on a per air interface basis. No commenter has objected to applying the exception on a per air interface basis, and the Commission sees no reason to depart from an earlier decision that adopted that interpretation. As the Commission previously indicated, a per air interface approach to the *de minimis* exception to the handset deployment obligations follows from the deployment obligations themselves, which are also applied on a per air interface basis (*i.e.*, manufacturers and service providers must offer the specified number of handsets for each air interface in their product lines). If the Commission were to apply the exception to the total number of handsets across a manufacturer's total product line while requiring the specified number or percentage of hearing aid-compatible handsets for each air interface, a manufacturer that offered just one handset each for four different interfaces would fall outside the exception for each of the four interfaces. This result would force the manufacturer in question to either significantly increase the number of handsets in its product line to meet a multiple-handset deployment obligation for each air interface or else withdraw some of its existing products from the U.S. wireless market, which could retard technological progress and limit competition.

44. While the Commission does not adopt at this time the new limitation proposed by HLAA/TDI and Gallaudet/RERC, the Commission leaves the record open for further comment. The Commission intends to address this issue further, taking into consideration any *ex parte* submissions it receives, in an upcoming Report and Order.

45. In addition, regardless of whether or how the Commission subsequently modifies the application of the *de minimis* exception, the Commission strongly encourages all manufacturers, including those falling within the *de minimis* exception, to consider hearing aid compatibility as an integral and early part of their handset design process and to incorporate hearing aid compatibility into their new designs wherever feasible. The Commission also strongly encourages all manufacturers, including new entrants as well as established companies, to participate in the standards-setting process so as to keep abreast of developments in this area, and to incorporate any revisions in the hearing aid compatibility standard at an early stage when designing and testing their handsets.

4. M4/T4 Standards

46. Most commenters that address this issue advise against the adoption of M4/T4 requirements, or state a preference to wait until the hearing aid compatibility rules are next reviewed in 2010 to consider any such standards. Rehabilitation Engineering Research Center for Wireless Technologies (Wireless RERC) states, on the other hand, that ''the FCC needs to expand the rules * * * to increase the number of models available with M4/T4 compatibility.'' Wireless RERC Comments at 5. Hearing Industries Association (HIA) states generally that it supports mandating M4/T4 performance by handsets ''if and when such performance is reasonably achievable.''

47. Given the weight of the record, especially the fact that no commenter submitted any specific proposals for new standards or rules, the Commission determines not to impose any additional benchmarks based on hearing aid compatibility standards more stringent than the M3/T3 standards in its rules and in the Joint Consensus Plan. Without more, the Commission finds that technology and the market are not yet fully enough developed to support a specific requirement at this time. Nevertheless, the Commission agrees with Gallaudet/RERC that the matter of requirements to deploy M4- or T4-rated handsets should be considered in the rulemaking review that the Commission plans to initiate in 2010. In the meantime, given the surveys and studies submitted by Wireless RERC, and the comments of HIA, the Commission encourages manufacturers and service providers, including new entrants, to develop and deploy wireless phones that meet M4 and T4 standards in order to give greater options to consumers with hearing loss. In its 2010 review, the Commission will look closely at the extent to which these handsets are commercially available, whether achieving these standards is technically feasible for all interfaces and frequency bands, and the degree to which hearing aid technologies may have improved so as to make achieving such standards unnecessary.

B. 2007 ANSI C63.19 Technical Standard

1. Adoption of the 2007 Standard and Phase-in

48. Consistent with the Joint Consensus Plan and the unanimous view of commenters, the Commission adopts the 2007 ANSI C63.19 standard as a replacement for the 2001, 2005, and 2006 versions of the standard. The Commission concludes that the use of the most current testing and rating techniques will best ensure that consumers with hearing loss can obtain wireless phones that meet their needs. The Commission also adopts the transition schedule set forth in the Joint Consensus Plan (under which use of either the 2007 or 2006 standard would be permitted immediately, and the 2007 standard would become mandatory for grants of equipment authorization beginning January 1, 2010), agreeing with commenters that this affords manufacturers appropriate time to begin producing phones to the new standard. The Commission further determines not to require recertification of handsets previously certified under one of the older standards, but instead to continue recognizing such phones as hearing aid-compatible even after the 2007 standard becomes mandatory for new certifications. As AT&T observes, older models are likely to be ''phased out of circulation through marketplace attrition,'' which should obviate the issue. AT&T Comments at 6. Finally, no commenter addressed whether the 2001 and 2005 versions of the standard should continue to be permissible for

new certifications during the transition period until 2010. To the contrary, the comments consistently assume that the choice during the transition period is between the 2006 and 2007 versions of the standard. As proposed in the Joint Consensus Plan, therefore, the Commission does not provide for the continued use of earlier versions.

49. In its comments, ANSI notes that the phase-in requirement contains an unspoken assumption, that ''this would require any given mobile phone handset to be qualified under a complete version of either the 2006 or 2007 standard.'' ANSI Technical Comment at 2. The Commission agrees. Accordingly, the Commission clarifies that a party can use either the 2006 or 2007 standard for new certifications through 2009, but must use a single version for all certification tests and criteria for both the M and T ratings with respect to a given device. The particular version of the standard used should be specified in the party's application for equipment certification.

50. To summarize, a newly-certified handset model or a handset model submitted for a permissive change relating to hearing aid compatibility will have to meet, at minimum, an M3 rating (for radio frequency interference reduction) or T3 rating (for inductive coupling capability) as set forth in either the 2006 or 2007 revision of the ANSI C63.19 standard to be considered compatible. Grants of equipment certification previously issued under earlier versions of the standard will remain valid for hearing aid compatibility purposes, and if a permissive change is submitted for a reason not related primarily to a handset model's hearing aid compatibility status, the analysis of the effect of that change on a phone's compliance status may use the version of the ANSI C63.19 standard under which the hearing aid compatibility certification for that model was first made. Consistent with the requirement to use a single version of the standard for all tests and criteria, however, if a permissive change is submitted for one of the hearing aid compatibility ratings, the manufacturer must also reevaluate the other hearing aid compatibility rating using the same version of the ANSI C63.19 standard. However, a manufacturer that is required to meet a T3 rating for 20 percent of its models under § 20.19(d)(1)(i) will only be able to count toward this requirement one model manufactured after January 1, 2009, and certified under a pre-2007 standard. Then, beginning on January 1, 2010, the Commission will only permit use of the 2007 version of the standard for obtaining new grants of equipment certification, while continuing to recognize the validity of existing grants under previous versions of the standard.

2. Application to Services in the 800–950 MHz and 1.6–2.5 GHz Bands

51. In the *NPRM,* the Commission observed that the 2007 version of the ANSI C63.19 standard includes target values for hearing aid compatibility procedures for operation over specific air interfaces at frequencies in the ranges of 800–950 MHz and 1.6–2.5 GHz, a broader range of frequencies than is currently covered by § 20.19(a). The Commission adopts its proposal to revise the rule to include services over any frequency band within the range covered by the ANSI C63.19–2007 standard, specifically, the 800–950 MHz and 1.6–2.5 GHz bands, to the extent that they employ air interfaces for which technical standards are established in that standard. The Commission notes that Wi-Fi technologies often operate in the 2.4 GHz band, within the frequency range addressed by the ANSI C63.19 standard. However, as noted elsewhere, the Commission has not yet determined the extent to which services and operations based on emerging technologies such as Wi-Fi should be subject to hearing aid compatibility obligations. The Commission notes that no commenter objects to this revision or indicates that any delay is necessary to meet hearing aid compatibility obligations within this frequency range. Accordingly, as of the effective date of the rules, providers of commercial mobile radio services that are operating over these frequency bands and are otherwise within the scope of § 20.19, as well as manufacturers of wireless phones used in the delivery of such services, will be subject to the same benchmark requirements that providers of cellular, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services have to deploy hearing aid-compatible handset models as determined using either the 2006 or 2007 version of ANSI standard C63.19. The Commission notes that the *NPRM* also requested comment on how the rules apply to mobile satellite service (MSS) providers and whether any rule revisions are necessary respecting such providers. The Commission defers these issues to a future Report and Order. The rules it adopts in the *R&O* do not apply to MSS unless they fall within the existing scope of § 20.19(a).

3. Future Revisions and Extensions to the Technical Standard

a. Rules Adopted in *R&O*

52. In the *R&O,* to help ensure that its rules continue to reflect the most current standard as ANSI adopts new revisions to the standard, the Commission, as it has previously done, delegates to the Chief, Wireless Telecommunications Bureau (WTB), and the Chief, Office of Engineering and Technology (OET), the authority to jointly adopt future versions of the ANSI C63.19 standard to the extent that the changes to the standard do not raise major compliance issues. In addition, the Commission expands its delegation to a limited extent, *i.e.*, to allow Commission staff to administer a mechanism by which new frequency bands and air interfaces for which technical standards do not currently exist may be made subject to hearing aid compatibility obligations once such standards have been established. Specifically, where future versions of the ANSI C63.19 standard have been promulgated that provide technical standards for additional frequency bands or air interfaces not covered by previous versions, the Commission directs the Chief, Wireless Telecommunications Bureau (WTB), and the Chief, Office of Engineering and Technology (OET), to initiate a rulemaking proceeding, adopting the standards as established technical standards for the new frequency bands or air interfaces if they determine, based on the record, that the standards do not impose with respect to such frequency bands or air interfaces materially greater obligations than those imposed on services already subject to § 20.19. To ensure that manufacturers and service providers have adequate time to comply with their obligations, the Commission further imposes a limitation that WTB and OET may not require manufacturers and Tier I carriers to meet deployment requirements for the relevant bands or air interfaces until at least one year after release of an order adopting standards for those bands or air interfaces, and may not require service providers other than Tier I carriers to meet such requirements sooner than 15 months after release of such order. However, manufacturers will be able to obtain hearing aid compatibility certification of handsets that can operate over the new bands or air interfaces, consistent with the multi-band/multi-mode rule, immediately upon the effective date of the rules adopted in such order. In a Report and Order regarding the 700 MHz Service, the Commission established a 24-month period for the

development of standards for all of the frequencies listed in § 27.1(b) of the rules, and provided that, if such standards were promulgated within that period, the Commission would initiate ''a further proceeding at that time to establish a specific timetable for deployment of hearing aid-compatible handsets for services in the relevant bands that meet the criteria discussed above.'' 22 FCC Rcd 8064, 8120 (2007). Pursuant to the Commission's action in the *R&O,* this rulemaking proceeding referenced in the 700 MHz Report and Order may be undertaken by WTB and OET under delegated authority.

53. The Commission's action in this regard is broadly supported by the record. In particular, every commenter that addresses the issue generally supports establishment of a streamlined mechanism for the approval of revised standards that provide tests for new frequency bands and air interfaces. Moreover, this process addresses concerns expressed by some commenters that the Commission should provide the public an opportunity to comment on the new standard before formally approving the standard in cases where the approval of the standard will result in extending hearing aid compatibility requirements to new bands or air interfaces. Telecommunications Industry Association (TIA) advocates that the Commission allow at least a two-year period after adoption of a new standard before requiring compliance. The Commission finds, however, that a one-year interval is generally both sufficient for industry and necessary in order to bring the benefits of hearing aid-compatible handsets promptly to consumers. Because manufacturers are already on notice that new bands and air interfaces will be subject to hearing aid compatibility requirements upon the establishment of standards, and given that manufacturers will likely be involved themselves in the standards development process, the Commission expects that they will be in a position to at least begin the process of developing hearing aid-compatible handsets for the new bands and air interfaces even before the relevant standards are approved by ANSI, not to mention during the pendency of the rulemaking proceeding. Furthermore, the industry's years of experience with hearing aid compatibility in other bands and air interfaces will enable them to achieve hearing aid-compatible designs more quickly than before. The Commission therefore adopts a minimum one-year period for manufacturers and Tier I carriers in order to ensure the offering of hearing aid-compatible handsets for new bands and air interfaces as early as reasonably possible. Consistent with its recognition elsewhere of the difficulties smaller service providers may have in procuring up-to-date handsets, the Commission prescribes a 15-month minimum interval for service providers other than Tier I carriers to begin offering hearing aid-compatible handsets for new bands and/or air interfaces.

54. Thus, in order to ensure that its rules continue to protect the ability of consumers with hearing loss to utilize services over all frequency bands and air interfaces for which standards exist, the Commission delegates authority to WTB and OET to implement rule changes to conform its rules to ANSI standards. The Commission takes this action pursuant to Section 5(c)(1) of the Communications Act, which grants the Commission authority to delegate any of its functions, with certain exceptions not relevant here. 47 U.S.C. 155(c)(1). The Commission finds that such rule changes do not involve novel questions of fact, law, or policy, and therefore are appropriately made under delegated authority. The Commission amends §§ 0.241(a)(1), 0.331(d), and 20.19 of its rules to provide the Chiefs of WTB and OET with this delegated authority. These amendments pertain to agency organization, procedure and practice. Consequently, the notice and comment provisions of the Administrative Procedure Act contained in 5 U.S.C. 553(b) are inapplicable. *See* 5 U.S.C. 553(b).

b. Rules Adopted in *Recon*

55. In the *Recon,* the Commission modifies the delegated authority and procedures adopted in the *R&O* by which WTB and OET may approve the use of future versions of the ANSI C63.19 standard to the extent that the changes to the standard do not raise major compliance issues. The Commission concludes, on further consideration, that approval by the Chiefs of new versions of the ANSI C63.19 standard that do not raise major compliance issues, and that are approved for use only as optional alternatives to the other approved versions of the standard, should be codified in the rules. Therefore, if the Chiefs determine that such a new version of the hearing aid compatibility technical standard should be approved, the Commission requires them to issue an order amending § 20.19 as necessary to codify the approval of the new version for use in determining and certifying hearing aid compatibility of covered handsets, and the Commission delegates to the Chiefs the authority to conduct a notice-and-comment proceeding, to the extent required by statute or otherwise in the public interest, to adopt the requisite rule changes. The Commission does not, however, require adoption by notice-and-comment procedures if such procedures are not otherwise required by statute.

56. As before, the Commission only authorizes the Chiefs to approve new versions of the ANSI C63.19 standard pursuant to this delegation of authority where changes in the new standard do not raise major compliance issues, and subject to the limitation that the Chiefs may only permit, not require, the use of such subsequent versions of ANSI C63.19 to establish hearing aid compatibility.

C. Reporting, Information, and Outreach

1. Reporting

57. The Commission adopts substantially the reporting requirements proposed in the *NPRM,* along with certain additions and changes. First, the Commission elaborates on the required content of the reports in order to ensure that they will provide complete information to the Commission and to consumers. The Commission further determines to require the same content from all providers, regardless of size. Furthermore, the Commission clarifies that the reporting requirements apply to all manufacturers and service providers, including those that come under the *de minimis* exception to the deployment benchmarks. The Commission establishes new timelines for the filing of the reports. Finally, the Commission delegates authority to prescribe a template, including the authority to require electronic filing, to WTB.

58. The Commission adopts the reporting content requirements proposed in the *NPRM* with certain elaborations and clarifications. These revised requirements will help ensure that the reports enable the Commission to fulfill its responsibilities in monitoring the status of access to hearing aid-compatible handsets and verifying compliance with its rules, and will ensure that the public has additional useful information on compatible handsets. Specifically, the Commission clarifies that manufacturers and service providers must provide the dates on which they began and ended offering specific models during the past 12 months in order to demonstrate compliance over time, instead of providing a once a year ''snapshot.'' The Commission further requires manufacturers to indicate if devices that

they market under separate model numbers constitute a single model for purposes of the hearing aid compatibility rules. This information will enable the Commission to verify compliance with all of the hearing aid compatibility rules at all relevant times. Finally, the Commission requires each service provider to include an explanation of its methodology for dividing its hearing aid-compatible phones into different levels of functionality, which will help the Commission as well as the public know the range of compatible handsets that are being made available. The Commission requires that these reports be filed by all manufacturers and service providers, even those that fall within the *de minimis* exception, although not all data categories will apply to *de minimis* entities.

59. *The revised report content requirements are as follows for manufacturers:* (1) Digital wireless phone handset models tested since the most recent report; (2) compliant phone models offered to service providers since the most recent report, identified by marketing model name/number(s) and FCC ID number; (3) for each such model, the air interface(s) and frequency band(s) over which it operates, the hearing aid compatibility ratings under ANSI C63.19 for each frequency band and air interface, the ANSI C63.19 version used, and the months in which the model was available since the most recent report; (4) non-compliant phone models offered to service providers since the most recent report, identifying each model by marketing model name/number(s) and FCC ID number; (5) for each non-compliant model, the air interface(s) over which it operates and the months in which the model was available since the most recent report; (6) total numbers of compliant and non-compliant phone models offered to service providers for each air interface as of the time of the report; (7) any instance, as of the date of the report or since the most recent report, in which multiple compliant or non-compliant devices are marketed under separate model name/numbers but constitute a single model for purposes of the hearing aid compatibility rules, identifying each device by marketing model name/number and FCC ID number; (8) status of product labeling; and (9) outreach efforts.

60. *The revised report content requirements are as follows for service providers:* (1) Compliant digital wireless phone handset models offered to customers since the most recent report, identified by marketing model name/number(s) and FCC ID number; (2) for each such model, the air interface(s) and frequency band(s) over which it operates, the hearing aid compatibility ratings under ANSI C63.19 for each frequency band and air interface, and the months in which the model was available since the most recent report; (3) non-compliant phone models offered since the most recent report, identifying each model by marketing model name/number(s) and FCC ID number; (4) for each non-compliant model, the air interface(s) over which it operates and the months in which the model was available since the most recent report; (5) total numbers of compliant and non-compliant phone models offered to customers for each air interface over which the provider offers service as of the time of the report; (6) information related to the retail availability of compliant phones; (7) status of product labeling; (8) outreach efforts; and (9) the levels of functionality into which the compliant phones fall and an explanation of the service provider's methodology for determining levels of functionality.

61. The Commission further determines that the same reporting requirements should apply to all service providers. The Commission rejects arguments by RCA and SouthernLINC that less information should be required of service providers that are not Tier I carriers. The Commission finds that uniform application of reporting requirements is necessary to inform all consumers, and the Commission is unconvinced by arguments that the reports will impose unreasonable burdens. In this regard, the Commission disagrees with those commenters that suggest that some of this information can be difficult to obtain or verify. Rather, in light of the requirements the Commission adopts, this information should be readily available to service providers either from the manufacturer's previous reports to the Commission, from the manufacturer's own Web site, or from the manufacturer directly. The Commission further rejects the proposition that some of this information, in particular the frequency bands and air interfaces over which a phone operates, is unnecessary. To the contrary, this information is essential to ensure correct application of its rules requiring deployment of hearing aid-compatible phones on a per-air interface basis, as well as its requirements that phones meet hearing aid compatibility standards for all air interfaces and frequency bands over which they operate. The Commission notes that even if a provider offers service over only one air interface, hearing aid compatibility over multiple air interfaces may be important to its customers who may use their phones when roaming.

62. Furthermore, the Commission clarifies that even manufacturers and service providers that come under the *de minimis* exception to the deployment benchmarks are under an obligation to file reports to the Commission. Even though these entities may be exempt from other requirements under § 20.19, it is still necessary to obtain information from them in order to form a complete picture of the availability of hearing aid-compatible handsets, as well as to inform consumers. For instance, consumers would benefit, if *de minimis* entities do produce or market handset models that have been tested and found to be hearing aid-compatible, from having access to information about those handsets. In addition, information regarding all handset models that these entities offer will enable the Commission to verify their eligibility for the exception. Entities that come under the *de minimis* exception will not be required to provide information other than that relating to the handset models that they offer. For example, as they are not subject to product labeling requirements, they need not provide information on labeling.

63. In addition, the Commission requires each manufacturer and service provider that is required to offer one or more hearing aid-compatible handset models to identify in its report, if it maintains a public Web site, the specific Web site address at which it provides information relating to the hearing aid-compatible handsets that it offers.

64. The Commission requires manufacturers and service providers to file their initial reports under the new rules on January 15, 2009. Thereafter, the reports will be filed annually beginning July 15, 2009, for manufacturers and January 15, 2010, for service providers. The information in the reports shall be current through the end of the calendar month preceding the filing date, and the reports shall include historical information for the period since the entity filed its last report (which in most instances will be 12 months). In order to afford sufficient time for manufacturers and service providers to transition to the new data collecting and reporting regime, however, the reports filed in January 2009 will need to include information relating to compliant and non-compliant handset models offered only for the previous six months (*i.e.*, beginning July 2008).

65. The Commission finds that this schedule appropriately balances

manufacturers' and service providers' need for time to collect the information that will be required under the new reports with the public's interest in maintaining a steady flow of information. In particular, requiring the first reports to be filed in January 2009, two months after the next reports would have been filed under existing rules and 14 months after the most recent reports, affords manufacturers and service providers a reasonable period to begin collecting the new information. Although this schedule departs from the November and May dates proposed in the Joint Consensus Plan, the differences are not great, and the Commission's adopted rule expands the period of time some entities are afforded before making their first reports. The Joint Consensus Plan was apparently drafted with the assumption that new rules would be in place before November 2007, and accordingly it is not clear how the proponents would intend to apply its proposed schedule in the current time frame. It is at least arguable, however, that Tier I carriers would be required to file their initial reports in May 2008. Manufacturers would file their first reports in November 2008. This time period also gives WTB an opportunity to devise and promulgate a standard electronic format for reporting. Consistent with the Joint Consensus Plan, the Commission finds that staggering the deadlines after the initial reports will allow service providers better to incorporate more recent manufacturer information into their reports, as well as facilitating efficient administrative review. In addition, the Commission disagrees with the Joint Consensus Plan's provision for a year's delay in reporting for service providers that are not Tier I carriers, particularly in light of its decision not to require any reports until January 2009. The Commission notes that in the past all service providers have had the same reporting obligations, and finds that this proposal would create an unacceptable and unnecessary gap in the availability of information. Only one party, RCA, filed comments supporting this aspect of the Joint Consensus Plan, and one smaller service provider, i wireless, specifically rejected the year's delay.

66. Finally, the Commission delegates authority to prescribe a template, including the authority to require electronic filing, to WTB. The Commission finds that a standardized form would improve the quality and utility of the reports for the Commission, industry, and the public. Although at least one commenter prefers to rely on a narrative report format, the Commission concludes that a standardized format will assist the Commission and the public in understanding and analyzing the reports.

2. Information and Outreach

67. In their comments, HLAA/TDI and Gallaudet/RERC offer several proposals for changes to the Commission's Web site and databases, as well as proposed requirements and recommendations for manufacturers and service providers. The Commission agrees with HLAA/TDI and Gallaudet/RERC that improvements in the outreach activities of the Commission, manufacturers, and service providers would enhance the ability of consumers easily to obtain information about hearing aid-compatible handsets that meet their needs. The Commission therefore takes action on their recommendations.

68. First, HLAA/TDI and Gallaudet/RERC propose several changes to the Commission's Web site, databases, and processes, including: Developing a single location or Web site where hearing aid users can find the ratings and model numbers of compliant handsets offered by manufacturers and service providers; adding a search function to the FCC's equipment authorization database that will enable consumers to browse among phone features by category; adding links to manufacturers' and service providers' Web sites from the Commission's Disability Rights Office (DRO)'s web page; and adopting a consumer-friendly method of handling hearing aid compatibility complaints that (1) Requires FCC resolution within 90 days, (2) provides for a separate and identifiable electronic and telephonic FCC receptacle for hearing aid compatibility complaints, and (3) facilitates the filing of formal hearing aid compatibility complaints.

69. The Commission directs the Consumer and Governmental Affairs Bureau (CGB), OET, and WTB to take these recommendations under advisement and to implement them to the extent feasible. The Commission concludes that all of these recommended actions, if feasible, would assist consumers. In particular, the Commission directs the Commission's DRO to include, on its Web site, links to the Web site addresses maintained by manufacturers and service providers that provide information on the hearing aid-compatible models that they offer. The idea that consumers should be able to access as much information as possible through easily accessible connections to relevant material is a fundamental one. The Commission notes, however, that because OET's database and the part 2 rules were designed to serve the equipment authorization process, there may be limits to their adaptability to provide accessible information on hearing aid compatibility certifications. In the *NPRM,* the Commission sought comment on whether to amend part 2 to require additional information regarding handset models in equipment authorization filings. The Commission defers action on these issues to a future Report and Order. The Commission declines at this time, in the absence of a more complete record, to require that hearing aid compatibility complaints be resolved within a particular time period, such as 90 days. The Commission does, however, expect that staff will make every effort to resolve such complaints within the shortest reasonable time frame, ideally within 90 days. The Commission also notes that, with its recent implementation of FCC Form 2000 online, the Commission has taken additional action to improve the manner in which it handles consumer complaints. In particular, FCC Form 2000C, the portion of Form 2000 that is used for disability access complaints, includes specific provisions for complaints relating to the hearing aid compatibility of wireless telephone equipment and service. The form is designed to be user-friendly, asking consumers targeted questions intended to facilitate processing of the complaint.

70. As proposed in the *NPRM,* HLAA/TDI specifically advocates adopting in the context of hearing aid compatibility complaints the contact information requirements for manufacturers and service providers that currently apply to complaints under Section 255 of the Communications Act, which governs access to telecommunications services by people with disabilities. Nokia Inc. (Nokia) and AT&T oppose this proposal, stating that ''[a]dditional actions by the Commission are not necessary,'' and that ''manufacturers should not be required to comply with Section 255's reporting requirements in the [hearing aid compatibility] context.'' Nokia Comments at 10.

71. After review of the record, the Commission adopts the proposal in the *NPRM* and amends its rules accordingly. Contrary to the arguments of some parties, the proposal from the *NPRM* was not to create a new mandate, but simply to alter the process under the existing part 68 mandate governing public complaints regarding hearing aid compatibility to make it conform to the part 6 rules that govern complaints under Section 255. Under the

Commission's part 68 complaint procedures, which are applicable to wireless hearing aid compatibility complaints, manufacturers and service providers are required to designate a service agent to the Administrative Council for Terminal Attachment (ACTA). A consumer wishing to make a complaint must first approach ACTA to secure the contact information for the relevant industry entity, only after which can the consumer actually file a complaint. This differs from the process for Section 255 complaints in part 6 of the rules, under which the contact information is provided directly to the Commission and made available to the public via the DRO Web site. The Commission concludes that requiring provision of hearing aid compatibility contact information directly to the Commission for posting on its Web site—without otherwise changing the procedures for handling such complaints—will assist consumers and will impose little if any additional burden on manufacturers and service providers, who are already required to make the same information available to a third party.

72. In addition to improvements to the Commission's Web site, databases, and processes, the Commission finds it essential to the proper functioning of its hearing aid compatibility rules that manufacturers and service providers make certain limited categories of up-to-date information available on their Web sites. Specifically, the Commission requires manufacturers and service providers, beginning January 15, 2009, to post a list of the hearing aid-compatible models that they offer (identified by marketing model name/number(s)), the hearing aid compatibility ratings of those models, and an explanation of the rating system. In addition, as suggested by Gallaudet/RERC, the Commission requires service providers to post the level of functionality for each model and an explanation of the service provider's methodology for designating levels of functionality. This list and related information should be updated within thirty days of any relevant changes. Although manufacturers and service providers are also required to provide this information annually to the Commission, such information will inevitably become dated over the course of a year. Thus, updated Web site postings are necessary both so that consumers can obtain up-to-date hearing aid compatibility information from their service providers and so that service providers can readily obtain such information from their manufacturer suppliers. Because all of the information that the Commission is requiring to be posted on Web sites is already required either in annual reports or on product packaging and inserts, the Commission disagrees with assertions that it would be unduly burdensome for manufacturers and service providers to procure and maintain such information. As noted with respect to service providers' annual reports, although information regarding handset compatibility is in the first instance under the control of manufacturers, the requirement that manufacturers post the information means it should be readily accessible for service providers to post as well. Consistent with its decision regarding reporting requirements, in order to afford manufacturers and service providers time to compile the requisite information and make the necessary changes to their Web sites, the Commission delays the effective date of these posting requirements until January 15, 2009.

73. The Commission also requires manufacturers and service providers to include in their annual reports to the Commission the Web site address at which this information is posted. Further, if this Web site address ceases to be functional at any time prior to the next report, the Commission requires the manufacturer or service provider to inform the DRO of the revised address within 30 days of the change. These reporting requirements will enable the DRO to maintain up-to-date links for the public on its Web site.

74. In addition to this required information, HLAA/TDI advocates that the Commission strongly urge industry to post certain other information on their Web sites, including: A search function for hearing aid compatibility data to allow consumers to browse within the category for features they want; a listing of hearing aid compatibility ratings for all handset models, not just those with ratings of 3 and 4 (because hearing aid ratings are now available to consumers); volume control levels on phones; vibrating feature on phones; ring tones most suitable for people with hearing loss—those with low frequencies; devices with QWERTY keyboards that can make it easier to send e-mails and instant messages that supplement hearing aid compatibility; other features and functions on handsets; a downloadable version of a brochure on hearing aid-compatible handsets developed by ATIS WG6 (print version of brochure should be available in every store, including independent stores); and a downloadable version of a phone evaluation tool that the RERC at Gallaudet is now testing on its Web sites and in its advertising.

75. The Commission agrees that this information would be useful to consumers, and the Commission urges manufacturers and service providers to include it on their Web sites and in other publicity to the extent feasible. In recognition of the great variety of products, marketing practices, and Web site designs, however, the Commission does not at present require the posting of any specific information other than that previously described.

76. Finally, the Commission clarifies that under the labeling requirement in § 20.19(f), the M and T ratings that are required on the label are the overall, worst case ratings for the handset. The Commission recognizes that a multi-band or multi-mode handset may have different hearing aid compatibility ratings for different frequency bands or air interfaces. Consistent with its holding regarding the compatibility status of multi-band and multi-mode handsets, the Commission finds that the most useful information for consumers is a single ''worst case'' rating constituting the handset's lowest rating for any air interface or frequency band. Accordingly, while the Commission expects that the reports will include all hearing aid compatibility ratings assigned to a particular model, the labeling accompanying a hearing aid-compatible handset, as well as the information on a manufacturer or service provider's Web site, shall include only the lowest such rating as the rating for the handset.

D. 2010 Review

77. No commenters objected to the proposed 2010 date for the next review of the hearing aid compatibility rules, although AT&T suggested that 2012 would be appropriate as well. The Commission therefore concludes to begin a further review of its hearing aid rules in 2010, after the May 2010 deployment benchmarks have passed.

IV. Conclusion

78. In the *R&O,* the Commission adopts a number of inter-related changes to its wireless hearing aid compatibility rules, largely based on proposals in the Joint Consensus Plan. These changes update the requirements regarding deployment of hearing aid-compatible handsets, reporting, and outreach, as well as the standards by which hearing aid compatibility will be determined. The Commission concludes that the changes will improve access to wireless telecommunications services for persons with hearing disabilities, which continues to be a critical goal of

the Commission as society increasingly relies on wireless services for social, business, and emergency communications.

V. Procedural Matters

A. Regulatory Flexibility Act

79. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the *R&O*. The FRFA is set forth in an appendix to the *R&O*.

B. Congressional Review Act

80. The Commission will send a copy of the *R&O* 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).

C. Accessible Formats

81. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

VI. Final Regulatory Flexibility Analysis

82. As required by the RFA, the Commission included an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the policies and rules considered in the *NPRM* in WT Docket No. 07–250. The Commission sought written public comment on the *NPRM* in this docket, including comment on the IRFA. The FRFA conforms to the RFA.

83. Although Section 213 of the Consolidated Appropriations Act of 2000 provides that the RFA shall not apply to the rules and competitive bidding procedures for frequencies in the 746–806 MHz Band, the Commission believes that it would serve the public interest to analyze the possible significant economic impact of the proposed policy and rule changes in this band on small entities. Accordingly, this FRFA contains an analysis of this impact in connection with all spectrum that falls within the scope of the *R&O*, including spectrum in the 746–806 MHz Band.

A. Need for, and Objectives of, the Rules

84. In the *R&O*, the Commission revises § 20.19 of the rules containing the hearing aid compatibility requirements applicable to providers of public mobile services and manufacturers of digital wireless handsets used in the delivery of those services. Specifically, the Commission adopts benchmark requirements for future deployment of hearing aid-compatible handsets, and related requirements, based on the proposals set forth in the *NPRM* and based on a Joint Consensus Plan developed by an ATIS working group that included nationwide carriers, handset manufacturers, and several organizations representing the interests of consumers with hearing loss. The Commission finds that these new handset deployment obligations for both manufacturers and service providers will ensure that its rules continue to be effective in an evolving marketplace of new technologies and services. Because service providers not in the Tier I category were not included in the Joint Consensus Plan, the Commission sought comment on and adopts in the *R&O* similar rule changes, with modified deadlines, for these entities. These requirements and deadlines are intended both to promote the accessibility of hearing aid-compatible handsets to all deaf and hard-of-hearing consumers, and to recognize the impediments to smaller and regional service providers obtaining the most recent handset models. In order to facilitate the continuing availability of a variety of hearing aid-compatible handset models to consumers, the Commission also adopts a requirement that manufacturers annually ''refresh'' their hearing aid-compatible offerings with new models, and a requirement that service providers offer hearing aid-compatible models with differing levels of functionality. The Commission further adopts an interim measure whereby phones with Wi-Fi capability that otherwise meet hearing aid compatibility standards may be counted as hearing aid-compatible, but the manufacturer and service provider must clearly disclose that they have not been rated with respect to their Wi-Fi operation. Finally, the Commission revises the annual reporting obligations of manufacturers and service providers. These amendments will, among other things, render the reports more useful to consumers who wish to know the compatibility ratings of different handset models that have been certified as hearing aid-compatible. In addition, to ensure the availability of such information on a more current basis to service providers and consumers wishing to offer or purchase hearing aid-compatible handsets, the Commission requires manufacturers and service providers to provide up-to-date information on their Web sites regarding their hearing aid-compatible handset models.

85. The Commission states that these inter-related changes, taken together and largely supported by manufacturers, service providers, and consumers with hearing loss, will further the statutory objective to ''ensure reasonable access to telephone service by persons with impaired hearing.'' 47 U.S.C. 610(a). Among other things, the Commission explains that the most disadvantaged wireless users in the deaf and hard-of-hearing community, who are more likely to rely on telecoil-equipped hearing aids, will benefit from rule changes that increase requirements to offer handsets with inductive coupling capability. The Commission further states that the requirements that manufacturers refresh their product offerings annually and that service providers offer hearing aid-compatible handset models at differing functionality levels will help to ensure that consumers with hearing loss have a variety of handsets available to them, including handsets with innovative user features, a goal that the Commission has sought to promote since 2003. Finally, the Commission notes its objective to ensure that the impact of the rules remains as technology-impartial as possible while also ensuring availability of hearing aid-compatible handsets to consumers.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

86. No comments specifically addressed the IRFA. Nonetheless, small entity issues raised in comments are addressed in the FRFA in sections D and E.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

87. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria

established by the Small Business Administration (SBA).

88. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305–2320 MHz and 2345–2360 MHz bands. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

89. *700 MHz Guard Bands Licenses.* In the 700 MHz Guard Bands Order, the Commission adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses for each of two spectrum blocks commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of remaining 700 MHz Guard Bands licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses. Subsequently, in the 700 MHz Second Report and Order, the Commission reorganized the licenses pursuant to an agreement among most of the licensees, resulting in a spectral relocation of the first set of paired spectrum block licenses, and an elimination of the second set of paired spectrum block licenses (many of which were already vacant, reclaimed by the Commission from Nextel). A single licensee that did not participate in the agreement was grandfathered in the initial spectral location for its two licenses in the second set of paired spectrum blocks. Accordingly, at this time there are 54 licenses in the 700 MHz Guard Bands and there is no auction data applicable to determine which are held by small businesses.

90. *700 MHz Band Commercial Licenses.* There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698–757, 758–763, 776–787, and 788–793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) ''Small business,'' which is defined as an entity that has attributed average annual gross revenues that do not exceed $40 million during the preceding three years; and (2) ''very small business,'' which is defined as an entity with attributed average annual gross revenues that do not exceed $15 million for the preceding three years. In Block C of the Lower 700 MHz Band (710–716 MHz and 740–746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: An ''entrepreneur,'' which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards.

91. An auction of 740 licenses for Blocks C (710–716 MHz and 740–746 MHz) and D (716–722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: Five EAG licenses and 251 CMA licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

92. The auction for the remaining 62 megahertz of commercial spectrum began on January 24, 2008. A total of 214 applicants were found to be qualified bidders, of which 38 applicants claimed status as small businesses and 81 applicants claimed status as very small businesses.

93. *Government Transfer Bands.* The Commission adopted small business size standards for the unpaired 1390–1392 MHz, 1670–1675 MHz, and the paired 1392–1395 MHz and 1432–1435 MHz bands. Specifically, with respect to these bands, the Commission defined an entity with average annual gross revenues for the three preceding years not exceeding $40 million as a ''small business,'' and an entity with average annual gross revenues for the three preceding years not exceeding $15 million as a ''very small business.'' SBA has approved these small business size standards for the aforementioned bands. Correspondingly, the Commission adopted a bidding credit of 15 percent for ''small businesses'' and a bidding credit of 25 percent for ''very small businesses.'' This bidding credit structure was found to have been consistent with the Commission's schedule of bidding credits, which may be found at § 1.2110(f)(2) of the Commission's rules. The Commission found that these two definitions will provide a variety of businesses seeking to provide a variety of services with opportunities to participate in the auction of licenses for this spectrum and will afford such licensees, who may have varying capital costs, substantial flexibility for the provision of services. The Commission noted that it had long recognized that bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities. The Commission also noted that it had found that the use of tiered or graduated small business definitions is useful in furthering its mandate under Section 309(j) to promote opportunities for and disseminate licenses to a wide variety of applicants. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded.

94. *Advanced Wireless Services.* In the AWS–1 Report and Order, the Commission adopted rules that affect applicants who wish to provide service in the 1710–1755 MHz and 2110–2155 MHz bands. The Commission anticipated that the services that will be deployed in these bands may have capital requirements comparable to those in the broadband Personal Communications Service (PCS), and that the licensees in these bands will be presented with issues and costs similar to those presented to broadband PCS licensees. Further, at the time the broadband PCS service was established,

it was similarly anticipated that it would facilitate the introduction of a new generation of service. Therefore, the AWS–1 Report and Order adopts the same small business size definition that the Commission adopted for the broadband PCS service and that the SBA approved. In particular, the AWS–1 Report and Order defines a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. The AWS–1 Report and Order also provides small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent.

95. *Wireless Cable Systems.* The SBA small business size standard for the broad census category of ''Wireless Telecommunications Carriers-except satellite'' appears applicable to MDS, ITFS and LMDS. The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (''BRS''), formerly Multipoint Distribution Service (''MDS''), and the Educational Broadband Service (''EBS''), formerly Instructional Television Fixed Service (''ITFS''), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. The Commission estimates that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Local Multipoint Distribution Service (''LMDS'') is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The SBA small business size standard for the broad census category of Wireless Telecommunications Carriers appears applicable to MDS, ITFS and LMDS. To gauge small business prevalence for MDS, ITFS and LMDS, the Commission must use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts. This data was gathered when Cable and Other Program Distribution was the applicable NAICS Code size standard under SBA.

96. The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, the Commission estimates that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

97. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). The Commission estimates that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small entities.

98. In the 1998 and 1999 LMDS auctions, the Commission defined a small business as an entity that has annual average gross revenues of less than $40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a ''very small business,'' which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years. These definitions of ''small business'' and ''very small business'' in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, the Commission believes that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

99. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category ''Wireless Telecommunications Carriers (except satellite).'' Under that SBA category, a business is small if it has 1,500 or fewer employees. For the census category of ''Cellular and Other Wireless Telecommunications,'' Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, under this category and size standard, the majority of firms can be considered small.

100. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses. Subsequent events concerning Auction 35, including

judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

101. *Specialized Mobile Radio.* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

102. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed ''small business'' status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

103. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million, or have no more than 1,500 employees. One firm has over $15 million in revenues. The Commission believes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

104. *Rural Radiotelephone Service.* The Commission uses the SBA definition applicable to Wireless Telecommunications Carriers (except satellite),'' i.e., an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

105. *Air-Ground Radiotelephone Service.* The Commission uses the SBA definition applicable to Wireless Telecommunications Carriers (except satellite),'' *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

106. *Offshore Radiotelephone Service.* This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. The Commission uses the SBA definition applicable to Wireless Telecommunications Carriers (except satellite),'' *i.e.*, an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this analysis, that all of the 55 licensees are small entities, as that term is defined by the SBA.

107. *Mobile Satellite Service Carriers.* Neither the Commission nor the U.S. Small Business Administration has developed a small business size standard specifically for mobile satellite service licensees. The appropriate size standard is therefore the SBA standard for Satellite Telecommunications, which provides that such entities are small if they have $13.5 million or less in annual revenues. Currently, the Commission's records show that there are 31 entities authorized to provide voice and data MSS in the United States. The Commission does not have sufficient information to determine which, if any, of these parties are small entities. The Commission notes that small businesses are not likely to have the financial ability to become MSS system operators because of high implementation costs, including construction of satellite space stations and rocket launch, associated with satellite systems and services.

108. *Wireless Communications Equipment Manufacturers.* The SBA has established a small business size standard for wireless communications equipment manufacturers. Under the Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicates that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The Commission estimates that the majority of wireless communications equipment manufacturers are small businesses.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

109. The Commission adopts reporting and outreach requirements that will involve some recordkeeping and other compliance requirements for small entities. Under the decision in the *R&O*, manufacturers and service providers, including those that are small entities, will continue to file regular reports with the Commission detailing their hearing aid compatibility efforts. In order to improve the existing reports for consumers and industry and meet the Commission's hearing aid compatibility objectives (see section A), however, the Commission adopts new content requirements for these reports. The Commission also adopts a new outreach obligation for manufacturers and service providers that maintain public Web sites to post up-to-date information involving some of this content, and to report and keep updated to the Commission a working link to the web location at which this information is posted. Finally, because many handset models are currently being offered that operate over both established CMRS interfaces and the Wi-Fi air interface for which no established hearing aid compatibility standards exist, the Commission allows such phones on an interim basis to be counted as hearing aid-compatible if

they otherwise qualify as hearing aid-compatible under its rules, but requires consumers to be informed that those phones have not been rated for hearing aid compatibility with respect to their Wi-Fi operations. Section E summarizes additional detail about these reporting and outreach requirements that the Commission adopts in the *R&O*.

110. The projected reporting, recordkeeping, and other compliance requirements resulting from the *R&O* will apply to all entities in the same manner. As discussed in section E, the Commission finds that applying the same rules equally to all entities in this context promotes fairness. The Commission does not believe that the costs and/or administrative burdens associated with the rules will unduly burden small entities. Moreover, any costs and burdens assumed by small entities will be offset by the benefits obtained by consumers. The revisions the Commission adopts should benefit consumers by giving them more information and more options for gaining access to hearing aid compatibility information.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

111. The RFA requires an agency to describe in the IRFA any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The Commission considered these alternatives with respect to all of the requirements that it is imposing on small entities in the *R&O,* and this FRFA incorporates by reference all discussion in the *R&O* that considers the impact on small entities of the rules adopted by the Commission. In addition, the Commission's consideration of those issues as to which the impact on small entities was specifically discussed in the record is summarized as follows:

112. *Hearing Aid-Compatible Handset Deployment Benchmarks and Deadlines.* In accordance with its objective of furthering the availability of hearing aid-compatible handsets to the deaf and hard-of-hearing community, the Commission considered several different proposals for handset deployment benchmarks and deadlines. These alternatives balanced several different approaches to improving wireless services for deaf and hard-of-hearing consumers. For example, the Commission considered the possibility of applying to small entities different benchmarks for offering handset models meeting M3 and T3 (or higher) hearing aid compatibility ratings. Six parties representing regional or smaller service providers submitted comments in favor of lower benchmarks for smaller service providers.

113. Ultimately, the Commission adopted identical benchmark alternatives for all manufacturers and all service providers (including small manufacturers and service providers). The Commission decided on a single set of deployment benchmark alternatives for all service providers (other than those coming under the *de minimis* exception) in accordance with its objective of furthering the availability of hearing aid-compatible handsets for all consumers regardless of where they reside. Under these alternatives for both M3 and T3 ratings, service providers may meet hearing aid compatibility standards for either a minimum number or minimum percentage of the handset models that they offer, whichever is less. Thus, under the percentage alternative, service providers with smaller product lines, including many small entities, are relieved of the burden of having to offer larger numbers of hearing aid-compatible models required of larger service providers. The Commission considered the alternative of reducing the benchmarks still further for smaller service providers, but determined that the increased relief of burdens that would be achieved by doing so was outweighed by the public interest in ensuring availability of hearing aid-compatible handsets to all consumers who need them, which is the primary objective of this proceeding.

114. In addition, to minimize the economic burden to service providers that are small entities, the Commission extended future hearing aid compatibility compliance deadlines for non-nationwide service providers by three months. The Commission provided this additional time in recognition that smaller service providers have few handset options and more difficulty in obtaining the newest offerings than their nationwide counterparts. In reaching this decision, the Commission considered and rejected other alternatives. In particular, five non-nationwide carriers submitted comments asking for extended deadlines of six months to one year following Tier I carriers' deadlines. The Commission did not agree with the extension of deadlines beyond three months, because it determined that such action would amount to an unacceptable and unnecessary denial of handset benefits to consumers. The Commission noted that the extension of three months is consistent with past orders where it has found that many smaller service providers justified waivers of approximately three months from prior hearing aid compatibility deadlines, but denied most requests for longer periods of delay.

115. In considering these deployment benchmarks and deadlines, the Commission also adopted the proposal of the Joint Consensus plan to retain the existing *de minimis* exception. Under this exception, manufacturers and service providers that offer two or fewer digital wireless handset models in the U.S. per air interface are exempt from hearing aid compatibility requirements (other than certain reporting requirements), and those offering three handset models per air interface are required to offer one hearing aid-compatible model. The Commission kept this rule, which minimizes economic impact on certain small entities, in recognition that exempting from hearing aid compatibility requirements all companies with very small product lines promotes innovation and competition.

116. *Other Hearing Aid-Compatible Handset Deployment Obligations.* In addition to handset deployment benchmarks and deadlines, the Commission adopted rules requiring handset manufacturers to refresh their hearing aid-compatible product offerings annually, and requiring service providers to offer to consumers hearing aid-compatible handsets with differing levels of functionality. The objective of these rules is to ensure that hearing aid users can select from a variety of compliant handset models, with varying features and prices. In adopting these rules, the Commission considered comments of several smaller service providers that the requirement to offer compatible models with differing levels of functionality is unnecessary and intrusive as applied to non-nationwide service providers. In response, the Commission acknowledged that it does not expect a service provider with four hearing aid-compatible models, for example, necessarily to offer as many levels of functionality or as broad a range of product offerings as a provider with eight or more models. Therefore, the Commission crafted the rule to afford service providers flexibility to

define their levels of functionality in a manner appropriate to their situation. Nonetheless, the Commission determined that even the smallest service providers should be able to distinguish among their offerings in some manner, and that requiring them to do so offers benefits to consumers that outweigh the relatively small burden on small entities.

117. *Reporting, Information, and Outreach.* As noted in section D, the Commission adopted reporting and other compliance requirements that will apply to all entities irrespective of their size. The *R&O* requires manufacturers and all service providers to file reports annually. This requirement to file annual reports continues a requirement that exists under the current rules. However, the *R&O* adds new required content to the reports, including: (1) Model name/numbers and FCC ID numbers; (2) the air interfaces and frequency bands over which each model operates; (3) information regarding handset models offered throughout the period since the previous report, including the months during which each model was available; and (4) for service providers, their models' levels of functionality and their methodology for dividing hearing aid-compatible handset models into different levels of functionality.

118. The Commission in the past has stated that annual hearing aid compatibility reports serve a dual purpose of assisting the Commission in monitoring handset deployment progress and providing valuable information to the public concerning the technical testing and commercial availability of hearing aid compatible handsets for consumers. The new content requirements in the *R&O* will result in better information to the Commission and to consumers. Some comments on the *NPRM* asserted that additional reporting requirements would be burdensome, particularly to smaller service providers, and the Commission considered whether any alternatives could serve consumers' needs in a manner less burdensome to small entities. As the Commission found, however, all of the information to be included in the reports is either within the service provider's control or can be readily gathered from manufacturers' Web sites or their previous reports. Thus, the Commission found that these reports will not impose any unreasonable burden on manufacturers and service providers, whether large or small. Furthermore, in order to ensure proper implementation of the hearing aid compatibility rules and to consumers, the Commission found it extremely important to obtain the information in question from all service providers without exception. Accordingly, the Commission found that other alternatives would not provide it with the information necessary to accomplish its objectives.

119. The Commission also considered whether, as advocated by one commenter, the initial reports under the new rules should be delayed by one year for service providers that are not Tier I carriers. The Commission found that this proposal would create an unacceptable and unnecessary gap in the availability of information. Moreover, in order to ease the burden of compliance for all manufacturers and service providers, the Commission determined not to require the next reports from any entities until January 15, 2009.

120. The Commission further authorized the Wireless Telecommunications Bureau to prescribe a uniform template for the annual reports and require electronic filing. The Commission considered whether to allow regulated entities, including small entities, alternatively to use a narrative format. To assist the Commission and consumers in understanding and analyzing the reports, it concluded that a uniform, electronic format will not impose a significant increase in economic burdens.

121. In addition to regular reporting, the *R&O* will require manufacturers and service providers that have public Web sites to post certain information, including the hearing aid-compatible handset models that they offer, the ratings of those models, an explanation of the rating system, and, for service providers, those models' levels of functionality and their methodology for determining levels of functionality. This information must be kept current within 30 days. In addition, service providers must include this web address in their reports to the Commission, and inform the Commission within 30 days if the address ceases to be functional. As with the annual reports, the Commission considered whether it could adopt less burdensome requirements for small entities, and concluded that it needed to impose the same requirements on all manufacturers and service providers to serve the purpose of providing critical information to all consumers. Moreover, because all of the information to be posted is also required in the reports to the Commission or in packaging inserts, the burden of maintaining it on the Web site should be small. Finally, as with the reports, the Commission eased the burden of coming into compliance for all entities by delaying the effective date of this requirement until January 15, 2009.

122. *Final Regulatory Flexibility Certification (FRFC) for Order on Reconsideration and Erratum.* The modifications in the *Recon* to the Commission process for approving new versions of the hearing aid compatibility technical standard do not place any new burdens on small entities. Therefore, the Commission certifies, pursuant to Section 605(b) of the RFA, that the action taken in the *Recon* will not have a significant economic impact on a substantial number of small entities.

F. Report to Congress

123. The Commission will send a copy of the *R&O,* including the FRFA, and a copy of the *Recon,* including the FRFC, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *R&O,* including the FRFA, and a copy of the *Recon,* including the FRFC, to the Chief Counsel for Advocacy of the SBA. Copies of the *R&O* and FRFA and the *Recon* and FRFC (or summaries thereof) are also being published in the **Federal Register**.

VII. Ordering Clauses

124. *It is ordered* that, pursuant to the authority of Sections 4(i), 303(r), and 710 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 610, the *R&O* is hereby adopted.

125. *It is further ordered* that parts 0, 20 and 68 of the Commission's Rules, 47 CFR parts 0, 20 and 68, are amended as specified in an Appendix to the *R&O,* effective June 6, 2008.

126. *It is further ordered* that the information collections contained in the *R&O will become effective* following approval by the Office of Management and Budget. The Commission will publish a document at a later date establishing the effective date.

127. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of the *R&O,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

128. *It is further ordered* that, pursuant to the authority of Sections 4(i), 303(r), and 710 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 610, and Section 1.108 of the Commission's rules, 47 CFR 1.108, the *Recon* is hereby adopted.

129. *It is further ordered* that the Commission's Consumer and

Governmental Affairs Bureau, Reference Information Center, shall send a copy of the *Recon*, including the FRFC, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 0

Organization and functions (government agencies).

47 CFR Part 20

Communications common carriers, Communications equipment. Incorporation by Reference.

47 CFR Part 68

Administrative practice and procedure.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0, 20, and 68 as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

■ 2. Section 0.241 is amended by revising paragraph (a)(1) to read as follows:

§ 0.241 Authority delegated.

(a) * * *

(1) Notices of proposed rulemaking and of inquiry and final orders in rulemaking proceedings, inquiry proceedings and non-editorial orders making changes, except that the Chief of the Office of Engineering and Technology is delegated authority, together with the Chief of the Wireless Telecommunications Bureau, to adopt certain technical standards applicable to hearing aid compatibility under § 20.19 of this chapter, as specified in § 20.19(k).

* * * * *

■ 3. Section 0.331 is amended by adding a new sentence after the second sentence in paragraph (d) introductory text to read as follows:

§ 0.331 Authority delegated.

* * * * *

(d) * * * Adoption of certain technical standards applicable to hearing aid compatibility under § 20.19 of this chapter made together with the Chief of the Office of Engineering and Technology, as specified in § 20.19(k) of this chapter, also need not be referred to the Commission. * * *

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PART 20—COMMERCIAL MOBILE RADIO SERVICES

■ 4. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 154, 160, 201, 251–254, 303, 332, and 710 unless otherwise noted.

■ 5. Section 20.19 is revised to read as follows:

§ 20.19 Hearing aid-compatible mobile handsets.

(a) Scope of section; definitions. (1) The hearing aid compatibility requirements of this section apply to providers of digital CMRS in the United States to the extent that they offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls, and such service is provided over frequencies in the 800–950 MHz or 1.6–2.5 GHz bands using any air interface for which technical standards are stated in the standard document ''American National Standard Methods of Measurement of Compatibility Between Wireless Communication Devices and Hearing Aids,'' American National Standards Institute (ANSI) C63.19–2007 (June 8, 2007).

(2) The requirements of this section also apply to the manufacturers of the wireless handsets that are used in delivery of the services specified in paragraph (a)(1) of this section.

(3) *Definitions.* For purposes of this section:

(i) *Manufacturer* refers to a wireless handset manufacturer to which the requirements of this section apply.

(ii) *Model* refers to a wireless handset device that a manufacturer has designated as a distinct device model, consistent with its own marketing practices. However, if a manufacturer assigns different model device designations solely to distinguish units sold to different carriers, or to signify other distinctions that do not relate to either form, features, or capabilities, such designations shall not count as distinct models for purposes of this section.

(iii) *Service provider* refers to a provider of digital CMRS to which the requirements of this section apply.

(iv) *Tier I carrier* refers to a CMRS provider that offers such service nationwide.

(b) *Hearing aid compatibility; technical standards.* A wireless handset used for digital CMRS only over the frequency bands and air interfaces referenced in paragraph (a)(1) of this section is hearing aid-compatible with regard to radio frequency interference or inductive coupling if it meets the applicable technical standard(s) set forth in paragraphs (b)(1) and (b)(2) of this section for all frequency bands and air interfaces over which it operates, and the handset has been certified as compliant with the test requirements for the applicable standard pursuant to § 2.1033(d) of this chapter. A wireless handset that incorporates a Wi-Fi air interface is hearing aid-compatible if the handset otherwise satisfies the requirements of this paragraph.

(1) For radio frequency interference.

(i) *Applicable technical standards prior to 2010.* Beginning June 6, 2008 and until January 1, 2010, a wireless handset submitted for equipment certification or for a permissive change relating to hearing aid compatibility must meet, at a minimum, the M3 rating associated with the technical standard set forth in either the standard document ''American National Standard Methods of Measurement of Compatibility Between Wireless Communication Devices and Hearing Aids,'' ANSI C63.19–2006 (June 12, 2006) or ANSI C63.19–2007 (June 8, 2007)—each available for purchase from the American National Standards Institute. Any grants of certification issued before June 6, 2008 under previous versions of ANSI C63.19 remain valid for hearing aid compatibility purposes.

(ii) *Applicable technical standards beginning in 2010.* On or after January 1, 2010, a wireless handset submitted for equipment certification or for a permissive change relating to hearing aid compatibility must meet, at a minimum, the M3 rating associated with the technical standard set forth in ANSI C63.19–2007 (June 8, 2007). Any grants of certification issued before January 1, 2010, under the earlier versions of ANSI C63.19 remain valid for hearing aid compatibility purposes.

(2) For inductive coupling.

(i) *Applicable technical standards prior to 2010.* Beginning June 6, 2008 and until January 1, 2010, a wireless handset submitted for equipment certification or for a permissive change relating to hearing aid compatibility must meet, at a minimum, the T3 rating associated with the technical standard set forth in either the standard

document ''American National Standard Methods of Measurement of Compatibility Between Wireless Communication Devices and Hearing Aids,'' ANSI C63.19–2006 (June 12, 2006) or ANSI C63.19–2007 (June 8, 2007). Any grants of certification issued before June 6, 2008 under previous versions of ANSI C63.19 remain valid for hearing aid compatibility purposes.

(ii) *Applicable technical standards beginning in 2010.* On or after January 1, 2010, a wireless handset submitted for equipment certification or for a permissive change relating to hearing aid compatibility must meet, at a minimum, the T3 rating associated with the technical standard set forth in ANSI C63.19–2007 (June 8, 2007). Any grants of certification issued before January 1, 2010, under the earlier versions of ANSI C63.19 remain valid for hearing aid compatibility purposes.

(3) [Reserved].

(4) All factual questions of whether a wireless handset meets the technical standard(s) of this paragraph shall be referred for resolution to the Chief, Office of Engineering and Technology, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

(5) The following standards are incorporated by reference in this section: American National Standards Institute Accredited Standards Committee on Electromagnetic Compatibility, C63™, ''American National Standard Methods of Measurement of Compatibility Between Wireless Communication Devices and Hearing Aids,'' ANSI C63.19–2006 (June 12, 2006), Institute of Electrical and Electronics Engineers, Inc., publisher; and American National Standards Institute Accredited Standards Committee on Electromagnetic Compatibility, C63™, ''American National Standard Methods of Measurement of Compatibility Between Wireless Communication Devices and Hearing Aids,'' ANSI C63.19–2007 (June 8, 2007), Institute of Electrical and Electronics Engineers, Inc., publisher. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any change in these materials will be published in the **Federal Register**. The materials are available for inspection at the Federal Communications Commission (FCC), 445 12th St., SW., Reference Information Center, Room CY–A257, Washington, DC 20554 and at the National Archives and Records Administration (NARA). For information on the availability of these materials at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

The materials are also available for purchase from IEEE Operations Center, 445 Hoes Lane, Piscataway, NJ 08854–4141, by calling (732) 981–0060, or going to *http://www.ieee.org/portal/site*.

(c) *Phase-in of requirements relating to radio frequency interference.* The following applies to each manufacturer and service provider that offers wireless handsets used in the delivery of the services specified in paragraph (a) of this section and that does not fall within the *de minimis* exception set forth in paragraph (e) of this section.

(1) *Manufacturers.*

(i) *Number of hearing aid-compatible handset models offered.* For each digital air interface for which it offers wireless handsets to service providers, each manufacturer of wireless handsets must:

(A) If it offers four to six models, ensure that at least two of its handset models offered to service providers comply with the requirements set forth in paragraph (b)(1) of this section; or

(B) If it offers more than six models, ensure that at least one-third of its handset models offered to service providers (rounded down to the nearest whole number) comply with the requirements set forth in paragraph (b)(1) of this section.

(ii) *Refresh requirement.* Beginning in calendar year 2009, and for each year thereafter that it elects to produce a new model, each manufacturer that offers any new model for a particular air interface during the calendar year must ''refresh'' its offerings of hearing aid-compatible handset models by offering a mix of new and existing models that comply with paragraph (b)(1) of this section according to the following requirements:

(A) For manufacturers that offer three models per air interface, at least one new model rated M3 or higher shall be introduced every other calendar year.

(B) For manufacturers that offer four or more models operating over a particular air interface, the number of models rated M3 or higher that must be new models introduced during that calendar year is equal to one-half of the minimum number of models rated M3 or higher required for that air interface (rounded up to the nearest whole number).

(2) *Tier I carriers.* For each digital air interface for which it offers wireless handsets to customers, each Tier I carrier must either:

(i) Ensure that at least fifty (50) percent of the handset models it offers comply with paragraph (b)(1) of this section, calculated based on the total number of unique digital wireless handset models the carrier offers nationwide; or

(ii) Ensure that it offers, at a minimum, the following specified number of handset models that comply with paragraph (b)(1) of this section:

(A) Prior to February 15, 2009, at least eight (8) handset models;

(B) Beginning February 15, 2009, at least nine (9) handset models; and

(C) Beginning February 15, 2010, at least ten (10) handset models.

(3) *Service providers other than Tier I carriers.* For each digital air interface for which it offers wireless handsets to customers, each service provider other than a Tier I carrier must:

(i) Prior to September 7, 2008, include in the handset models it offers at least two handset models that comply with paragraph (b)(1) of this section;

(ii) Beginning September 7, 2008, either:

(A) Ensure that at least fifty (50) percent of the handset models it offers comply with paragraph (b)(1) of this section, calculated based on the total number of unique digital wireless handset models the service provider offers nationwide; or

(B) Ensure that it offers, at a minimum, the following specified number of handset models that comply with paragraph (b)(1) of this section:

(*1*) Until May 15, 2009, at least eight (8) handset models;

(*2*) Beginning May 15, 2009, at least nine (9) handset models; and

(*3*) Beginning May 15, 2010, at least ten (10) handset models.

(4) *All service providers.* The following requirements apply to Tier I carriers and all other service providers.

(i) *In-store testing.* Each service provider must make available for consumers to test, in each retail store owned or operated by the provider, all of its handset models that comply with paragraph (b)(1) of this section.

(ii) *Offering models with differing levels of functionality.* Each service provider must offer its customers a range of hearing aid-compatible models with differing levels of functionality (*e.g.*, operating capabilities, features offered, prices). Each provider may determine the criteria for determining these differing levels of functionality, and must disclose its methodology to the Commission pursuant to paragraph (i)(3)(vii) of this section.

(d) *Phase-in of requirements relating to inductive coupling capability.* The following applies to each manufacturer

and service provider that offers wireless handsets used in the delivery of the services specified in paragraph (a) of this section and that does not fall within the *de minimis* exception set forth in paragraph (e) of this section.

(1) *Manufacturers.* Each manufacturer offering to service providers four or more handset models in a digital air interface for use in the United States or imported for use in the United States must ensure that it offers to service providers, at a minimum, the following number of handset models that comply with the requirements set forth in paragraph (b)(2) of this section, whichever number is greater in any given year:

(i) At least two (2) handset models in that air interface; or

(ii) At least the following percentage of handset models (rounded down to the nearest whole number):

(A) Beginning February 15, 2009, at least twenty (20) percent of its handset models in that air interface, provided that, of any such models introduced during calendar year 2009, one model may be rated using ANSI C63.19–2006 (June 12, 2006), and all other models introduced during that year or subsequent years shall be rated using ANSI C63.19–2007 (June 8, 2007) or subsequently adopted version as may be approved pursuant to paragraph (k);

(B) Beginning February 15, 2010, at least twenty-five (25) percent of its handset models in that air interface; and

(C) Beginning February 15, 2011, at least one-third of its handset models in that air interface.

(2) *Tier I carriers.* For each digital air interface for which it offers wireless handsets to service providers, each Tier I carrier must:

(i) Ensure that at least one-third of the handset models it offers comply with paragraph (b)(2) of this section, calculated based on the total number of unique digital wireless handset models the carrier offers nationwide; or

(ii) Ensure that it offers, at a minimum, the following specified number of handset models that comply with paragraph (b)(2) of this section:

(A) Prior to February 15, 2009, at least three (3) handset models;

(B) Beginning February 15, 2009, at least five (5) handset models;

(C) Beginning February 15, 2010, at least seven (7) handset models; and

(D) Beginning February 15, 2011, at least ten (10) handset models.

(3) *Service providers other than Tier I carriers.* For each digital air interface for which it offers wireless handsets to customers, each service provider other than a Tier I carrier must:

(i) Prior to September 7, 2008, include in the handset models it offers at least two handset models that comply with paragraph (b)(2) of this section;

(ii) Beginning September 7, 2008, either:

(A) Ensure that at least one-third of the handset models it offers comply with paragraph (b)(2) of this section, calculated based on the total number of unique digital wireless handset models the carrier offers nationwide; or

(B) Ensure that it offers, at a minimum, the following specified number of handset models that comply with paragraph (b)(2) of this section:

(*1*) Until May 15, 2009, at least three (3) handset models;

(*2*) Beginning May 15, 2009, at least five (5) handset models;

(*3*) Beginning May 15, 2010, at least seven (7) handset models; and

(*4*) Beginning May 15, 2011, at least ten (10) handset models.

(4) *All service providers.* The following requirements apply to Tier I carriers and all other service providers.

(i) *In-store testing.* Each service provider must make available for consumers to test, in each retail store owned or operated by the provider, all of its handset models that comply with paragraph (b)(2) of this section.

(ii) *Offering models with differing levels of functionality.* Each service provider must offer its customers a range of hearing aid-compatible models with differing levels of functionality (*e.g.*, operating capabilities, features offered, prices). Each provider may determine the criteria for determining these differing levels of functionality, and must disclose its methodology to the Commission pursuant to paragraph (i)(3)(vii) of this section.

(e) *De minimis exception.* (1) Manufacturers or service providers that offer two or fewer digital wireless handsets in an air interface in the United States are exempt from the requirements of this section in connection with that air interface, except with regard to the reporting requirements in paragraph (i) of this section. Service providers that obtain handsets only from manufacturers that offer two or fewer digital wireless handset models in an air interface in the United States are likewise exempt from the requirements of this section other than paragraph (i) of this section in connection with that air interface.

(2) Manufacturers or service providers that offer three digital wireless handset models in an air interface must offer at least one handset model compliant with paragraphs (b)(1) and (b)(2) of this section in that air interface. Service providers that obtain handsets only from manufacturers that offer three digital wireless handset models in an air interface in the United States are required to offer at least one handset model in that air interface compliant with paragraphs (b)(1) and (b)(2) of this section.

(f) *Labeling and disclosure requirements.* (1) *Labeling requirements.* Manufacturers and service providers shall ensure that handsets that are hearing aid-compatible, as defined in paragraph (b) of this section, clearly display the rating, as defined in paragraphs (b)(1) and (b)(2) of this section, on the packaging material of the handset. In the event that a hearing aid-compatible handset achieves different radio interference or inductive coupling ratings over different air interfaces or different frequency bands, the RF interference reduction and inductive coupling capability ratings displayed shall be the lowest rating assigned to that handset for any air interface or frequency band. An explanation of the ANSI C63.19 rating system must also be included in the device's user's manual or as an insert in the packaging material for the handset.

(2) *Disclosure requirement relating to handsets with Wi-Fi capability.* Beginning December 7, 2008, each manufacturer and service provider shall ensure that, wherever it provides hearing aid compatibility ratings for a handset model that incorporates a Wi-Fi air interface, it discloses to consumers, by clear and effective means (*e.g.*, inclusion of call-out cards or other media, revisions to packaging materials, supplying of information on Web sites) that the handset has not been rated for hearing aid compatibility with respect to Wi-Fi operation.

(g) *Model designation requirements.* Where a manufacturer has made physical changes to a handset that result in a change in the hearing aid compatibility rating under paragraph (b)(1) or (b)(2) of this section, the altered handset must be given a model designation distinct from that of the handset prior to its alteration.

(h) *Web site requirements.* Beginning January 15, 2009, each manufacturer and service provider subject to this section that operates a publicly-accessible Web site must make available on its Web site a list of all hearing aid-compatible models currently offered, the ratings of those models, and an explanation of the rating system. Each service provider must also specify on its Web site, based on the levels of functionality that the service provider has defined, the level that each hearing aid-compatible model falls under as well as an explanation of how the

functionality of the handsets varies at the different levels.

(i) *Reporting requirements.*

(1) *Reporting dates.* Manufacturers shall submit reports on efforts toward compliance with the requirements of this section on January 15, 2009 and on July 15, 2009, and on an annual basis on July 15 thereafter. Service providers shall submit reports on efforts toward compliance with the requirements of this section on January 15, 2009, and annually thereafter. Information in the reports must be up-to-date as of the last day of the calendar month preceding the due date of the report.

(2) *Content of manufacturer reports.* Reports filed by manufacturers must include:

(i) Digital wireless handset models tested, since the most recent report, for compliance with the applicable hearing aid compatibility technical ratings;

(ii) Compliant handset models offered to service providers since the most recent report, identifying each model by marketing model name/number(s) and FCC ID number;

(iii) For each compliant model, the air interface(s) and frequency band(s) over which it operates, the hearing aid compatibility ratings for each frequency band and air interface under ANSI Standard C63.19, the ANSI Standard C63.19 version used, and the months in which the model was available to service providers since the most recent report;

(iv) Non-compliant models offered to service providers since the most recent report, identifying each model by marketing model name/number(s) and FCC ID number;

(v) For each non-compliant model, the air interface(s) over which it operates and the months in which the model was available to service providers since the most recent report;

(vi) Total numbers of compliant and non-compliant models offered to service providers for each air interface as of the time of the report;

(vii) Any instance, as of the date of the report or since the most recent report, in which multiple compliant or non-compliant devices were marketed under separate model name/numbers but constitute a single model for purposes of the hearing aid compatibility rules, identifying each device by marketing model name/number and FCC ID number;

(viii) Status of product labeling;

(ix) Outreach efforts; and

(x) If the manufacturer maintains a public Web site, the Web site address of the page(s) containing the information regarding hearing aid-compatible handset models required by paragraph (h) of this section.

Note to Paragraph (i)(2): For reports due on January 15, 2009, information provided with respect to paragraphs (i)(2)(ii) through(i)(2)(v) and (i)(2)(vii) and (i)(2)(viii) need be provided only for the six-month period from July 1 to December 31, 2008.

(3) *Content of service provider reports.* Reports filed by service providers must include:

(i) Compliant handset models offered to customers since the most recent report, identifying each model by marketing model name/number(s) and FCC ID number;

(ii) For each compliant model, the air interface(s) and frequency band(s) over which it operates, the hearing aid compatibility ratings for each frequency band and air interface under ANSI Standard C63.19, and the months in which the model was available since the most recent report;

(iii) Non-compliant models offered since the most recent report, identifying each model by marketing model name/number(s) and FCC ID number;

(iv) For each non-compliant model, the air interface(s) over which it operates and the months in which the model was available since the most recent report;

(v) Total numbers of compliant and non-compliant models offered to customers for each air interface over which the service provider offers service as of the time of the report;

(vi) Information related to the retail availability of compliant handset models;

(vii) The levels of functionality into which the compliant handsets fall and an explanation of the service provider's methodology for determining levels of functionality;

(viii) Status of product labeling;

(ix) Outreach efforts; and

(x) If the service provider maintains a public Web site, the Web site address of the page(s) containing the information regarding hearing aid-compatible handset models required by paragraph (h) of this section.

Note to Paragraph (i)(3): For reports due on January 15, 2009, information provided with respect to paragraphs (i)(3)(i) through (i)(3)(iv) and (i)(3)(vi) through (i)(3)(viii) need be provided only for the six-month period from July 1 to December 31, 2008.

(4) *Format.* The Wireless Telecommunications Bureau is delegated authority to approve or prescribe formats and methods for submission of these reports. Any format that the Bureau may approve or prescribe shall be made available on the Bureau's Web site.

(j) *Enforcement.* Enforcement of this section is hereby delegated to those states that adopt this section and provide for enforcement. The procedures followed by a state to enforce this section shall provide a 30-day period after a complaint is filed, during which time state personnel shall attempt to resolve a dispute on an informal basis. If a state has not adopted or incorporated this section, or failed to act within six (6) months from the filing of a complaint with the state public utility commission, the Commission will accept such complaints. A written notification to the complainant that the state believes action is unwarranted is not a failure to act. The procedures set forth in part 68, subpart E of this chapter are to be followed.

(k) *Delegation of rulemaking authority.*

(1) The Chief of the Wireless Telecommunications Bureau and the Chief of the Office of Engineering and Technology are delegated authority, by notice-and-comment rulemaking, to issue an order amending this section to the extent necessary to adopt technical standards for additional frequency bands and/or air interfaces upon the establishment of such standards by ANSI Accredited Standards Committee C63™, provided that the standards do not impose with respect to such frequency bands or air interfaces materially greater obligations than those imposed on other services subject to this section. Any new obligations on manufacturers and Tier I carriers pursuant to paragraphs (c) through (i) of this section as a result of such standards shall become effective no less than one year after release of the order adopting such standards, and any new obligations on other service providers shall become effective no less than 15 months after the release of such order.

(2) The Chief of the Wireless Telecommunications Bureau and the Chief of the Office of Engineering and Technology are delegated authority, by notice-and-comment rulemaking if required by statute or otherwise in the public interest, to issue an order amending this section to the extent necessary to approve any version of the technical standards for radio frequency interference or inductive coupling adopted subsequently to ANSI C63.19–2007 for use in determining whether a wireless handset meets the appropriate rating over frequency bands and air interfaces for which technical standards have previously been adopted either by the Commission or pursuant to paragraph (k)(1) of this section. This delegation is limited to the approval of changes to the technical standard that

do not raise major compliance issues. Further, by such approvals, the Chiefs may only permit, and not require, the use of such subsequent versions of standard document ANSI C63.19 to establish hearing aid compatibility.

PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

■ 6. The authority citation for part 68 continues to read as follows:

Authority: Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082; (47 U.S.C. 154, 155, 303).

■ 7. Section 68.418 is amended by revising paragraph (b) to read as follows:

§ 68.418 Procedure; designation of agents for service.

* * * * *

(b) To ensure prompt and effective service of informal complaints filed under this subpart, every responsible party of equipment approved pursuant to this part shall designate and identify one or more agents upon whom service may be made of all notices, inquiries, orders, decisions, and other pronouncements of the Commission in any matter before the Commission. Such designation shall be provided to the Commission and shall include a name or department designation, business address, telephone number, and, if available, TTY number, facsimile number, and Internet e-mail address. The Commission shall make this information available to the public.

[FR Doc. E8–9855 Filed 5–6–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 07–253; FCC 08–98]

Ancillary Terrestrial Components in the 1.6/2.4 GHz Big LEO Bands

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Currently, Globalstar, Inc. (Globalstar) operates a Mobile-Satellite Service (MSS) system in the 1610–1626.5 MHz band (Big LEO L–band) and the 2483.5–2500 MHz band (Big LEO S–band). Globalstar, a code division multiple access (CDMA) system, is authorized to operate an ancillary terrestrial component (ATC) in the 1610–1615.5 MHz and 2487.5–2493 MHz segments of the Big LEO bands. By this decision, the Federal Communications Commission (Commission) increases the spectrum in which Big LEO MSS systems using CDMA technology operate ATC. As a result, the Commission increases the spectrum in which Globalstar may operate ATC in the Big LEO L–band to include the 1610–1617.775 MHz band, an increase of 2.275 megahertz, and in the Big LEO S–band to include the 2483.5–2495 MHz band, an increase of six megahertz.

DATES: Effective June 6, 2008.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Howard Griboff, 202/418–0657.

SUPPLEMENTARY INFORMATION: The 1610–1626.5 MHz band and 2483.5–2500 MHz band were allocated to the MSS for low-earth orbiting satellites in 1994. Currently, CDMA MSS systems, of which Globalstar is the only operational system, have exclusive MSS use of the 1610–1617.775 MHz segment of the L–band and the 2483.5–2500 MHz segment of the L–band.

ATC allows MSS systems to provide coverage in areas where the satellite signal is blocked, particularly in side buildings, by using terrestrial base stations that operate in the same frequency bands as the satellite systems. In order for an MSS system to operate ATC, it must meet several criteria to ensure that the ATC is part of the MSS system and not a stand-alone terrestrial system.

In 2003, the Commission authorized CDMA Big LEO MSS systems to operate ATC in 11 megahertz of their authorized spectrum: 5.5 megahertz at 1610–1615.5 MHz in the Big LEO L–band, and 5.5 megahertz at 2487.5–2493 MHz in the Big LEO S–band. In 2006, Globalstar requested that the Commission authorize it to operate ATC in all of the spectrum assigned to Globalstar, currently the 1610–1618.725 MHz and 2483.5–2500 MHz bands.

By a Report and Order and Order Proposing Modification, the Commission increases the spectrum in which CDMA Big LEO MSS systems may operate ATC to 7.775 megahertz at 1610–1617.775 MHz in the Big LEO L–band and 11.5 megahertz at 2483.5–2495 MHz in the Big LEO S–band, a total increase of 8.775 megahertz from the previous ATC authorization of eleven megahertz to an ATC authorization of 19.275 megahertz. The Commission does not authorize CDMA Big LEO MSS operators to operate ATC in the L–band segment at 1617.775–1618.725 MHz because that segment is shared time division multiple access (TDMA) Big LEO MSS, and it is highly likely that ATC would cause harmful interference to the only TDMA Big LEO MSS currently operational, operated by Iridium Satellite LLC. The Commission also does not authorize ATC in the 2495–2500 MHz segment of the Big LEO S–band because that segment is shared with the fixed and mobile services, including the Broadband Radio Service/Educational Broadband Service (BRS/EBS), and it is highly likely that ATC would cause harmful interference to that service.

The Commission also establishes strict out-of-band emissions limits for the upper edge of the ATC S–band (2495 MHz) to ensure that ATC will not cause harmful interference to BRS Channel 1 operations in the 2496–2502 MHz band.

The Commission proposes to modify Globalstar's MSS license pursuant to its authority under Section 316 of the Communications Act, to reflect that Globalstar will have authority to operate ATC in the bands 1610–1617.775 MHz and 2483.5–2495 MHz. This license modification will serve the public interest by providing more capable and flexible MSS/ATC service offerings in the Big LEO bands. Globalstar may protest the proposed modification of its license within 30 days of publication of this Report and Order and Order Proposing Modification in the **Federal Register**.

This Report and Order and Order Proposing Modification does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

The Commission will send a copy of this Report and Order and Order Proposing Modification 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).

List of Subjects in 47 CFR Part 25

Satellites.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 25 to read as follows:

PART 25—SATELLITE COMMUNICATIONS

■ 1. The authority citation for part 25 continues to read:

Authority: 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309 and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

■ 2. Revise paragraphs (a)(2)(iii) and (b)(5)(ii) of § 25.149 to read as follows:

§ 25.149 Application requirements for ancillary terrestrial components in the mobile-satellite service networks operating in the 1.5/1.6 GHz, 1.6/2.4 GHz and 2 GHz mobile-satellite service.

(a) * * *

(2) * * *

(iii) In the 1610–1626.5 MHz/2483.5–2500 MHz bands (Big LEO bands), ATC operations are limited to the 1610–1617.775 MHz, 1621.35–1626.5 MHz, and 2483.5–2495 MHz bands and to the specific frequencies authorized for use by the MSS licensee that seeks ATC authority.

* * * * *

(b) * * *

(5) * * *

(ii) In the Big LEO bands, MSS ATC is limited to no more than 7.775 MHz of spectrum in the L-band and 11.5 MHz of spectrum in the S-band. Licensees in these bands may implement ATC only on those channels on which MSS is authorized, consistent with the Big LEO band-sharing arrangement.

* * * * *

■ 3. Add paragraph (d) to § 25.254 to read as follows:

§ 25.254 Special requirements for ancillary terrestrial components operating in the 1610–1626.5 MHz/2483.5–2500 MHz bands.

* * * * *

(d) To avoid interference to an adjacent channel licensee in the Broadband Radio Service (BRS), the power of any ATC base station emission above 2495 MHz shall be attenuated below the transmitter power (P) measured in watts in accordance with the standards below. If these measures do not resolve a documented interference complaint received from the adjacent channel BRS licensee, the provisions of § 25.255 shall apply.

(1) For base stations, the attenuation shall be not less than 43 + 10 log (P) dB at the upper edge of the authorized ATC band, unless a documented interference complaint is received from an adjacent channel licensee in the BRS. Provided that a documented interference complaint cannot be mutually resolved between the parties, the following additional attenuation requirements set forth in subsections (2)–(5) shall apply:

(2) If a pre-existing BRS base station suffers harmful interference from emissions caused by a new or modified ATC base station located 1.5 km or more away, within 24 hours of the receipt of a documented interference complaint the ATC licensee must attenuate its emissions by at least 67 + 10 log (P) dB measured at 3 megahertz above the edge of the authorized ATC band, and shall immediately notify the complaining licensee upon implementation of the additional attenuation.

(3) If a pre-existing BRS base station suffers harmful interference from emissions caused by a new or modified ATC base station located less than 1.5 km away, within 24 hours of the receipt of a documented interference complaint the ATC licensee must attenuate its emissions by at least 67 + 10 log (P) -20 log(D_{km}/1.5) dB measured at 3 megahertz above the edge of the authorized ATC band, or if both base stations are co-located, limit its undesired signal level at the pre-existing BRS base station receiver(s) to no more than -107 dBm measured in a 5.5 megahertz bandwidth and shall immediately notify the complaining licensee upon such reduction in the undesired signal level.

(4) If a new or modified BRS base station suffers harmful interference from emissions caused by a pre-existing ATC base station located 1.5 km or more away, within 60 days of receipt of a documented interference complaint the licensee of the ATC base station must attenuate its base station emissions by at least 67 + 10 log (P) dB measured at 3 megahertz above the edge of the authorized ATC band.

(5) If a new or modified BRS base station suffers harmful interference from emissions caused by a pre-existing ATC base station located less than 1.5 km away, within 60 days of receipt of a documented interference complaint:

(i) the ATC licensee must attenuate its base station emissions by at least 67 + 10 log (P) -20 log(D_{km}/1.5) dB measured 3 megahertz above the edge of the authorized ATC band, or

(ii) if both base stations are co-located, the ATC licensee must limit its undesired signal level at the new or modified BRS base station receiver(s) to no more than -107 dBm measured in a 5.5 megahertz bandwidth.

(6) Compliance with these rules is based on the use of measurement instrumentation employing a resolution bandwidth of 1 MHz or greater. However, in the 1 MHz bands immediately above and adjacent to the 2495 MHz a resolution bandwidth of at least one percent of the emission bandwidth of the fundamental emission of the transmitter may be employed. A narrower resolution bandwidth is permitted in all cases to improve measurement accuracy, provided the measured power is integrated over the full required measurement bandwidth (i.e., 1 MHz or 1 percent of emission bandwidth, as specified). The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated at least 26 dB below the transmitter power. When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

* * * * *

[FR Doc. E8–10095 Filed 5–6–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HOMELAND SECURITY

48 CFR Part 3002

Homeland Security Acquisition Regulation (HSAR); Definitions of Words and Terms

CFR Correction

In title 48 of the Code of Federal Regulations, chapter 29 to end, revised as of October 1, 2007, on page 66, in 3002.101, remove the definition of ''Organizational Element (OE)''.

[FR Doc. E8–10061 Filed 5–6–08; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

Fisheries Off West Coast States

CFR Correction

In title 50 of the Code of Federal Regulations, part 660 to end, revised as of October 1, 2007, on page 194, in part 660, reinstate § 660.510 to read as follows:

§ 660.510 Fishing seasons.

All seasons will begin at 0001 hours and terminate at 2400 hours local time. Fishing seasons for the following CPS species are:

(a) *Pacific sardine.* January 1 to December 31, or until closed under § 660.509.

(b) *Pacific mackerel.* July 1 to June 30, or until closed under § 660.509.

[FR Doc. E8–10062 Filed 5–6–08; 8:45 am]

BILLING CODE 1505–01–D

Proposed Rules

Federal Register
Vol. 73, No. 89
Wednesday, May 7, 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.

FEDERAL RESERVE SYSTEM

12 CFR Part 261a

[Docket No. R–1313]

Privacy Act of 1974; Privacy Act Regulation

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) proposes to amend its regulation implementing the Privacy Act of 1974 (Privacy Act). The primary changes concern: the waiver of copying fees charged to current and former Board employees, and applicants for Board employment, for access to their records under the Privacy Act; amending special procedures for the release of medical records to permit the Board's Chief Privacy Officer to also consult with the Board's Employee Assistance Program counselor to determine whether the disclosure of medical records directly to the requester could have an adverse effect on the requester; changes to procedures for requests by current Board employees for access to their personnel records; changes to the time limits for responding to requests for access to information and amendment of records; and updates to the exemptions claimed for certain systems of records. In addition, the Board is proposing to make minor editorial and technical changes to ensure that the Board's regulation is consistent with the Board's published systems of records and is clearer.

DATES: Comment must be received on or before June 6, 2008.

ADDRESSES: You may submit comments, identified by Docket No. R–1313, by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *FAX:* 202/452–3819 or 202/452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Brad Fleetwood, Senior Counsel, (202) 452–3721, Legal Division. For user of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Board's Privacy Act Regulation was last revised in 2002 (67 FR 44526, July 3, 2002). Since that time, in its ongoing review of this regulation and the Board's Privacy Act systems of records, the Board has determined that certain additional changes should be made to the regulation to improve procedures and to make the regulation clearer and more understandable. Below is an explanation of the proposed substantive changes.

The Privacy Act (5 U.S.C. 552a(f)(5)) permits agencies to assess fees for copying requested records. Section 261a.4(a) of the Board's current regulation states that the duplication fee for Privacy Act requests will be the same as that charged for duplication of records in response to a Freedom of Information Act request (currently $.10/page). Section 261a.4(c) states that duplication fees totaling $50 or less will be waived in the connection with a request by an employee, former employee, or applicant for employment for records for use in prosecuting a grievance or complaint of discrimination against the Board; but the Secretary of the Board also may waive fees exceeding that amount. A review of current Board practice revealed that all copying fees are waived in connection with any request by current or former Board employees, and applicants for Board employment. Accordingly, the Board proposes to amend the regulation to conform to this practice.

Currently, section 261a.7 of the Board's Regulation permits the Chief Privacy Officer, in consultation with the Board's physician, to determine that disclosure of medical records directly to the requester could have an adverse effect on the requester. In that situation, the Board would transmit the records to a licensed physician named by the requester, and the physician would disclose the records to the requester in a manner deemed appropriate by the physician. The Board proposes to amend the regulation to permit the Chief Privacy Officer to also consult with the Board's Employee Assistance Program (EAP) counselor to determine whether the disclosure of medical records directly to the requester could have an adverse effect on the requester.

Currently, section 261a.5 provides that any person seeking to learn of the existence of, or to gain access to, an individual's record in a system of records shall submit a request in writing to the Secretary of the Board, except that a request by a current Board employee for that employee's personnel records may be made in person during regular business hours at the Human Resources Function of the Board's Management Division. The Board proposes to modify this provision and require all requests for access, including those made by current Board employees for access to their personnel records, to be submitted in writing to the Secretary of the Board. The proposed change will facilitate appropriate tracking and processing of all Privacy Act requests.

Currently, § 261.a(6)(b) states that individuals' requests for access to information shall be acknowledged, or where practicable, substantially responded to within 10 business days from receipt of the request. After a review of the Board's actual practice, the Board proposes to modify this time limit to provide the Board 20 business days to respond, where practicable.

Currently, § 261.a(9)(a) states that to the extent possible, a determination

upon a request to amend a record shall be made within 10 business days after receipt of the request. The Privacy Act requires agencies to respond to requests to amend records promptly. Thus, the Board proposes to change its regulation to require the Board to respond promptly to such requests.

The current regulation sets out, in § 261.12, the statutory exceptions to restrictions on disclosure. Because this provision adds no substantive or interpretative matter to the statutory provision, the proposal simply references the statutory exception provision in the text of proposed § 261a.11 relating to restrictions on disclosure.

The Board recently updated its Privacy Act systems of records, and the Board is now updating the exemptions listed under § 261a.13 (to be renumbered § 261a.12) to conform to the exemptions approved for each of the Board's Privacy Act systems of records. In addition, under § 261a.12(d), the Board has clarified that all Office of Inspector the General Investigatory Records held in system BGFRS/OIG–1 are exempt from parts of the Privacy Act under 5 U.S.C. 552a(j)(2).

The remaining proposed changes are technical or editorial in nature and should not have a substantive effect on any persons.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

The Privacy Act Regulation sets forth the procedures by which individuals may request access and amendment to records maintained in systems of records at the Board. The Board certifies that this rule will not have a significant economic impact on a substantial number of small entities, because it does not apply to business entities.

List of Subjects in 12 CFR Part 261a

Privacy.

For the reasons set forth in the preamble, the Board proposes to revise 12 CFR part 261a to read as follows:

PART 261a—RULES REGARDING ACCESS TO PERSONAL INFORMATION UNDER THE PRIVACY ACT 1974

Subpart A—General Provisions

Subpart B—Procedures for Requests by Individual to Whom Record Pertains

Subpart C—Disclosure of Records

Authority: 5 U.S.C. 552a.

Subpart A—General Provisions

§ 261a.1 Authority, purpose and scope.

(a) *Authority.* This part is issued by the Board of Governors of the Federal Reserve System (the Board) pursuant to the Privacy Act of 1974 (5 U.S.C. 552a).

(b) *Purpose and scope.* This part implements the provisions of the Privacy Act of 1974 with regard to the maintenance, protection, disclosure, and amendment of records contained within systems of records maintained by the Board. It sets forth the procedures for requests for access to, or amendment of, records concerning individuals that are contained in systems of records maintained by the Board.

§ 261a.2 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Business day* means any day except Saturday, Sunday, or a legal Federal holiday.

(b) *Guardian* means the parent of a minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction.

(c) *Individual* means a natural person who is either a citizen of the United States or an alien lawfully admitted for permanent residence.

(d) *Maintain* includes maintain, collect, use, or disseminate.

(e) *Record* means any item, collection, or grouping of information about an individual maintained by the Board that contains the individual's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint, voice print, or photograph.

(f) *Routine use* means, with respect to disclosure of a record, the use of such record for a purpose that is compatible with the purpose for which it was collected or created.

(g) *System of records* means a group of any records under the control of the Board from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

(h) *You* means an individual making a request under the Privacy Act.

(i) *We* means the Board.

§ 261a.3 Custodian of records; delegations of authority.

(a) *Custodian of records.* The Secretary of the Board is the official custodian of all Board records.

(b) *Delegated authority of Secretary.* The Secretary of the Board is authorized to—

(1) Respond to requests for access to, accounting of, or amendment of records contained in a system of records, except for such requests regarding systems of records maintained by the Board's Office of the Inspector General (OIG);

(2) Approve the publication of new systems of records and amend existing systems of records, except systems of records exempted pursuant to § 261a.13(b), (c) and (d); and

(3) File any necessary reports related to the Privacy Act.

(c) *Delegated authority of designee.* Any action or determination required or permitted by this part to be done by the Secretary of the Board may be done by a Deputy or Associate Secretary or other responsible employee of the Board who has been duly designated for this purpose by the Secretary.

(d) *Delegated authority of Inspector General.* The Inspector General is authorized to respond to requests for access or amendment for systems of records maintained by the OIG.

§ 261a.4 Fees.

(a) *Copies of records.* We will provide you with copies of records you request under § 261a.5 of this part at the same cost we charge for duplication of records and/or production of computer output under the Board's Rules Regarding Availability of Information, 12 CFR part 261.

(b) *No fee.* We will not charge you a fee if—

(1) Your total charges are less than $5, or

(2) You are a Board employee or former employee, or an applicant for employment with the Board, and you request records pertaining to you.

Subpart B—Procedures for Requests by Individuals to Whom Record Pertains

§ 261a.5 Request for access to record.

(a) *Procedures for making request.* (1) Except as provided in paragraph (a)(2) of this section, if you (or your guardian) want to learn of the existence of, or to gain access to, your record in a system of records, you may submit a request in

writing to the Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

(2) If you want to request information contained in a system of records maintained by the Board's OIG, you may submit the request in writing to the Inspector General, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

(b) *Contents of request.* Your request must include—

(1) A statement that the request is made pursuant to the Privacy Act of 1974;

(2) The name of the system of records you believe contains the record you request, or a concise description of that system of records;

(3) Information necessary to verify your identity pursuant to paragraph (c) of this section; and

(4) Any other information that may assist us in identifying the record you seek (*e.g.*, maiden name, dates of employment, etc.).

(c) *Verification of identity.* We will require proof of your identity, and we reserve the right to determine whether the proof you submit is adequate. In general, we will consider the following to be adequate proof of identity:

(1) If you are a current Board employee, your Board identification card; or

(2) If you are not a current Board employee, either—

(i) Two forms of identification, including one photo identification, or

(ii) A notarized statement attesting to your identity.

(d) *Verification of identity not required.* We will not require verification of identity when the records you seek are available to any person under the Freedom of Information Act (5 U.S.C. 552).

(e) *Request for accounting of previous disclosures.* You may request an accounting of previous disclosures of records pertaining to you in a system of records as provided in 5 U.S.C. 552a(c).

§ 261a.6 Board procedures for responding to request for access.

(a) *Compliance with Freedom of Information Act.* We will handle every request made pursuant to § 261a.5 of this part as a request for information pursuant to the Freedom of Information Act, except that the time limits set forth in paragraph (b) of this section and the fees specified in § 261a.4 of this part will apply to such requests.

(b) *Time for response.* We will acknowledge every request made pursuant to § 261a.5 of this part within 20 business days from receipt of the request and will, where practicable, respond to each request within that 20-day period. When a full response is not practicable within the 20-day period, we will respond as promptly as possible.

(c) *Disclosure.* (1) When we disclose information in response to your request, except for information maintained by the Board's OIG, you may inspect or copy it during regular business hours at the Board's Freedom of Information Office, or you may request that we mail it to you.

(2) When the information to be disclosed is maintained by the Board's OIG, the OIG will make the information available for inspection and copying or will mail it to you on request.

(3) You may bring with you anyone you choose to see the requested material.

(d) *Denial of request.* If we deny a request made pursuant to § 261a.5 of this part, we will tell you the reason(s) for denial and the procedures for appealing the denial.

§ 261a.7 Special procedures for medical records.

If you request medical or psychological records pursuant to § 261a.5, we will disclose them directly to you unless the Chief Privacy Officer, in consultation with the Board's physician or Employee Assistance Program counselor, determines that such disclosure could have an adverse effect on you. If the Chief Privacy Officer makes that determination, we will provide the information to a licensed physician or other appropriate representative you name, who may disclose those records to you in a manner he or she deems appropriate.

§ 261a.8 Request for amendment of record.

(a) *Procedures for making request.*

(1) If you wish to amend a record that pertains to you in a system of records, you may submit a request in writing to the Secretary of the Board (or to the Inspector General for records in a system of records maintained by the OIG) in an envelope clearly marked ''Privacy Act Amendment Request.''

(2) Your request for amendment of a record must—

(i) Identify the system of records containing the record for which amendment is requested;

(ii) Specify the portion of that record requested to be amended; and

(iii) Describe the nature of and reasons for each requested amendment.

(3) We will require you to verify your identity under the procedures set forth in § 261a.5(c) of this part, unless you have already done so in a related request for access or amendment.

(b) *Burden of proof.* Your request for amendment of a record must tell us why you believe the record is not accurate, relevant, timely, or complete. You have the burden of proof for demonstrating the appropriateness of the requested amendment, and you must provide relevant and convincing evidence in support of your request.

§ 261a.9 Board review of request for amendment of record.

(a) *Time limits.* We will acknowledge your request for amendment of your record within 10 business days after we receive your request. In the acknowledgment, we may request additional information necessary for a determination on the request for amendment. We will make a determination on a request to amend a record promptly.

(b) *Contents of response to request for amendment.* When we respond to a request for amendment, we will tell you whether your request is granted or denied. If we deny the request, in whole or in part, we will tell you—

(1) Why we denied the request (or portion of the request);

(2) That you have a right to appeal; and

(3) How to file an appeal.

§ 261a.10 Appeal of adverse determination of request for access or amendment.

(a) *Appeal.* You may appeal a denial of a request made pursuant to § 261a.5 or § 261a.8 of this part within 10 business days after we notify you that we denied your request. Your appeal must—

(1) Be made in writing to the Secretary of the Board, with the words ''PRIVACY ACT APPEAL'' written prominently on the first page;

(2) Specify the background of the request; and

(3) Provide reasons why you believe the initial denial is in error.

(b) *Determination.* We will make a determination on your appeal within 30 business days from the day we receive it, unless we extend the time for good cause.

(1) If we grant your appeal regarding a request for amendment, we will take the necessary steps to amend your record, and, when appropriate and possible, notify prior recipients of the record of our action.

(2) If we deny your appeal, we will inform you of such determination, tell you our reasons for the denial, and tell you about your right to file a statement of disagreement and your right to have a court review our decision.

(c) *Statement of disagreement.* (1) If we deny your appeal regarding a request for amendment, you may file a concise statement of disagreement with the denial. We will maintain your statement with the record you sought to amend, and any disclosure of the record will include a copy of your statement of disagreement.

(2) When practicable and appropriate, we will provide a copy of the statement of disagreement to any prior recipients of the record.

Subpart C—Disclosure of Records

§ 261a.11 Restrictions on disclosure.

We will not disclose any record about you contained in a system of records to any person or agency without your prior written consent unless the disclosure is authorized by 5 U.S.C. 552a(b).

§ 261a.12 Exempt Records.

(a) *Information compiled for civil action.* This regulation does not permit you to have access to any information compiled in reasonable anticipation of a civil action or proceeding.

(b) *Law enforcement information.* Pursuant to 5 U.S.C. 552a(k)(2), we have determined that it is necessary to exempt the systems of records listed below from the requirements of the Privacy Act concerning access to records, accountings of disclosures of records, maintenance of only relevant and necessary information in files, and certain publication provisions, respectively, 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f), and §§ 261a.5, 261a.7, and 261a.8 of this part. The exemption applies only to the extent that a system of records contains investigatory materials compiled for law enforcement purposes.

(1) BGFRS-1 Recruiting and Placement Records.

(2) BGFRS 2 Personnel Security Systems.

(3) BGFRS 4 General Personnel Records.

(4) BGFRS 5 EEO Discrimination Complaint File.

(5) BGFRS 18 Consumer Complaint Information.

(6) BGFRS 21 Supervisory Enforcement Actions and Special Examinations Tracking System.

(7) BGFRS 31 Protective Information System.

(8) BGFRS 32 Visitor Registration System.

(9) BGFRS 36 Federal Reserve Application Name Check System.

(10) BGFRS/OIG 1 OIG Investigative Records.

(c) *Confidential references.* Pursuant to 5 U.S.C. 552a(k)(5), we have determined that it is necessary to exempt the systems of records listed below from the requirements of the Privacy Act concerning access to records, accountings of disclosures of records, maintenance of only relevant and necessary information in files, and certain publication provisions, respectively, 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f), and §§ 261a.5, 261a.7, and 261a.8 of this part. The exemption applies only to the extent that a system of records contains investigatory material compiled to determine an individual's suitability, eligibility, and qualifications for Board employment or access to classified information, and the disclosure of such material would reveal the identity of a source who furnished information to the Board under a promise of confidentiality.

(1) BGFRS-1 Recruiting and Placement Records.

(2) BGFRS-2 Personnel Security Systems.

(3) BGFRS-4 General Personnel Records.

(4) BGFRS-10 General Files on Board Members.

(5) BGFRS-11 Official General Files.

(6) BGFRS-13 Federal Reserve System Bank Supervision Staff Qualifications.

(7) BGFRS-14 General File on Federal Reserve Bank and Branch Directors.

(8) BGFRS-25 Multi-Rater Feedback Records.

(9) BGFRS/OIG-1 OIG Investigative Records.

(10) BGFRS/OIG-2 OIG Personnel Records.

(d) *Criminal law enforcement information.* Pursuant to 5 saU.S.C. 552a(j)(2), we have determined that the OIG Investigative Records (BGFRS/OIG–1) are exempt from the Privacy Act, except the provisions regarding disclosure, the requirement to keep an accounting, certain publication requirements, certain requirements regarding the proper maintenance of systems of records, and the criminal penalties for violation of the Privacy Act, respectively, 5 U.S.C. 552a(b), (c)(1), and (2), (e)(4)(A) through (F), (e)(6), (e)(7), (e)(9), (e)(10), (e)(11) and (i).

By order of the Board of Governors of the Federal Reserve System, April 30, 2008.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E8–9927 Filed 5–6–08; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0174; Directorate Identifier 2008–NE–03–AD]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. CFM56–5B1/P; –5B2/P; –5B3/P; –5B3/P1; –5B4/P; –5B4/P1; –5B5/P; –5B6/P; –5B7/P; –5B8/P; and –5B9/P Turbofan Engines

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for CFM International, S.A. CFM56–5B1/P; –5B2/P; –5B3/P; –5B3/P1; –5B4/P; –5B4/P1; –5B5/P; –5B6/P; –5B7/P; –5B8/P; and –5B9/P turbofan engines. This proposed AD would require initial and repetitive eddy current inspections (ECIs) of certain part number (P/N) low-pressure (LP) turbine rear frames. This proposed AD results from a refined lifing analysis by the engine manufacturer that shows the need to identify initial and repetitive inspection thresholds for inspecting certain LP turbine rear frames. We are proposing this AD to detect low-cycle-fatigue cracks in the LP turbine rear frame, which could result in engine separation from the airplane, possibly leading to loss of control of the airplane.

DATES: We must receive any comments on this proposed AD by July 7, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

You can get the service information identified in this proposed AD from CFM International, Technical Publications Department, 1 Neumann Way, Cincinnati, OH 45215; telephone (513) 552–2800; fax (513) 552–2816.

FOR FURTHER INFORMATION CONTACT: Stephen Sheely, Aerospace Engineer,

Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *stephen.k.sheely@faa.gov;* telephone (781) 238–7750; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2008–0174; Directorate Identifier 2008–NE–03–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

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 proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Discussion

CFM International, S.A. performed a refined lifing analysis that shows the need to identify initial and repetitive inspection thresholds for inspecting LP turbine rear frames, P/Ns 338–171–703–0; 338–171–704–0; 338–171–705–0; and 338–171–706–0. These parts are installed in CFM56–5B1/P; –5B2/P; –5B3/P; –5B3/P1; –5B4/P; –5B4/P1; –5B5/P; –5B6/P; –5B7/P; –5B8/P; and –5B9/P turbofan engines. This proposed AD would require initial and repetitive ECIs of these LP turbine rear frames. This condition, if not corrected, could result in low-cycle-fatigue cracks in the LP turbine rear frame, engine separation from the airplane, possibly leading to loss of control of the airplane.

Relevant Service Information

We have reviewed and approved the technical contents of CFM International, S.A. Service Bulletin No. CFM56–5B S/B 72–0620, Revision 1, dated December 20, 2007, that describes procedures for performing ECIs of the LP turbine rear frame.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require initial and repetitive ECIs of the affected P/N LP turbine rear frames.

Costs of Compliance

We estimate that this proposed AD would affect 426 CFM56–5B series turbofan engines installed on airplanes of U.S. registry. We estimate that it would take about 3 work-hours to perform an eddy current inspection of an LP turbine rear frame. The average labor rate is $80 per work-hour. A replacement LP turbine rear frame costs about $102,240. If all 426 LP turbine rear frames needed replacement, we estimate the total cost of the proposed AD to U.S. operators to be $43,656,480.

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 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. Would 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. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive:

CFM International, S.A.: Docket No. FAA–2008–0174; Directorate Identifier 2008–NE–03–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by July 7, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to CFM International, S.A. CFM56–5B1/P; –5B2/P; –5B3/P; –5B3/P1; –5B4/P; –5B4/P1; –5B5/P; –5B6/P; –5B7/P; –5B8/P; and –5B9/P turbofan engines with

low-pressure (LP) turbine rear frames, part numbers 338–171–703–0; 338–171–704–0; 338–171–705–0; and 338–171–706–0, installed. These engines are installed on, but not limited to, Airbus A318, A319, A320, and A321 series airplanes.

Unsafe Condition

(d) This AD results from a refined lifing analysis by the engine manufacturer that shows the need to identify initial and repetitive inspection thresholds for inspecting certain LP turbine rear frames. We are issuing this AD to detect low-cycle-fatigue cracks in the LP turbine rear frame, which could result in engine separation from the airplane, possibly leading to loss of control of the airplane.

Compliance

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

Initial Inspection

(f) Perform an initial eddy current inspection (ECI) of the LP turbine rear frame using paragraphs 3.A. through 3.A.(7)(d) of the Accomplishment Instructions of CFM International, S.A. Service Bulletin (SB) No. CFM56–5B S/B 72–0620, Revision 1, dated December 20, 2007, at the following compliance times:

(1) For commercial engine applications, within 25,000 cycles-since-new (CSN) on the LP turbine rear frame.

(2) For corporate engine applications, within 19,000 CSN on the LP turbine rear frame.

(3) For engines with unknown LP turbine rear frame CSN, within 300 cycles from the effective date of this AD.

Repetitive Inspections

(g) Perform repetitive ECIs of the LP turbine rear frame using paragraphs 3.A. through 3.A.(7)(d) of the Accomplishment Instructions of CFM International, S.A. SB No. CFM56–5B S/B 72–0620, Revision 1, dated December 20, 2007. Use the inspection intervals in paragraph 3.A.(8) of the Accomplishment Instructions of CFM International, S.A. SB No. CFM56–5B S/B 72–0620, Revision 1, dated December 20, 2007.

LP Turbine Rear Frame Removal Criteria

(h) Remove LP turbine rear frames from service that have a single crack length of 2.56 inches (65 mm) or longer, or multiple cracks with accumulated crack length of 2.56 inches (65 mm) or longer.

Alternative Methods of Compliance

(i) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(j) European Aviation Safety Agency AD 2007–0221, dated August 13, 2007, also addresses the subject of this AD.

(k) Contact Stephen Sheely, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *stephen.k.sheely@faa.gov;* telephone (781) 238–7750; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on April 29, 2008.

Peter A. White,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E8–10050 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0520; Directorate Identifier 2008–NM–018–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 777–200 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Boeing Model 777–200 series airplanes. This proposed AD would require repetitive inspections for any wrinkle in certain external skin panels, and for cracking at the fuselage bulkhead shear tie end fastener locations at certain stations of section 48 of the fuselage; and doing related investigative and corrective actions if necessary. This proposed AD results from a report of cracks found in the external skin on the left and right sides of the Section 48 panel of the fuselage on two airplanes with skin wrinkles found at two of the external crack locations. We are proposing this AD to detect and correct wrinkles and cracks in certain external skin panels of Section 48, which could join together and result in reduced structural integrity of support structure for the vertical and horizontal stabilizers and inability of the airplane to sustain limit loads.

DATES: We must receive comments on this proposed AD by June 23, 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: Duong Tran, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6452; 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–2008–0520; Directorate Identifier 2008–NM–018–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

We have received a report of cracks found in the external skin on the left and right sides of the section 48 panel of the fuselage on two airplanes. There were ten external skin cracks on one airplane with 22,732 total flight hours and 20,286 total flight cycles; the cracks were 0.20 to 0.50 inch in length at

Stations 2195.75 and 2221.65, between Stringers 6 to 10 on the left and right sides. In addition, skin wrinkles 4.5 and 5.0 inches long and 1.0 inch wide and 0.014 inch deep were found at two of the external skin crack locations. A second report indicated that three external skin cracks, 0.12 to 0.20 inches in length were found at Station 2195.75, above Stringer 7 on the left side, on an airplane with 22,147 total flight hours and 19,281 total flight cycles. This condition, if not corrected, could result in reduced structural integrity of support structure for the vertical and horizontal stabilizers and inability of the airplane to sustain limit loads.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 777–53A0051, dated November 8, 2007. The alert service bulletin describes procedures for repetitive general visual inspections for any wrinkle of the external skin at Stations 2195.75, 2221.65, and 2245.70 of the Section 48 panel of the fuselage, between stringers 5 and 10 on the left and right sides. The service bulletin also describes procedures for repetitive high frequency eddy current (HFEC) and detailed inspections for cracking at the fuselage bulkhead shear tie end fastener locations of the external skin at Stations 2195.75, 2221.65, and 2245.70 of the section 48 panel of the fuselage; between stringers 5 and 10 on the left and right sides. In addition, the service bulletin describes performing related investigative and corrective actions if necessary. The corrective actions include removing any skin wrinkle, repairing any skin crack, and installing a skin repair if any wrinkle or crack is found. The related investigative actions include an internal HFEC inspection of the repair doubler edge row fasteners for cracking if a skin repair is installed. The service bulletin also recommends contacting Boeing for repair data if any crack is found that is 1.0 or more inches in length.

The compliance times for the inspections specified in the service bulletin are as follows:

- General visual and external HFEC inspections for any wrinkle and cracking of the skin panels and bulkhead shear tie end fastener locations at Stations 2195.75, 2221.65, and 2245.70 of the Section 48 panel of the fuselage, between stringers 5 and 10: Before 16,000 total flight cycles or within 2,300 flight cycles after the date on the service bulletin, whichever occurs later. If no wrinkle or skin crack is found, the service bulletin specifies repeating the inspections thereafter at intervals not to exceed 4,500 flight cycles.
- Internal HFEC inspection of the repair doubler shear tie end fasteners and external and internal detailed inspection of the tripler, doubler, skin, shear tie, stringer, or fuselage bulkhead (fastener locations): Within 30,000 flight cycles after installation of the repair.
- Internal HFEC inspection of the repair doubler edge row fasteners and external and internal detailed inspection of the tripler, doubler, skin, shear tie, stringer or fuselage bulkhead within the repair area: Before 30,000 total flight cycles, or within 16,000 flight cycles after installation of the repair, whichever occurs first. If no cracking is found, the service bulletin describes repeating the inspections thereafter at intervals not to exceed 16,000 flight cycles. If any crack is found, the service bulletin recommends contacting Boeing for repair data and repairing.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Difference Between the Proposed AD and Service Information.''

Difference Between the Proposed AD and Service Information

The alert service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization whom we have authorized to make those findings.

Costs of Compliance

We estimate that the inspections in this proposed AD would affect 13 airplanes of U.S. registry. We also estimate that it would take about 15 work-hours per product to comply with this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $15,600, or $1,200 per product, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2008–0520; Directorate Identifier 2008–NM–018–AD.

Comments Due Date

(a) We must receive comments by June 23, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 777–200 series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 777–53A0051, dated November 8, 2007.

Unsafe Condition

(d) This AD results from a report of cracks found in the external skin on the left and right sides of the section 48 fuselage panel on two airplanes with skin wrinkles found at two of the external crack locations. We are issuing this AD to detect and correct wrinkles and cracks in certain external skin panels of section 48, which could join together and result in reduced structural integrity of support structure for the vertical and horizontal stabilizers and inability of the airplane to sustain limit loads.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Repetitive Inspections/Investigative and Corrective Actions

(f) At the applicable compliance times specified in paragraph 1.E., ''Compliance'' of Boeing Alert Service Bulletin 777–53A0051, dated November 8, 2007, except as provided by paragraph (g) of this AD: Do the applicable inspections for any wrinkle of the external skin and for cracking at the fuselage bulkhead shear tie end fastener locations at Stations 2195.75, 2221.65, and 2245.70 of the section 48 panel of the fuselage, between stringers 5 and 10 on the left and right sides; and do all the applicable investigative and corrective actions; by doing all of the applicable actions in accordance with the Accomplishment Instructions of the service bulletin, except as provided by paragraph (h) of this AD. Do all applicable investigative and corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified in paragraph 1.E. of the service bulletin.

Exception to Compliance Times

(g) Where Boeing Alert Service Bulletin 777–53A0051, dated November 8, 2007, specifies counting the compliance time from ''* * * the date on this service bulletin,'' this AD requires counting the compliance time from the effective date of this AD.

Exception to Corrective Actions

(h) If any damage beyond the repair limits specified in Boeing Alert Service Bulletin 777–53A0051, dated November 8, 2007, is found during any inspection required by this AD, and the service bulletin specifies to contact Boeing for appropriate action: Before further flight, repair the crack using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Duong Tran, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6452; fax (425) 917–6590 has the authority to approve AMOCs for this AD, if requested using 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.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane.

Issued in Renton, Washington, on April 25, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–10059 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0043; Directorate Identifier 2007–NM–058–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747SR, and 747SP Series Airplanes

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

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: The FAA is revising an earlier NPRM for an airworthiness directive (AD) that applies to certain Boeing Model 747 series airplanes. The original NPRM would have superseded an existing AD that currently requires inspecting to detect cracking in certain lower lobe fuselage skin lap joints, doing repetitive inspections for cracking at certain fastener locations having countersunk fasteners, and replacing countersunk fasteners with protruding head fasteners at certain fastener locations. The original NPRM proposed to replace a previous high-frequency eddy current (HFEC) inspection method with a new HFEC inspection method, add a one-time inspection for cracking of certain airplanes, and terminate the adjustment factor for the inspection compliance times based on cabin differential pressure. The original NPRM also included an inspection at an additional lap joint. The original NPRM resulted from reports of fuselage skin cracks found at certain countersunk fastener locations in the upper row of lap joints near the wing-to-body fairings, and from a report that the presence of Alodine-coated rivets could cause faulty results during the required inspections using the optional sliding probe HFEC inspection method specified in the existing AD. This new action revises the original NPRM by including inspections at additional lap joint locations and by removing inspections at certain other lap joint locations. We are proposing this supplemental NPRM to prevent reduced structural integrity of the fuselage.

DATES: We must receive comments on this supplemental NPRM by June 2, 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: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; 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–2007–0043; Directorate Identifier 2007–NM–058–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

We proposed to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) with a notice of proposed rulemaking (NPRM) for an AD (the ''original NPRM'') to supersede AD 94–15–06, amendment 39–8977 (59 FR 37659, July 25, 1994). The original NPRM applied to certain Boeing Model 747 series airplanes. The original NPRM was published in the **Federal Register** on October 17, 2007 (72 FR 58777). The original NPRM proposed to retain certain requirements of AD 94–15–06. The original NPRM also proposed to replace a previous high-frequency eddy current (HFEC) inspection method with a new HFEC inspection method, add a one-time inspection for cracking of certain airplanes, and terminate the adjustment factor for the inspection compliance times based on cabin differential pressure. The original NPRM also proposed to require an inspection at an additional lap joint.

Actions Since Original NPRM Was Issued

Since we issued the original NPRM, we have determined that the requirements of AD 94–15–06 included additional errors in lap joint locations that would require a general visual inspection for countersunk fasteners for certain Boeing Model 747SP airplanes. The errors are as follows:

- The requirements of AD 94–15–06 included body station (BS) 520 to 1000 at stringer (S)–34L, S–34R, S–39L, S–39R, S–44L, and S–44R, but should have included only BS 560 to 800 at those stringer locations. (See paragraph (j)(2) of this supplemental NPRM.)
- The requirements of AD 94–15–06 included BS 1480 to 1741 at S–34L, S–34R, S–40L, and S–40R, but should have included only BS 1640 to 1741 at those stringer locations. (See paragraph (j)(2) of this supplemental NPRM.)
- The requirements of AD 94–15–06 did not include BS 1741 to 1901 at S–34L, S–34R, S–40L, and S–40R. (See paragraph (q)(1) of this supplemental NPRM.)
- The requirements of AD 94–15–06 did not include the lap joint at stringer location S–46L in the list of lap joints requiring inspection for Model 747SP airplanes. We included BS 520 to 1000 at that stringer location in the original NPRM, but should instead have included BS 1640 to 1901. (See paragraph (q)(1) of this supplemental NPRM.)

Therefore, we have revised paragraphs (j)(2) and (q)(1) of this supplemental NPRM to correct the body station and stringer locations.

Comments

We have considered the following comments on the original NPRM.

Request To Revise Alternative Methods of Compliance (AMOCs) Paragraph

Boeing requests that we revise paragraph (v)(4) of the original NPRM to read: ''AMOCs approved previously in accordance with AD 94–15–06 for airplane line numbers 630 through 814 inclusive, are approved as AMOCs for the corresponding provisions of this AD if the AMOC does not involve using the existing sliding probe HFEC or alternate skin inspection method specified in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992, or an earlier version. AMOCs approved previously in accordance with AD 94–15–06 for airplane line numbers 201 through 629 inclusive are approved as AMOCs for the corresponding provisions of this AD regardless if the AMOC involves using the existing sliding probe HFEC or alternate skin inspection method specified in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992, or an earlier version.'' Boeing explains that for airplane line numbers 630 through 814, the sliding probe HFEC inspection method can produce incorrect results due to the possibility that Alodine rivets are installed. However, airplanes with line numbers in the range 201 through 629 did not have Alodine rivets installed in production, and therefore the sliding probe HFEC inspection method is a valid inspection.

We agree with the commenter for the reasons stated. We have included the requested information in a revised paragraph (v)(4) and a new paragraph (v)(5) in this supplemental NPRM.

Request To Specify Use of Only Revision 3 of Service Bulletin

Boeing requests that we specify in paragraph (q) of the original NPRM that Boeing Alert Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007 (the appropriate source of service information for certain actions proposed in the NPRM), must be used after the effective date of the AD. Boeing explains that this change would ensure that the most recent revision of the service bulletin is followed.

We agree with Boeing's request. The procedures in Revision 2 of the service bulletin specify to inspect a smaller area than that specified in Revision 3. Therefore, we have changed paragraph (q) of this supplemental NPRM to include only Revision 3 of the service bulletin as the appropriate source of service information for doing the proposed actions.

Request To Revise ''Actions Since Existing AD Was Issued'' Section of NPRM

Boeing asks that we revise the ''Actions Since Existing AD Was Issued'' paragraph of the original NPRM to add the words ''for certain airplanes'' to the end of the following sentence: ''The sliding probe HFEC (high frequency eddy current) inspection specified in the previous revisions of the service bulletin would no longer be allowed in this proposed AD.'' Boeing explains that Boeing Alert Service Bulletin 747–53A2312, Revision 3, allows using the sliding probe procedure as an alternative HFEC inspection procedure for Group 1 airplanes only, as specified in Note 2 of Figure 5 of the service bulletin. Those airplanes were not delivered with Alodine rivets.

We partially agree. We agree that the sliding probe HFEC inspection

procedure is an acceptable inspection procedure for Group 1 airplanes, as the commenter explained. However the ''Actions Since Existing AD Was Issued'' section of the preamble of the original NPRM is not repeated in this supplemental NPRM. Therefore, we have not changed this supplemental NPRM in this regard.

Request To Revise ''Relevant Service Information'' Section of NPRM

Boeing asks that we delete the words ''and repair if necessary'' from the end of the following sentence in the ''Relevant Service Information'' section of the original NPRM: ''However, Revision 3 * * * gives instructions for a special (one-time) inspection for cracking of airplanes * * * and on which the sliding probe HFEC inspection method was used during the last skin inspection, and repair if necessary.'' Boeing states that this change would eliminate potential confusion because the sliding probe inspection does not apply to modifications or repairs.

We disagree with the requested change. The phrase ''repair if necessary'' is intended to state that the repair is necessary if a crack is found during the special (one-time) inspection. Furthermore, the ''Relevant Service Information'' section is not repeated in this supplemental NPRM. Therefore, we have not changed this supplemental NPRM in this regard.

Request To Capitalize ''Alodine''

Boeing points out that the term ''Alodine'' in the original NPRM should be capitalized because ''Alodine'' is a trademarked name.

We agree. We have revised several sections of this supplemental NPRM to reflect this change.

Explanation of Clarification

We have clarified paragraph (p), ''Post-modification Inspections for all Airplanes,'' of this supplemental NPRM to specify that the post-modification inspection is done at all fastener locations where a countersunk fastener was found during the inspection required by paragraph (j) or (q)(1) of the proposed AD.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

The changes to the body station and stringer locations and the change to the service information specified in paragraph (q) discussed above expand the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment on this supplemental NPRM.

Costs of Compliance

There are about 348 airplanes in the worldwide fleet. We estimate that this proposed AD would affect 90 airplanes of U.S. registry. The issue associated with Alodine-coated aluminum rivets occurs on 162 airplanes in the worldwide fleet and affects 24 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD. The average labor rate is $80 per work hour.

ESTIMATED COSTS

Action	Work hours	Parts	Number of affected airplanes	Cost per airplane	Fleet cost
Inspections (required by AD 94–15–06 and retained in this AD).	14	$0	90	$1,120, per inspection cycle.	$100,800, per inspection cycle.
Inspections (required by AD 94–15–06 and retained in this AD).	82	0	90	$6,560, per inspection cycle.	$590,400, per inspection cycle.
Modification (required by AD 94–15–06 and retained in this proposed AD).	124	(1)	90	$9,920	$892,800.
One-time inspection (new proposed action)	4	0	24	$320	$7,680.

[1] Minimal.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–8977 (59 FR 37659, July 25, 1994) and by adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2007–0043; Directorate Identifier 2007–NM–058–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by June 2, 2008.

Affected ADs

(b) This AD supersedes AD 94–15–06.

Applicability

(c) This AD applies to Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747SR, and 747SP series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007.

Unsafe Condition

(d) This AD results from reports of fuselage skin cracks found at certain countersunk fastener locations in the upper row of lap joints near the wing-to-body fairings, and from a report that the presence of Alodine-coated rivets could cause faulty results during the required inspections using the optional sliding probe HFEC inspection method specified in AD 94–15–06. We are issuing this AD to prevent reduced structural integrity of the fuselage.

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.

Requirements of AD 94–15–06 With Revised Body Station and Stringer Locations

Inspections for Airplanes Having Line Numbers 201 through 765 Inclusive

(f) For airplanes having line numbers 201 through 765 inclusive: Conduct a high frequency eddy current (HFEC) inspection to detect cracking of the lower lobe lap joints in the vicinity of the wing-to-body fairings, in accordance with Boeing Alert Service Bulletin 747–53A2312, dated June 12, 1989; Revision 1, dated March 29, 1990; Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD; at the time specified in paragraph (f)(1), (f)(2), (f)(3), or (f)(4) of this AD, as applicable. As of the effective date of this AD, only Revision 3 shall be used. Repeat this inspection thereafter at intervals not to exceed 4,000 landings until the inspection required by paragraph (j) of this AD is accomplished.

(1) For airplanes that have accumulated less than 11,200 total landings as of February 5, 1990 (the effective date of AD 90–01–07, amendment 39–6440, which was superseded by AD 94–15–06): Prior to the accumulation of 11,000 total landings, or within the next 1,000 landings after February 5, 1990, whichever occurs later.

(2) For airplanes that have accumulated 11,200 or more total landings but less than 15,201 total landings as of February 5, 1990: Within the next 1,000 landings after February 5, 1990, or prior to the accumulation of 15,500 total landings, whichever occurs earlier.

(3) For airplanes that have accumulated 15,201 or more total landings but less than 18,200 total landings as of February 5, 1990: Within the next 300 landings after February 5, 1990, or prior to the accumulation of 18,250 total landings, whichever occurs earlier.

(4) For airplanes that have accumulated 18,200 or more landings as of February 5, 1990: Within the next 50 landings after February 5, 1990.

Repair and Modification for Airplanes Having Line Numbers 201 Through 765 Inclusive

(g) For airplanes having line numbers 201 through 765 inclusive: Accomplish the requirements of paragraphs (g)(1) and (g)(2) of this AD.

(1) If any cracking is detected during the inspections required by paragraph (f) of this AD, prior to further flight, repair in accordance with Boeing Alert Service Bulletin 747–53A2312, dated June 12, 1989; Revision 1, dated March 29, 1990; Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. As of the effective date of this AD, only Revision 3 shall be used.

(2) Prior to the accumulation of 20,000 total landings, or within the next 3,000 landings after February 5, 1990 (the effective date of AD 90–01–07), whichever occurs later, modify the airplane by replacing countersunk fasteners in the upper row of the lower lobe lap joints in the vicinity of the wing-to-body fairings with protruding head fasteners, in accordance with the procedures described in Boeing Alert Service Bulletin 747–53A2312, dated June 12, 1989; Revision 1, dated March 29, 1990; Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. As of the effective date of this AD, only Revision 3 shall be used.

Adjustments for Cabin Differential Pressure for Airplanes Having Line Numbers 201 Through 765 Inclusive

(h) For airplanes having line numbers 201 through 765 inclusive: Before the effective date of this AD, for purposes of complying with paragraphs (f) and (g) of this AD, the number of landings may be determined to equal the number of pressurization cycles where the cabin pressure differential was greater than 2.0 psi.

(i) For airplanes having line numbers 201 through 765 inclusive: Before the effective date of this AD, for Model 747SR series airplanes only, based on continued mixed operation of lower cabin differentials, the inspection and modification compliance times specified in paragraphs (f) and (g) of this AD may be multiplied by a 1.2 adjustment factor.

General Visual Inspection for Countersunk Fasteners for All Airplanes

(j) *For all airplanes:* Prior to the accumulation of 11,000 total landings, or within 1,000 landings after August 24, 1994 (the effective date of AD 94–15–06), whichever occurs later, conduct a general visual inspection, unless previously accomplished within the last 3,000 landings prior to August 24, 1994, to determine if countersunk fasteners have been installed in the lap joints listed in paragraph (j)(1) or (j)(2) of this AD, as applicable, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. As of the effective date of this AD, only Revision 3 shall be used. Accomplishment of this inspection terminates the inspection requirements of paragraph (f) of this AD.

(1) For Model 747–100, –200, –300, –400, and 747SR series airplanes: From body stations (BS) 741 to 1000 at stringers (S)–34L, S–34R, S–39L, S–39R, S–44L, and S–44R, and from BS 1480 to 1741 at S–34L, S–34R, S–40L, and S–40R.

(2) For Model 747SP series airplanes: From BS 560 to 800 at S–34L, S–34R, S–39L, S–39R, S–44L, and S–44R, and from BS 1640 to 1741 at S–34L, S–34R, S–40L, and S–40R.

Corrective Action for Countersunk Fasteners for All Airplanes

(k) *For all airplanes:* If no countersunk fastener is found in the upper row of a lap joint during the inspection required by paragraph (j) of this AD, no further action is required by this AD for that lap joint.

(l) *For all airplanes:* If any countersunk fastener is found in the upper row of a lap joint during the inspection required by paragraph (j) of this AD, prior to further flight, perform a high frequency eddy current (HFEC) inspection to detect cracking at all fastener locations in the lap joint where a countersunk fastener was found during the inspection required by paragraph (j) of this AD, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. As of the effective date of this AD, only Revision 3 shall be used.

Repetitive Inspections

(m) If no cracking is detected during any inspection required by paragraphs (l) and (q) of this AD, at any fastener location where a countersunk fastener was found during the inspection required by paragraph (j) or (q)(1) of this AD, repeat the HFEC inspection thereafter at intervals not to exceed 4,000 landings, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except

as provided by paragraph (u) of this AD. As of the effective date of this AD, only Revision 3 shall be used. As an alternative to the HFEC inspection, operators may perform a detailed inspection to detect cracking at any fastener location where a countersunk fasteners was found, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. Perform the detailed inspection within the next 4,000 landings after the HFEC inspection required by paragraph (l) of this AD, and repeat the inspection thereafter at intervals not to exceed 500 landings. At any of the subsequent inspection cycles, operators may use either inspection method provided that the corresponding inspection interval is used to determine the compliance time of the next inspection.

(n) If cracking is detected during any inspection required by paragraph (l), (m), (p), or (q) of this AD, at any fastener location where a countersunk fastener was found during the inspection required by paragraph (j) or (q)(1) of this AD, prior to further flight, repair and modify that lap joint in accordance with Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. As of the effective date of this AD, only Revision 3 shall be used. Accomplishment of this repair and modification terminates the repetitive inspections required by paragraph (m) of this AD for that lap joint.

Modification of Countersunk Fasteners for All Airplanes

(o) For all airplanes: Prior to the accumulation of 20,000 total landings or within 1,000 landings after August 24, 1994, whichever occurs later, modify all fastener locations where a countersunk fastener was found during the inspections required by paragraph (j) of this AD, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. As of the effective date of this AD, only Revision 3 shall be used. For purposes of complying with the requirements of this paragraph, fastener locations that were previously modified in accordance with paragraph (g) or (n) of this AD do not need to be modified again. Accomplishment of this modification terminates the repetitive inspections required by paragraph (m) of this AD for the modified fastener locations.

Post-Modification Inspections for All Airplanes

(p) For all airplanes: Prior to the accumulation of 10,000 total landings following the modification required by paragraph (g), (n), (o), (q) or (s) of this AD, perform an HFEC inspection to detect cracking at all fastener locations where a countersunk fastener was found during the inspection required by paragraph (j) or (q)(1) of this AD, and repeat this inspection thereafter at intervals not to exceed 4,000 landings, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992; or Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. As of the effective date of this AD, only Revision 3 shall be used.

New Requirements of This AD

General Visual Inspection for Countersunk Fasteners and Modification for Model 747SP Airplanes at Stringers S–34L, S–34R, S–40L, S–40R, and S–46L

(q) For Model 747SP series airplanes having line numbers 201 through 814 inclusive, do the actions in paragraphs (q)(1) and (q)(2) of this AD at the times specified in those paragraphs.

(1) Prior to the accumulation of 11,000 total landings, or within 1,000 landings as of the effective date of this AD, whichever occurs later, unless previously accomplished within the last 3,000 landings prior to the effective date of this AD, conduct a general visual inspection of the lap joint from BS 1640 to 1901 at stringer S–46L, and from BS 1741 to 1901 at S–34L, S–34R, S–40L, and S–40R, to determine if countersunk fasteners have been installed in the specified area, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD.

(i) If no countersunk fastener is found in the upper row of the lap joint during the inspection, no further action is required by this AD for the lap joint.

(ii) If any countersunk fastener is found in the upper row of the lap joint, prior to further flight, perform an HFEC inspection to detect cracking at all fastener locations where a countersunk fastener was found, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD.

A. If no cracking is found, repeat the inspection thereafter in accordance with the requirements of paragraph (m) of this AD.

B. If any cracking is found, prior to further flight, repair and modify the lap joint as required by paragraph (n) of this AD.

(2) Prior to the accumulation of 20,000 total landings, or within 1,000 landings as of the effective date of this AD, whichever occurs later, modify all fastener locations where a countersunk fastener was found, during the inspection required by paragraph (q)(1) of this AD, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. For purposes of complying with the requirements of this AD, fastener locations that were previously modified in accordance with paragraph (n) of this AD do not need to be modified again. Accomplishment of this modification terminates the repetitive inspections required by paragraph (m) of this AD for the modified fastener locations.

Adjustments to Compliance Time: Cabin Differential Pressure

(r) For the purposes of calculating the compliance threshold and repetitive intervals for actions required by paragraphs (f) and (g) of this AD, as of the effective date of this AD: All flight cycles, including the number of flight cycles in which cabin differential pressure is at 2.0 psi or less, must be counted when determining the number of flight cycles that have occurred on the airplane, and a 1.2 adjustment factor may not be used. However, for airplanes on which the repetitive intervals for the actions required by paragraph (f) of this AD have been calculated in accordance with paragraph (h) and/or (i) of this AD by excluding the number of flight cycles in which cabin differential pressure is at 2.0 pounds psi or less, and/or by using a 1.2 adjustment factor: Continue to adjust the repetitive intervals in accordance with paragraph (h) and/or (i) of this AD until the next inspection required by paragraph (f) of this AD is accomplished. Thereafter, no adjustment to compliance times based on paragraph (h) and/or (i) of this AD is allowed.

Special One-Time Inspection for Cracking of Certain Airplanes

(s) For airplanes with line numbers 630 through 814 inclusive that meet the conditions specified in paragraphs (s)(1) and (s)(2) of this AD: Within 300 flight cycles after the effective date of this AD, or within 500 flight cycles after the most recent sliding probe inspection done in accordance with Boeing Alert Service Bulletin 747–53A2312, Revision 1, dated March 29, 1990; or Revision 2, dated October 8, 1992; whichever occurs later, do a special one-time HFEC inspection or a special one-time detailed inspection for cracking, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007. If any cracking is found in a lap joint, before further flight, repair and modify that lap joint in accordance with Boeing Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007; except as provided by paragraph (u) of this AD. Accomplishment of this repair and modification terminates the repetitive inspections required by paragraph (m) of this AD for that lap joint. This special one-time inspection is not required for lap joints that have been modified in accordance with paragraph (g), (n), (o), or (q) of this AD.

(1) Airplanes that have not been modified in accordance with paragraph (g) or (o) of this AD.

(2) Airplanes on which the sliding probe HFEC inspection method specified in Boeing Service Bulletin 747–53A2312, Revision 1, dated March 29, 1990; or Revision 2, dated October 8, 1992; was used during the last skin inspection required by paragraph (f), (l), or (m) of this AD.

Actions After the Special One-Time Inspection if No Cracking Is Found

(t) For airplanes specified in paragraph (s) of this AD on which no cracking is found during the special one-time inspection, do the applicable repetitive inspections specified in paragraph (t)(1) or (t)(2) of this AD.

(1) If the special one-time inspection was done using the HFEC inspection method in accordance with paragraph (s) of this AD, perform the next inspection required by paragraph (m) of this AD within the next 4,000 flight cycles after doing the inspection

required by paragraph (s) of this AD, and repeat the inspection thereafter in accordance with paragraph (m) of this AD.

(2) If the special one-time inspection was done using the detailed inspection method in accordance with paragraph (s) of this AD, perform the next inspection required by paragraph (m) of this AD within the next 500 flight cycles after doing the inspection required by paragraph (s) of this AD, and repeat the inspection thereafter in accordance with paragraph (m) of this AD.

Contacting the Manufacturer

(u) Where Boeing Alert Service Bulletin 747–53A2312, Revision 3, dated February 8, 2007, specifies to contact Boeing for appropriate action for a repair or inspection, before further flight, do the applicable action in paragraph (u)(1) or (u)(2) of this AD.

(1) Do the repair using a method approved in accordance with the procedures specified in paragraph (v) of this AD.

(2) Do the inspection using a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

Alternative Methods of Compliance (AMOCs)

(v)(1) The Manager, Seattle ACO, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) 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.

(3) An AMOC that provides an acceptable level of safety shall be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously in accordance with AD 94–15–06 for airplane line numbers 630 through 814 inclusive are approved as AMOCs for the corresponding provisions of this AD if the AMOC does not involve using the existing sliding probe HFEC skin inspection method specified in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992, or an earlier version. In addition, the provisions of paragraph (r) of this AD must be applied to AMOCs approved previously in accordance with AD 94–15–06, amendment 39–8977, where applicable.

(5) AMOCs approved previously in accordance with AD 94–15–06 for airplane line numbers 201 through 629 inclusive are approved as AMOCs for the corresponding provisions of this AD. In addition, the provisions of paragraph (r) of this AD must be applied to AMOCs approved previously in accordance with AD 94–15–06, where applicable.

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

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–10060 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0194; Directorate Identifier 2007–NM–263–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier NPRM for the products listed above. This action revises the earlier NPRM by expanding the scope. This proposed 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:

Fuel system reassessment, performed according to RBHA–E88/SFAR–88 (Regulamento Brasileiro de Homologacao Aeronautica 88/Special Federal Aviation Regulation No. 88), requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by May 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 W12–40, 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 proposed 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; fax (425) 227–1149.

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–2008–0194; Directorate Identifier 2007–NM–263–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 based on 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

We proposed to amend 14 CFR part 39 with an earlier NPRM for the specified products, which was published in the **Federal Register** on February 21, 2008 (73 FR 9500). That earlier NPRM proposed to require actions intended to address the unsafe condition for the products listed above.

Since that earlier NPRM was issued, we have determined that for certain airplanes the initial compliance times

for doing the tasks specified in paragraph (f)(2) of the earlier NPRM must be reduced. That earlier NPRM resulted from Brazilian Airworthiness Directive 2007–08–01, dated September 27, 2007 (referred to after this as ''the MCAI'').

The MCAI does not provide an initial compliance time for doing the tasks. In the earlier NPRM we proposed an initial compliance time that started from the effective date of the AD; or the date of issuance of the original Brazilian standard airworthiness certificate or the date of issuance of the original Brazilian export certificate of airworthiness; whichever occurs later. Although unstated in the MCAI, we have determined that the intent of the MCAI is for the initial compliance time to start from the initial delivery date of the airplane in order to address the identified unsafe condition in a timely manner. We have also revised the initial compliance times for clarity by providing a threshold and grace period for each task. We have revised this supplemental NPRM by adding Table 1 to specify the initial compliance times for each task. You may obtain further information by examining the MCAI in the AD docket.

Comments

We have considered the following comments received on the earlier NPRM.

Request To Clarify Compliance Times

EMBRAER requests that we revise the NPRM to enable operators to comply if replacement parts are not immediately available. EMBRAER states that paragraph (section) A2.5.1 of Appendix 2 of the EMBRAER Legacy BJ Maintenance Planning Guide (MPG) MPG–1483, Revision 5, dated March 22, 2007, contains provisions to allow operators to implement the required fuel system limitation inspections in a more timely manner. EMBRAER therefore requests that we revise the NPRM to include paragraph A2.5.1 of the MPG.

We do not agree with the request to include MPG paragraph A2.5.1, which describes deferring the first mandatory inspections to the next ''C'' check (5,000 flight hours). However, as described previously, we have revised paragraph (f)(2) of the supplemental NPRM to clarify the initial compliance times. With these revised compliance times, there should be sufficient spare parts. In addition, if an operator decides that more compliance time is needed, the operator may request an alternative method of compliance (AMOC) in accordance with paragraph (g)(1) of the supplemental NPRM.

Clarification of Increased Costs

The original NPRM specified that about 37 airplanes would be affected by that proposed action. We have determined that about 49 airplanes would be affected by this proposed action, and have revised the Costs of Compliance accordingly in this supplemental NPRM.

FAA's Determination and Requirements of This Proposed AD

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

Certain changes described above expand the scope of the earlier NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this proposed AD.

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 proposed 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 proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 49 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,920, or $80 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Empresa Brasileira de Aeronautica S.A. (Embraer): Docket No. FAA–2008–0194; Directorate Identifier 2007–NM–263–AD.

Comments Due Date

(a) We must receive comments by May 27, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all EMBRAER Model EMB–135BJ airplanes, certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

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

Reason

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

Fuel system reassessment, performed according to RBHA–E88/SFAR–88, requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness (ICA) to incorporate new limitations for fuel tank systems.

Actions and Compliance

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

(1) The term ''MPG,'' as used in this AD, means the EMBRAER Legacy BJ Maintenance Planning Guide (MPG) MPG–1483, Revision 5, dated March 22, 2007.

(2) Before December 16, 2008, revise the ALS of the ICA to incorporate Section A2.5.2, Fuel System Limitation Items, of Appendix 2 of the MPG. For all tasks identified in Section A2.5.2 of Appendix 2 of the MPG, the initial compliance times start from the applicable times specified in Table 1 of this AD; and the repetitive inspections must be accomplished thereafter at the interval specified in section A2.5.2 of Appendix 2 of the MPG, except as provided by paragraphs (f)(4) and (g) of this AD.

TABLE 1.—INITIAL INSPECTIONS

Reference No.	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
28–11–00–720–001–A00	Functionally Check critical bonding integrity of selected conduits inside the wing tank, Fuel Pump and FQIS connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours.	Within 90 days after the effective date of this AD.
28–13–01–720–002–A00	Functionally Check Aft Fuel tank critical bonding integrity of Fuel Pump, FQGS and Low Level SW connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours.	Within 90 days after the effective date of this AD.
28–15–04–720–001–A00	Functionally Check Fwd Fuel tank critical bonding integrity of Fuel Pump, FQGS and Low Level SW connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours.	Within 90 days after the effective date of this AD.
28–21–01–220–001–A00	Inspect Wing Electric Fuel Pump Connector.	Before the accumulation of 10,000 total flight hours.	Within 90 days after the effective date of this AD.
28–23–03–220–001–A00	Inspect Pilot Valve harness inside the conduit.	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.
28–23–04–220–001–A00	Inspect Vent Valve harness inside the conduit.	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.
28–41–01–720–001–A00	Functionally Check Fuel Conditioning Unit (FCU).	Before the accumulation of 10,000 total flight hours.	Within 90 days after the effective date of this AD.
28–41–03–220–001–A00	Inspect FQIS harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.
28–46–02–220–001–A00	Aft Fuel Tank Internal Inspection: FQGS harness and Low Level SW harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.
28–46–04–220–001–A00	Fwd Fuel Tank Internal Inspection: FQGS harness and Low Level SW harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.
28–46–05–720–001–A00	Functionally Check Auxiliary Fuel Conditioning Unit (FCU).	Before the accumulation of 10,000 total flight hours.	Within 90 days after the effective date of this AD.

(3) Before December 16, 2008, or within 90 days after the effective date of this AD, whichever occurs first, revise the ALS of the ICA to incorporate items 1, 2, and 3 of Section A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MPG.

(4) After accomplishing the actions specified in paragraphs (f)(2) and (f)(3) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the

inspections, intervals, or CDCCLs are part of a later revision of Appendix 2 of the MPG that is approved by the Manager, ANM–116, FAA, or ANAC (or its delegated agent); or unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (g) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows:

(1) The MCAI specifies a compliance date of ''Before December 31, 2008'' for doing the ALI revisions. We have already issued regulations that require operators to revise their maintenance/inspection programs to address fuel tank safety issues. The compliance date for these regulations is December 16, 2008. To provide for coordinated implementation of these regulations and this AD, we are using this same compliance date in this AD.

(2) The MCAI specifies a compliance time of 180 days to revise the ALS of the ICA to incorporate items 1, 2, and 3 of Section A2.4 of Appendix 2 of the MPG. This AD requires a compliance time of 90 days to do this revision. This difference has been coordinated with ANAC.

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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; 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 Brazilian Airworthiness Directive 2007–08–01, effective September 27, 2007; and Sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MPG; for related information.

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

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–10063 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0182; Directorate Identifier 2007–NM–262–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135ER, –135KE, –135KL, and –135LR Airplanes, and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier NPRM for the products listed above. This action revises the earlier NPRM by expanding the scope. This proposed 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:

Fuel system reassessment, performed according to RBHA–E88/SFAR–88 (Regulamento Brasileiro de Homologacao Aeronautica 88/Special Federal Aviation Regulation No. 88), requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by May 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 W12–40, 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 proposed 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; fax (425) 227–1149.

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–2008–0182; Directorate Identifier 2007–NM–262–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 based on 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

We proposed to amend 14 CFR part 39 with an earlier NPRM for the specified products, which was published in the **Federal Register** on February 21, 2008 (73 FR 9497). That earlier NPRM proposed to require actions intended to address the unsafe condition for the products listed above.

Since that earlier NPRM was issued, we have determined that for certain airplanes the initial compliance times for doing the tasks specified in paragraph (f)(2) of the earlier NPRM

must be reduced. That earlier NPRM resulted from Brazilian Airworthiness Directive 2007–08–02, effective September 27, 2007 (referred to after this as ''the MCAI'').

The MCAI does not provide an initial compliance time for doing the tasks. In the original NPRM, we proposed an initial compliance time that started from the effective date of the AD; or the date of issuance of the original Brazilian standard airworthiness certificate or the date of issuance of the original Brazilian export certificate of airworthiness; whichever occurs later. Although unstated in the MCAI, we have determined that the intent of the MCAI is for the initial compliance time to start from the initial delivery date of the airplane in order to address the identified unsafe condition in a timely manner. We have also revised the initial compliance times for clarity by providing a threshold and grace period for each task. We have revised this supplemental NPRM by adding Table 1 to specify the initial compliance times for each task. You may obtain further information by examining the MCAI in the AD docket.

Comments

We have considered the following comments received on the earlier NPRM.

Request To Clarify Compliance Times

EMBRAER and ExpressJet request that we revise the NPRM to include paragraph (section) A2.5.1 of Appendix 2 of EMBRAER EMB–135/ERJ–140/EMB–145 Maintenance Review Board Report (MRBR) MRB–145/1150, Revision 10, dated August 4, 2006. The commenters assert that paragraph A2.5.1 contains provisions to allow operators to implement the required fuel system limitation inspections in a timely manner. ExpressJet asserts that without the inclusion of paragraph A2.5.1, operators will be non-compliant with the AD immediately upon the inclusion of paragraph A.2.5.2 into the maintenance programs. Finally, ExpressJet asserts that operators will not have sufficient spare parts and states that they have been informed that the manufacturer of replacement parts required by these new limitations will be unable to meet the demand, which could lead to immediate grounding of airplanes. The commenters therefore request that we revise the NPRM to include paragraph A2.5.1 of the MRBR so operators are able to comply with the AD in an achievable time frame.

We do not agree with this request to include MRBR paragraph A2.5.1, which describes deferring the first mandatory inspections to the next ''C'' check (5,000 flight hours). However, as described previously, we have revised the initial compliance times specified in paragraph (f)(2) of the supplemental NPRM. With these revised compliance times, there should be sufficient spare parts. In addition, if an operator decides that more compliance time is needed, the operator may request an alternative method of compliance (AMOC) in accordance with paragraph (g)(1) of the supplemental NPRM.

New Service Information

Since the NPRM was issued, we have reviewed sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the EMBRAER EMB–135/ERJ–140/EMB–145 MRBR MRB–145/1150, Revision 11, dated September 19, 2007 (we referred to the EMBRAER EMB–135/ERJ–140/EMB–145 MRBR MRB–145/1150, Revision 10, dated August 4, 2006, as the appropriate source of service information for doing the actions specified in the NPRM). No changes were made to the tasks specified in the MRBR. We have revised this AD to refer to Revision 11 of the MRBR.

FAA's Determination and Requirements of This Proposed AD

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

Certain changes described above expand the scope of the earlier NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this proposed AD.

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 proposed 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 proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 704 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $56,320, or $80 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Empresa Brasileira De Aeronautica S.A. (Embraer): Docket No. FAA–2008–0182; Directorate Identifier 2007–NM–262–AD.

Comments Due Date

(a) We must receive comments by May 27, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to EMBRAER Model EMB–135ER, –135KE, –135KL, and –135LR airplanes, and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP airplanes; certificated in any category; except for Model EMB–145LR airplanes modified according to Brazilian Supplemental Type Certificate 2002S06–09, 2002S06–10, or 2003S08–01.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

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

Reason

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

Fuel system reassessment, performed according to RBHA–E88/SFAR–88, requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness (ICA) to incorporate new limitations for fuel tank systems.

Actions and Compliance

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

(1) The term ''MRBR,'' as used in this AD, means the EMBRAER EMB–135/ERJ–140/EMB–145 Maintenance Review Board Report (MRBR) MRB–145/1150, Revision 11, dated September 19, 2007.

(2) Before December 16, 2008, revise the ALS of the ICA to incorporate Section A2.5.2, Fuel System Limitation Items, of Appendix 2 of the MRBR. For all tasks identified in section A2.5.2 of Appendix 2 of the MRBR, the initial compliance times start from the applicable times specified in Table 1 of this AD; and the repetitive inspections must be accomplished thereafter at the interval specified in Section A2.5.2 of Appendix 2 of the MRBR, except as provided by paragraphs (f)(4) and (g) of this AD.

TABLE 1.—INITIAL INSPECTIONS

Reference No.	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
28–11–00–720–001–A00	Functionally Check critical bonding integrity of selected conduits inside the wing tank, Fuel Pump and FQIS connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours.	Within 90 days after the effective date of this AD.
28–17–01–720–001–A00	Functionally Check critical bonding integrity of Fuel Pump, VFQIS and Low Level SW connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours.	Within 90 days after the effective date of this AD.
28–21–01–220–001–A00	Inspect Electric Fuel Pump Connector	Before the accumulation of 10,000 total flight hours.	Within 90 days after the effective date of this AD.
28–23–03–220–001–A00	Inspect Pilot Valve harness inside the conduit	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.
28–23–04–220–001–A00	Inspect Vent Valve harness inside the conduit	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.
28–27–01–220–001–A00	Inspect Electric Fuel Transfer Pump Connector.	Before the accumulation of 10,000 total flight hours.	Within 90 days after the effective date of this AD.
28–41–01–720–001–A00	Functionally Check Fuel Conditioning Unit (FCU).	Before the accumulation of 10,000 total flight hours.	Within 90 days after the effective date of this AD.
28–41–03–220–001–A00	Inspect FQIS harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.
28–41–04–720–001–A00	Functionally Check Ventral Fuel Conditioning Unit (VFCU).	Before the accumulation of 10,000 total flight hours.	Within 90 days after the effective date of this AD.

TABLE 1.—INITIAL INSPECTIONS—Continued

Reference No.	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
28–41–07–220–001–A00	Inspect VFQIS and Low Level SW Harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours.	Within 90 days after the effective date of this AD.

(3) Before December 16, 2008, or within 90 days after the effective date of this AD, whichever occurs first, revise the ALS of the ICA to incorporate items 1, 2, and 3 of section A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MRBR.

(4) After accomplishing the actions specified in paragraphs (f)(2) and (f)(3) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are part of a later revision of Appendix 2 of the MRBR that is approved by the Manager, ANM–116, FAA, or ANAC (or its delegated agent); or unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (g) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: The MCAI specifies a compliance date of ''Before December 31, 2008'' for doing the ALI revisions. We have already issued regulations that require operators to revise their maintenance/inspection programs to address fuel tank safety issues. The compliance date for these regulations is December 16, 2008. To provide for coordinated implementation of these regulations and this AD, we are using this same compliance date in this AD.

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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; 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 Brazilian Airworthiness Directive 2007–08–02, effective September 27, 2007; and sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MRBR; for related information.

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

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–10065 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0521; Directorate Identifier 2008–NM–040–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) 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:

Following in-flight test deployments, several Air-Driven generators (ADGs) failed to come on-line. Investigation revealed that, as a result of a wiring anomaly that had not been detected during ADG manufacture, a short circuit was possible between certain internal wires and their metallic over-braided shields, which could result in the ADG not providing power when deployed. * * *

The unsafe condition is that failure of the ADG could lead to loss of several functions essential for safe flight. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by June 6, 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 proposed 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: Fabio Buttitta, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7303; fax (516) 794–5531.

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–2008–0521; Directorate Identifier 2008–NM–040–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 based on 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

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2008–09, dated February 5, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Following in-flight test deployments, several Air-Driven generators (ADGs) failed to come on-line. Investigation revealed that, as a result of a wiring anomaly that had not been detected during ADG manufacture, a short circuit was possible between certain internal wires and their metallic over-braided shields, which could result in the ADG not providing power when deployed. This directive mandates checking of the ADG and modification of the ADG internal wiring, if required. It also prohibits future installation of unmodified ADGs.

The unsafe condition is that failure of the ADG could lead to loss of several functions essential for safe flight. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Service Bulletin 601R–24–113, Revision A, dated August 11, 2005. 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 Proposed AD

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

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 proposed 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 proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 686 products of U.S. registry. We also estimate that it would take about 5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $274,400, or $400 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2008–0521; Directorate Identifier 2008–NM–040–AD.

Comments Due Date

(a) We must receive comments by June 6, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes; certificated in any category; having serial numbers (SNs) 7305 through 7990 and 8000 and subsequent.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical Power.

Reason

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

Following in-flight test deployments, several Air-Driven generators (ADGs) failed to come on-line. Investigation revealed that, as a result of a wiring anomaly that had not been detected during ADG manufacture, a short circuit was possible between certain internal wires and their metallic over-braided shields, which could result in the ADG not providing power when deployed. This directive mandates checking of the ADG and modification of the ADG internal wiring, if required. It also prohibits future installation of unmodified ADGs.

The unsafe condition is that failure of the ADG could lead to loss of several functions essential for safe flight.

Actions and Compliance

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

(1) For airplanes having serial number (SN) 7305 through 7990 and 8000 through 8083: Within 12 months after the effective date of this AD, inspect the SN of the installed ADG. A review of airplane maintenance records is acceptable in lieu of this inspection if the serial number of the ADG can be conclusively determined from that review.

(i) If the serial number is not listed in paragraph 1.A of Bombardier Service Bulletin 601R–24–113, Revision A, dated August 11, 2005, no further action is required by this AD.

(ii) If the serial number is listed in paragraph 1.A of Bombardier Service Bulletin 601R–24–113, Revision A, dated August 11, 2005, before further flight, inspect the ADG identification plate and, as applicable, do the actions of paragraph (f)(1)(ii)(A) or (f)(1)(ii)(B) of this AD.

(A) If the identification plate is marked with the symbol ''24–2'', no further action is required by this AD.

(B) If the identification plate is not marked with the symbol ''24–2'', modify the ADG wiring in accordance with the Accomplishment Instructions of the service bulletin.

(2) For airplanes having SN 7305 through 7990 and 8000 and subsequent: As of the effective date of this AD, no ADG as described in Table 1 of this AD may be installed on any airplane, unless the identification plate of the ADG is identified with the symbol ''24–2'' (refer to Hamilton Sundstrand Service Bulletin ERPS10AG–24–2 for further information).

TABLE 1.—ADG IDENTIFICATION

ADG part No.—	Having ADG serial No.—
604–90800–1 (761339C), 604–90800–17 (761339D), or 604–90800–19 (761339E).	0101 through 0132, 0134 through 0167, 0169 through 0358, 0360 through 0438, 0440 through 0456, 0458 through 0467, 0469, 0471 through 0590, 0592 through 0597, 0599 through 0745, 0747 through 1005, or 1400 through 1439.

(3) Actions done before the effective date of this AD according to Bombardier Service Bulletin 601R–24–113, dated April 22, 2004, are considered acceptable for compliance with the corresponding actions specified in this AD, provided the ADG has not been replaced since those actions were done.

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, 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: Fabio Buttitta, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7303; 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–2008–09, dated February 5, 2008, and Bombardier Service Bulletin 601R–24–113, Revision A, dated August 11, 2005, for related information.

Issued in Renton, Washington, on April 25, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–10097 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 317

[Project No. P082900]
RIN 3084-AB12

Prohibitions On Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking; request for public comment.

SUMMARY: The Federal Trade Commission (FTC or Commission) is requesting comment on the manner in which it should carry out its rulemaking responsibilities under Section 811 of Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 (EISA).

DATES: Comments must be received on or before June 6, 2008.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Market Manipulation Rulemaking, P082900'' to facilitate the organization of comments. Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c).[1]

Because paper mail in the Washington-area, and specifically to the FTC, is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: *https://secure.commentworks.com/ftc-marketmanipulationANPR/* (and

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c) (2008).

following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (*https://secure.commentworks.com/ftc-marketmanipulationANPR/*). If this notice appears at *http://www.regulations.gov*, you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/opa/index.shtml*) to read the Advance Notice of Proposed Rulemaking and the news release describing it.

A comment filed in paper form should include the ''Market Manipulation Rulemaking, P082900'' reference both in the text and on the envelope, and should be mailed to the following address: Federal Trade Commission, Market Manipulation Rulemaking, P.O. Box 2846, Fairfax, VA 22031-0846. This address does not accept courier or overnight deliveries. Courier or overnight deliveries should be delivered to: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex G), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.htm*).

FOR FURTHER INFORMATION CONTACT: John H. Seesel, Associate General Counsel for Energy, Federal Trade Commission, Market Manipulation Rulemaking, P.O. Box 2846, Fairfax, VA 22031-0846, (202) 326-3772.

SUPPLEMENTARY INFORMATION:

I. Statutory Framework

Subtitle B of EISA, which became effective on December 19, 2007,[2] includes two substantive sections respectively entitled ''Prohibition On Market Manipulation'' (Section 811) and ''Prohibition On False Information'' (Section 812). Section 811 prohibits ''any person'' from directly or indirectly (1) using or employing ''any manipulative or deceptive device or contrivance,'' (2) ''in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale,'' (3) that violates a rule or regulation that the Federal Trade Commission ''may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.'' Section 812 prohibits ''any person'' from reporting information that is ''required by law to be reported'' — and that is ''related to the wholesale price of crude oil gasoline or petroleum distillates'' — to a Federal department or agency if the person (1) ''knew, or reasonably should have known, [that] the information [was] false or misleading;'' and (2) intended such false or misleading information ''to affect data compiled by the department or agency for statistical or analytical purposes with respect to the market for crude oil, gasoline, or petroleum distillates.''

Section 813 provides that Subtitle B ''shall be enforced by the Federal Trade Commission in the same manner, by the same means, and with the same jurisdiction'' as though ''all applicable terms'' of the Federal Trade Commission Act (FTC Act) were incorporated into and made a part of Subtitle B. Consequently, any entity subject to Commission jurisdiction under the FTC Act is subject to the Commission's enforcement of Subtitle B, and must comply with Section 812 and any rule promulgated under Section 811 of Subtitle B.[3] Section 813 further provides that the violation of any provision of Subtitle B ''shall be treated as an unfair or deceptive act or practice proscribed under a rule issued under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)),'' even though rules and regulations that the Commission may prescribe are to be issued under Subtitle B.[4]

The Commission could seek a number of different types of relief against a person who violated Subtitle B. In particular, Section 13(b) of the FTC Act permits the Commission to file a federal court civil action seeking a temporary restraining order or a preliminary injunction to prevent any ''person, partnership, or corporation'' from violating a rule promulgated under EISA Section 811 or from violating EISA Section 812, and to secure a permanent injunction ''in proper cases.'' In such a proceeding, the Commission would also be able to secure corollary equitable relief, such as an asset freeze, disgorgement, and/or the appointment of a receiver. 15 U.S.C. 53(b). Moreover, Section 19 of the FTC Act permits the Commission to file a federal court civil action in its own name against any person, partnership, or corporation that ''violates any rule . . . respecting unfair or deceptive acts or practices . . . ,''[5] and permits the court to grant relief needed:

> to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation . . . [including but not limited to] rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation. . . .[6]

Furthermore, Section 5(m)(1)(A) of the FTC Act permits the Commission, by referral to the Department of Justice, to file a federal court civil action to recover civil penalties of up to $11,000[7] per violation from:

> any person, partnership, or corporation which violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices . . .

[2] Pub. L. 110-140, 121 Stat. 1723 (December 19, 2007), Title VIII, Subtitle B, *to be codified* at 42 U.S.C. 17301-17305.

[3] Section 811 and Section 812 of Subtitle B expressly cover ''any person.'' The Administrative Procedure Act, 5 U.S.C. 551(2), defines ''person'' as including ''an individual, partnership, corporation, association, or public or private organization other than an agency.'' Similarly, the FTC's jurisdiction under the FTC Act covers ''persons, partnerships, or corporations.'' 15 U.S.C. 45(a)(2). While the FTC Act applies broadly, certain entities are wholly or partly exempt from Commission authority under that Act. These include banks, savings and loan institutions, federal credit unions, transportation and communications common carriers, air carriers, and livestock firms. 15 U.S.C. 45(a)(2). In addition, the term ''corporation,'' as defined in Section 4 of the FTC Act, does not extend to entities not organized to carry on business for their own profit or that of their members. 15 U.S.C. 44.

[4] *See* EISA Section 811 (defining acts or practices that shall be unlawful under ''rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens''). Because the rulemaking procedures for the issuance of trade regulation rules are limited to rules promulgated ''under'' Section 18(a)(1)(B) of the FTC Act (*see* 15 U.S.C. 57a(a)(1)(B)), the issuance of rules and regulations under EISA Section 811 is instead governed by the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. 553, and Part 1, Subpart C, of the Commission Rules of Practice for the adoption of non-Section 18 rules. *See* 16 CFR 1.21-1.26.

[5] 15 U.S.C. 57b(a)(1).

[6] 15 U.S.C. 57b(b).

[7] This amount has been adjusted upward from the original statutory amount of $10,000 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. 28 U.S.C. 2461.

with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.[8]

Because Section 813 of the EISA provides that a violation of Subtitle B shall be treated as a violation of such a rule, any person that violates Subtitle B is subject to these civil penalties.

Section 814(a) of Subtitle B further provides that — ''[i]n addition to any penalty applicable'' under the FTC Act — ''any supplier that violates section 811 or 812 shall be punishable by a civil penalty of not more than $1,000,000.''[9] Both Section 5(m)(1)(C) of the FTC Act, 15 U.S.C. 45(m)(1)(C), and Section 814(c)(1) of the EISA provide that each day of a continuing violation shall be considered a separate violation.

Section 815(a) provides that nothing in Subtitle B ''limits or affects'' Commission authority ''to bring an enforcement action or take any other measure'' under the FTC Act or ''any other provision of law.'' Section 815(b) provides that ''[n]othing in [Subtitle B] shall be construed to modify, impair, or supersede the operation'' (1) of any of the antitrust laws (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) or (2) of Section 5 of the FTC Act ''to the extent that . . . [S]ection 5 applies to unfair methods of competition.'' Section 815(c) provides that nothing in Subtitle B ''preempts any State law.''

II. Overview of the Advance Notice of Proposed Rulemaking

Section 811 applies to violations of ''such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.'' This Advance Notice of Proposed Rulemaking seeks public comment from interested parties, including other federal agencies and the States, on whether, and if so in what manner, the Commission should promulgate a rule pursuant to Section 811 in order to ensure that the rule, on balance, carries out the objectives of the statute by prohibiting practices that constitute manipulative or deceptive devices or contrivances to the benefit of the public interest.[10]

The Commission has devoted substantial resources to enforcing the antitrust laws in various parts of the petroleum industry, including in the refining and distribution of crude oil, gasoline, and petroleum distillates. The Commission has also expended significant research efforts in this same space. As a consequence, the Commission and its staff have experience with many parts of the petroleum industry. The Commission will draw upon this foundation in conducting this Rulemaking proceeding.

The Commission's consumer protection efforts provide a second important foundation for conducting this Rulemaking proceeding, and in particular for determining the extent to which the law of unfairness and deception can inform the Commission's interpretation of a ''manipulative or deceptive device or contrivance.''[11] In interpreting Section 5 of the FTC Act, the Commission has determined that a representation, omission, or practice is deceptive if (1) it is likely to mislead consumers acting reasonably under the circumstances; and (2) it is material, that is, likely to affect consumers' conduct or decisions with respect to the product at issue.[12] Section 5 also provides that an act or practice is unfair if the injury to consumers it causes or is likely to cause (1) is substantial; (2) is not outweighed by countervailing benefits to consumers or to competition; and (3) is not reasonably avoidable by consumers themselves.[13]

As a consequence of the foregoing law enforcement, research, and related efforts — through both its competition mission and its consumer protection mission — the Commission and its staff have gained an understanding of the domestic petroleum industry; of how participants in the industry compete; of how prices of gasoline and other refined petroleum products are determined; and of how particular practices may, in specific circumstances, constitute either unfair methods of competition or unfair or deceptive acts or practices, in violation of Section 5 of the FTC Act. The Commission expects to use this experience and understanding to effectuate the objectives of Subtitle B. Through this Advance Notice of Proposed Rulemaking, the Commission expects to secure new and valuable information concerning how best to achieve those objectives. Commenters are encouraged to review this document in its entirety and offer comments concerning any of the points or questions raised, as well as any other relevant issue.

III. The Antecedents of Section 811 and Relevant Legal Precedent

The manner in which the courts and regulatory agencies have interpreted provisions similar to those comprising Section 811 is relevant both to formulating a rule under Section 811 and to determining how the resultant formulation will fare in the courts. Public comment will provide critical information in that regard. While there are substantial similarities among prior interpretations and their contexts, there are substantial differences as well. In order to provide a framework within which commenters can develop and provide their own assessments for purposes of considering a rule under Section 811, we offer a brief discussion of the statutory and regulatory antecedents of Section 811, and court interpretations of similar statutes and regulations. The Commission encourages comment on these or any other aspects of precedent that may help to guide the Commission's approach in this Rulemaking.

Establishing a violation of Section 811 first requires a showing that a person[14] directly or indirectly used or employed a ''manipulative or deceptive device or contrivance.'' In determining the contours of this requirement —

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[8] 15 U.S.C. 45(m)(1)(A). Section 16(a)(1) of the FTC Act requires the Commission to refer such actions to the United States Attorney General in the first instance, and permits the Commission to file such actions in its own name if ''the Attorney General fails within 45 days after receipt of such notification to commence . . . such action.'' 15 U.S.C. 56(a)(1).

[9] It is not clear whether the use of the term ''supplier'' in Section 814 is intended to limit use of the remedy available under that section to violations committed by suppliers through *sales* of crude oil, gasoline, or petroleum distillates, or was intended to extend to violations committed by suppliers through *purchases* of such products as well. Commenters are encouraged to discuss this point.

[10] The prohibitions embodied in Section 812 of EISA became effective with enactment of EISA on December 19, 2007. These prohibitions therefore already apply to any person subject to the jurisdiction granted to the Commission by the FTC Act, and the Commission may seek legal and equitable relief to remedy violations of Section 812 in the manner described above, through civil actions in federal court.

[11] The term ''manipulative or deceptive'' arguably can be read as a single adjective. That is the approach the Federal Energy Regulatory Commission followed in promulgating the Final Rule discussed *infra*, in reliance on the fact that, with respect to Securities Rule 10b-5 cases, the Supreme Court had ''concluded that both [manipulative and deceptive] require 'misrepresentation.'" *Federal Energy Regulatory Commission, 18 CFR Part 1c: Prohibition of Energy Market Manipulation: Final Rule*, 71 FR 4244, 4253 n. 107 (January 26, 2006). By contrast, however, the FTC has for many years vigorously enforced the separate prohibition of ''deceptive acts or practices'' embodied in Section 5 of the FTC Act, 15 U.S.C. 45.

[12] *See generally* Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs.*, 103 F.T.C. 110, 174-83 (1984).

[13] 15 U.S.C. 45(n); *see generally* Federal Trade Commission Policy Statement on Unfairness, appended to *International Harvester, Co.*, 104 F.T.C. 949, 1070-76 (1984). Neither deception nor unfairness requires a showing of scienter.

[14] For the reasons discussed *supra*, the term ''person'' is used in this document to refer to ''person, partnership, or corporation,'' consistent with the jurisdictional reach of the FTC Act.

including determining the state of mind that is required — commenters are encouraged to address the extent to which the Commission can or should rely on four separate sets of existing statutory and regulatory constructs, discussed below.

A. The Securities Laws

The phrase ''manipulative or deceptive device or contrivance'' derives from the Securities Exchange Act of 1934 (Exchange Act). Section 10(b) of that statute prohibits the use or employment of:

> any *manipulative or deceptive device or contrivance* in contravention of such rules as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[15]

The Securities and Exchange Commission (SEC) relied on Section 10(b) of the Exchange Act to promulgate Rule 10b-5, which makes it unlawful for any person:

> (a) To employ any device, scheme, or artifice to defraud;
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . .; or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. . . .
>
> in connection with the purchase or sale of any security.[16]

In 1976, the Supreme Court determined that a private cause of action for damages would not lie under Section 10(b) or Rule 10b-5 without proof that the defendant possessed scienter; that is, the ''intent to deceive, manipulate, or defraud.''[17] In particular, the Court noted:

> Section 10(b) makes unlawful the use or employment of ''any manipulative device or contrivance'' in contravention of [Securities and Exchange] Commission rules. The words ''manipulative or deceptive'' used in conjunction with ''device or contrivance'' strongly suggest that [Section] 10(b) was intended to proscribe knowing or intentional misconduct.[18]

Moreover, the Court found that use of the terms ''[t]o use or employ'' supported ''the view that Congress did not intend [Section] 10(b) to embrace negligent conduct.''[19] The Court concluded that ''the language of [Section] 10(b) . . . clearly connotes intentional misconduct. . . .''[20] Soon thereafter, the Court determined that the SEC, as well as private plaintiffs, must:

> establish scienter as an element of a civil enforcement action to enjoin violations of . . . [Section] 10(b) of the [Securities Exchange Act of 1934], and Rule 10b-5 promulgated under that section of the 1934 Act.[21]

While the Supreme Court has reserved the question

> whether reckless behavior is sufficient for civil liability under Section 10(b) and Rule 10b-5, . . . [e]very Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required.[22]

More generally, the Court of Appeals for the Second Circuit has elaborated that, in order to establish a Rule 10b-5 violation, the SEC must establish that the defendant:

> (1) [m]ade a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; and (3) in connection with the purchase or sale of securities.[23]

B. The Natural Gas Act and the Federal Power Act

The Energy Policy Act of 2005 amended the Natural Gas Act and the Federal Power Act, respectively, to prohibit the same type of conduct that Section 10(b) of the Exchange Act targets — that is, the use or employment of ''any manipulative or deceptive device or contrivance (as those terms are used in [Section 10(b) of the Securities Exchange Act of 1934] . . .).''[24] In 2006, the Federal Energy Regulatory Commission (FERC) relied on those prohibitions to promulgate two rules — respectively prohibiting natural gas market manipulation and electric energy market manipulation (collectively referred to as the Final Rule). The FERC Final Rule is identical in many respects to SEC Rule 10b-5.[25] FERC also determined to interpret the Final Rule in a manner ''consistent with analogous SEC precedent that is appropriate under the circumstances.''[26] In particular, FERC included a scienter requirement, noting that ''[t]he final rule is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale energy markets,''[27] and that ''there can be no violation of the final rule, or any of its sections, absent a showing of the requisite scienter.''[28] FERC determined that a showing of recklessness would be sufficient to satisfy the scienter requirement under the FERC Final Rule.[29] FERC expressly declined to incorporate ''a specific intent standard'' into the Final Rule.[30]

FERC relied on the foregoing analysis to determine that it will take action pursuant to the Final Rule in cases where an entity:

> (1) [u]ses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order,

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[15] 15 U.S.C. 78j(b) (emphasis added). Section 9 of the Exchange Act more specifically addresses ''Manipulation of security prices,'' and prohibits or limits the use of certain practices with respect to ''[t]ransactions relating to purchase or sale of security;'' ''[t]ransactions relating to puts, calls, straddles, or options;'' ''[e]ndorsement or guarantee of puts, calls, straddles, or options;'' and ''practices that affect market volatility.'' 15 U.S.C. 78i(a),(b),(c),(h).

[16] 17 CFR 240.10b-5(a)-(c) (2008). In addition, the SEC's rules under Section 10(b) prohibit a number of specific practices in specific circumstances. *See* 17 CFR 240.10b-1 through 240.10b-18.

[17] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976); *accord, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. ___ (June 21, 2007), slip op. at 1-2, 7; *In re Worlds of Wonder Securities Litigation*, 35 F.3d 1407, 1424 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 185 (1995); *Loveridge v. Dreagoux*, 678 F.2d 870, 875 (10th Cir. 1982).

[18] *Ernst & Ernst*, 425 U.S. at 197. The Court concluded that the terms ''manipulative,'' ''device,'' and ''contrivance'' . . . make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence. Use of the word ''manipulative'' is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.

Id. at 199 (internal citations omitted). *See also Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 6-7 (1985); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 476 (1977) (the term ''manipulation'' ''refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.'').

[19] *Id.* at 199 n. 20.

[20] *Id.* at 201, *citing United States v. Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *accord, e.g., Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 690 (1980).

[21] *Aaron v. SEC*, 446 U.S. at 701-702.

[22] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. ___ (June 21, 2007), slip op. at 7 n. 3, *citing Ernst & Ernst v. Hochfelder*, 425 U.S. at 194 n. 12; *Ottman v. Hanger Orthopedic Group, Inc.*, 353 F.3d 338, 343 (collecting Court of Appeals cases).

[23] *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999).

[24] *Compare* Section 4A of the Natural Gas Act, 15 U.S.C. 717c-1, *with* Section 222 of the Federal Power Act, 16 U.S.C. 824v.

[25] 18 CFR 1c.1, 1c.2 (2008).

[26] *Federal Energy Regulatory Commission, 18 CFR Part 1c: Prohibition of Energy Market Manipulation: Final Rule*, 71 FR 4244, 4246 (January 26, 2006).

[27] *Id.* at 4246.

[28] *Id.* at 4252; *accord, id.* at 4253, *citing Ernst & Ernst v. Hochfelder*, 425 U.S. at 197; *Aaron v. SEC*, 446 U.S. at 690.

[29] *Id.* at 4253-54 and n. 109 (''Courts of appeal are in general agreement that recklessness in some form satisfies the scienter requirement of SEC Rule 10b-5.'') (citations omitted).

[30] *Id.* at 4253.

> rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.[31]

FERC defined fraud ''generally . . . to include any action, transaction, or conspiracy for the purpose of impairing, obstructing, or defeating a well-functioning market.''[32] FERC also provided examples of practices that would violate the Final Rule because the practices constituted ''manipulative or deceptive devices or contrivances.'' FERC's cited practices were already prohibited by its Market Behavior Rule 2 (since-repealed), but included in particular:

> wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation.[33]

FERC also determined to incorporate the ''safe harbor presumptions of compliance and affirmative defenses'' available under its Market Behavior Rules into its enforcement of the Final Rule.[34] FERC rejected the argument registered by some commenters that its rule was ''vague and overly broad,'' noting that it was modeled after SEC Rule 10b-5, and that the courts have determined that the latter rule is neither vague nor overly broad.[35]

FERC's statute specifically limited its application to actions ''in connection with a jurisdictional transaction.'' Relying on cases addressing Section 10(b) of the SEC, in its Final Rule, FERC defined ''in connection with'' to mean that ''in committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.''[36]

FERC's first litigated case under the Final Rule provides a helpful illustration of how it intends to enforce the Final Rule in practice. In that case, FERC issued an Order to Show Cause and Notice of Proposed Penalties against hedge fund Amaranth LLC, and two traders, alleging that they had illegally manipulated the price of transactions subject to FERC jurisdiction by trading in the New York Mercantile Exchange (NYMEX) Natural Gas Futures Contracts for February, March, and April of 2006. In particular, the Order alleged that the respondents intentionally manipulated the final, or ''settlement,'' price of the NYMEX Natural Gas Futures Contract — on three occasions in 2006 — by selling an extraordinary quantity of these contracts during the last 30 minutes of trading before they expired, with the purpose and effect of driving down the settlement price. The settlement price is explicitly used to determine the price for a substantial volume of physical natural gas transactions subject to FERC jurisdiction, and Amaranth had previously taken positions in various financial derivatives that were several times larger — and whose values increased — as a direct result of the fall in the settlement price of each natural gas futures contract. As a consequence, for every dollar Amaranth lost on its sales of the futures contracts, Amaranth gained several dollars on its derivative financial positions.[37] The Order gave Amaranth 30-days to show cause why it should not be assessed $200 million in civil penalties and be required to disgorge profits totaling $59 million, plus interest. The case remains in litigation.[38]

C. The Commodity Exchange Act

Interpretation of the first component of Section 811 can also be informed by the manner in which the concept of ''manipulation'' has been defined in cases arising under the Commodity Exchange Act (CEA).[39] That statute empowers the CFTC, *inter alia*, to bring an administrative enforcement action, or a civil injunctive action in federal district court against:

> any person (other than a registered entity) [who] is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity. . . .[40]

In addition, Section 9(a)(2) of the CEA makes it a felony for:

> [a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to corner or attempt to corner any such commodity . . . .[41]

The CEA also requires any board of trade (defined as any organized exchange or other trading facility[42]) that wishes to be designated as a contract market, *inter alia*, to comply with a variety of statutory ''Core Principles.''[43]

The Supreme Court decision in *Merrill Lynch v. Curran* provides an extensive discussion of the origins of futures trading and the CEA, and of how the foregoing statutory proscriptions of manipulation should be interpreted.[44] In particular, the Court held that the primary purpose of the 1974 amendments to the CEA was to protect ''against manipulation of markets and to protect any individual who desires to participate in futures market trading.''[45]

D. The Sherman Act, the Clayton Act, and the Federal Trade Commission Act

The enactment of Subtitle B raises the important question of the extent to which the Commission should rely

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[31] *Id.* at 4253.

[32] *Id., citing Dennis v. United States*, 384 U.S. 855, 861 (1966).

[33] *Id.* at 4254.

[34] *Id.* at 4255. Thus, for example, FERC will presume that a market participant that ''undertakes an action or transaction that is explicitly contemplated in Commission-approved rules and regulations'' does not violate the Final Rule. Moreover, if a market participant takes an action or engages in a transaction — at the direction of an Independent System Operator or a Regional Transmission Organization, but not approved by FERC — it can assert that as a defense for the action taken.

[35] *Id.* at 4250, *citing United States v. Persky*, 520 F.2d 283 (2d Cir. 1975); *Todd & Co. v. SEC*, 557 F.2d 1008, 1013 (3d Cir. 1977).

[36] *Id.* at 4249.

[37] *Commission Takes Preliminary Action in Two Major Market Manipulation Cases*, Federal Energy Regulatory Commission News (July 26, 2007), available at *http://www.ferc.gov/news/news-releases/2007/2007-3/07-26-07.pdf.*

[38] On July 25, 2007, the Commodity Futures Trading Commission (CFTC) filed a civil enforcement action in federal district court against Amaranth challenging many of the same actions at issue in the FERC proceeding described above. The CFTC is seeking permanent injunctive relief, an award of civil penalties, and other remedial and ancillary relief. The CFTC and FERC both noted that they had coordinated their respective investigations, pursuant to the agencies' Memorandum of Understanding. The ultimate resolution of the CFTC and FERC cases will provide important guidance concerning the interaction between their respective statutes and rules with respect to manipulation. *See U.S. Commodity Futures Trading Commission Charges Hedge Fund Amaranth and its Former Head Energy Trader, Brian Hunter, with Attempted Manipulation of the Price of Natural Gas Futures*, Commodity Futures Trading Commission News (July 25, 2007), *available at* (*http://www.cftc.gov/newsroom/enforcementpressreleases/2007/pr5359-07.html.*)

[39] The CEA provides that the CFTC possesses, *inter alia*, ''exclusive jurisdiction'' for ''transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market . . . or derivatives transaction execution facility . . . or any other board of trade, exchange, or market. . . .'' 7 U.S.C. 2(a)(1)(A). It further provides for non-exclusive CFTC anti-manipulation authority over cash and physical transactions, as well as certain derivatives transactions relating to securities. 7 U.S.C. 2(a)(1)(A), (C), (D).

[40] 7 U.S.C. 9, 13b; *see* 7 U.S.C. 15. The statute defines a ''registered entity'' as including certain boards of trade designated as contract markets; derivatives transaction execution facilities; and ''derivatives clearing organizations.'' 7 U.S.C. 1a(29).

[41] 7 U.S.C. 13(a)(2).

[42] 7 U.S.C. 1a(2).

[43] 7 U.S.C. 7(d).

[44] *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

[45] *Id.* at 372, n. 50. Subsequently, the Commodity Futures Modernization Act of 2000 identified the purposes of the CEA as including, *inter alia*, ''to deter and prevent price manipulation or any other disruptions to market integrity. . .'' 7 U.S.C. 5(b). *See also Frey v. Commodity Futures Trading Commission*, 931 F.2d 1171, 1175 (7th Cir. 1991).

upon antitrust and consumer protection precedent as a frame of reference for this Rulemaking proceeding. The legislation gave the Commission new law enforcement tools to prevent both market manipulation and the reporting of false information. However, the extent to which law enforcement agencies have been able to prevent manipulation or deception in the past may provide useful lessons as commenters offer their input as to how best to effectuate EISA Section 811 and the statutory objectives it represents.

In the context of antitrust law, the term ''manipulative or deceptive device or contrivance'' is not a term of art. But, practices that potentially fall within the definition of those terms have been analyzed in the past through the prism of the Sherman Act Section 1 prohibition against certain unreasonable contracts, combinations and conspiracies in restraint of trade; through the Sherman Act Section 2 prohibition against monopolization, attempts to monopolize, and conspiracies to monopolize; and through the FTC Act prohibition against unfair methods of competition.

For example, 60 years ago, the Supreme Court addressed the concept of manipulation in the petroleum industry in *United States v. Socony-Vacuum Oil Co.* In that case, 12 oil companies and five individuals violated Section 1 of the Sherman Act by operating the ''Mid-Continent Buying Program'' and the ''East Texas Buying Program.''[46] The defendant participants in these two programs agreed that they would purchase tank cars of ''distress gasoline'' from independent oil refiners.[47] Thereafter, the participants in the Mid-Continent Buying Program held monthly meetings at which each participant would advise the others of ''how much his company would buy and from whom.''[48]

The Supreme Court determined that the:

> whole scheme was carefully planned and executed to the end that distress gasoline would not overhang the markets and depress them at any time. And as a result of the payment of fair going market prices a floor was placed and kept under the spot markets. Prices rose and jobbers and consumers in the Mid-Western area paid more for their gasoline than they would have paid but for the conspiracy. Competition was not eliminated from the markets; but it was clearly curtailed, since restriction of the supply of gasoline, the timing and placement of the purchases under the buying programs and the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand.[49]

The Court determined that the purchases ''at or under the market are one species of price-fixing,''[50] and that ''there was substantial competent evidence that the buying programs resulted in an increase of spot market prices, of prices to jobbers and of retail prices in the Mid-Western area.''[51] The Court concluded that the buying programs, by stabilizing market prices, constituted ''one form of manipulation,'' and defined ''market manipulation in its various manifestations'' as:

> an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.[52]

The *Socony-Vacuum* decision is among many in antitrust and consumer protection law that may provide useful guidance to the Commission in determining the metes and bounds of manipulative conduct under Subtitle B.[53] To the extent commenters believe the Commission should be aware of particular antitrust or consumer protection law decisions, commenters are encouraged to discuss the cases and provide an explanation of the lessons to be incorporated from those opinions.

In addition, unlike the SEC, CFTC, and FERC, the Commission has long had authority to prevent ''unfair or deceptive acts or practices.''[54] That prohibition is not limited to ''devices or contrivances,'' and violations do not require proof of actual fraud or intent to deceive. The Commission seeks comments on any guidance its experience with unfair or deceptive acts or practices should or could provide in implementing its new authority.[55]

E. Reflecting on the Legal Framework — Questions for Commenters

The conduct component of Section 811 derives from a similar prohibition in Section 10(b) of the Securities Exchange Act of 1934 — as implemented by the SEC through its promulgation and enforcement of Rule 10b-5 — and from the 2005 amendments to the Natural Gas Act and the Federal Power Act, as implemented through regulations promulgated and enforced by FERC. The Commodity Exchange Act, as enforced by the CFTC, and the antitrust laws provide additional guidance as to the manner in which the Supreme Court and lower courts have interpreted the manipulation concept.

Commenters are encouraged to assess whether, and if so to what extent, a Section 811 rule should incorporate or otherwise reflect any other aspects of these statutory and federal court precedents. Commenters are encouraged to assess whether these statutory and federal court precedents indicate that a Section 811 rule should prohibit a person from using or employing ''any manipulative or deceptive device or contrivance'' only if that person possesses the scienter — to execute the allegedly manipulative strategy at issue — that is analogous to the general intent to injure competition component of the monopolization offense under Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. In addition, commenters are encouraged to assess whether, and if so to what extent, a Section 811 rule should incorporate or otherwise reflect the FTC Act prohibition of unfair or deceptive acts or practices.[56]

In addition, in the Commission's 2006 *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases Report to Congress*,[57] the Commission described and looked for a

[46] *United States v. Socony-Vacuum Oil Co., Inc., et al.*, 310 U.S. 150, 181-90 (1940).

[47] For example, in the Mid-Continent oil field, 17 independent refiners did not have regular outlets for their gasoline, and because they had to keep their refineries running, they had to sell approximately 600 to 700 tank cars of gasoline each month at ''distress'' prices. *Id.* at 178-79. For similar reasons, a number of independent refiners in the East Texas oil field had to sell a substantial number of tank cars of gasoline at ''distress'' prices. *See id.* at 185-90.

[48] *Id.* at 182. The East Texas Buying Program followed a similar approach with respect to independent refiners in the East Texas oil field. *Id.* at 185-90.

[49] *Id.* at 220.

[50] *Id.* at 223.

[51] *Id.* at 251. The Court rejected as irrelevant the defendants' arguments that the prices at issue were reasonable, and that their activities ''merely removed from the market the depressive effect of distress gasoline. . . .'' *Id.* at 229.

[52] *Id.* at 223.

[53] Other cases that may be of interest include *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004); *Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 455-56 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985); and *Virtual Maintenance Inc. v. Prime Computer Inc.*, 11 F.3d 660, 662 (6th Cir. 1993). This list is not intended to be exhaustive, but merely illustrative.

[54] *See supra* for the criteria the Commission uses under the FTC Act.

[55] Please note that nothing in connection with this Section 811 Rulemaking, any subsequently enacted rules, or related efforts should be construed to alter the standards associated with establishing a deceptive practice or an unfair practice in a case brought by the Commission.

[56] The Commission notes that neither knowledge nor intent need be shown to prove a deceptive practice or an unfair practice under Section 5 of the FTC Act. *See, e.g., FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573-74 (7th Cir. 1989).

[57] Federal Trade Commission Report to Congress, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (Spring 2006). Commenters may consider this report a useful primer on the industry.

number of types of practices and circumstances in various components of the petroleum refining and distribution system that might be viewed as manipulative.[58] Commenters are encouraged to discuss whether a Section 811 rule should limit or prohibit any of these types of practices and, if so, in what circumstances, including discussing the direct and indirect benefits and costs of doing so. Commenters are also encouraged to discuss conduct in connection with the purchase and sale of crude oil, which, though outside the scope of the 2006 report, is within the reach of Section 811.

IV. Particular Questions For Commenters

Below is a general framework within which commenters are encouraged to discuss what they believe the contours of a Section 811 rule should be. The Commission encourages commenters to answer specific questions, and to focus in particular on defining manipulative or deceptive behavior, in order to help the Commission formulate a workable rule that on balance benefits consumers.

A. Defining Market Manipulation

The Commission is considering various possible definitions of market manipulation for the purpose of this Rulemaking under Section 811. One possible definition is the following:

> *Market manipulation shall mean knowingly using or employing, directly or indirectly, a manipulative or deceptive device or contrivance — in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale — for the purpose or with the effect of increasing the market price thereof relative to costs.*

The Commission seeks comment on whether this proposed definition of market manipulation is one under which a rule may be adopted that is ''necessary and appropriate in the public interest or for the protection of United States citizens,'' as required by Section 811. The Commission also seeks comment on whether an effect on prices should be a necessary element of proof under either a charge of market manipulation or a charge of attempted market manipulation. In addition, the Commission encourages commenters to suggest any other definitions that, in their view, may better address the public policy concern enunciated through the Commission's new rulemaking authority.

B. Manipulative or Deceptive Device or Contrivance

As discussed above, Section 811 is modeled on authority previously granted to the SEC, FERC, and the CFTC. The Commission encourages commenters to address how Section 811's rulemaking authority should be exercised in light of the similar authority granted to the SEC and to FERC. In particular, the Commission seeks comments on how legal precedent established for violations of rules addressing manipulation or deceit in regulated behavior (such as securities trading or the execution of transactions carried out by regulated entities) should apply to unregulated behavior, such as the purchase and sale at wholesale of crude oil, gasoline, or petroleum distillates. To what extent (or in what particulars) should the jurisprudence under the other laws addressing manipulation apply under the Commission's new authority? What should not apply? The Commission encourages commenters to identify both general criteria and specific applications of the other laws, and to explain why each should or should not apply under a Section 811 rule, with a specific discussion of the costs and benefits of application

The Commission also seeks comment on the potential costs or benefits of an FTC rule that simply mirrors the language of SEC Rule 10b-5 or the language of the FERC Final Rule. In particular, could a Section 811 rule, that is similar to the rules adopted by the SEC and FERC for their specific purposes, provide sufficient clarity as to prohibited practices in the different context of crude oil, gasoline, and petroleum distillates transactions? In addition, commenters are asked to consider whether a rule that provides more specificity would be adequately broad and flexible to allow the Commission to address new and varied types of manipulation and deception. If the Commission develops a rule with more specific guidance and standards, what should those standards be?

In the larger context discussed above, the Commission also seeks comment on the regulatory authority granted to the other federal agencies, and the potential or actual impact on consumer prices from the exercise of this authority. In addition, the Commission encourages commenters to address whether an anti-manipulation rule promulgated under Section 811 could be a mechanism for abuse by customers, competitors, or others.

C. Effect on the Market

As indicated in a number of the cases discussed above, as well as the FERC rulemaking, the primary focus of the prohibition on manipulation appears to be on practices that are not a reaction to market forces. Instead, the focus is on practices that intentionally, willfully, or recklessly cause distortions in the market, such as artificially raising or depressing prices. Commenters are encouraged to consider whether this should be a focus of a potential Section 811 rule.

D. Scienter/State of Mind

In determining whether particular conduct violates any of the statutory and regulatory proscriptions, the federal courts have required a showing that the defendants or respondents were not simply negligent, but rather possessed at least the requisite scienter to execute the manipulative practice in question.

For example, the courts have interpreted Section 10(b) of the SEA to require a showing of scienter — that is, of intentional, willful, or reckless conduct designed to deceive or defraud by controlling or artificially affecting market prices or market activity. FERC relied on that precedent to incorporate a scienter requirement into its Final Rule. By contrast, the courts and the CFTC have interpreted the CEA and its implementing regulations as requiring a showing of a specific intent to injure a futures market through the execution of an intentionally manipulative strategy. The Commission seeks comment on the appropriate nature and level of scienter for a violation, and on whether that determination should depend on the nature of the practice at issue (and, if so, in what way). An additional question for consideration includes whether the Commission should incorporate either of the above scienter standards into a Section 811 rule. Commenters are encouraged to provide a specific discussion of the costs and benefits of the standard they recommend.

E. In Connection With

Establishing a violation of Section 811 also requires establishing that the conduct at issue was used or employed ''in connection with the purchase or sale of crude oil[,] gasoline[,] or

[58] The Commission examined: ''(1) all transactions and practices that are prohibited by the antitrust laws, including the Federal Trade Commission Act, and (2) *all other transactions and practices, irrespective of their legality under the antitrust laws, that tend to increase prices relative to costs and to reduce output.*'' *Id.* at ii (emphasis added). The Commission made clear, however, that this definition for purpose of the report represented neither existing legal prohibitions nor, in its view, an identification of practices that should be prohibited.

petroleum distillates at wholesale.''[59] As a consequence, Section 811 does not extend to retail sales of gasoline. Instead, it arguably covers sales and purchases starting at the point at which crude oil, gasoline, or a petroleum distillate is sold by the producer or importer, and ending at the point at which it is purchased by a retailer. Commenters are encouraged to discuss how the phrase ''in connection with the sale or purchase of crude oil, gasoline, or petroleum distillates at wholesale'' should be interpreted. In relying on cases addressing Section 10(b) of the SEA to promulgate its Final Rule, FERC defined ''in connection with'' to mean that ''in committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.''[60] The Commission specifically seeks guidance as to whether the FERC model is appropriate for adoption by the Commission.

F. In the Public Interest or For the Protection of United States Citizens

Establishing a violation of Section 811 also requires a showing that the practices ''used or employed'' violate a rule that the Commission has prescribed ''as necessary or appropriate in the public interest or for the protection of United States citizens.'' Commenters are encouraged to address how the Commission may best ensure that a Section 811 rule satisfies this standard. Commenters are also encouraged to discuss whether antitrust or consumer protection principles should or should not be incorporated at all into a Section 811 rule. For example, the Commission seeks comment on whether a Section 811 rule should conform to traditional antitrust analysis by requiring (1) the use or employment of ''any manipulative or deceptive device or contrivance'' to satisfy the anticompetitive conduct component of the offenses of monopolization and attempted monopolization prohibited by Section 2 of the Sherman Act and (2) the intent and market power components of those offenses to be satisfied under the standards explained throughout antitrust case law.[61] Commentors are asked to explain whether such a construction is necessary or appropriate in the context of this Rulemaking.

G. Penalties

Section 814 provides civil penalty authority of up to $1,000,000, which can be assessed against ''suppliers'' for each violation for each day, taking into consideration the seriousness of the violation and any attempts by the violator to mitigate the harm. The Commission seeks comment on whether any potential chilling effect of these penalties on legitimate business behavior should affect the interpretation of, or required state of mind for, a ''manipulative deceptive device or contrivance.'' The Commission also seeks comment on whether the Section 814 civil penalty authority extends only to violations committed by suppliers through sales of crude oil, gasoline, or petroleum distillates, or is intended to extend to violations committed by suppliers through purchases of such products as well.

H. Overlapping Jurisdiction

As noted above, Congress has provided anti-manipulation authority to FERC and the CFTC to reach behavior previously not regulated by those agencies. In some cases, this authority may lead to a shared jurisdiction over the same behavior. The manipulation authority provided by Section 811 may subject market participants to similar overlapping agency oversight, and create the potential for market participants to be subject to differing standards of conduct and multiple levels of liability. The Commission seeks comment on the possible effects of this type of overlapping jurisdiction. The Commission also seeks comment on the usefulness of inter-agency information sharing on market manipulation regulation law enforcement; on reducing costs; on speeding enforcement actions; on other potential benefits or costs for consumers and businesses; and, on how it can best harmonize its enforcement efforts with those of FERC and the CFTC.

I. Potential Practices

The Commission requests comment on the following topic list, but encourages commenters to present any other proposals for formal rule provisions that they may wish to suggest. This list is not to be perceived as a formal proposal to address any of the practices described pursuant to Section 811; rather, it is intended to be illustrative, and to encourage further thinking.

- Certain refiners have made public announcements of planned reductions in the overall utilization of their refinery plant(s). The Commission seeks comment on: (1) whether such practices should be viewed as manipulative; (2) the perceived harm from such actions, if any; (3) whether such practices should or would manifest the intent necessary to violate Section 811; and (4) whether any business justifications balance the perceived harm.
- Refiners engage in periodic scheduled maintenance and refinery downtime in order to prevent breakdowns or to change equipment. On the one hand, such maintenance and scheduled downtime are necessary for the safe and efficient operation of petroleum refineries; on the other hand, public announcements of downtime may enable competitors to collude inappropriately. The Commission therefore seeks comment on both the costs and the benefits of a rule restricting public pre-announcements of such downtime.
- Wholesale petroleum market participants frequently rely on independent published data for market prices in effecting purchase and sale contracts and other supply arrangements. In the past, Commission staff have received allegations of false or misleading physical sales reports furnished to private reporting entities by market participants in thinly traded petroleum commodity markets. The Commission seeks comment on experiences with this practice, the likelihood the practice could drive false or misleading market prices, the ability of a market manipulation rule

[59] The phrase ''crude oil gasoline or petroleum distillates,'' without commas, is used in Section 811 (as well as in the first clause of Section 812), while the phrase ''crude oil, gasoline, or petroleum distillates'' (with commas) is used in Section 812(3). This is presumably a non-substantive typographical error; therefore, all parts of both Sections should be read to cover all three types of products (that is, crude oil, gasoline, and petroleum distillates).

[60] 71 FR 4249, *quoting SEC v. Zandford*, 535 U.S. 813, 825 (2002) (the Supreme Court has construed the ''in connection with'' requirement broadly, ''to encompass many circumstances where securities transactions 'coincide' with the overall scheme to defraud'').

[61] The Supreme Court has defined market power as the power '''to force a purchaser to do something that he would not do in a competitive market,''' and as '''the ability of a single seller to raise price and restrict output.''' *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 464 (1992), *citing Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984); *accord, e.g., United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). Consistent with that determination, the *Horizontal Merger Guidelines* define market power as to a seller as ''the ability profitably to maintain prices above competitive levels for a significant period of time.'' *U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines* (1992), Section 0.1, at 4; *accord, Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 99 (2d Cir. 1998); *United States v. Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990). As the Commission has noted, although the terms ''market power'' and ''monopoly power'' are often treated as synonymous from an economic perspective, market power can be thought of as a continuum along which the power to control prices varies, beginning with the complete absence of market power at one end and ending with monopoly power at the other. *International Telephone & Telegraph Co.*, 104 F.T.C. 280, 411 n. 60 (1984).

effectively to police such activities, and the potential benefits or harm to public data sources or private data compilation services.

- The Commission seeks comment on the circumstances, if any, under which a firm's decision regarding supplying a market (including whether to reduce, increase, or maintain unchanged the amount it supplies) should be considered manipulative or deceptive. Commenters are encouraged to address both the immediate and the long-term costs and benefits to consumers of permitting, prohibiting, or restricting such actions, as well as the effects such decisions would have during a time of national emergency or natural disaster.
- Some have argued that market participants with terminal or other storage inventory should be under an affirmative obligation to release inventory during price spikes when the participant knows, or should know, that the release of the product will be profitable. The Commission seeks comment on when such an obligation should be imposed; what possible intent standard should be used as a test for liability; how one should measure profitability in such a circumstance; and, the costs and benefits to consumers of placing such an obligation on potential market suppliers.
- FERC and state regulations govern open access to common carrier pipelines. In some circumstances, prospective shippers on a given common carrier pipeline may lack the ability to access that pipeline due to an inability to place product in a terminal from which to enter the pipeline system, or because those shippers lack a terminal from which to exit the pipeline system. The Commission seeks comment on whether a denial of access to a non-regulated terminal may be an act of market manipulation subject to Section 811, and on whether applying the rule to this behavior is likely to result in benefits that outweigh the costs.
- Regulated petroleum pipelines may not allow new shippers a share of a pipeline's capacity when historical shippers seek to transport more petroleum products than the pipeline is capable of transporting. The Commission seeks comment on whether pre-announcements that pipelines are approaching capacity constraints may be a conduit for market manipulation or deceit under Section 811, and on whether applying the rule to this behavior is likely to result in benefits that outweigh the costs.
- Accurate cost and volume data for wholesale transactions at all levels of trade, refinery or pipeline outage data, and import and inventory volumes are frequently difficult to construct or are unavailable. The Commission seeks comment on whether it possesses the authority to promulgate a rule under Section 811 requiring a covered person to maintain and submit such information to the Commission or any other government entity, and, if so, whether it should do so, and what particular data it should require.
- The Commission seeks comment on how to determine an artificial price. For example, if an entity with market power that was not obtained by improper means, sets its prices above what would have been a competitive level, and as a result, prices in the market are higher than competitive prices, is this an artificial price? Commenters are encouraged to explain how the competitive price should be determined, including during a period in which capacity has declined unexpectedly because of a disaster. Commenters are encouraged to assess, in particular, whether setting the prices above a competitive level should be considered a manipulative device or contrivance; whether that answer would depend on other factors or circumstances, and, if so, on which ones; and what the direct and indirect, short- and long-term effects of treating this as a manipulative device or contrivance would be.
- The Commission seeks comment as to what extent or in what circumstances should the distinction between forbidden and permitted business behavior be primarily a function of the intent, purpose, or knowledge of the actor? For example, if a firm holds back inventory during a supply shortage with the intent to raise or expectation of raising immediate prices, but the effect is that the inventory is sold later, when the shortage is more severe, and thus mitigates the more severe shortage, should that be a violation? If a firm decreases the amount of product sold in a tight market in order to grow its business elsewhere, regardless of whether prices in the tight market will rise, should that be a violation?
- The Commission encourages commenters, in addressing any of the foregoing practices, to discuss whether, and if so how, a Section 811 rule should account for the fact that the practice is used prior to, during, or in the aftermath of a natural disaster, such as an earthquake or a hurricane.

V. Questions Arising From Two Case Studies

This part of the Advance Notice of Proposed Rulemaking focuses on two separate series of events that are frequently cited as examples of possible manipulation in energy markets.

A. BP Amoco/Atlantic Richfield, FTC Docket No. C-3938

In *BP Amoco/Atlantic Richfield*, the Commission issued a consent order that remedied the anticompetitive effects of the proposed $27 billion merger between BP Amoco p.l.c. (BP) and Atlantic Richfield Company (ARCO).[62] Under the terms of the settlement, BP was required to divest, among other things, all of ARCO's assets relating to oil production on Alaska's North Slope (ANS) to Phillips Petroleum Company (Phillips). The divestitures required by the consent order fully resolved the competitive concerns that initially led the Commission to seek a preliminary injunction to block the transaction. By requiring the divestiture of all of ARCO's operations in Alaska, the Commission ensured that BP's market share in the exploration, production and transportation of ANS crude oil would remain unchanged, and that the number of players would remain the same.

The divestiture itself is not remarkable for purposes of this Rulemaking. However, the Commission had reason to believe that BP occasionally had exported ANS crude oil to the Far East in order to increase spot prices for ANS crude oil on the West Coast, and that BP benefitted from those higher spot prices because of its status as a merchant marketer. Commenters are encouraged to discuss this scenario, whether this type of conduct is likely to recur, whether this type of conduct still occurs (and if so, how frequently), and whether this type of practice can be characterized as a manipulative or deceptive device or contrivance — in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale — that should be prohibited by a Section 811 rule. Commenters are also encouraged to address scenarios such as, for example, when a person or entity determines to hold a supply of crude oil or petroleum product off the coast of the United States for five days — waiting for the price to go up, and thereby shorting the U.S. supply of crude oil or petroleum product — and then sells the crude oil or petroleum product after the price has risen, thereby securing greater revenues than it would have secured if it had simply sold the supply on the first day rather than the fifth.

[62] *In the Matter of BP Amoco p.l.c. and Atlantic Richfield Company, FTC File No. 9910192, Docket No. C-3938* (August 25, 2000) (hereinafter BP Amoco/ARCO).

B. Enron

The substantial disruptions in Western electricity and natural gas markets in 2000 and 2001 are often cited as the product of market manipulation by Enron Corp. and other energy traders, and the Commission is interested in securing comments on the extent to which those disruptions may provide guidance as to what may constitute the use of a manipulative or deceptive device or contrivance, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale. In May 2001, FERC initiated a staff investigation to determine whether Enron or any other sellers manipulated electricity and natural gas markets in California and other Western states in 2000 and 2001. In a Final Staff Report issued in March 2003, the FERC staff found ''significant market manipulation,'' but also determined that

> significant supply shortfalls and a fatally flawed market design were the root causes of the California market meltdown. The underlying supply-demand imbalance and flawed market design greatly facilitated the ability of certain market participants to engage in manipulation.[63]

The staff found in particular that markets for natural gas and electricity in California were inextricably linked; that dysfunctions in each market fed off the other during the crisis; that spot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market; and that the dysfunctions in the natural gas market appeared to stem, at least in part, from efforts to manipulate price indices compiled by trade publications.[64] The FERC Staff Report concluded, *inter alia*, that Enron manipulated natural gas markets to the detriment of California electricity consumers.[65]

The FERC Staff Report provides an extensive discussion of a number of manipulative trading strategies that energy traders used, including two of particular relevance to this Rulemaking proceeding. First, a number of market participants provided false reports of natural gas prices and trade volumes to industry publications, including in particular *Gas Daily* and *Inside FERC*, which the staff characterized as ''the most influential and relied-upon compilers of natural gas price indices.''[66] The staff found that ''the false reporting included fabricating trades, inflating the volume of trades, omitting trades, and adjusting the price of trades.''[67] The staff further found that:

> [t]he predominant motives for reporting false information were to influence reported gas prices, to enhance the value of financial positions or purchase obligations, and to increase reported volumes to attract participants by creating the impression of more liquid markets. Market participants that sold power in California, or that were affiliated with such sellers, also had incentives to manipulate reported prices because the clearing price set for power was based, in part, on natural gas spot prices.[68]

Second, the staff found that Enron used its subsidiary, EnronOnline (EOL), to carry out several different types of manipulation. The staff found that certain characteristics — including in particular the fact that Enron served as the counterparty to every trade on EOL — made the system ripe for abuse, and permitted Enron to use EOL to effect a number of different types of manipulation. In particular, the staff found that wash trades — in which two parties would prearrange a pair of sales of the same product with no net change in ownership — were common on EOL. The parties effected such ''trades'' in order artificially to influence the closing price on EOL, and/or to increase the apparent volume of trading in order deceptively to make the market for that product appear to be more liquid than was actually the case. The staff further found that EOL itself ''often posted its willingness to buy and sell at the same price;'' that Enron also manipulated prices on EOL ''by having affiliates on both sides of certain wash-like trades;'' and that these practices both created a false sense of liquidity and raised or otherwise distorted prices.[69] The staff also found that EOL gave Enron a huge information advantage — derived from its central position in the physical markets — which enabled it to earn more than $500 million in 2000 and 2001 from its financial products, while sustaining trading losses at a much lower level in the ''thinner physical markets.''[70]

Four important characteristics of the markets for the physical products — that is, for electricity and natural gas — facilitated execution of the foregoing strategies. First, electricity cannot economically be stored more than a few seconds. As a result, electricity generation and transmission are necessarily ''just-in-time'' activities. Because storing electricity is prohibitively expensive, electricity suppliers must essentially anticipate demand on a minute-by-minute basis, and errant forecasts can cause the system to become unstable and lead to blackouts. Moreover, the absence of storage capability may make physical withholding more attractive to a supplier — because closing a plant or generation unit will then result in the immediate withdrawal of output from the market — and unless such a reduction is offset by a competing supplier, this output reduction might be sufficient to produce an increase in price levels.

Second, electricity suppliers may be able to increase profits by withholding capacity during peak demand periods because other rival facilities are already committed to production and cannot respond. Third, the regulation of wholesale electricity markets generates an enormous amount of publicly available information. In particular, the cost structure of electricity generators is publicly available, and this information may potentially support the exercise of market power. And fourth, electric utilities — including in particular those in the California market — have relied upon purchasing electricity on spot markets, rather than through the negotiation of long-term contracts, and that type of reliance may facilitate the exercise of market power by placing electricity suppliers in a repetitive situation that supports signaling.

The Commission encourages commenters to consider the foregoing discussion, and to address in particular whether any of the types of manipulative strategies used in the electricity and natural gas markets might be used in the markets for crude oil, gasoline, and petroleum distillates.

C. Questions For Commenters Relating to Case Studies

• Prior to 1995, Congress had imposed a ban on exports of Alaska North Slope crude oil. In 1995, Congress repealed that ban, but also granted the President the power to reimpose the export ban in certain circumstances. The Commission seeks comment on the effects of the export ban and of its repeal; on the residual authority of the President to reimpose the ban; and on

[63] *Final Report On Price Manipulation In Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000*, Prepared by the Staff of the Federal Energy Regulatory Commission (March 2003), at ES-1 (hereinafter FERC Staff Report), available at (*http://www.ferc.gov/industries/electric/indus-act/wec/enron/info-release.asp*)

[64] FERC Staff Report at ES-1.

[65] Thereafter, in June 2007, an Administrative Law Judge issued a decision revoking Enron's market-based rate authorization as of January 1997 and ordering it to disgorge $1.6 billion of unjust profits. *See* the initial decision in the *Gaming and Partnership Proceedings* 119 FERC ¶ 63013 (2007), Docket No. EL03-180-000, available at (*http://www.ferc.gov/industries/electric/indus-act/wec/enron/info-release.asp*) (hereafter Initial Decision).

[66] *Id.* at ES-6.

[67] *Id.*

[68] *Id.*

[69] *Id.* at ES-11-12.

[70] *Id.* at ES-12.

any implications these circumstances may have for a Section 811 rule.

• Consider the following scenario: a supplier provides a particular type or formulation of product that cannot be obtained from other suppliers (not due to monopolization by the supplier). This particular product is needed in certain areas, and is not easily substituted for by other suppliers' products. The Commission seeks comment on whether the following practice would constitute a manipulative device or contrivance: if the supplier sold some of its product to certain areas but not to other areas, at a loss or for a profit that is not as great as it would likely have made in the area where it did not sell. In answering this question, commenters are encouraged to address whether their answers depend on the supplier's knowledge or motivation(s), such as that the supplier (1) might have had contractual arrangements elsewhere; (2) might have anticipated developing more business elsewhere; (3) might have anticipated that prices in the particular areas might go up, making the rest of its supply sold in those areas more profitable; or (4) might have taken the foregoing steps for the express purpose of causing the prices in those areas to go up. Commenters are also encouraged to address whether their answers depend on how difficult it is to substitute for or do without the product, and, if so, what constitutes an unreasonable degree of difficulty.

• As noted above, market manipulation by certain firms (Enron and others) is often cited as a significant cause of the substantial disruptions in Western electricity and natural gas markets in 2000 and 2001. The Commission seeks comment on the extent to which such activities, including but not limited to the activities described above, may provide guidance as to what may constitute the use of a manipulative or deceptive device or contrivance, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.

• In light of the electricity market characteristics identified by the FERC Staff Report, and the physical peculiarities of electricity storage and distribution, the Commission seeks comment on how relevant this experience may be to wholesale petroleum markets, and on whether (and if so to what extent) this experience can inform the Commission's approach to distinguishing manipulative or deceptive devices or contrivances from legitimate business practices.

VI. Regulatory Flexibility Act

• Does Subtitle B of the EISA impose any disparate impact on small businesses? If so, how may this disparate impact be minimized?

• Describe and, where feasible, estimate the number of small entities to which Subtitle B applies.

VII. Conclusion

The Commission will proceed from this ANPR to a Notice of Proposed Rulemaking. The evaluation of comments submitted in response to this ANPR will comprise part of the Commission's rulemaking process.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E8–10102 Filed 5–6–08: 8:45 am]

BILLING CODE 6750–01–S

COAST GUARD

33 CFR Part 165

[Docket No. USCG–2008–0314]

RIN 1625–AA00

Safety Zone; Red Bull Air Race, Detroit River, Detroit, MI

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishing a temporary safety zone on the Detroit River, Detroit, Michigan. This Zone is intended to restrict vessels from portions of the Detroit River during the Red Bull Air Race. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with air races.

DATES: Comments and related material must reach the Coast Guard on or before May 22, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2008–0314 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) Online: *http://www.regulation.gov.*

(2) Mail: Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) Hand delivery: Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) Fax: 202–493–2251.

FOR FURTHER INFORMATION CONTACT: LT Jeff Ahlgren, Waterways Management, U.S. Coast Guard Sector Detroit, 110 Mount Elliot Ave., Detroit, MI 48207, (313) 568–9580.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0314), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name, mailing address, and an e-mail address or other contact information in the body of your document to ensure that you can be identified as the submitter. This also allows us to contact you in the event further information is needed or if there are questions. For example, if we cannot read your submission due to technical difficulties and you cannot be contacted; your submission may not be considered. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time, click on ''Search for Dockets,'' and enter the docket number for this rulemaking (USCG–2008–0218) in the Docket ID

box, and click enter. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

C. Privacy Act

Anyone can 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 the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://DocketsInfo.dot.gov.*

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to U.S. Coast Guard Sector Detroit at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

This temporary safety zone is necessary to ensure the safety of vessels and the public from hazards associated with an air race. The Captain of the Port Detroit has determined air races in close proximity to watercraft and infrastructure pose significant risk to public safety and property. The likely combination of large numbers of recreation vessels, airplanes traveling at high speeds and performing aerial acrobatics, and large numbers of spectators in close proximity on the water could easily result in serious injuries or fatalities. Establishing a safety zone around the location of the race course will help ensure the safety of persons and property at these events and help minimize the associated risks.

Discussion of Proposed Rule

This proposed rule is intended to ensure safety of the public and vessels during the setup, course familiarization, time trials and race in conjunction with the Red Bull Air Race. The air race and associated set-up and removal will occur between 9 a.m., May 29, 2008 and 6 p.m., June 1, 2008. The safety zone will be enforced from 9 a.m. to 5 p.m. on May 29, 2008 through May 31, 2008, and from 9 a.m. to 6 p.m. on June 1, 2008.

The safety zone will encompass all navigable waters of the United States on the Detroit River, Detroit, MI, bound by a line extending from a point on land southwest of Joe Louis Arena at position 42°19.4′ N; 083°3.3′ W, northeast along the Detroit shoreline to a point on land at position 42°20.0′ N; 083°1.2′ W, southeast to the international border with Canada at position 42°19.8′ N; 083°1.0′ W, southwest along the international border to position 42°19.2′ N; 083°3.3′ W, and northwest to the point of origin at position 42°19.4′ N; 083°3.3′ W. (DATUM: NAD 83).

The Captain of the Port will cause notice of enforcement of the safety zone established by this section to be made by all appropriate means to the affected segments of the public. Such means of notification will include, but is not limited to, Broadcast Notice to Mariners and Local Notice to Mariners. Likewise, the Windsor Port Authority intends to restrict vessel movement on the Canadian side of the Detroit River. The exclusionary area on the Canadian side will be aligned with the east and west borders of the U.S. safety zone and will extend to the shoreline along Windsor, ON. The Captain of the Port will issue a broadcast Notice to Mariners notifying the public when enforcement of the safety zone is terminated.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary.

This determination is based on the minimal time that vessels will be restricted from the zone and the zone is an area where the Coast Guard expects insignificant adverse impact to mariners from the zones' activation.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in the above portion of the Detroit River between 9 a.m. and 6 p.m. on May 29, 2008 through June 1, 2008.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for approximately six hours each day of the race. Additionally, small entities such as passenger vessels, have been involved in the planning stages for this event and have had ample time to make alternate arrangements with regards to mooring positions and business operations during the hours this safety zone will be in place. Furthermore, local sailing and yacht clubs will be notified prior to the event by Coast Guard Station Belle Isle with information on what to expect during the event with the intention of minimizing interruptions in their normal business practices. In the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of the Port Detroit to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast Notice to Mariners that the regulation is in effect. Additionally, the COTP will suspend enforcement of the safety zone if the event for which the zone is established ends earlier than the expected time.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Jeff Ahlgren, Waterways Management, U.S. Coast Guard Sector Detroit, 110 Mount

Elliot Ave., Detroit MI, 48207; (313)568–9580. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

The Coast Guard recognizes the treaty rights of Native American Tribes. Moreover, the Coast Guard is committed to working with Tribal Governments to implement local policies and to mitigate tribal concerns. We have determined that these regulations and fishing rights protection need not be incompatible. We have also determined that this Proposed Rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Nevertheless, Indian Tribes that have questions concerning the provisions of this Proposed Rule or options for compliance are encouraged to contact the point of contact listed under **FOR FURTHER INFORMATION CONTACT**.

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. This event establishes a safety zone, therefore paragraph (34)(g) of the Instruction applies.

A preliminary ''Environmental Analysis Check List'' and ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether this proposed rule should be categorically excluded from further environmental review. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Section *165.T09–0314 is added to read as follows:*

§ 165.T09–0314 Safety Zone; Red Bull Air Race, Detroit River, Detroit, MI.

(a) *Location.* The following area is a temporary safety zone: all U.S. waters of the Detroit River, Detroit, MI, bound by a line extending from a point on land southwest of Joe Louis Arena at position 42°19.4′ N; 083°3.3′ W, northeast along the Detroit shoreline to a point on land at position 42°20.0′ N; 083°1.2′ W, southeast to the international boarder with Canada at position 42°19.8′ N; 083°1.0′ W, southwest along the international border to position 42°19.2′

N; 083°3.3′ W, and northwest to the point of origin at position 42°19.4′ N; 083°3.3′ W. (DATUM: NAD 83).

(b) *Effective Period.* This regulation is effective from 9 a.m. on May 29, 2008 through 6 p.m. on June 1, 2008. The safety zone will be enforced daily from 9 a.m. to 5 p.m. on May 29, 2008 through May 31, 2008, and from 9 a.m. to 6 p.m. on June 1, 2008.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Detroit, or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Detroit or his on-scene representative to obtain permission to do so.

Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port or his on-scene representative.

Dated: April 23, 2008.

P.W. Brennan,

Captain, U.S. Coast Guard, Captain of the Port Detroit.

[FR Doc. E8–10238 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–15–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2007–11]

Definition of Cable System

AGENCY: Copyright Office, Library of Congress.

ACTION: Termination of rulemaking proceeding.

SUMMARY: The Copyright Office previously sought comment on issues associated with the definition of the term ''cable system'' under the Copyright Act as well as on the National Cable and Telecommunications Association's request for the creation of subscriber groups for the purposes of eliminating the ''phantom signal'' phenomenon. After reviewing the record in this proceeding, the Copyright Office finds that it lacks the statutory authority to adopt rules sought by the cable industry. The Copyright Office, however, clarifies regulatory policy regarding the application of the 3.75% fee to phantom signals. This proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Ben Golant, Assistant General Counsel, and Tanya M. Sandros, General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: Section 111 of the Copyright Act (''Act''), title 17 of the United States Code (''Section 111''), provides cable systems with a statutory license to retransmit a performance or display of a work embodied in a primary transmission made by a television or radio station licensed by the Federal Communications Commission (''FCC''). Cable systems that retransmit broadcast signals in accordance with the provisions governing the statutory license set forth in Section 111 are required to pay royalty fees to the Copyright Office. Payments made under the cable statutory license are remitted semi–annually to the Copyright Office which invests the royalties in United States Treasury securities pending distribution of these funds to those copyright owners who are entitled to receive a share of the fees.

I. Introduction

In 2007, the Copyright Office published a Notice of Inquiry (''NOI'') seeking comment on issues associated with the definition of the term ''cable system'' under the Copyright Act and the Copyright Office's implementing rules. The Copyright Office also sought comment on the National Cable and Telecommunications Association's (''NCTA'') request for the creation of subscriber groups for the purposes of eliminating the ''phantom signal'' phenomenon. 72 FR 70529 (Dec. 12, 2007). The purpose of the NOI was to solicit input on, and address possible solutions to, the complex issues presented when only a subset of a cable system's subscriber base receive a particular distant signal.

II. Background

Section 111(f) of the Copyright Act defines a ''cable system'' as:

> ''a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1)[of Section 111], two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered one system.'' 17 U.S.C. 111(f).

In implementing the cable statutory license provisions of the Copyright Act, the Copyright Office adopted a definition of the term ''cable system'' that replicated the statutory provision. The Copyright Office, however, separated the text of the provision into two parts in order to clarify that a cable system can be defined in either of two ways for the purpose of calculating royalty fees. Thus, the regulatory definition provides that ''two or more facilities are considered as one individual cable system if the facilities are either: (1) in contiguous communities under common ownership or control or (2) operating from one headend.'' 37 CFR 201.17(b)(2). The Copyright Office stated that its interpretation of the statutory ''cable system'' definition was consistent with Congress's goal of avoiding the ''artificial fragmentation'' of systems (a large system purposefully broken up into smaller systems) and the consequent reduction in royalty payments to copyright owners. *See Compulsory License for Cable Systems*, 43 FR 958 (Jan. 5, 1978).

The Copyright Office has, in the past, recognized certain practical problems associated with the definition when cable systems merge. For example, in 1997, the Copyright Office stated that ''[s]o long as there is a subsidy in the rates for the smaller cable systems, there will be an incentive for cable systems to structure themselves to qualify as a small system.'' *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (''1997 Report'') (Aug. 1, 1997) at 45. The Copyright Office further stated that although Section 111(f) has worked well to avoid artificial fragmentation, ''it has had the result of raising the royalty rates some cable systems pay when they merge. This happens because, if the two systems have different distant signal

offerings, then all the signals are being paid for based on the total number of subscribers of the two systems, even if some of those signals are not reaching all the subscribers.'' *Id.* at 46. The Copyright Office, echoing the NCTA's nomenclature, called this phenomenon the ''phantom signal'' problem. *Id.* In the 1997 Report, the Copyright Office recommended to Congress, as part of a broader effort to reform Section 111, that cable statutory royalties be based on ''subscriber groups'' that actually receive the signal. The Copyright Office also recommended that systems under common ownership and control be considered as one system only when they are either in contiguous communities or use the same headend (*i.e.*, two unrelated operators sharing a single headend would not be treated as one system). *Id.* at 47. Believing that it lacked the authority to alter the definition of cable system as established in Section 111, the Copyright Office suggested that Congress amend the Copyright Act in accordance with its recommendations. Id at 46.

NCTA has proposed a three part remedy to rectify the phantom signal problem as it sees it. First, it urged the Copyright Office to change its cable system regulatory definition. Second, it requested that the Copyright Office adopt a new rule permitting cable operators that operate a cable system serving multiple communities with varying complements of distant broadcast signals to use a community–by–community approach when determining the royalties due from that system, seemingly without regard to whether a phantom signal problem exists. NCTA, in short, advocated the creation of ''subscriber groups'' for cable royalty purposes where the operator pays royalties only where distant signals are actually received by a particular household. Finally, NCTA urged the Copyright Office to announce that it would not challenge Statements of Account on which the cable operator has used a community–by–community approach for determining Section 111 royalties.

Specifically, NCTA proposed that Section 201.17(b)(2) of the Copyright Office's rules be amended so that the last sentence reads as follows: ''For these purposes, two or more cable facilities are considered as one individual cable system if the facilities are in contiguous communities, under common ownership or control, and operating from one headend.'' Stated another way, under NCTA's proposed rule change, cable facilities serving multiple communities would be treated as a single system for statutory license purposes only when three distinct conditions are satisfied: (1) the facilities are in contiguous communities; (2) the facilities are under common ownership or control; and (3) the facilities are operating from the same headend. The significant change NCTA suggests is that the word ''or'' be replaced by the word ''and'' before the clause ''operating from one headend.'' NCTA asserted that this regulatory change would help resolve the phantom signal issue because it would base royalty payments on signals that are carried throughout the cable system and made available to all subscribers. According to NCTA, a cable operator would still be deterred from ''artificially fragmenting'' its facility under this approach because any operator who attempts to do so would lose the operational efficiencies concomitant with a single headend. NCTA also stated that while its proposed definition is narrower than the existing definition, it would ensure that facilities, which were truly technically and managerially distinct from one another, would not be artificially joined together for purposes of the statutory license. In the NOI, we noted that NCTA's proposed rule change raises significant statutory interpretation issues and sought comment on this possibility. 73 FR at 70532.

In addition to arguing for a change in the Copyright Office's cable system definition, NCTA also advocated the adoption of a new paragraph (g) in Section 201.17 of the Copyright Office's rules. NCTA's proposed rule amendment would create subscriber groups, based on cable communities and partial carriage, for the purpose of calculating royalties in a manner that would eliminate phantom signals. Specifically, the NCTA proposed that: (1) ''A cable system serving multiple communities shall use the system's total gross receipts from the basic service of providing secondary transmissions of primary broadcast transmitters to determine which of the Statement of Account forms identified in paragraph (d)(2) is applicable to the system;'' and (2) ''Where the complement of distant stations actually available for viewing by subscribers to a cable system is not identical in all of the communities served, the royalties due for the system may be computed on a community–by–community basis by multiplying the total distant signal equivalents derived from signals actually available for viewing by subscribers in a community by the gross receipts from secondary transmissions from subscribers in that community.'' NCTA adds that the total copyright royalty fee for a system to which this rule would apply must be equal to the larger of (1) the sum of the royalties computed for the system on a community–by–community basis or (2) 1.013 percent of the systems' gross receipts from all subscribers (which is the current minimum royalty fee payment for SA–3 systems beginning with the July 1–December 31, 2005, accounting period). We sought comment on the overall structure and formulation of NCTA's ''combined revenues/community–specific royalty determination'' proposal. We also sought comment on several examples comparing royalties calculated under the current regulatory structure and how they might be calculated if we were to adopt NCTA's proposed rule changes. 72 FR at 70533, 70537–40.

In the NOI, we questioned whether NCTA's proposals were limited only to those situations where two or more systems have recently merged. It appeared that NCTA's expansive proposals likely covered any situation where a cable operator provides a different set of distant signals to different subscriber groups served by the same cable system. We noted that its regulatory proposal was much different from the matter the Copyright Office raised and addressed in its 1989 and 1997 rulemaking proceedings on cable system mergers and acquisitions. We therefore sought comment on whether our interpretation of NCTA's proposals were correct. 72 FR at 70531.

III. Comments

Section 111 Royalty Structure and Phantom Signals. NCTA admits that the ''phantom signal'' problem is not confined to circumstances such as where System A and System B, each carrying a unique set of distant signals, merge and are not yet technically integrated. It notes that, in this situation, the Copyright Office suggests that the phantom signal issue is temporary, until the systems can become technically integrated. It states, however, the phantom signal problem can arise in other contexts. It notes that in some cases it may not be possible to technically integrate multiple systems with identical line–ups system–wide. In other cases, it comments that phantom signals can arise when cable operators pursue a regional strategy of clustering systems, or where commonly–owned System A and System B become contiguous with each other through system expansion. NCTA asserts that where there are legitimate reasons for maintaining separate headends, the rules unfairly require the operator to artificially ''merge'' these systems and inflate royalty payments. In addition to

technical reasons, NCTA remarks that channel lineups may be different because customers of two different systems may have different settled viewing expectations based on historical distant signal carriage. It states that this circumstance cannot be solved simply by adding a distant signal to a particular channel line–up because of the scarcity of available channels on a basic service tier.

NCTA asserts that the Office's phantom signal policy affords copyright owners a ''bonanza based upon non–performance of their works.'' NCTA also asserts that the current ''phantom signal policy'' presents operators with a series of choices, none of them good for consumers or competition. It states that, on the one hand, application of the phantom signal policy may result in an increase in royalty payments that the operator either must pass through to subscribers (who receive nothing of value in return) or must absorb itself (reducing the resources available to provide other services). NCTA states, on the other hand, that the operator may simply be deterred from carrying stations that might trigger phantom signal payments, depriving consumers of programming that they desire. It concludes that neither of these results is good for consumers or good for competition.

The American Cable Association (''ACA'') asserts that the phantom signal problem requires cable operators to pay for a license for the non–use of copyrighted works and posits that no theory of intellectual property rights supports an obligation to pay for a license for works not used. ACA asserts that the current royalty scheme requires a cable operator to pay more royalties for distant signals that are not carried than for distant signals actually carried. It provides the following example: two cable systems in Missouri serving equal–sized subscriber groups. System A carries only WGN, system B carries both WGN and KVTJ. If the owner of system B purchases system A, connects the systems with fiber optics, and eliminates system A's headend, the nonexistent KVTJ signal broadcast to subscriber group A becomes a ''phantom signal'' and accounts for 58% of all royalties payable by the combined cable system. It argues that this is irrational and unfair.

At the outset, Copyright Owners[1] comment that the ''phantom signal'' problem is one of the industry's own creation; that is, a cable operator purposefully chooses to make certain distant signals available to only some of its customers. They comment that NCTA's proposals are not limited to situations where mergers result in the combined system offering phantom signals, but also cover any situation where a cable operator provides a different set of distant signals to different subscriber groups. Copyright Owners then assert that the formula for calculating Section 111 royalties represents a statutory compromise where the cable operator pays ''miniscule royalty rates'' that are derived from a broad revenue base. Copyright Owners believe that the rates in the statutory formula are inequitable, and favor the cable operator, even when applied to the broad revenue base. They state that if the Copyright Office adopts NCTA's suggestions, then merging Form 3 systems would pay even less royalties after a merger. They remark that Congress adopted a ''convenient revenue base,'' not one that was congruent to programming actually received by subscribers. They request that the Copyright Office act expeditiously to reject NCTA's proposal and end the controversy so that all participants in the Section 111 royalty scheme have a degree of certainty to move forward.

Copyright Owners state that aside from the statutory minimum fee, the Office's interpretation of Section 111 does not require cable operators to pay for any distant signals they do not ''use'' or works they do not ''perform.'' They assert that cable systems pay for only those distant signals that they actually carry and therefore ''use;'' once they carry a station in any portion of their system, they engage in a public performance of each work broadcast by the station, regardless of the total number of subscribers who actually receive that work. 17 U.S.C. 101 (definition of ''to perform publicly''). They add that if a cable system does not carry a distant signal in any portion of its system (and thus does not perform any work included in that signal), the system does not ascribe any DSE value to that signal in its Section 111 royalty calculation. They assert that nothing in the Office's existing rules governing phantom signals requires payment for ''non–use'' or affords copyright owners a ''bonanza for non–performance,'' as NCTA and ACA contend.

Copyright Owners take issue with NCTA's complaint that the law ''makes no sense'' because it requires payment of royalties for works that ''are not being seen by the operator's customers.'' They comment that ''It is more than strange'' that the principal representative of the cable television industry would complain about requiring payments for programming ''not being seen'' by cable subscribers. Copyright Owners remark that the cable business model is premised on requiring each subscriber to pay for packages of programming, the majority of which programming is never ''seen'' by that subscriber. In defense of that business model, they note that NCTA itself has been a vocal opponent of any ''a la carte'' requirement that would allow consumers to pay for only programming they want to see. *See A La Carte – Fewer Choices, Less. Diversity, Higher Prices*, http://www.ncta.com/IssueBrief. aspx?contentId=15 (last visited March 25, 2008). Copyright Owners note that, in any event, there is nothing in Section 111 that restricts royalty payment to copyrighted works actually ''seen'' by cable subscribers. They conclude by stating that ''the fact that NCTA's proposals are based upon the notion that only programming actually seen should be compensated under Section 111 provides further confirmation of the impropriety of those proposals.''

Program Suppliers comment that NCTA does not provide any real–life examples of where the phantom signal problem has had any adverse effect. They state that NCTA's proposal would rewrite the royalty payment system for all cable systems, not just those with a supposed phantom signal problem. They also reply that ACA's effort to eliminate the phantom signal problem is based on a pre–determined hypothetical with no real–world counterpart.

NCTA, in reply, states that the Copyright Owners that have attempted to defend phantom signal payments do not, and cannot, demonstrate that there is anything rational about requiring a cable operator to pay more for the retransmission of a distant signal simply because the operator happens to serve subscribers in a neighboring community where it does not retransmit that signal. It states that, instead, they try to justify phantom signal payments based on the false notion that an obligation to compensate copyright owners for the fictional use of their works is somehow embedded in the structure of the Act and the Office is powerless to change it.

Section 111(f) and the Cable System Definition. Copyright Owners state that NCTA has asked the Office to substitute the word ''and'' for the word ''or'' above, so that cable systems would be considered a single system only if they were in contiguous communities under common ownership and control, and operated from one headend. They argue that this proposal is inconsistent with

[1] Copyright Owners are comprised of the Joint Sports Claimants, the Music Claimants, Program Suppliers, National Association of Broadcasters, Devotional Claimants, Public Television Claimants, and National Public Radio.

the canons of statutory interpretation as well as the legislative purpose behind Section 111.

Copyright Owners note that NCTA claims, as justification for the rule change, that the existing cable system definition inhibits the practice of clustering. They point out, however, that the number and size of clusters have risen, and no cable system would make a decision to cluster solely based on its Section 111 royalty obligations. In any event, they remark that Congress intended that two merging systems should pay more in royalties than if they remained as two smaller systems. They state that this position is consistent with Section 111, which establishes a royalty schedule based on a cable operator's ability to pay. Program Suppliers also note that system clustering has not been inhibited by Section 111's definitions or its royalty structure. They note that the number of cable subscribers served by clusters has more than doubled from 1994 to 2003 and the proportion of subscribers in clusters has risen from 34% to 81% of all basic cable subscribers. They further note, at the same time, total annual cable royalty fees paid fell from $161 million to $132 million.

NCTA recognizes that Congress's purpose in enacting the cable system definition was to prevent artificial fragmentation in order to reduce royalty fees owed. It asserts that while the Office cannot change the ''cable system'' definition, it can protect against artificial fragmentation without requiring irrational fee calculations. NCTA comments that its proposal would still require operators to continue to combine revenues from separate–but commonly–owned and contiguous–cable systems to determine their filing status as a Form 1, 2 or 3 system.

Statutory Authority. Program Suppliers assert that the Copyright Office does not have the authority to interpret the statutory term ''or'' in the Section 111(f) definition of cable system to mean ''and.'' They comment that the Office must follow the explicit language of the statute in formulating its regulations. Copyright Owners add that Section 111 specifies only one situation where a cable system may ''prorate'' its ''gross receipts;'' that is, where the system carries a ''partially distant'' signal. They state that NCTA is asking the Office to permit proration of ''gross receipts'' and the creation of subscriber groups in many additional circumstances. They argue that Congress did not give the Copyright Office the authority to expand the language of the Act in the manner proposed by the NCTA. In any event, Copyright Owners submit that the Copyright Office has already articulated that it has no authority to adopt NCTA proposals, yet, NCTA keeps claiming this issue is unresolved.

NCTA replies that the Copyright Owners' comments ignore that the Office has adopted a similar method of calculating royalties, permitting community–specific calculations in cases of partially permitted, partiallynon–permitted distant signal carriage. NCTA asserts that the Act does not expressly require this exception either, but no one is suggesting that the Office exceeded its authority by adopting a rational solution to that administrative problem. Rather, the Office has an obligation to make ''common sense'' responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent.

Subscriber Group Proposal. NCTA argues that its subscriber group proposal does not require a statutory amendment to Section 111. It notes that Program Suppliers, at one time, supported a very similar method for calculating royalties. It comments that even though Section 111 is silent on whether subscriber groups can be created, it certainly does not expressly mandate phantom signal treatment. It notes, for example, that the Copyright Office's rules already authorize operators to create subscriber groups to calculate royalties for ''partially–permitted, partially non–permitted'' distant signals. It concludes that the Copyright Office is able to remedy the phantom signal problem even if the definition of ''cable system'' is not changed.

NCTA states that calculating royalties based on actual carriage is entirely consistent with the Act's structure. It argues that the requirement that operators pay a minimum fee, regardless of whether any distant signals are carried at all, is the one narrow exception to the general principle of paying only for what is carried. NCTA notes that the legislative history explains the minimum payment for the privilege of retransmitting distant signals served a particular purpose: ''the purpose of this initial rate, applicable to all cable systems in this class, is to establish a basic payment, whether or not a particular cable system elects to transmit distant non–network programming.'' Beyond this basic payment required of all operators retransmitting broadcast signals, NCTA asserts that the Act and its legislative history show no intent to inflate the amount of other payments through some artificial levy for non–use.

According to Copyright Owners, NCTA states that the Office's current regulations prohibiting the creation of subscriber groups are inconsistent with the ''fundamental principle'' that a cable system should be required to pay royalties only for ''actual signal carriage'' and thus ''use'' of copyrighted works. Copyright Owners argue that the Act's legislative history does not support this assertion. Copyright Owners also suggest that NCTA's proposal introduces methodological wrangles and monitoring expenses. They assert that current statement of account forms do not provide all the necessary information needed to ensure compliance.[2] They conclude that adopting NCTA's proposal would not only increase uncertainty and disputes, but upset the entire regulatory scheme set up by the Copyright Office.

In Reply, Program Suppliers assert that NCTA's proposed rewrite of Section 201.17(b)(2) appears as nothing more than a new effort to legitimize artificial fragmentation designed to reduce royalty fees. They further assert that NCTA's proposal would allow cable operators to choose what is a ''separate'' system on the basis of whatever makes sense from a business standpoint. Program Suppliers conclude that NCTA's plan would bestow on operators both the motive and the means to fragment their systems so as to reduce the applicable royalty fees, exactly the situation that the current Section 111(f) definition was intended to prevent. They state that such a result would unfairly penalize copyright owners, allowing cable operators to contort the statutory license scheme to reduce for their benefit the already limited compensation copyright owners receive.

Program Suppliers comment that NCTA's contention that no statutory amendment is required to adopt a ''not carried'' subscriber group category is belied by its own discussion of the existing subscriber groups allowed by the current regulations: one each for a non–permitted distant signal, a permitted distant signal, or a local signal. Program Suppliers state that each of those regulations is anchored on an explicit statutory provision: the permitted, non–permitted subscriber groups rely on Section 801(b)(2)(B) that applies the 3.75% rate only to nonpermitted signals, while Section 111(d)(1)(B) allows subscriber groups for partially distant and partially local

[2] Copyright Owners argue that the Copyright Office needs to create an audit right so that royalty claimants may investigate SOAs and also request that the Office post on its website a list of cable Statements of Account that do not calculate royalties in accordance with Office regulations.

signals. They argue that there is no comparable statutory provision for NCTA's proposed fourth designation ''not carried''' signals that explicitly allows the use of ''not carried'' subscriber groups. Program Suppliers conclude that because Section 111 does not exempt ''not carried'' distant signals from royalty fee payments, no valid basis exists on which to promulgate such a subscriber group methodology for calculating royalties.

In Reply, NCTA notes that its proposal would simply require contiguous communities to combine revenues, and calculate royalties based on distant signals actually retransmitted in that community. It asserts that Program Suppliers and Copyright Owners have not provided a sufficient policy reason why its subscriber group proposal should not be adopted.

ACA argues that if the Copyright Office concludes that it lacks the statutory authority to adopt NCTA's proposal, then it should recommend that Congress amend Section 111 to clarify that a cable operator is only obligated to pay royalties on revenues derived from the actual retransmission of a signal to subscribers.

NOI examples. In the NOI, we sought comment on several royalty scenarios, based on actual Statement of Account filings, to illustrate NCTA's proposals in action. 72 FR at 70537–40. To provide context, we reiterate that there are two types of cable system SOAs currently in use. The SA1–2 Short Form is used for cable systems whose semi–annual gross receipts are less than $527,600.00. There are three levels of royalty fees for cable operators using the SA1–2 Short Form: (1) a system with gross receipts of $137,000 or less pays a flat fee of $52.00 for the retransmission of all broadcast station signals; (2) a system with gross receipts greater than $137,000.00 and equal to or less than $263,800.00, pays between $52.00 to $1,319.00; and (3) a system grossing more than $263,800.00, but less than $527,600.00 pays between $1,319.00 to $3,957.00. Cable systems falling under the latter two categories pay royalties based upon a fixed percentage of gross receipts. The SA–3 Long Form is used by larger cable systems grossing $527,600.00 or more semi–annually. We used the terms ''Form 1,'' ''Form 2,'' and ''Form 3'' to describe the SOA–type systems that were being merged in the scenarios. We used the terms ''System 1'' and ''System 2'' as the generic names of the systems in each of the examples; these terms do not reflect the type of SOA that such a system would file with the Copyright Office.''

With regard to the royalty scenarios, NCTA comments that the Office ''strangely'' focuses on the size of the royalty pool and ignores everything else. It notes that the examples in Set 1 show a 900% increase in royalties paid by System 2 users under the current approach, but only a 70% increase under its proposal. In Set 2, it notes that while its proposal does not result in an increase, there should still be no concern with artificial fragmentation because two Form 3 systems are being merged. In Set 3, it notes that total royalty payments would be the same post–merger as they are pre–merger under its proposal where the line–ups are the same, but under the current approach rates would go up 55% – from $41,401 to $64,447. With regard to the latter result, NCTA comments that ''Only an Alice in Wonderland 'through the looking glass' perspective could lead one to conclude that its proposal results in a ''reduction'' in an operator's royalty payments.'' NCTA comments that its proposal merely prevents the large, and unjustified, increases in royalty payments that can be produced by the irrational phantom signal policy.

NCTA comments that other hypothetical examples are unlikely to occur in the real world and do not justify inaction on its petition. It notes, for example, the comment on application of the syndicated exclusivity surcharge to subscriber groups. It states that only seven systems paid syndex surcharge royalties last accounting period, and the amount paid ($25,000) is *de minimis* when compared to the total semi–annual royalty payments of more than $70 million. Similarly, it notes that the Office suggests that there could be scenarios where a Form 1 system merging with a Form 3 system might pay less than the $52 minimum fee if it carries no distant signals and has gross revenues less than $5,133. It argues that concerns about these relatively farfetched scenarios, though, do not justify inaction here. NCTA admits that anomalous situations might occasionally arise if subscriber groups are used for calculating royalties, but remarks that the Office could tweak NCTA's proposed regulations to address these issues. It emphasizes that these unusual situations do not provide a legitimate reason to avoid remedying this situation altogether.

Program Suppliers state that the disconnect between NCTA's claim that actual carriage should control the royalty plan and should be the basis for calculation of royalty payments is demonstrated by the hypothetical in Set 1, Scenario 1, which NCTA mistakenly asserts shows a phantom signal problem. According to Program Suppliers, NCTA uses this hypothetical, involving merger of a Form 2 with no distant carriage and a Form 3 system with distant carriage, for the proposition that ''the mere fact that these two systems are combined for filing purposes results in a 900 percent increase in copyright costs for subscribers to System 2 [the Form 2 system].'' Program Suppliers note that they have previously demonstrated in their Section 109 comments that royalty payment obligations of cable operators do not correlate to subscriber fees. *See* Program Suppliers' Section 109 Comments, Docket No. 2007–1, at 8–10. Second, They state that NCTA assumes the 900% increase is due solely to phantom signals, but the same increase would apply post–merger if System 2 carried exactly the same complement of distant signals as System 1 pre– and post–merger. They assert that no phantom signal claim could be made based on that hypothetical. To the contrary, they argue that the 900% increase would occur due to the extremely low Form 2 flat fee, $1,931, postulated for pre–merger System 2. They state that the flat fee does not change even if pre–merger System 2 carried the same signals as did System 1. They conclude that the royalty payment increases contained in the Set 1 Scenarios follow exactly the statutory plan intended by Congress, viz., royalties for Form 3 systems are substantially higher than the *de minimis* payments made by smaller systems.

Copyright Owners add that the Copyright Office did not misapply NCTA's subscriber group proposals; rather, the Office has applied it in the way some of NCTA's members have done. They note that, according to NCTA, cable operators using the subscriber group proposal must calculate a minimum fee for each subscriber group with less than one DSE — and then add those minimum fees to the royalties calculated for each subscriber group with one or more DSEs. *See* NCTA Comments at 12 n.31 (stating that Copyright Office ''miscalculates'' the royalty owed by one of its hypothetical cable systems because it ''mistakenly failed to compute the minimum fee due from subscribers in Group 1''). Copyright Owners assert that cable operators have not been following NCTA's own approach; rather, they have been routinely ascribing a zero royalty — rather than the minimum fee — to any subscriber group with no DSEs. Copyright Owners add that NCTA has been using fractional DSE values (rather

than a minimum fee) to calculate the royalty for any subscriber group with less than one, but more than zero, DSEs. Copyright Owners conclude that ''there are multiple methods for implementing a subscriber group policy for phantom signals. The one trait they all share in common is that none is consistent with Section 111.''

IV. Discussion

We published the NOI to gather comments on the long–debated issue of phantom signals. The responses to the NOI have substantially aided our effort to understand the issues surrounding the cable industry's proposals. Based on the record evidence, we find that NCTA has not adequately demonstrated that its proposed changes are permissible under Section 111. We cannot read the statute or its legislative history to permit the creation of subscriber groups as suggested. NCTA argues about public policy and the inherent unfairness of the current system, but it ignores the underlying legal construct that binds the Office. We believe Section 111 is clear. As long as a cable operator subjects itself to the statutory license, and publicly performs the non–network programming carried by a distant signal, it must pay royalties for such use no matter if some subscribers are unable to receive it.

Further, as we have stated in the past, we do not believe we have the statutory authority to change the royalty fee structure in the manner suggested by the cable industry. While the NCTA argues that the Office has the authority to adopt its proposed rule change, it ignores our limited role under Section 111, which allows the Office to administer a statutory rate structure, but gives us no discretion to alter that scheme. The cable industry has long been aware of our perspective on this issue and our policy of requesting additional payment when a cable operator does not submit the appropriate amount of royalties for a partially carried distant signal, yet it has maintained that it has been an unresolved issue. The cable industry can no longer cite to any inaction on our part for not paying royalties that are due for the use of the Section 111 license.

In any event, we believe that NCTA has made cogent policy arguments concerning the inadequacies of the current statute. However, Congress is the proper forum to address its concerns. In 1997, the Copyright Office recommended to Congress, as part of a broader effort to reform Section 111, that cable statutory royalties should be paid on a flat per subscriber–per system basis just as satellite carriers are required to do under Section 119 of the Copyright Act. *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (Aug. 1, 1997) at 60. This approach would eliminate the phantom signal problem. In lieu of this proposal, and assuming that operators would continue to pay royalties based on gross receipts, the Office recommended that the Section 111 royalty fee structure be based on ''subscriber groups'' that actually receive the signal. *Id.* at 59. The Copyright Office also recommended that systems under common ownership and control be considered as one system only when they are either in contiguous communities or use the same headend (*i.e.*, two unrelated operators sharing a single headend would not be treated as one system). *Id.* at 47.

On this point, we note that Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (''SHVERA'') requires the Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Copyright Act and recommend any necessary legislative changes no later that June 30, 2008. In the NOI in this proceeding, we stated that we understood our responsibilities under SHVERA to closely examine the continued relevancy of Section 111 and its many provisions.[3] We also noted that the matters raised by the parties on the phantom signals issue deserved consideration, sooner rather than later. 72 FR at 70536–37. Consequently, we proceeded with the current rulemaking and, with the publication of today's notice, conclude that the proposed regulatory changes cannot solve the problem. Nevertheless, we continue to consider the issues raised in this proceeding in the context of the pending Section 109 Report and possible legislative solutions.

We are nevertheless compelled to resolve one issue before terminating this docket. In the NOI, we noted that we have historically accepted the retransmission of phantom signals at the permitted rate (''base rate fee''). We stated, however, that some cable operators have raised concern that the Office might find, at some point in the future, that the retransmission of a phantom signal should be treated as if it were actually carried and thus subject to the 3.75% fee as a non–permitted signal. In the absence of a clear policy statement on this matter, the Office has not stipulated payment of the 3.75% fee and has left the decision as to which rate applies to the operator's discretion. 72 FR at 70535. In response to questions raised about the 3.75% fee in the NOI, NCTA stated that there is no rationale for applying the fee simply because two systems merge. It stated that the 3.75% fee was only meant to apply to newly added signals carried for the first time, not for phantom signals. Neither Copyright Owners nor Program Suppliers commented on the relationship between the 3.75% fee and phantom signals.

We find it is necessary to resolve the application of the 3.75% fee to phantom signals to provide closure on the matter. In the NOI, we noted that on one hand, the 3.75% fee could be applied to non–permitted phantom signals because there is no specific statutory provision or Office regulation exempting such payment. We also commented that, on the other hand, the cable industry generally has, for nearly three decades, reported and paid royalties under the assumption that the 3.75% fee would not be applied to non–permitted phantom signals. Further, our review of the Statements of Account indicate that most cable systems have paid either the Base Rate Fee or no fee for phantom signals while very few cable systems have paid the 3.75% fee for these signals. In the NOI, we sought comment on the appropriate policy in this context.

We believe that cable operators, under the law, do not have to pay the 3.75% fee for the retransmission of distant broadcast signals that a subset of the subscriber population served by a cable system is unable to receive. Under Section 801 of the Copyright Act, the 3.75% fee royalty adjustment was intended to address carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals. 17 U.S.C. 801(b)(2)(B). The United States Court of Appeals for the District of Columbia Circuit explained that the 3.75% fee was to apply only to ''newly added signals, *i.e.*, those carried for the first time after the change in the FCC's distant signal rules.'' *See National Cable Television Association, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 180 (D.C. Cir. 1983). Based upon the language of the statute and relevant legal precedent, it is reasonable to conclude that the 3.75% fee is intended to only apply to ''newly'' carried distant broadcast signals and not to other situations such as those where signals are not available on a system–wide basis. As NCTA argues, ''[i]mposing the 3.75% rate on a signal

[3] Several parties commented on phantom signals in response to the Section 109NOI. *See, e.g.*, ACA comments at 10-13, NCTA comments at 18-19, Joint Sports reply comments at 11, NAB comments at 11, and Program Suppliers comments at 6.

not carried in a particular community would be completely unmoored from any justification for the penalty rate in the first place.'' NCTA comments at 14. In any event, we note that if two cable systems merge, and the operator then carries a non–permitted distant signal above its market quota, under the analysis stated herein, this ''newly added'' signal would be subject to the 3.75% fee.

V. Conclusion

Based on the preceding, we hereby terminate this proceeding. The Office will not consider the issues raised by NCTA in any further proceeding unless Congress so requires by statute. This constitutes a final action by the Copyright Office.

Dated: May 2, 2008.

Marybeth Peters,

Register of Copyrights.

[FR Doc. E8–10088 Filed 5–6–08; 8:45 am]

BILLING CODE 1410–30–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–7778]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1 percent annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before August 5, 2008.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–7778, to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151, or (e-mail) *bill.blanton@dhs.gov*.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151 or.(e-mail) *bill.blanton@dhs.gov*.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

Administrative Procedure Act Statement. This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Jackson County, North Carolina, and Incorporated Areas				
Abbs Creek	At the confluence with Caney Fork	None	+2419	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of East Brasstown Road (State Road 1744).	None	+2688	
Allens Branch	At the confluence with Scott Creek	None	+2074	Unincorporated Areas of Jackson County, Town of Sylva.
	Approximately 1,500 feet upstream of East Nugget Lane.	None	+2480	
Barkers Creek	At the confluence with Tuckasegee River	None	+1899	Unincorporated Areas of Jackson County.
	Approximately 350 feet upstream of West Barkers Creek Road (State Road 1392).	None	+2022	
Big Witch Creek	At the confluence with Wrights Creek	None	+2438	Eastern Band of Cherokee Indians.
	Approximately 1.6 miles upstream of the confluence with Wrights Creek.	None	+3024	
Blackrock Creek	At the confluence with Soco Creek	None	+2530	Unincorporated Areas of Jackson County, Eastern Band of Cherokee Indians.
	Approximately 1.3 miles upstream of confluence with Soco Creek.	None	+3052	
Blanton Branch	At the confluence with Scott Creek	None	+2143	Unincorporated Areas of Jackson County.
	Approximately 1,200 feet upstream of East Racking Cove (State Road 1775).	None	+2371	
Brook Branch	At the confluence with Greens Creek	None	+2140	Unincorporated Areas of Jackson County.
	Approximately 220 feet upstream of East Alpine Road	None	+2199	
Brushy Fork	At the confluence with Greens Creek	None	+2261	Unincorporated Areas of Jackson County.
	Approximately 20 feet upstream of West Brushy Fork Road (State Road 1371).	None	+2327	
Buff Creek	At the confluence with Scott Creek	None	+2260	Unincorporated Areas of Jackson County.
	Approximately 1,900 feet upstream of East Bamboo Trail.	None	+2428	
Bumgarner Branch	At the confluence with Mill Creek (into Tuckasegee River).	None	+2114	Unincorporated Areas of Jackson County.
	Approximately 1,200 feet upstream of Big Orange Way.	None	+2136	
Camp Creek	At the confluence with Tuckasegee River	None	+1856	Unincorporated Areas of Jackson County.
	Approximately 50 feet upstream of East Firefly Road (State Road 1408).	None	+2088	
Cane Branch	At the confluence with Tuckasegee River	None	+1871	Unincorporated Areas of Jackson County.
	Approximately 1,670 feet upstream of the confluence with Tuckasegee River.	None	+1953	
Cane Creek	Approximately 50 feet upstream of East Old Cullowhee Road (State Road 1002).	None	+2058	Unincorporated Areas of Jackson County.
	Approximately 2,000 feet upstream of East Old Cullowhee Road (State Road 1002).	None	+2122	
Caney Fork	Approximately 10 feet upstream of the confluence with Tuckasegee River.	None	+2123	Unincorporated Areas of Jackson County.
	Approximately 0.9 mile upstream of the confluence of Mull Creek.	None	+2932	
Cedar Creek	At the confluence with West Fork Tuckasegee River ..	None	+3499	Unincorporated Areas of Jackson County.
	Approximately 1.1 miles upstream of East Receptive Drive.	None	+3672	
Chastine Creek	At the confluence with Cane Creek	None	+2550	Unincorporated Areas of Jackson County.
	Approximately 2,000 feet upstream of East Caney Fork Road (State Road 1737).	None	+2824	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Chattooga River	At the North Carolina/South Carolina State boundary	None	+2150	Unincorporated Areas of Jackson County.
	Approximately 0.7 mile upstream of the confluence of Chattooga River Tributary 5.	None	+3399	
Cope Creek	Approximately 80 feet upstream of confluence with Scott Creek.	+2045	+2046	Unincorporated Areas of Jackson County, Town of Sylva.
	Approximately 50 feet upstream of East Claude Cook Road (State Road 1712).	None	+2396	
Cox Branch	At the confluence with Cullowhee Creek	None	+2107	Unincorporated Areas of Jackson County, Town of Forest Hills.
	Approximately 1,450 feet upstream of West Slate Mountain.	None	+2204	
Crooked Creek	At the confluence with Tuckasegee River	None	+1853	Unincorporated Areas of Jackson County, Eastern Band of Cherokee Indians.
	Approximately 1,400 feet upstream of East Dynasty Drive.	None	+1891	
Cullowhee Creek	Approximately 400 feet upstream of West Camp Lab Road.	None	+2096	Unincorporated Areas of Jackson County.
	Approximately 300 feet upstream of West Ramp Cove Road.	None	+2367	
Cullowhee Creek Tributary 3	At the confluence with Cullowhee Creek	None	+2137	Unincorporated Areas of Jackson County.
	Approximately 110 feet upstream of West Parker Farm Road (State Road 1166).	None	+2170	
Dark Ridge Creek	At the confluence with Scott Creek	None	+2632	Unincorporated Areas of Jackson County.
	Approximately 0.5 mile upstream of the confluence with Scott Creek.	None	+2686	
Dicks Creek	At the confluence with Tuckasegee River	None	+1933	Unincorporated Areas of Jackson County.
	Approximately 900 feet upstream of East Dicks Creek Road (State Road 1388).	None	+2216	
Dills Branch	Approximately 90 feet upstream of U.S. Highway 23/74.	None	+2021	Unincorporated Areas of Jackson County, Town of Sylva.
	Approximately 320 feet upstream of East Dills Cove Road (State Road 1380).	None	+2534	
Dills Creek (into Fisher Creek).	At the confluence with Fisher Creek	None	+2396	Unincorporated Areas of Jackson County.
	Approximately 650 feet upstream of West Dills Branch Road.	None	+2821	
East Fork Savannah Creek	At the confluence with Savannah Creek	None	+2175	Unincorporated Areas of Jackson County.
	Approximately 1,700 feet upstream of West Chickadee Lane.	None	+2342	
Fisher Creek	At the confluence with Scott Creek	None	+2118	Unincorporated Areas of Jackson County.
	Approximately 150 feet upstream of West Kellogg Lane.	None	+2467	
Flat Creek	At the confluence with Tuckasegee River	None	+2566	Unincorporated Areas of Jackson County.
	Approximately 2.3 miles upstream of the confluence with Tuckasegee River.	None	+3275	
Fowler Creek	At the confluence with Chattooga River	None	+2706	Unincorporated Areas of Jackson County.
	Approximately 1,430 feet upstream of West Chimney Top Trail.	None	+3415	
Gem Creek	At the confluence with Little Pine Creek	None	+3534	Unincorporated Areas of Jackson County.
	Approximately 900 feet upstream of West Salt Rock Road (State Road 1160).	None	+3550	
Gladie Creek	At the confluence with Tuckasegee River	None	+2566	Unincorporated Areas of Jackson County.
	Approximately 1.3 miles upstream of the confluence with Tuckasegee River.	None	+2644	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Grassy Camp Creek	At the confluence with Norton Creek	None	+3632	Unincorporated Areas of Jackson County.
	Approximately 800 feet upstream of Norton Road (State Road 1143).	None	+3678	
Greenland Creek	At the confluence with Panthertown Creek and Tuckasegee River.	None	+3654	Unincorporated Areas of Jackson County.
	Approximately 1.2 miles upstream of the confluence with Panthertown Creek and Tuckasegee River.	None	+3711	
Greens Creek	At the confluence with Savannah Creek	None	+2119	Unincorporated Areas of Jackson County.
	Approxmimately 1,060 feet upstream of West Sugar Fork Road (State Road 1370).	None	+2417	
Hornbuckle Creek	At the confluence with Soco Creek	None	+2776	Unincorporated Areas of Jackson County, Eastern Band of Cherokee Indians.
	Approximately 0.9 mile upstream of the confluence with Soco Creek.	None	+3042	
Horsepasture River	At the Jackson/Transylvania County boundary	None	+2973	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of U.S. 64 Highway	None	+3208	
Horsepasture River Tributary 4.	At the confluence with Horsepasture River	None	+3141	Unincorporated Areas of Jackson County.
	Approximately 1,400 feet upstream of the confluence with Horsepasture River.	None	+3147	
Hurricane Creek	At the confluence with West Fork Tuckasegee River ..	None	+3499	Unincorporated Areas of Jackson County.
	Approximately 0.8 mile upstream of North Norton Road (State Road 1145).	None	+3635	
Jacks Creek	At the confluence with Tuckasegee River	None	+1884	Unincorporated Areas of Jackson County.
	Approximately 700 feet upstream of U.S. Highway 74	None	+1935	
Johns Creek	At the confluence with Caney Fork	None	+2292	Unincorporated Areas of Jackson County.
	Approximately 1,800 feet upstream of East Nicholson Cove Road (State Road 1748).	None	+2479	
Kitchen Branch	At the confluence with Scott Creek	None	+2105	Unincorporated Areas of Jackson County.
	Approximately 1,350 feet upstream of East Kitchen Branch Road (State Road 1442).	None	+2714	
Knob Creek	At the confluence with Norton Creek	None	+3578	Unincorporated Areas of Jackson County.
	Approximately 1,350 feet upstream of Flintlock Road	None	+3985	
Laurel Branch	At the confluence with Tuckasegee River	None	+1918	Unincorporated Areas of Jackson County.
	Approximately 1,600 feet upstream of Cowee Tunnel Road.	None	+2119	
Little Pine Creek	At the confluence with Pine Creek	None	+3532	Unincorporated Areas of Jackson County.
	Approximately 180 feet upstream of West Salt Rock Road (State Road 1160).	None	+3582	
Little Savannah Creek	At the confluence with Savannah Creek	None	+2028	Unincorporated Areas of Jackson County.
	Approximately 800 feet upstream of East Little Savannah Road (State Road 1367).	None	+2190	
Locust Creek	Approximately 500 feet upstream of the confluence with Tuckasegee River.	+2042	+2043	Unincorporated Areas of Jackson County.
	Approximately 0.5 mile upstream of West Match Point	None	+2314	
Logan Creek	At the confluence with Horsepasture River	None	+3158	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of U.S. 64 Highway	None	+3170	
Long Branch	Approximately 950 feet upstream of East Little Savannah Road (State Road 1367).	None	+2235	Unincorporated Areas of Jackson County.
	Approximately 1,650 feet upstream of East Little Savannah Road (State Road 1367).	None	+2262	
Long Branch (into Horsepasture River).	At the confluence with Horsepasture River	None	+3128	Unincorporated Areas of Jackson County.
	Approximately 980 feet upstream of U.S. Highway 64	None	+3134	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Mill Creek	At the confluence with West Fork Tuckasegee River	None	+3499	Unincorporated Areas of Jackson County.
	Approximately 940 feet upstream of Sunbird Lane	None	+3780	
Mill Creek (into Tuckasegee River).	At the confluence with Tuckasegee River	None	+2026	Unincorporated Areas of Jackson County, Town of Sylva, Town of Webster.
	Approximately 150 feet upstream of the confluence of Bumgarner Branch.	None	+2114	
Monteith Branch	At the confluence with Scott Creek	None	+2114	Unincorporated Areas of Jackson County.
	Approximately 1,010 feet upstream of West Razorback Trail.	None	+3118	
Moses Creek	At the confluence with Caney Fork	None	+2198	Unincorporated Areas of Jackson County.
	Approximately 30 feet upstream of East Moses Creek Road.	None	+2371	
Mull Creek	At the confluence with Caney Fork	None	+2709	Unincorporated Areas of Jackson County.
	Approximately 0.5 mile upstream of East Caney Fork Road (State Road 1737).	None	+2845	
Nations Creek	At the confluence with Tuckasegee River	None	+1869	Unincorporated Areas of Jackson County.
	Approximately 0.9 mile upstream of confluence with Tuckasegee River.	None	+2011	
Norton Creek	At the confluence with West Fork Tuckasegee River	None	+3499	Unincorporated Areas of Jackson County.
	Approximately 600 feet upstream of Jodytown Road (State Road 1150).	None	+3677	
Norton Mill Creek	At the confluence with Chattooga River	None	+2566	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of West Whiteside Cove Road (State Road 1107).	None	+2767	
Ochre Hill Creek	At the confluence with Scott Creek	None	+2227	Unincorporated Areas of Jackson County.
	Approximately 1,520 feet upstream of the confluence with Scott Creek.	None	+2271	
Panthertown Creek	At the confluence with Greenland Creek and Tuckasegee River.	None	+3654	Unincorporated Areas of Jackson County.
	Approximately 0.7 mile upstream of the confluence of Panthertown Creek Tributary 1.	None	+3702	
Panthertown Creek Tributary 1.	At the confluence with Panthertown Creek	None	+3662	Unincorporated Areas of Jackson County.
	Approximately 1,540 feet upstream of the confluence with Panthertown Creek.	None	+3674	
Peewee Branch	At the confluence with Greens Creek	None	+2332	Unincorporated Areas of Jackson County.
	Approximately 685 feet upstream of the confluence with Greens Creek.	None	+2357	
Pine Creek	At the confluence with West Fork Tuckasegee River	None	+3499	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of West Pine Creek Road (State Road 1163).	None	+3568	
Pressley Creek	At the confluence with Tilley Creek	None	+2186	Unincorporated Areas of Jackson County.
	Approximately 800 feet upstream of the confluence with Tilley Creek.	None	+2204	
Savannah Creek	At the confluence with Tuckasegee River	None	+2004	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of the confluence of Shell Branch.	None	+3081	
Scott Creek	At the confluence with Tuckasegee River	None	+1974	Unincorporated Areas of Jackson County, Town of Dillsboro, Town of Sylva.
	Approximately 350 feet upstream of U.S. 74/23 Highway.	None	+3164	
Scott Creek Tributary 13	At the confluence with Scott Creek	None	+2127	Unincorporated Areas of Jackson County.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	Approximately 850 feet upstream of East Skyland Drive (State Road 1432).	None	+2160	
Shoal Creek	At the confluence with Soco Creek	+1941	+1943	Unincorporated Areas of Jackson County.
	Approximately 1.4 miles upstream of East Olivet Church Road (State Road 1424).	None	+2052	
Silver Run Creek	At the confluence with Whitewater River	None	+3303	Unincorporated Areas of Jackson County.
	Approximately 0.9 mile upstream of East Moody Road (State Road 1106).	None	+3465	
Slickens Creek	At the confluence with Tuckasegee River	None	+2893	Unincorporated Areas of Jackson County.
	Approximately 1,300 feet upstream of the confluence with Tuckasegee River.	None	+3181	
Soapstone Creek	At the confluence with Scott Creek	None	+2541	Unincorporated Areas of Jackson County.
	Approximately 580 feet upstream of East Cripple Creek (State Road 1708).	None	+2627	
Soco Creek	Approximately 1,100 feet downstream of U.S. Highway 441.	+1935	+1936	Unincorporated Areas of Jackson County, Eastern Band of Cherokee Indians.
	Approximately 350 feet upstream of the confluence of Hornbuckle Creek.	None	+2808	
Sugar Fork	At the confluence with Greens Creek	None	+2359	Unincorporated Areas of Jackson County.
	Approximately 800 feet upstream of the confluence with Greens Creek.	None	+2400	
Sutton Branch	At the confluence with Savannah Creek	None	+2098	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of U.S. 23/441 Highway.	None	+2196	
Tanasee River	At the confluence with Tuckasegee River	None	+3078	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of East Tannassee Creek Road (State Road 1262).	None	+3157	
Tatham Creek	At the confluence with Savannah Creek	None	+2241	Unincorporated Areas of Jackson County.
	Approximately 1,400 feet upstream of the confluence with Savannah Creek.	None	+2289	
Tilley Creek	At the confluence with Cullowhee Creek	None	+2150	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of West Tilley Creek Road (State Road 1001).	None	+2424	
Trout Creek	At the confluence with West Fork Tuckasegee River	None	+2439	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of East Trout Creek Road (State Road 1131).	None	+2771	
Tuckasegee River	Approximately 150 feet downstream of the Jackson/Swain County boundary.	None	+1835	Unincorporated Areas of Jackson County.
	The confluence of Greenland Creek and Panthertown Creek.	None	+3654	
Tuckasegee River Tributary 13.	At the confluence with Tuckasegee River	None	+1849	Unincorporated Areas of Jackson County.
	Approximately 500 feet upstream of West Thomas Cove Road.	None	+1881	
Tuckasegee River Tributary 42.	At the confluence with Tucksegee River	None	+2129	Unincorporated Areas of Jackson County.
	Approximately 930 feet upstream of the confluence with Tuckasegee River.	None	+2132	
Wayehutta Creek	Approximately 500 feet upstream of the confluence with Tuckasegee River.	+2079	+2080	Unincorporated Areas of Jackson County.
	Approximately 1,260 feet upstream of East Wayehutta Road (State Road 1731).	+2079	+2096	
West Fork Tuckasegee River	At the confluence with Tuckasegee River	None	+2149	Unincorporated Areas of Jackson County.
	At the confluence of Hurricane Creek	None	+3499	
Whitewater River	At the North Carolina/South Carolina State boundary	None	+1961	Unincorporated Areas of Jackson County.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	Approximately 550 feet upstream of confluence of Silver Run Creek.	None	+3308	
Wolf Creek	At the confluence with Tuckasegee River	None	+2571	Unincorporated Areas of Jackson County.
	Approximately 2.3 miles upstream of West Canada Road.	None	+3108	
Wrights Creek	Approximately 500 feet upstream of the confluence with Soco Creek.	+2054	+2055	Eastern Band of Cherokee Indians.
	Approximately 0.9 mile upstream of the confluence of Big Witch Creek.	None	+2708	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Eastern Band of Cherokee Indians

Maps are available for inspection at Ginger Lynn Welch Complex, 810 Aquoni Road, Cherokee, NC.

Town of Dillsboro

Maps are available for inspection at Dillsboro Town Office, 42 Front Street, Dillsboro, NC.

Town of Forest Hills

Maps are available for inspection at Jackson County Inspections Department, 401 Grindstaff Cove Road, Suite 105, Sylva, NC.

Town of Sylva

Maps are available for inspection at Sylva Town Hall, 83 Allen Street, Sylva, NC.

Town of Webster

Maps are available for inspection at Jackson County Inspections Department, 401 Grindstaff Cove Road, Suite 105, Sylva, NC.

Unincorporated Areas of Jackson County

Maps are available for inspection at Jackson County Inspections Department, 401 Grindstaff Cove Road, Suite 105, Sylva, NC.

Jackson County, Ohio, and Incorporated Areas

North Pigeon Creek	Approximately 800 feet downstream of Chessie System Railroad.	None	+630	Unincorporated Areas of Jackson County.
	Approximately 580 feet upstream of County Highway 31.	None	+641	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Jackson County

Maps are available for inspection at GIS Office, 237 E. Main Street, Jackson, OH 45640.

Rusk County, Wisconsin, and Incorporated Areas

Chippewa River	At County Boundary with Chippewa County	+1045	+1046	Unincorporated Areas of Rusk County.
	Approximately 7.5 miles upstream of County Highway E.	None	+1065	
Flambeau River	At its confluence with Chippewa River	+1056	+1054	Unincorporated Areas of Rusk County, City of Ladysmith.
	Approximately 1.5 miles upstream of U.S. Highway 8	+1117	+1120	
Flambeau River	At Dairyland Reservoir	None	+1184	Unincorporated Areas of Rusk County.
	At Big Falls Dam	None	+1190	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Ladysmith

Maps are available for inspection at City Hall, 120 Miner Avenue West, Ladysmith, WI 54848.

Unincorporated Areas of Rusk County

Maps are available for inspection at Rusk County Courthouse, 311 East Miner Avenue, Ladysmith, WI 54848.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: April 29, 2008.

David I. Maurstad,

Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–10152 Filed 5–6–08; 8:45 am]

BILLING CODE 9110–12–P

Notices

Federal Register
Vol. 73, No. 89
Wednesday, May 7, 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

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Forest Service, intends to grant to H2H Innovations, LLC of Wilmington, Delaware, an exclusive license to the Federal Government's patent rights in U.S. Patent No. 7,345,136, ''Water-Resistant Vegetable Protein Adhesive Dispersion Compositions'', issued on March 18, 2008.

DATES: (**Federal Register**) Comments must be received within thirty (30) days of the date of publication of this Notice in the **Federal Register**.

ADDRESSES: Send comments to: Janet I. Stockhausen, USDA, Forest Service, Forest Products Laboratory, One Gifford Pinchot Drive, Madison, Wisconsin 53726–2398.

FOR FURTHER INFORMATION CONTACT: Janet I. Stockhausen of the USDA Forest Service at the address given above; telephone: 608–231–9502; fax: 608–231–9508; or e-mail: jstockhausen@fs.fed.us.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as H2H Innovations, LLC of Wilmington, Delaware, has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Forest Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. E8–10018 Filed 5–6–08; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Privacy Act of 1974: New System of Records

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice of a new system of records.

SUMMARY: The Foreign Agricultural Service (FAS) proposes to add a system of records notice to its inventory of records systems subject to the Privacy Act of 1974 as amended (5 U.S.C. 552a). This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records systems maintained by the agency (5 U.S.C. 552a(e)(4)).

DATES: This action will be effective without further notice June 6, 2008 unless comments are received that would result in a contrary determination.

ADDRESSES: Send written comments to Privacy Act Officer, William Hawkins, Director, Program Management Division, USDA/FAS/OAO, Mail Stop 1065, 1400 Independence Avenue, SW., Washington, DC 20250–1065, telephone (202) 720–3241, e-mail: *william hawkins@fas.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Lana Bennett, Director, Import and Trade Support Programs Division, USDA/FAS/OTP, Mail Stop 1021, 1400 Independence Avenue, SW., Washington, DC 20250–1021; e-mail: *lana.bennett@fas.usda.gov;* telephone: (202) 720–0638.

SUPPLEMENTARY INFORMATION: The Dairy Import Licensing Group maintains the web-based Dairy Accelerated Importer Retrieval and Information Exchange System (DAIRIES) to administer the Dairy Import Licensing Program. Importers can apply for, receive and monitor their dairy import licenses through DAIRIES. Importers must have a U.S. Customs and Border Protection (Customs) importer number, which is either an employer identification number or a social security number, in order to apply for a license. Importers must meet required annual minimum import amounts in order to be eligible to apply for a license. The Dairy Import Licensing Group must verify if the importer's eligible, which can only be done by accessing the importer's Customs record using their Customs importer number. A small percentage of the importers that apply under the program continue to use their social security number as their Customs importer number.

USDA/FAS–8

SYSTEM NAME:

Dairy Accelerated Importer Retrieval and Information Exchange System (DAIRIES).

SYSTEM LOCATION:

Electronic records are located at Foreign Agricultural Service, United States Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Importers that are self-proprietors and maintain a valid Customs importer number.

CATEGORIES OF RECORDS IN THE SYSTEM:

The data in the system for individuals include their name, address, telephone number, and a social security number or employer identification number as the Customs importer number.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The import licensing program is authorized by 7 CFR part 6, 19 U.S.C. 1202, 3513 and 3601, and 31 U.S.C. 9701. The collection of the social security numbers by Customs is authorized by 19 CFR 24.5.

PURPOSE:

The Dairy Import Licensing Group will maintain the information in DAIRIES to verify the eligibility of persons applying for a dairy import license by accessing the importer Customs record using the Customs importer number.

STORAGE:

Records are stored in paper and electronic format.

RETRIEVABILITY:

Records are retrieved by a unique control number, assigned by the Dairy Import Licensing Group.

SAFEGUARDS:

All records containing personal information are maintained in secured file cabinets or in restricted areas, in which access is limited to authorized personnel. Access to computerized data is password-protected and under the responsibility of the system manager and subordinates. The database administrator has the ability to review audit trails, thereby permitting regular ad hoc monitoring of computer usage.

RETENTION AND DISPOSAL:

Records are maintained for a period of 5 years, as required by 7 CFR part 6. The records are then destroyed in accordance with USDA procedures.

SYSTEM MANAGER AND ADDRESS:

Brenda Lawson, Chief, Application Development Branch, USDA/FAS/OAO/ITD, Mail Stop 1064, 1400 Independence Avenue, SW., Washington, DC 20250–1064.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Privacy Act Officer, William Hawkins, Director, Program Management Division, USDA/FAS/OAO, Mail Stop 1065, 1400 Independence Avenue, SW., Washington, DC 20250–1065. Individuals must identify DAIRIES in their inquiries.

RECORDS ACCESS PROCEDURES:

Individuals who wish to gain access to or amend their own records should contact the Dairy Import Licensing Group, Mail Stop 1021, 1400 Independence Avenue, SW., Washington, DC 20250–1021.

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual who is the subject of these records.

EXEMPTION CLAIMED FOR THE SYSTEM:

None.

Date: April 25, 2008.

Michael W. Yost,

Administrator, Foreign Agricultural Service.

[FR Doc. E8–10006 Filed 5–6–08; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Forest Service

Ketchikan-Misty FiordsFiords Ranger District; Tongass National Forest; Alaska; Central Gravina Timber Sale Environmental Impact Statement

AGENCY: Forest Service, USDA.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement.

SUMMARY: The Forest Service, U.S. Department of Agriculture will prepare an Environmental Impact Statement (ETS) on a proposal to construct roads and harvest timber in central Gravina Island on the Ketchikan Misty Fiords Ranger District, Tongass National Forest. Two Alternatives have been developed for the public to comment on. These Proposed Alternatives would harvest between 18 and 38 million board feet (MMBF) of timber on between 515 and 1,250 acres and would construct between 7 and 16 miles of road respectively.

DATES: Opportunities for comments are available throughout the analysis process. Comments concerning the scope of the analysis will be most helpful if received within 30 days of the date of this notice. Additional opportunities for comment will be provided after release of both the Draft Environmental Impact Statement which is expected to be published November 2008 and the Final Environmental Impact Statement and Record of Decision are expected in May 2009.

ADDRESSES: Send or hand deliver written comments to the Ketchikan Misty Fiords Ranger District, Attn: Central Gravina ElS, Tongass National Forest, 3031 Tongass Avenue, Ketchikan, AK 99901; telephone (907) 225–2148. The FAX number is (907) 225–8738.

Send e-mail comments to: *comments-alaska-tongass-ketchikan-mistyfiord@fs.fed.us* with Central Gravina EIS on the subject line. Include your name, address, and organization name if you are commenting as a representative.

FOR FURTHER INFORMATION CONTACT: For further information, mail correspondence to Lynn Kolund, District Ranger, Ketchikan Misty Fiords Ranger District, Tongass National Forest, 3031 Tongass Avenue, Ketchikan, AK 99901, telephone (907) 228–4100 or Linda Pulliam, Interdisciplinary Team Leader, Ketchikan Misty Fiords Ranger District, Tongass National Forest, 3031 Tongass Avenue, Ketchikan, AK 99901, telephone (907) 228–4124.

SUPPLEMENTARY INFORMATION: This EIS will tier to the 2008 Tongass Land and Resource Management Plan (Forest Plan) that provides overall guidance, goals, objectives, and management area direction to achieve the desired condition for the project area.

The project area is administered by the Ketchikan-Misty Fiords Ranger District of the Tongass National Forest, Ketchikan, Alaska and occurs in Value Comparison Units (VCUs) 7610 and VCU 7630 as designated by the Forest Plan. The Central Gravina project area is located between Bostwick Inlet and Vallenar Bay on Gravina Island, which is located approximately 5 miles west of Ketchikan. The land use designation (LUD) for the project area is Timber Production. As part of the Forest Plan update certain LUDs on Gravina Island were adjusted based on comments received from the public during the Forest Plan draft EIS review. LUDs to the south and west of the Central Gravina project area have been adjusted and allocated to more restrictive non development LUDs. The proposed timber harvest units and roads are within the Gravina Inventoried Roadless Area #522. Slightly over three-quarters of inventoried roadless acres are included in non-development LUDS. The Forest Plan allocates 24% of the inventoried roadless acres to development LUDs; only three percent of the land in inventoried roadless areas would be included in the suitable land base. The Central Gravina project area falls within this three percent inventory roadless area that lies within a Timber LUD. The 2008 Forest Plan Timber Sale Program Adaptive Management Strategy identified three phases of projected timber development. The Central Gravina project area falls within the Phase 1, which includes most of the roaded portion of the ASQ land base and most of the lower valued inventoried roadless areas.

Purpose and Need for Action

The purpose and need for the proposed action responds to the goals and objectives identified by the 2008 Tongass Land and Resource Management Plan, and helps move the area toward the Forest Plan desired conditions. Forest Plan goals, objectives, and desired conditions that apply to the project include:

1. Maintain and promote wood production from suitable forest lands, providing a continuous supply of wood to meet society's needs.

2. Manage Forest lands for sustained long-term timber yields.

3. Seek to provide a supply of timber that meets the annual and planning-

cycle market demand, consistent with the standards and guidelines for this LUD.

Proposed Action (Alternative 3)

The Central Gravina Timber Harvest proposed action (Alternative 3) is to harvest approximately 38 million board feet (MMBF) of timber volume from approximately 1,250 acres of forested land in 53 harvest units while meeting Forest Plan standards. The proposed action includes using ground-based shovel, cable, helicopter yarding systems. Areas suitable for ground-based or cable logging would be harvested with even-aged (clearcut) harvest prescriptions. Helicopter logging areas would be harvested either with even-aged (clearcut) or uneven-aged (group or single tree selection) harvest prescriptions depending on terrain, tree species, economics, or environmental concerns. All timber harvest will use silviculture prescriptions suited to meet the standards and guidelines for the Tongass Forest Plan.

The proposed action includes construction of approximately 14 miles of National Forest System and 2 miles of temporary road would be constructed. All logs would be hauled by truck to a privately owned log transfer facility located near Pacific Log and Lumber on Tongass Narrows.

Alternative 2

An alternative to the proposed action is to build roads to harvest timber units only on the east side of the central valley on Gravina Island. This alternative would harvest approximately 515 acres from 25 Units yielding 18 MMBF of timber volume. This proposes construction of approximately 6 miles of National Forest System and 1 mile of temporary road would be constructed. All logs would be hauled by truck to a marine access facility located near Pacific Log and Lumber on Tongass Narrows. Alternative 2 provides an option for roadless area concerns.

Public Participation

This notice initiates the scoping process which guides the development of the environmental impact statement. The Forest Service will be seeking information, comments, and assistance from Tribal Governments, Federal, State, and local agencies, individuals and organizations may be interested in, or affected by, the proposed activities. In addition to this Notice of Intent, legal notices and display ads will be placed in the *Ketchikan Daily News.* The *Ketchikan Daily News* is the official newspaper of record for this project. Written scoping comments are being solicited through a scoping letter that was mailed to interested individuals and agencies on May 6, 2008. The scoping process includes: (1) Identification of potential issues; (2) identification of issues to be analyzed in depth; and (3) elimination of non-significant issues or those that have been covered by a previous environmental review. Based on results of scoping and the resource capabilities within the project area, alternatives including a ''no-action'' alternative will be developed for the Draft Environmental Impact Statement. Subsistence hearings, as provided for in Title VIII, Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), will be conducted, if necessary, during the comment period on the Draft Environmental Impact Statement.

Importance of Public Participation in Subsequent Environmental Review

A Draft Environmental Impact Statement will be prepared for comment. The comment period on the Draft Environmental Impact Statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of Draft Environmental Impact Statement must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions, (*Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the Draft Environmental Impact Statement stage but that are not raised until after completion of the Final Environmental Impact Statement may be waived or dismissed by the courts, *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the Final Environmental Impact Statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the Draft Environmental Impact Statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the Draft Environmental Impact Statement. Comments may also address the adequacy of the Draft Environmental Impact Statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points. Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR 215 or 217.

Permits or Licenses Required

1. U.S. Army Corps of Engineers

- Approval of discharge of dredge or fill material into the waters for the United States under Section 404 of the Clean Water Act;
- Approval of the construction of structures or work in navigable waters of the United States under Section 10 of the Rivers and Harbor Act of 1899;

2. Environmental Protection Agency

- General National Pollutant Discharge Elimination System for Log Transfer Facilities in Alaska;
- Review Spill Prevention Control and Countermeasure Plan;

3. State of Alaska, Department of Environmental Conservation (DEC)

- Tideland Permit and Lease or Easement;
- Certification of Compliance with Alaska Water Quality Standards (401 Certification) Chapter 20

4. Alaska State Division of Natural Resources (DNR)

- Division of Coastal and Ocean Management (DCOM)—ACMP Consistency Determination

Comment Requested

This notice of intent initiates the scoping process which guides the development of the environmental impact Statement.

Responsible Official

Forrest Cole, Forest Supervisor, Tongass National Forest, Federal

Building, 648 Mission Street, Ketchikan, Alaska 99901.

Nature of Decision To Be Made

The Forest Supervisor will decide:

1. If the project will proceed under a chosen alternative, as a modified alternative, or not at all.

2. The design criteria, mitigations and monitoring requirements the Forest Service will apply to the project.

The responsible official will consider the comments, responses, disclosure of environmental consequences, and applicable laws, regulations and policies in making the decision and state his rationale in the Record of Decision.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: April 29, 2008.

Forrest Cole,

Forest Supervisor.

[FR Doc. E8–9929 Filed 5–6–08; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Missouri Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Missouri Advisory Committee to the Commission will convene by conference call at 10 a.m. and adjourn at approximately 12 p.m. on Thursday, May 22, 2008. The purpose of this meeting is to conduct SAC orientation and plan future activities.

This meeting is available to the public through the following toll-free call-in number: (866) 364–7584, conference call access code number 42559706. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and contact name Farella E. Robinson.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Corrine Sanders of the Central Regional Office and TTY/TDD telephone number, by 4:00 p.m. on May 16, 2008.

Members of the public are entitled to submit written comments. The comments must be received in the regional office by May 16, 2008. The address is U.S. Commission on Civil Rights, 400 State Avenue, Suite 908, Kansas City, Kansas 66101. Comments may be e-mailed to *frobinson@usccr.gov.* Records generated by this meeting may be inspected and reproduced at the Central Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov,* or to contact the Central Regional Office at the above e-mail or street address.

The meetings will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, May 2, 2008.

Christopher Byrnes,

Chief, Regional Programs Coordination Unit.

[FR Doc. E8–10155 Filed 5–6–08; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Rhode Island Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that orientation and planning meetings of the Rhode Island Advisory Committee to the Commission will convene at 11:30 a.m. on Wednesday, May 14, 2008, at the Urban League of Rhode Island, located at 246 Prairie Ave. in Providence Rhode Island. The purpose of these meetings is to provide an orientation to new members and plan future activities of the committee. After the meeting, the committee will hear from presenters who will discuss fair housing issues in Rhode Island.

Members of the public are entitled to submit written comments; the comments must be received in the regional office by June 13, 2008. The address is Eastern Regional Office, 624 9th St., NW., Washington, DC 20425. Persons wishing to e-mail their comments, or who desire additional information should contact Alfreda Greene, Secretary, at 202–376–7533 or by e-mail to: *agreene@usccr.gov.*

Hearing-impaired persons who will attend the meetings and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meetings.

Records generated from these meetings may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov,* or to contact the Eastern Regional Office at the above e-mail or street address.

The meetings will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, May 2, 2008.

Christopher Byrnes,

Chief, Regional Programs Coordination Unit.

[FR Doc. E8–10075 Filed 5–6–08; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Economic Analysis (BEA).

Title: Survey of International Travel Expenditures.

OMB Control Number: None.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 1,000.

Number of Respondents: 6,000.

Average Hours per Response: 10 minutes.

Needs and Uses: The proposed survey of international travel expenditures is authorized by the Bretton Woods Agreements Act, Section 8, and Executive Order 10033, as amended. The Act allows the DOC/BEA to collect the data necessary to produce the U.S. international transactions accounts (ITAs), which are part of the U.S. obligations to the International Monetary Fund.

The survey will collect information on travel expenditures by method of payment (cash, credit card, etc.) from U.S. travelers returning from abroad and foreign travelers leaving the United States.

This survey is needed to improve the quality of the travel component of the U.S. ITAs, which are used by government and other organizations for national and international economic policy formulation and analytical purposes.

Affected Public: Individuals or households.

Frequency: One-time only.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Paul Bugg, (202) 395–3093.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via e-mail at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Paul Bugg, OMB Desk Officer, FAX number (202) 395–7245 or via e-mail at *pbugg@omb.eop.gov*.

Dated: May 2, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–10049 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–EA–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 19–2008]

Foreign–Trade Zone 26 Atlanta, GA, Withdrawal of Application for Subzone Status, Kia Motors Manufacturing Georgia, Inc. (Motor Vehicles)

Notice is hereby given of the withdrawal of the application requesting special–purpose subzone status for the motor vehicle manufacturing plant of Kia Motors Manufacturing Georgia, Inc. The application was filed on March 28, 2008 (73 FR 20247, 4–15–2008).

The withdrawal was requested due to changed circumstances involving potential expansion of FTZ 26 to include new general–purpose (multi–user) sites in the western Georgia area, and the case has been closed without prejudice.

Dated: April 25, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–10077 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Docket 28–2008

Foreign–Trade Zone 38 Spartanburg County, SC, Request for Manufacturing Authority, ZF Lemförder Corporation (Automotive Suspension Systems)

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the South Carolina State Ports Authority, grantee of FTZ 38, pursuant to Section 400.28(a)(2) of the Board's regulations (15 CFR Part 400), requesting authority on behalf of ZF Lemförder Corporation (Lemförder), to assemble automotive suspension systems under FTZ procedures within FTZ 38. It was formally filed on April 30, 2008.

The Lemförder facility (71 employees) is located at 191 Parkway West (Site 3) in Duncan, South Carolina. Under FTZ procedures, Lemförder would assemble up to 105,000 automotive suspension systems (HTSUS 8708.80) annually for the U.S. market and export. Foreign components that would be used in the assembly activity (up to 100% of total purchases) include: stoppers/lids/caps, reinforced tubes/pipes/hoses, articles of rubber, fasteners, helical and leaf springs, cables and wires, fittings, check valves, brake system parts, suspension systems and related parts, dampeners, height sensors, wheel hubs, drive shafts, universal joints, and ball bearings (duty rates: free - 9.0%).

FTZ procedures would exempt Lemförder from customs duty payments on the foreign components used in production for export. On domestic shipments transferred in–bond to U.S. automobile assembly plants with subzone status, no duties would be paid on the foreign components within the suspension systems until the finished vehicles are subsequently entered for consumption, at which time the finished automobile duty rate (2.5%) could be applied to the foreign components. For the suspension systems withdrawn directly by Lemförder for customs entry, the finished automotive suspension system rate (2.5%) could be applied to the foreign inputs noted above. The application indicates that the company would also realize duty deferral and certain logistical/supply chain savings. The application indicates that the savings from FTZ procedures would help improve the facility's international competitiveness.

In accordance with the Board's regulations, Pierre Duy of the FTZ Staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230–0002. The closing period for receipt of comments is July 7, 2008. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to July 21, 2008.

A copy of the application will be available for public inspection at the Office of the Foreign–Trade Zones Board's Executive Secretary at the address listed above. For further information, contact Pierre Duy, examiner, at: pierre__duy@ita.doc.gov, or (202) 482–1378.

Dated: April 30, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–10089 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

(Docket 26–2008)

Foreign–Trade Zone 14 -- Little Rock, Arkansas Application for Subzone Status Husqvarna Outdoor Products Inc. (Outdoor Power Products Manufacturing) Nashville, Arkansas

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the Arkansas Economic Development Commission, grantee of Foreign–Trade Zone (FTZ) 14, requesting special–purpose subzone status for the outdoor power products manufacturing facility of Husqvarna Outdoor Products Inc. (Husqvarna) located in Nashville, Arkansas. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on April 29, 2008.

The Husqvarna facility is located at 1 Poulan Drive, in Nashville (96 acres, 1,400 employees). The facility is used for manufacturing various types of gas–powered outdoor products (blowers, trimmers and chainsaws, HTSUS numbers 8414.59, 8430.20, 8467.89 and 8467.81). At full capacity the Husqvarna facility can produce up to 3.9 million

units annually. Imported components and raw materials account for approximately 35 percent of the value of inputs used in manufacturing. Parts and components that may be imported into the proposed subzone for manufacturing include: plastic tubes, pipes and hoses (3917.29); petroleum oils and oils from bituminous minerals (2710.19); carbides (2849.90); lubricating preparations (3403.19); polymides (3908.10); plastic monofilament (3916.90); self–adhesive plate, sheet, film, foils, tape and strip of plastics (3919.90); other plate, sheet, film, foil and strip of polymers of styrene (3921.11); plastic articles used for packing or conveyance of goods (3923.10, 3923.29, 3923.50, 3923.90); other plastic articles (3926.90); vulcanized rubber tubes, pipes and hoses (4009.11); vulcanized rubber conveyor or transmission belts (4010.36, 4010.39); vulcanized rubber washers and seals (4016.93); other vulcanized rubber products (4016.99); synthetic twine, cordage, rope and cable (5607.50); articles of yarn, strip, twine, cordage, rope or cable (5609.50); textile articles and products for technical uses (5911.90); labels (6307.90); millstones, grindstones and grinding wheels (6804.21, 6804.22); iron or steel flanges (7307.91, 7307.92); self–tapping screws (7318.14); screws and bolts, with or without washers (7318.15); nuts (7318.16); spring washers and lock washers (7318.21); non–threaded articles of iron or steel (7318.29); iron or steel helical springs (7320.90); tungsten articles/powders (8101.10); agriculture, horticulture or forestry hand tools and their parts (8201.90); handsaws, blades and their parts (8202.40); files, rasps, pliers, pincers, tweezers, pipe and bolt cutters and similar (8203.20); hand–operated spanners and wrenches (8204.11); hand tools for drilling, threading or tapping (8205.10); screwdrivers and their parts (8205.40); anvils, forges and grinding wheels and their parts (8205.70); vises, clamps and their parts (8205.70); pressing, stamping and punching tools and their parts (8207.30); drilling tools (8207.50, 8207.90); iron or steel flexible tubing (8307.10); spark–ignition internal combustion engine parts (8409.91); fuel, lubricating and cooling pumps for internal combustion piston engines and their parts (8413.30, 8413.91); air and vacuum pumps and their parts (8414.59, 8414.90); air filters (8421.31); spray guns (8424.20); tool holders (8466.10); check valves and their parts (8481.30); pressure–reducing and thermostatically controlled valves (8481.80); ball bearings (8482.10); needle roller bearings (8482.40); transmission shafts, camshafts and crankshafts and their parts (8483.10); bearing housings/plain shaft bearings (8483.30); gears and gearing and other transmission elements, including torque converters (8483.40); flywheels and pulleys, including pulley blocks (8483.50); clutches and shaft couplings, including universal joints (8483.60); toothed wheels, chain sprockets and other transmission elements (8483.900); universal AC/DC motors (8501.20); single–phase AC motors (8501.20); multi–phase AC motors (8501.52); AC generators/alternators (8501.61); electrical transformers, static convertors, inductors and their parts (8504.33, 8504.40); electromagnetic couplings, clutches and brakes (8505.20); primary cells and batteries (8506.80); lead–acid storage batteries (8507.20); spark plugs (8511.10); ignition coils (8511.30); electrical ignition or starting equipment parts (8511.90); microphones and loudspeakers (8518.30); electrical switches (8536.50); lamp–holders, plugs and sockets (8536.69, 8536.90); fluorescent lamps (8539.31); microwave tubes (8540.89); winding wire (8544.20); electrical conductors (8544.42, 8544.49); Drive and non–drive axles and parts thereof (8708.50); trailers and semi–trailers and their parts (8716.80); micrometers, calipers and gauges (9017.30); other instruments (9017.80); revolution and production counters, taximeters, odometers and pedometers (9029.10); and, stroboscopes (9029.20). The duty rates on the imported components range from duty–free to 12 percent.

This application requests authority for Husqvarna to conduct the manufacturing activity under FTZ procedures, which could exempt the company from customs duty payments on the imported components used in export production. Approximately 30 percent of production is exported. On domestic sales, the company could choose the lower duty rate (duty–free to 2.3 percent) that applies to the finished products for the imported components used in manufacturing. Husqvarna may also realize savings related to direct delivery and weekly customs entry procedures. The company would also realize savings on the elimination of duties on materials that become scrap/waste during manufacturing. The application indicates that the FTZ–related savings would improve the plant's international competitiveness.

In accordance with the Board's regulations, Christopher Kemp of the FTZ staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address listed below. The closing period for their receipt is July 7, 2008. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15–day period (to July 21, 2008).

A copy of the application and accompanying exhibits will be available at each of the following addresses: U. S. Department of Commerce Export Assistance Center, 425 West Capital Avenue, Suite 425, Little Rock, Arkansas, 72201; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, D.C. 20230. For further information contact Christopher Kemp at christopher__kemp@ita.doc.gov or (202) 482–0862.

Dated: April 30, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–10086 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

(Docket 27–2008)

Foreign–Trade Zone 14 -- Little Rock, Arkansas Application for Subzone Status Husqvarna Outdoor Products Inc. (Outdoor Power Products Manufacturing) De Queen, Arkansas

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the Arkansas Economic Development Commission, grantee of Foreign–Trade Zone (FTZ) 14, requesting special–purpose subzone status for the outdoor power products manufacturing facility of Husqvarna Outdoor Products Inc. (Husqvarna) located in De Queen, Arkansas. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on April 29, 2008.

The Husqvarna facility is located at 123 Red Bridge Road, in De Queen (13 acres, 850 employees). The facility is used for manufacturing various types of electric–powered outdoor products (blowers, trimmers and chainsaws, HTSUS numbers 8414.59, 8467.22, 8467.29, 8467.89 and 8467.81). At full capacity the Husqvarna facility can

produce up to 4.5 million units annually. Imported components and raw materials account for approximately 35 percent of the value of inputs used in manufacturing. Parts and components that may be imported into the proposed subzone for manufacturing include: plastic tubes, pipes and hoses (3917.29); petroleum oils and oils from bituminous minerals (2710.19); carbides (2849.90); lubricating preparations (3403.19); polymides (3908.10); plastic monofilament (3916.90); self–adhesive plate, sheet, film, foils, tape and strip of plastics (3919.90); other plate, sheet, film, foil and strip of polymers of styrene (3921.11); plastic articles used for packing or conveyance of goods (3923.10, 3923.29, 3923.50, 3923.90); other plastic articles (3926.90); vulcanized rubber tubes, pipes and hoses (4009.11); vulcanized rubber conveyor or transmission belts (4010.36, 4010.39); vulcanized rubber washers and seals (4016.93); other vulcanized rubber products (4016.99); synthetic twine, cordage, rope and cable (5607.50); articles of yarn, strip, twine, cordage, rope or cable (5609.50); textile articles and products for technical uses (5911.90); labels (6307.90); iron or steel flanges (7307.91, 7307.92); self–tapping screws (7318.14); screws and bolts, with or without washers (7318.15); nuts (7318.16); spring washers and lock washers (7318.21); non–threaded articles of iron or steel (7318.29); iron or steel helical springs (7320.90); tungsten articles/powders (8101.10); agriculture, horticulture or forestry hand tools and their parts (8201.90); handsaws, blades and their parts (8202.40); iron or steel flexible tubing (8307.10); spark–ignition internal combustion engine parts (8409.91); fuel, lubricating and cooling pumps for internal combustion piston engines and their parts (8413.30, 8413.91); air and vacuum pumps and their parts (8414.59, 8414.90); air filters (8421.31); tool holders (8466.10); check valves and their parts (8481.30); pressure–reducing and thermostatically controlled valves (8481.80); ball bearings (8482.10); needle roller bearings (8482.40); transmission shafts, camshafts and crankshafts and their parts (8483.10); bearing housings/plain shaft bearings (8483.30); gears and gearing and other transmission elements, including torque converters (8483.40); flywheels and pulleys, including pulley blocks (8483.50); clutches and shaft couplings, including universal joints (8483.60); toothed wheels, chain sprockets and other transmission elements (8483.900); universal AC/DC motors (8501.20); single–phase AC motors (8501.20); multi–phase AC motors (8501.52); AC generators/alternators (8501.61); electrical transformers, static convertors, inductors and their parts (8504.33, 8504.40); electromagnetic couplings, clutches and brakes (8505.20); primary cells and batteries (8506.80); lead–acid storage batteries (8507.20); spark plugs (8511.10); ignition coils (8511.30); electrical ignition or starting equipment parts (8511.90); microphones and loudspeakers (8518.30); electrical switches (8536.50); lamp–holders, plugs and sockets (8536.69, 8536.90); fluorescent lamps (8539.31); electrical conductors (8544.42, 8544.49); and, revolution and production counters, taximeters, odometers and pedometers (9029.10). The duty rates on the imported components range from duty–free to 10.8 percent.

This application requests authority for Husqvarna to conduct the manufacturing activity under FTZ procedures, which could exempt the company from customs duty payments on the imported components used in export production. Approximately 30 percent of production is exported. On domestic sales, the company could choose the lower duty rate (duty–free to 2.3 percent) that applies to the finished products for the imported components used in manufacturing. Husqvarna may also realize savings related to direct delivery and weekly customs entry procedures. The company would also realize savings on the elimination of duties on materials that become scrap/waste during manufacturing. The application indicates that the FTZ–related savings would improve the plant's international competitiveness.

In accordance with the Board's regulations, Christopher Kemp of the FTZ staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address listed below. The closing period for their receipt is July 7, 2008. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15–day period (to July 21, 2008).

A copy of the application and accompanying exhibits will be available at each of the following addresses: U. S. Department of Commerce Export Assistance Center, 425 West Capital Avenue, Suite 425, Little Rock, Arkansas, 72201; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, D.C. 20230. For further information contact Christopher Kemp at christopher__kemp@ita.doc.gov or (202) 482–0862.

Dated: April 30, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–10085 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Prior Notification of Exports Under License Exception Agriculture Commodities

AGENCY: Bureau of Industry and Security.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before July 7, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Larry Hall, BIS ICB Liaison, (202) 482–4896, *lhall@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Section 906 of the Trade Sanctions Reform and Export Enhancement Act (TSRA) requires that exports of agricultural commodities, medicine or medical devices to Cuba are made pursuant to one-year licenses and that the requirements of one-year licenses shall be no more restrictive than license exceptions administered by the Department of Commerce. Exports and certain reexports of agricultural commodities are also authorized under License Exception AGR to Cuba. To meet the requirements of TSRA, BIS has imposed a prior notification procedure under License Exception Agricultural Commodities (AGR). The prior

notification procedure requires exporters to complete a form BIS–748P (approved under OMB Control No. 0694–0088) and after eleven days if no U.S. Government agency objects, the exporter is free to export the items.

II. Method of Collection

Paper format.

III. Data

OMB Control Number: 0694–0123.

Form Number(s): BIS–748P.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations; not-for-profit institutions.

Estimated Number of Respondents: 215.

Estimated Time Per Response: 58 minutes.

Estimated Total Annual Burden Hours: 208.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

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

Dated: May 2, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–10083 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 05–BIS–08]

In the Matter of: Kabba & Amir Investments, Inc., d.b.a. International Freight Forwarders, 286 Attwell Drive #16, Toronto, ON M9W 5B2, Canada, Respondent; Final Decision and Order

This matter is before me upon a Recommended Decision and Order (''RDO'') of an Administrative Law Judge (''ALJ''), as further described below.

In a charging letter filed on June 28, 2005, the Bureau of Industry and Security (''BIS'') alleged that Respondent Kabba & Amir Investments, Inc., d/b/a International Freight Forwarders (''IFF''), committed two violations of the Export Administration Regulations (currently codified at 15 CFR Parts 730–774 (2008) (''Regulations'')), issued pursuant to the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401–2420 (2000)) (the ''Act''), 1 stemming from its involvement in an attempted unlicensed export of items subject to the Regulations from the United States to Cuba. Charge One of the charging letter alleged as follows:

Charge 1 15 CFR 764.2(b)—Aiding and abetting an attempted violation of the Regulations.

On or about June 29, 2000, IFF aided and abetted the doing of an act prohibited by the Regulations when it took possession of a shipment of X–Ray Film Processors, items subject to the Regulations, in the United States for export to Cuba via Canada. Under section 746.2 of the Regulations, a BIS export license was required for this shipment, but no such license was obtained. In aiding and abetting the attempted export, IFF committed one violation of section 764.2([b])2 of the Regulations.

June 28, 2005 Charging Letter, at 1.

On November 6, 2007, BIS filed a motion for summary decision against IFF as to Charge One. During the briefing of this motion, BIS withdrew the only other charged violation, Charge Two, which alleged that IFF had conspired to violate the Regulations. See § 7663(a) of the Regulations (''BIS may unilaterally withdraw charging letters at any time, by notifying the respondent and the administrative law judge.''). The ALJ entered an order of dismissal as to Charge Two on January 29, 2008, consistent with BIS's notice of withdrawal of that charge.

On April 2, 2008, based on the record before him, the ALJ issued an RDO in which he determined that BIS was entitled to summary decision as to Charge One, finding that IFF had committed one violation of § 764.2(b) when it aided and abetted an attempted unlicensed export of items subject to the Regulations to Cuba, via Canada. The ALJ also recommended, following consideration of the record, that IFF be assessed a monetary penalty of $6,000.00 and a denial of export privileges for three years. The ALJ further recommended that the denial of export privileges be suspended for a period of three years as long as IFF pays the monetary penalty of $6,000.00 within thirty days of the final Decision and Order and does not commit any further violations of the Act or Regulations within three years of the issuance of the final Decision and Order.

The RDO, together with the entire record in this case, has been referred to me for final action under § 766.22 of the Regulations. I find that the record supports the ALJ's findings of fact and conclusions of law. In making this finding, I have determined that the ALJ made at least an implied finding that IFF took constructive possession of the items in question when it had the items transported by truck to Canada, arranged for them to then be transported to Cuba by plane, and took other actions to effect their forwarding and the completion of their unlicensed export to Cuba. Such a finding is entirely consistent with Charge One of the charging letter and the RDO. See, e.g., RDO at 5–6 (making finding based on uncontroverted documentary exhibits submitted by BIS in support of its Motion for Summary Decision, including Respondent's Answer, that IFF had, inter alia, agreed to forward the items from the United States to Cuba, had the items trucked to Canada, and arranged for their further transport by plane to Cuba prior to the items being seized by Canada Customs); RDO at 13 (''BIS established by documentary evidence and IFF's admissions that there exists no genuine issues of material fact that Respondent violated 15 CFR 764.2(b) by aiding and abetting in the attempted export of X–Ray film Processors (classified as EAR 99) from the United States to Cuba, via Canada on or about June 29, 2000.'')

I also find that the penalty recommended by the ALJ based upon his review of the entire record is appropriate, given the nature of the violations, the facts of this case, and the importance of deterring future unauthorized exports or attempted exports.

Based on my review of the entire record, I affirm the findings of fact and conclusions of law in the RDO.

Accordingly, *it is therefore ordered,*

First, that a civil penalty of $6,000.00 is assessed against Kabba & Amir Investments, Inc., d/b/a International Freight Forwarders, which shall be paid to the U.S. Department of Commerce within (30) thirty days from the date of entry of this Order.

Second, pursuant to the Debt Collection Act of 1982, as amended (31 U.S.C. 3701–3720E (2000)), the civil penalty owed under this Order accrues interest as more fully described in the attached Notice, and, if payment is not made by the due date specified herein, Kabba & Amir Investments, Inc., d/b/a International Freight Forwarders, will be assessed, in addition to the full amount of the civil penalty and interest, a penalty charge and administrative charge.

Third, for a period of three (3) years from the date that this Order is published in the **Federal Register**, Kabba & Amir Investments, Inc., d/b/a International Freight Forwarders, 286 Attwell Drive #16, Toronto, ON M9W 5B2, Canada (''IFF''), its successors or assigns, and when acting for or on behalf of IFF, its representatives, agents, officers or employees (hereinafter collectively referred to as ''Denied Person'') may not participate, directly or indirectly, in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Fourth, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations; B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Fifth, that, after notice and opportunity for comment as provided in § 766.23 of the Regulations, any person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of the Order.

Sixth, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

Seventh, that, as authorized by § 766.17(c) of the Regulations, the denial period set forth above shall be suspended in its entirety, and shall thereafter be waived, provided that: (1) Within thirty days of the effective date of the Decision and Order, IFF pays the monetary penalty of $6,000.00 in full, and (2) during the period of the suspension IFF commits no further violations of the Act or Regulations.

Eighth, that the final Decision and Order shall be served on IFF and on BIS and shall be published in the **Federal Register**. In addition, the ALJ's Recommended Decision and Order, except for the section related to the Recommended Order, shall also be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter, is effective upon publication in the **Federal Register**.

Dated: April 30, 2008.

Mario Mancuso,

Under Secretary of Commerce for Industry and Security.

1. From August 21, 1994 through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 CFR, 2000 Comp. 397 (2001)), continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) (''IEEPA''). On November 13, 2000, the Act was reauthorized and remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 15, 2007 (72 FR 46137 (August 16, 2007)), has continued the Regulations in effect under IEEPA.

2. Due to a typographical error, BIS referred to section 764.2(d) in the last sentence of the original Charge One. This typographical error was later corrected by BIS, as noted by the ALJ in fn. 4 of the RDO.

3. The sanction recommended by the ALJ also is consistent with the sanction proposed by BIS, which based its request on the facts and circumstances of the case as a whole.

[FR Doc. E8–9980 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 05–BIS–08]

Recommended Decision and Order; In the Matter of: Kabba & Amir Investments, Inc., d.b.a. International Freight Forwarders, 286 Attwell Drive #16, Toronto, ON M9W 5B2, Canada; Respondent(s)

Issued: April 2, 2008

Issued By: Hon. Michael J. Devine Presiding.

Appearances: For the Bureau of Industry and Security: Charles G. Wall, Esq., Joseph V. Jest, Esq., John T. Masterson, Office of Chief Counsel for Industry & Security, U.S. Department of Commerce, Room H–3839,

14th Street & Constitution Ave., NW., Washington, DC 20230.

For Respondent Kabba & Amir Investments, Inc., d.b.a. International Freight Forwarders, A. Rahman Amir, Managing Director, pro se.

Preliminary Statement

The Bureau of Industry and Security [1] (''BIS'' or ''Agency'') commenced this administrative enforcement action against Kabba & Amir Investments, Inc. d.b.a. International Freight Forwarders (''IFF'' or ''Respondent''). In a Charging Letter dated June 27, 2005, BIS alleges that on or about June 29, 2000,[2] IFF committed two violations of the Export Administration Act of 1979 (''Act''), as amended and codified at 50 U.S.C. App. 2401–20 (2000), and the Export Administration Regulations (''EAR'' or ''Regulations''), as amended and codified at 15 CFR parts 730–74 (2000 & 2007).[3]

The allegations stem from IFF's involvement in the export of X-Ray Film Processors to Cuba via Canada without first obtaining the required United States government license for the transaction. Both charges read as follows:

Charge 1 15 CFR 764.2(b)—Aiding and Abetting an Attempted Violation of the Regulations

On or about June 29, 2000, IFF aided and abetted the doing of an act prohibited by Regulations when it took possession of a shipment of X-Ray Film Processors, items subject to the Regulations, in the United States for export to Cuba via Canada. Under section 746.2 of the Regulations, a BIS export license was required for this shipment, but no such license was obtained. In aiding and abetting the attempted export, IFF committed one violation of sections 764.2(b) (sic) of the Regulations.[4]

Charge 2 15 CFR 764.2(d)—Conspiracy To Do an Act That Is in Violation of the Regulations

On or about June 29, 2000, IFF conspired with one or more persons to do an act that constituted a violation of the Regulations. Specifically, IFF arranged with co-conspirators, known and unknown, to export X-Ray Film Processors, items subject to the Regulations, to Cuba via Canada without the BIS export license required by section 746.2 of the Regulations. IFF took one or more acts in furtherance of the conspiracy, including taking possession of the items in the United States. In so doing, IFF committed one violation of section 764.2(d) of the Regulations.

On November 6, 2007, BIS filed a Motion for Summary Decision on Charge 1. In support thereof, BIS argues that there are no genuine issues as to any material fact because of IFF's admissions regarding its participation in the attempted export from the United States to Cuba. Therefore, BIS states it is entitled to summary decision as a matter of law. Attached to its motion were eight (8) exhibits marked Government Exhibit (''Gov't Ex.'') A–H.

A pre-hearing conference was conducted on December 18, 2007, at which time a scheduling order was issued establishing, among other things, a deadline for Respondent to file an Answer to the BIS Motion for Summary Decision. Order Memorializing Pre-Hearing Conference, December 20, 2007. IFF timely filed a response to the Motion for Summary Decision on January 8, 2008. While IFF does not deny its participation in the transaction at issue, the company argues that Charge 1 should be dismissed. To support its argument, IFF asserts that Gov't Ex. C–E are irrelevant. IFF also states that the company lacked any knowledge that the shipment at issue was manufactured in the United States or that an export control permit was required. According to IFF, the shipper is responsible for securing the required export control permits, not the freight forwarder. Therefore, IFF asserts that the company cannot be found liable for violating 15 CFR 764.2(b).

BIS filed a reply on January 24, 2008. BIS attached to its reply brief two additional exhibits, marked Gov't Ex. I and J. Both exhibits attempt to attack the credibility of IFF's assertion of ignorance concerning the origin of the X-Ray Film Processors. Following a pre-hearing conference, the previous Scheduling Order dated December 20, 2007, was modified and IFF was provided an opportunity to introduce rebuttal evidence concerning Gov't Ex. I and J. See Scheduling Order, February 19, 2008. A deadline was also established for BIS to file a proposed sanction and for IFF to submit rebuttal evidence concerning the proposed sanction. *Id.* BIS timely filed a Motion for Proposed Sanction. IFF provided a response dated February 25, 2008, regarding the BIS submission that included Exhibits I and J [5] but did not submit a response to the Motion for Proposed Sanction.

On January 24, 2008, BIS also filed a Notice of Withdrawal of Charge 2. Pursuant to 15 CFR 766.3(a), BIS may ''unilaterally withdraw charging letters at any time, by notifying the respondent and the administrative law judge.'' While section 766.3(a) only refers to unilateral withdrawal of charging letters, implicit in the regulations is the fact that BIS may unilaterally withdraw a single charge. Accordingly, Charge 2 was dismissed by Order dated January 29, 2007. Order Granting Motion to Withdraw Charge 2.

For reasons stated below, BIS's Motion for Summary Decision on Charge 1 is GRANTED. Since Charge 2 was withdrawn by BIS, this Recommended Decision & Order resolves the entire case.

[1] On April 26, 2002, through an internal organizational order, the Department of Commerce changed the name of BXA to BIS. See Industry and Security Programs: Change of Name, 67 Fed. Reg. 20630 (Apr. 26, 2002). Pursuant to the Savings Provision of the order, ''Any actions undertaken in the name of or on behalf of the Bureau of Export Administration, whether taken before, on, or after the effective date of this rule, shall be deemed to have been taken in the name of or on behalf of the Bureau of Industry and Security.'' *Id.* at 20631.

[2] The charged violation occurred in 2000. The regulations governing the violations at issue are found in the 2000 version of the Code of Federal Regulations (15 CFR 730–74 (2000)). The 2007 regulations codified at 15 CFR Part 766 establish the procedural rules that apply to this matter.

[3] The EAA and all regulations promulgated there under expired on August 20, 2001. *See* 50 U.S.C. App. 2419. Three days before its expiration, on August 17, 2001, the President declared the lapse of the BAA constitutes a national emergency. 5g Exec. Order. No. 13222, reprinted in 3 CFR at 783–784, 2001 Comp. (2002). Exercising authority under the International Emergency Economic Powers Act (''IEEPA''), 50 U.S.C. 1701–1706 (2002), the President maintained the effectiveness of the BAA and its underlying regulations throughout the expiration period by issuing Exec. Order. No. 13222 on August 17, 2001. *Id.* The effectiveness of the export control laws and regulations were further extended by successive Notices issued by the President; the most recent being that of August 15, 2007. See Notice: Continuation of Emergency Regarding Export Control Regulations, 72 Fed. Reg. 46, 137 (August 15, 2007). Courts have held that the continuation of the operation and effectiveness of the BAA and its regulations through the issuance of Executive Orders by the President constitutes a valid exercise of authority. *See* Wisconsin Project on *Nuclear Arms Control* v. *United States Dep't of Commerce, 317 F.3d 275, 278-79 (D.C. Cir. 2003); Times Publ'g Co.* v. *U.S. Department of Commerce, 236 F.3d 1286, 1290 (11th Cir. 2001).*

[4] In the Charging Letter, BIS mistakenly cites to section 764.2(d) instead of section 764.2(b). This is a typographical error, which BIS corrects in the Motion for Summary Decision filed on November 6, 2007. Prior decisions have allowed BIS to amend an incorrect citation in the Charging Letter caused by a typographical error. *See* e.g. In re Export Materials, Inc., 64 Fed. Reg. 40,820, 40,820 n. 3 (Jul. 28, 1999). This is especially true where, as in this case, the amendment is not a substantive change and it in no way prejudices the respondent.

[5] It is noted that on February 13, 2008, Respondent filed a letter addressing Gov't Ex. J, as well as other matters concerning the BIS's discovery request. Nonetheless, to ensure that Respondent was offered a reasonable opportunity to file rebuttal evidence to the new exhibits filed by BIS in accordance with 15 CFR 766.15 (2007), the scheduling order was established.

Recommended Findings of Fact

The facts, when viewed in a light most favorable to IFF, establish:

1. IFF is a Canadian freight forwarding business (*Gov't Ex. B*).

2. Kontron Instruments S.A. (Kontron) is a French based company (*Gov't Ex. K*).

3. On May 29, 2000, Kontron issued Purchase Order # 17–3688–58–1124 to Medical Equipment Specialists, Inc., a United States based company (*Gov't Ex. C*).[6]

4. Purchase Order # 17–3688–58–1124 was for four (4) AFP brand X-Ray Film Developers Minimed 90 with initial supplies and parts. (*Id.*).[7]

5. The X-Ray Film Developers were to be shipped to IFF in Canada. (*Id.*).

6. On June 23, 2000, Invoice # 70467 was issued to Medical Equipment Specialists, Inc. for four (4) Minimed 90 PRCSR 110/60. (*Gov't Ex. D*).

7. On June 28, 2000, Medical Equipment Specialists, Inc. issued Invoice # 624865 for four (4) Mini-Med X-Ray Film Processors sold to Kontron. The items were to be shipped to IFF in Canada by ''Truck Air Freight'' and ''Via Ground to Canada.'' (*Gov't Ex. K*).

8. IFF admits that on or around June 29, 2000, the company was ''advised to pickup a shipment from United States for furtherance to Cuba.'' (*Gov't Ex. B*).

9. With respect to the Cuban shipment, Kontron instructed IFF to, among other things:

a. Remove all packing lists and shipping documents attached to the parcels;

b. Attach new packing lists to the parcels and affix new shipping labels on top of the original labels;

c. Reserve a space on the next available flight on Cubana de Aviacion to Habana-Cuba;

d. Prepare an Air way bill for the shipment;

e. Complete the Certificate of Origin by typing the Airline Company, Flight number, and date of flight; and

f. Secure insurance for the benefit of Technoimport-Habana-Cuba. (*Gov't Ex. F*).

10. IFF never inquired whether a license was obtained for the export of the X-Ray Film Processors from the United States to Cuba, via Canada. *See generally Kabba & Amir Investments, Inc. letter dated Jan. 8, 2008* (regarding response to the BIS motion for summary decision).

11. Upon arrival from the United States, the shipment was seized by Canada Customs and Revenue Agency from a Canadian custom bonded warehouse to which IFF could not access. (*Gov't Ex. B*).

12. The APP Mini-medical/90 X-Ray Processors are classified as EAR99. (*Gov't Ex. G, see also* 15 CFR 734.3 (2000)).

13. In 2000, the United States had a virtual embargo on the export and re-export of certain goods from the United States to Cuba. However, there was a limited exception for medical items and agricultural goods. Such items required an export license. (*Gov't Ex. G; see also* 15 CFR 746.2 (2000)).

14. Even though the Medical X-Ray Film Processors are U.S. origin goods, Medical Equipment Specialists, Inc. failed to secure the required license. (*Gov't Ex. H–J*).

Discussion

A. Standard of Review

The standard for review of a motion for summary decision is set forth in 15 CFR 766.8 (2007). That standard of review is the same legal standard adopted in Rule 56(c) of the Federal Rules of Civil Procedure. Under section 766.8, summary decision is appropriate where the entire record shows that: (a) There is no genuine issue as to any material fact; and (b) the moving party is entitled to summary decision as a matter of law. 15 CFR 766.8 (2007). A dispute over a material fact is ''genuine'' if the evidence is such that a reasonable fact finder could render a ruling in favor of the non-moving party. *Anderson* v. *Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).* Substantive law dictates which facts are material, and only disputes that might affect the outcome of the litigation will properly preclude the entry of summary decision. *Id.* at 247.

When reviewing a summary judgment motion, all competing inferences and evidence are viewed in a light most favorable to the non-moving party. Anderson, 477 U.S. at 255. The burden of proof is on the moving party to identify those portions of the record that demonstrate absence of a genuine issue of material fact. *Id.* at 25 1–255; *Celotex Corp.* v. *Catrett, 477 U.S. 317, 322–24 (1986).* Once the moving party proves that there exists no genuine issue of material fact, the burden shifts to the non-moving party to identify specific facts evidencing triable issues of fact. *Id.* A simple denial or conclusory allegations are insufficient to defeat a summary decision motion. See In re: MK Technology Assoc., Ltd., 64 Fed. Reg. 69,478 (Dec. 13, 1999).

B. Substantive Law/Regulations

The EAA and EAR govern exports from the United States. *See* 50 U.S.C. App. 2402(2)(A), 2404(A)(1), 2405(A)(1), and 15 CFR 730.2 (2000). In 2000, there was a virtual embargo on the export and re-export of certain goods from the United States to Cuba. (*Gov't Ex. G*). Section 746.2(a) established, ''you will need a license to export or reexport all items subject to the EAR * * * to Cuba.'' *See* 15 CFR 746.2(a) (2000). The phrase '' '[s]ubject to the EAR' * * * describes those items and activities over which the [Agency] exercises regulatory jurisdiction.'' *See* 15 CFR 734.2(a)(1). It broadly includes:

(a) All items in the United States, including in a U.S. Foreign Trade Zone or moving in transit through the United States from one foreign country to another;

(b) All U.S. origin items wherever located;

(c) U.S. origin parts, components, materials, or other commodities incorporated abroad into foreign-made products, U.S. origin software commingled with foreign software, and U.S. origin technology commingled with foreign technology, in quantities exceeding *de minimis* levels;

(d) Certain foreign-made direct products of U.S. origin technology or software; and

(e) Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S. origin technology or software. *See* 15 CFR 734.3(a).[8]

Section 736.2(b)(6) contains a general prohibition against the ''export or reexport of any items subject to the EAR [without a license or License Exception] to a country that is embargoed by the United States or otherwise made subject to controls * * * as described in part 746 of the EAR.'' *See* 15 CFR 736.2(b)(6) (2000). The ''export or reexport of items subject to the EAR that will transit through * * * or be transshipped in a country or countries to a new country or are intended for reexport to the new country, are deemed to be exports to the new country.'' *See* 15 CFR 734.2(b)(6).

The term '' 'Export' means an actual shipment or transmission of items

[6] Gov't Ex. C contains a typographical error, which is now being corrected. Gov't Ex. C indicates that Medical Equipment Specialists, Inc. is located in ''Shrewsbuty, MA 01545.'' The true name of the city is ''Shrewsbury'', not ''Shrewsbuty.'' *See* (*Gov't Ex. E* (Medical Equipment Specialists, Inc.'s Invoice)).

[7] Throughout this case, ''AFP brand X-Ray Film Developers Minimed 90'', ''Minimed 90 PRCSR 110/60'', ''Mini-Med X-Ray Film Processors,'' ''AFP Mini-medical/90 X-Ray Processors'' are names used to refer to the same item, X-Ray Film Processors.

[8] Items subject to the EAR are listed in the Commerce Control List (CCL) located in part 774 of the EAR. 15 CFR 734.3(c). Those items subject to the EAR which are not listed on the CCL are designated as EAR99. *Id.*

subject to the EAR out of the United States.'' *See* 15 CFR 734.2(b)(1). Conversely, the term '' 'Reexport' means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country * * * outside the United States.'' *Id.* at (b)(4). The export or reexport need not be completed to constitute a violation of the EAR. The mere attempt to export or reexport an item subject to the EAR without a license constitutes a violation. *See* 15 CFR 764.2(c). Further, a person is not relieved of ones obligation to comply with the EAR simply because that person complied with the license or other requirements of foreign law or regulation. *See* 15 CFR 734.12.

IFF is charged with aiding and abetting the attempted unlicensed export of X-Ray Film Processors to Cuba via Canada in violation of section 764.2(b), which states:

(c) Causing, aiding, or abetting a violation. No person may cause or aid, abet, counsel, command, induce, procure, or permit the doing of any act prohibited or the omission of any act required, by the EAA, the EAR, or any order, license or authorization issued thereunder. *See* 15 CFR 764.2(b).

C. IFF's Answer constitutes an admission thereby eliminating any genuine issue of material fact.

In these proceedings, a respondent's Answer to the Charging Letter is critical in framing the factual issues in the case. In re Jabal Damavand General Trading Co., 67 Fed. Reg. 32,009 (May 13, 2002). There are no factual issues in dispute where a respondent admits the allegations contained in the Charging Letter. An ''admission'' is defined as ''a voluntary acknowledgement made by a party of the existence of the truth of certain facts.'' Black's Law Dictionary 47 (6th Ed. 1990).

The issue in this case is whether IFF's answer to the Charging Letter and subsequent responses operate as an admission thereby eliminating any genuine issues of material fact in this case. The Agency points to IFF's letter dated January 17, 2006 wherein Mr. A. Rahman Amir, Managing Director of IFF, acknowledges the company was ''advised to pickup a shipment from United States for furtherance to Cuba.'' In the same breadth, however, IFF claims that: (1) The company was ''not aware of the * * * origin of the goods'' or that the goods required an ''export control permit'' and (2) under Canadian law, the shipper—not the freight forwarder—is responsible for obtaining the ''export control permit.'' Both arguments are rejected.

Based on a reading of IFF's Answer, the aforementioned response effectively operates as an admission. Respondent's contention that they ''were not aware of the nature of the good [or] the origin of the goods'' does not absolve the company of liability. Under the EAR, jurisdiction is established on all items in the United States regardless of origin. *See* generally 15 CFR 734.3(a).

Further, Respondent's lack of awareness that the X-Ray Film Processors required an ''export control permit'' does not insulate the company from liability. IFF is in a highly regulated industry. Those engaged in the industry are ''presumed to be aware of, and practitioners in the industry are charged with knowledge of, as well as the responsibility to comply with, the duly promulgated regulations.'' In re Aluminum Company of America, 64 Fed. Reg. 42,641, 42,648 (Aug. 5, 1999) (citing *United States* v. *Int'l Minerals and Chemical Corp., 402 U.S. 558, 563 & 565 (1971).* One's compliance with foreign law or regulation does not relieve one of the obligations to comply with the EAR. 15 CFR 734.12.

Here, as a freight forwarder, IFF had an obligation, at very least, to inquire whether all applicable export licenses had been secured for the X-Ray Film Processors before entering into the transaction. Upon learning that no license had been secured for the export from the United States to Cuba via Canada IFF should have acted accordingly. Its failure to do either of the above unnecessarily exposed IFF to liability in this case.

BIS correctly argues that IFF's knowledge of the violation is irrelevant in determining whether a violation occurred because 15 CFR 764.2(b) is strict liability. Knowledge or intent is simply not a requisite element of proof for an aiding or abetting violation. Doron Totler individually and d/b/a Ram Robotics, Ltd. a/k/a Ram Robotic Automation Mfg. Systems. Ltd., 58 Fed. Reg. 62,095 (Nov. 24, 1993). Thus, liability may be imposed regardless of knowledge or intent. *Iran Air* v. *Kugelman, 996 F.2d 1253, 1258–59 (D.C. Cir. 1992*); *see* also In re Aluminum Company of America, 64 Fed. Reg. 42,641 (Aug. 5, 1999).

In addition, the fact that the X-Ray Film Processors were not exported to Cuba as planned, and that IFF never took actual possession of the items does not serve as a defense in this case. The mere attempt to export or reexport the X-Ray Film Processors, classified as EAR99, from the United States to Cuba, via Canada without a license is sufficient to establish a violation of the EAA and EAR. *See* 15 CFR 764.2(c).

Based on the above and viewing the evidence in a light most favorable to Respondent, BIS is entitled to summary decision as a matter of law based on IFF's admission and the documentary evidence supporting the motion for summary decision.

Recommended Ultimate Findings of Fact and Conclusions of Law

1. Kabba & Amir Investments, Inc. d.b.a. International Freight Forwarders and the subject matter of this case are properly within the jurisdiction of the Bureau of Industry and Security in accordance with the Export Administration Act of 1979 (50 U.S.C. App. 2401–20 (2000)), and the Export Administration Regulations (15 CFR Parts 730–74 (2000 & 2007)).

2. Under 15 CFR 764.2(c), the attempted export of the Medical X-Ray Film Processors (classified as EAR99) from the United States to Cuba, via Canada constitutes a violation of the EAR.

3. Title 15 CFR 764.2(b) is a strict liability offense. Thus, the Agency need not prove ''knowledge'' or ''intent'' to establish that Respondent aided or abetted the attempted export of X-Ray Film Processors (classified as EAR99) from the United States to Cuba, via Canada on or about June 29, 2000.

4. Respondent is not relieved of the obligation to comply with the EAR simply by establishing compliance with Canadian laws and/or regulations. See generally 15 CFR 734.12.

5. IFF's answer to the Charging Letter and subsequent responses constitute admissions thereby eliminating any genuine issues of material fact in this case.

6. BIS has established by documentary evidence and IFF's admissions that there exists no genuine issues of material fact that Respondent violated 15 CFR 764.2(b) by aiding or abetting in the attempted export of X-Ray Film Processors (classified as EAR99) from the United States to Cuba, via Canada on or about June 29, 2000. Accordingly, BIS is entitled to summary decision.

Recommended Sanction

Section 764.3 of the EAR sets forth the sanctions BIS may seek for violations. The sanctions include: (i) A monetary penalty; (ii) suspension from practice before BJS, and (iii) denial of export privileges. 15 CFR 766.3. A denial order may be considered an appropriate sanction even in matters involving simple negligence or carelessness, if the violation involves ''harm to the national security or other essential interests protected by the export control system,''

if the violations are of such a nature and extent that a monetary fine alone represents an insufficient penalty. 15 CFR Part 766, Supp. No. 1, III, A.

Here, BIS seeks a monetary penalty amount of $6,000 and a denial of export privileges for a period of three (3) years. BIS also proposes that this denial of export privileges be suspended as long as Respondent pays the monetary penalty within thirty (30) days from the date of the final Decision and Order, and Respondent does not commit any further violations of the Act or Regulations within three (3) years from the date of the final Decision and Order. Furthermore, BIS counsel explains that this sanction is reasonable because it falls below the maximum penalty allowed.

The governing regulations in this case provide for the available sanction of civil monetary penalties, suspension from practice before BIS and denial of export privileges. See 15 CFR 764.3. Specifically, 15 CFR 764.3(a)(1) states that maximum monetary penalty allowed is set forth in the Export Administration Act of 1979 (EAA).[9] 50 U.S.C. App. 2401–20 (2000). ''In the event that any provision of the EAR is continued by IEEPA or any other authority, the maximum monetary penalty for each violation shall be proved by such other authority. Id. Since the EAA had lapsed at the time of the violation, the regulations violated by Respondent were in effect under the IEEPA and thus, the maximum monetary penalty is provided for under the IEEPA. The maximum penalty amount according the IEEPA is $250,000.00.

At the time the charging letter was filed the IEEPA provided for a maximum penalty amount of $11,000.00 per violation. 15 CFR 6.4, 764.3(a) (2000). On October 15, 2007, Congress increased the maximum civil penalty under the IEEPA to $250,000 or twice the amount of the transaction that is the basis of the violation. Public Law No. 110–96, 121 Stat. 1011 (2007). Congress applied this penalty increase with respect to which enforcement action was pending or commenced on or after the date of the enactment of the EAA. Id. Therefore, since this action was pending on October 16, 2007, the maximum penalty available is $250,000.00 per violation.

Although Respondent did not reply to the Agency's Motion for Proposed Sanction, Respondent did assert lack of knowledge in prior filings. I have taken that into consideration and after review of the entire record, including all filings and responses by the parties, I find that the sanction proposed by BIS is appropriate. Accordingly, Respondent shall be sanctioned with a monetary penalty of $6,000.00, and a denial of export privileges for three (3) years. This three (3) year suspension shall be suspended for a period of three years as long as Respondent pays the monetary penalty of $6,000.00 within thirty (30) days of the issuance of the Final Decision and Order and Respondent does not commit any further violations of the Act or Regulations within three (3) years of the issuance of the Final Decision and Order.

Recommended Order [10]

[REDACTED SECTION] pgs. 16–18.

[REDACTED SECTION] pg. 19 partially redacted.

PLEASE BE ADVISED that this Recommended Decision and Order is being referred to the Under Secretary for Industry & Security for review and final action for the agency. Pursuant to section 766.22(b), the parties have twelve (12) days from the date of issuance of this recommended decision and order in which to submit simultaneous responses. Parties thereafter shall have eight (8) days from receipt of any response(s) in which to submit replies. Any response or reply must be received within the time specified by the Under Secretary.

PLEASE BE FURTHER ADVISED that within thirty (30) days after receipt of this Recommended Decision and Order, the Under Secretary shall issue a written order affirming, modifying, or vacating the Recommended Decision and Order in accordance with 15 CFR 766.22 (2007), a copy of which is supplied in Attachment A.

Done and dated April 2, 2008, Norfolk, Virginia.

Michael J. Devine,

Administrative Law Judge, U.S. Coast Guard.[11]

Attachment A—Notice of Review by Under Secretary

15 CFR 766.22 Review by Under Secretary.

(a) *Recommended decision.* For proceedings not involving violations relating to part 760 of the EAR, the administrative law judge shall immediately refer the recommended decision and order to the Under Secretary. Because of the time limits provided under the EAA for review by the Under Secretary, service of the recommended decision and order on the parties, all papers filed by the parties in response, and the final decision of the Under Secretary must be by personal delivery, facsimile, express mail or other overnight carrier. If the Under Secretary cannot act on a recommended decision and order for any reason, the Under Secretary will designate another Department of Commerce official to receive and act on the recommendation.

(b) *Submissions by parties.* Parties shall have 12 days from the date of issuance of the recommended decision and order in which to submit simultaneous responses. Parties thereafter shall have eight days from receipt of any response(s) in which to submit replies. Any response or reply must be received within the time specified by the Under Secretary.

(c) *Final decision.* Within 30 days after receipt of the recommended decision and order, the Under Secretary shall issue a written order affirming, modifying or vacating the recommended decision and order of the administrative law judge. If he/she vacates the recommended decision and order, the Under Secretary may refer the case back to the administrative law judge for further proceedings. Because of the time limits, the Under Secretary's review will ordinarily be limited to the written record for decision, including the transcript of any hearing, and any submissions by the parties concerning the recommended decision.

(d) *Delivery.* The final decision and implementing order shall be served on the parties and will be publicly available in accordance with § 766.20 of this part.

(e) *Appeals.* The charged party may appeal the Under Secretary's written order within 15 days to the United States Court of Appeals for the District of Columbia pursuant to 50 U.S.C. app. 2412(c)(3).

[FR Doc. E8–9982 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–DT–M

[9] From August 21, 1994 through November 12, 2000, the EAA was in lapse. The regulations were continued in effect under the International Emergency Economic Powers Act (IEEPA) pursuant to Executive Order 12924 and several successive Presidential Notices. The EAA was reauthorized on November 13, 2000, by Public Law No. 106–508 (114 Stat. 2360 (2000)). The EAA lapsed again on August 20, 2001 but was continued in effect under the IEEPA pursuant to Executive Order 13222 and several successive Presidential Notices.

[10]

[11] United States Coast Guard Administrative Law Judges perform adjudicatory functions for the Bureau of Industry and Security with approval from the Office of Personnel Management pursuant to a memorandum of understanding between the Coast Guard and the Bureau of Industry and Security.

DEPARTMENT OF COMMERCE

International Trade Administration

A–427–801, A–428–801, A–475–801, A–588–804, A–412–801

Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews and Intent to Rescind Reviews in Part

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

SUMMARY: In response to requests from interested parties, the Department of Commerce (the Department) is conducting administrative reviews of the antidumping duty orders on ball bearings and parts thereof (ball bearings) from France, Germany, Italy, Japan, and the United Kingdom. The reviews cover 27 manufacturers/exporters. The period of review is May 1, 2006, through April 30, 2007.

We have preliminarily determined that sales have been made below normal value by companies subject to these reviews. If these preliminary results are adopted in our final results of administrative reviews, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries.

We invite interested parties to comment on these preliminary results. Parties who submit comments in these reviews are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument.

EFFECTIVE DATE: May 7, 2008.

FOR FURTHER INFORMATION CONTACT: Edythe Artman or Richard Rimlinger, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3931 and (202) 482–4477, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 15, 1989, the Department published the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom in the **Federal Register** (54 FR 20900). On June 29, 2007, in accordance with 19 CFR 351.213(b), we published a notice of initiation of administrative reviews of 163 companies subject to these orders. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review*, 72 FR 35690 (June 29, 2007).

On January 16, 2008, we extended the due date for the completion of these preliminary results of reviews from January 31, 2008, to April 15, 2008. *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews*, 73 FR 2887 (January 16, 2008). On April 15, 2008, we extended the due date for the completion of the results from April 15, 2008, to April 30, 2008. See *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews*, 73 FR 21311 (April 21, 2008).

For these administrative reviews, the period of review covered is May 1, 2006, through April 30, 2007. The Department is conducting these administrative reviews in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of Orders

The products covered by the orders are ball bearings (other than tapered roller bearings) and parts thereof. These products include all antifriction bearings that employ balls as the rolling element. Imports of these products are classified under the following categories: antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.

Imports of these products are classified under the following *Harmonized Tariff Schedules* (HTS) subheadings: 3926.90.45, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.35, 8482.99.2580, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.30.40, 8483.30.80, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.93.30, 8708.93.6000, 8708.99.06, 8708.99.3100, 8708.99.4000, 8708.99.4960, 8708.99.58, 8708.99.8015, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

As a result of recent changes to the HTS, effective February 2, 2007, the subject merchandise is also classifiable under the following additional HTS item numbers: 8708.30.50.90, 8708.40.75.00, 8708.50.79.00, 8708.50.8900, 8708.50.91.50, 8708.50.99.00, 8708.70.6060, 8708.80.65.90, 8708.93.75.00, 8708.94.75, 8708.95.20.00, 8708.99.55.00, 8708.99.68, 8708.99.81.80.

Although the HTS item numbers above are provided for convenience and customs purposes, the written descriptions of the scope of these orders remain dispositive.

The size or precision grade of a bearing does not influence whether the bearing is covered by one of the orders. These orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, etc.) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scope of these orders. For unfinished parts, such parts are included if they have been heat–treated or if heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by these orders are those that will be subject to heat treatment after importation. The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bearings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scope of these orders.

For a listing of scope determinations which pertain to the orders, see the ''Memorandum to Laurie Parkhill'' regarding scope determinations, dated April 30, 2008, which is on file in the Central Records Unit (CRU) of the main Commerce building, room B–099, in the General Issues record (A–100–001) for the 2006–2007 reviews.

Intent to Rescind Reviews in Part

We received a letter, dated June 21, 2007, from a company, Essex Nexans Europe SAS, on behalf its subsidiaries Essex Nexans SAS, Essex Nexans L&K GmbH, and Essex International Ltd., in which it stated that Essex Nexans and its subsidiaries did not manufacture, sell, or ship ball bearings of French, German, Italian, or U.K. origin to the United States during the period of review. We also received letters of no shipments from IKN GmbH and WWC Service–Center GmbH concerning ball bearings from France, Germany, Italy, or the United Kingdom. We have received no comments on the submissions from the three companies. Because we preliminarily find that Essex Nexans Europe SAS and its subsidiaries, IKN GmbH, and WWC Service–Center GmbH had no shipments of subject merchandise during the period of review, we intend to rescind the

administrative reviews with respect to these companies. If we continue to find at the time of our final results that they had no shipments of ball bearings from France, Germany, Italy, or the United Kingdom, we will rescind the reviews of these companies.

Selection of Respondents

Due to the large number of companies in the reviews and the resulting administrative burden to review each company for which a request had been made and not withdrawn, the Department exercised its authority to limit the number of respondents selected for the reviews. Where it is not practicable to examine all known exporters/producers of subject merchandise because of the large number of such companies, section 777A(c)(2) of the Act, allows the Department to limit its examination to either a sample of exporters, producers, or types of products that is statistically valid, based on the information available at the time of selection, or exporters and producers accounting for the largest volume of subject merchandise from the exporting country that can be reasonably examined.

Accordingly, in June 2007 we requested information concerning the quantity and value of sales to the United States from the 163 exporters/producers listed in the initiation notice. We received responses from most of the exporters/producers in June and July of 2007. A number of the companies indicated that they had no shipments of the subject merchandise to the United States during the period of review. A number of the companies indicated that they were affiliated with other companies for which we had initiated administrative reviews, and these companies and their affiliates reported their sales to the United States collectively. Some of the companies withdrew their requests for review prior to our selection of respondents for individual examination. Finally, three companies, Christian Feddersen GmbH & Co. KG, Lentz & Schmahl GmbH, and Societe Nexans, for which we initiated reviews subject to the orders on France, Germany, Italy, and the United Kingdom, did not respond to our questionnaire. Based on our analysis of the responses and our available resources, we chose to examine the sales of the following companies:

France:

* SKF France S.A. and SFK Aerospace France S.A.S. (SKF France)

Germany:

* Gebrüder Reinfurt GmbH & Co., KG (GRW)
* SKF GmbH (SKF Germany)

Italy:

* SKF RIV–SKF Officine di Villas Perosa S.p.A.; SKF Industrie S.p.A.; RFT S.p.A.; OMVP S.p.A. (collectively SKF Italy)

Japan:

* JTEKT Corporation (formerly known as Koyo Seiko Co., Ltd.) (JTEKT)
* NTN Corporation (NTN)

United Kingdom:

* The Barden Corporation (UK) Limited; Schaeffler (UK) Ltd. (formerly known as the Barden Corporation (UK) Ltd.; FAG (UK) Ltd. (collectively Barden/FAG)) (collectively Barden/Schaeffler UK)

See order–specific memoranda to Laurie Parkhill regarding respondent selection, dated August 14, 2007, for the detailed analysis of the selection process for each country–specific review.[1]

For the responding companies which remain under review and which we did not select for individual examination, we have either calculated a simple average of the weighted–average margins of the two selected respondents in a review (Japan) or assigned the weighted–average margin of a sole selected respondent in a review (United Kingdom). Thus, based on our preliminary margin calculations, we have calculated a margin of 10.30 percent for non–selected respondents from Japan. See Memorandum to Laurie Parkhill regarding the calculation of a simple–average margin for the Japan proceeding, dated April 30, 2008.

For the U.K. review, while we have applied, for these preliminary results, the rate of 0.28 percent calculated for the sole respondent selected for individual examination, Barden/Schaeffler UK, to the company not individually examined, Rolls Royce, we invite comments from interested parties regarding the methodology to be used to determine the rate for the non–examined company. Specifically, we invite interested parties to comment on the rate to be applied to the non–examined company, considering, but not limited to, the following factors: (a) the Department has limited its examination of respondents pursuant to section 777A(c)(2)(B) of the Act; (b) section 735(c)(5) of the Act provides that, with some exceptions, the all–others rate in an investigation is to be calculated excluding any margins that are zero, *de minimis*, or based entirely on facts available; (c) the *Statement of Administrative Action* states that, with respect to the calculation of the all–others rate in such cases, ''the expected method will be to weight–average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non–investigated exporters or producers, Commerce may use other reasonable methods.'' See *Statement of Administrative Action* accompanying the *Uruguay Round Agreements Act*, H.R. Doc. No. 103–316, vol.1 (1994) at 870 (*SAA*) at 873.

Verification

As provided in section 782(i) of the Act, we have verified information provided by Barden/Schaeffler UK in the administrative review of the order on ball bearings from the United Kingdom using standard verification procedures, including the examination of relevant sales and financial records and the selection and review of original documentation containing relevant information. Our verification results are outlined in the public version of our Barden/Schaeffler UK verification report, which is on file in the CRU, room 1117 of the main Department building.

Use of Facts Otherwise Available

For the reasons discussed below, we determine that the use of adverse facts available (AFA) is appropriate for the preliminary results of reviews with respect to four companies.

A. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the administering authority, fails to provide such information by the deadlines for submission of the information and in the form or manner requested, subject to subsections (c)(1) and (e) of section 782, significantly impedes a proceeding under this title, or provides such information but the information cannot be verified as provided in 782(i), the administering authority shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that, if the administering authority determines that a response to a request for information does not comply with the request, the

[1] Subsequent to our selection of respondents, two of the U.K. companies, Molins PLC and NSK Bearings Europe, and one of the Japanese companies, NSK Ltd., withdrew their requests for a review and we rescinded the reviews of these companies. See 72 FR 64577 (November 16, 2007).

administering authority shall promptly inform the responding party and, to the extent practicable, provide an opportunity to remedy the deficient submission. If the party fails to remedy the deficiency within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act provides that the Department ''shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority'' if the information is timely, can be verified, and is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information, if it can do so without undue difficulties.

As discussed above, in June 2007, we requested information concerning the quantity and value of sales to the United States from each of the exporters/producers listed in the initiation notice for the current reviews. Three companies, Christian Feddersen GmbH & Co. KG, Lentz & Schmahl GmbH, and Societe Nexans, did not respond to our request concerning their sales or exports of ball bearings from France, Italy, Germany and the United Kingdom. Because these companies did not respond to our request, we could neither consider them in our selection of respondents for individual examination nor complete any administrative reviews of the companies. Because these companies have failed to provide the information requested and thus have significantly impeded the respective proceedings, we find that we must base their margins on the use of facts otherwise available. See section 776(a) of the Act.

Additionally, we find that it is appropriate to use facts otherwise available for certain U.S. sales made by SKF Germany for which SKF Germany was not the producer and for which the producer failed to provide cost–of-production (COP) information by the deadline for submission of the information. The Department's practice is to use the actual production costs of unaffiliated suppliers in lieu of the exporter's acquisition costs to calculate COP and constructed value and is extending this practice, where appropriate, to the reviews of the orders on ball bearings. See *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part*, 72 FR 58053 (October 12, 2007) (AFBs 17), and accompanying Decision Memorandum, at Comment 17. See also *Notice of Final Results of Antidumping Duty Administrative Review, and Final Determination to Revoke the Order in Part: Individually Quick Frozen Red Raspberries from Chile*, 72 FR 70295 (December 11, 2007) (*Final–Raspberries from Chile*).

SKF Germany's supplier is an interested party because it is a producer of the subject merchandise. See sections 771(9)(A) and 771(28) of the Act. Further, section 771(28) of the Act states that, ''{f}or purposes of section 773 of the Act, the term exporter or producer' includes both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sales of that merchandise.'' *Id.* In addition, the *SAA* at 835 explains that ''the purpose of section 771(28) . . . is to clarify that where different firms perform the production and selling functions, Commerce may include the costs, expenses, and profits of each firm in calculating cost of production and constructed value.'' *Id.*

On November 6, 2007, we determined that SKF Germany should report the actual COP for bearings it purchased from its largest supplier.[2] Accordingly, on November 7, 2007, we requested that SKF Germany coordinate with its largest supplier and report the actual COP data for those bearings SKF Germany purchased during the period of review. On November 14, 2007, SKF Germany stated that it had conferred with its supplier and that, for reasons SKF designated as proprietary, its supplier would not be able to provide any cost data for the period of review. On November 28, 2007, we sent a letter to SKF Germany's supplier requesting that it coordinate with SKF Germany and report the actual COP data for those bearings purchased by SKF Germany during the period of review. The response deadline was January 3, 2008. We received no response by the deadline and no extension of the deadline was requested by any party. On January 8, 2008, we received an untimely submission from the supplier which did not include the actual COP for the period of review. On January 31, 2008, consistent with 19 CFR 351.302(d) and 19 CFR 351.104(a)(2), we rejected the supplier's submission as untimely and informed it that we would not consider the information in our final results. On February 1, 2008, the supplier submitted a letter in which, although it acknowledged that it ''neglected to submit the requested data by the due date or request an extension to do so,'' it requested that we reconsider our decision for rejecting its submission. See Letter to Laurie Parkhill, dated February 1, 2008. On March 3, 2008, we responded to the supplier, reaffirming our decision to reject its COP data as untimely.

In accordance with section 776(a)(2)(B) of the Act, if the Department finds that an interested party ''fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782, the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.'' Section 782(c)(1) of the Act is not applicable because SKF Germany's supplier did not notify the Department that it would be unable to provide the COP information as requested in our November 28, 2007, letter. Further, sections 782(e) and (d) of the Act are not applicable because the requested information was not submitted by the established deadline. Therefore, pursuant to section 776(a)(2)(B) of the Act, because SKF Germany's supplier did not provide the relevant COP information by the established deadline, we find that use the facts otherwise available is warranted.

In addition, in accordance with section 776(b) of the Act, if the Department finds that ''an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information,'' an adverse inference may be used in determining the facts otherwise available. Because SKF Germany's supplier, which, as a producer of subject merchandise and an interested party in this proceeding, did not act to the best of its ability by failing to provide the COP information by the deadline, we preliminarily find that it is appropriate to make an adverse inference pursuant to section 776(b) of the Act with respect to the bearings that SKF Germany purchased from that supplier and sold in the United States. Thus, for the sales of those bearings, we have applied an AFA rate in place of rates for those sales that, if we had the

[2] See Memorandum to Laurie Parkhill regarding the calculation of the cost of production and constructed value for merchandise produced by unaffiliated suppliers, dated November 6, 2007.

cost information, would be based on the normal value of the bearings.

B. Application of Adverse Inferences for Facts Available

In applying the facts otherwise available, section 776(b) of the Act provides that, if the administering authority finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority, in reaching the applicable determination under this title, the administering authority may use an inference adverse to the interests of that party in selecting from among the facts otherwise available. See, *e.g.*, *Final–Raspberries from Chile*, 72 FR at 70297; *Notice of Preliminary Determination of Sales at Less Than Fair Value, and Postponement of Final Determination: Certain Circular Welded Carbon–Quality Line Pipe From Mexico*, 69 FR 59892, 59896 (October 6, 2004).

Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' See *Notice of Preliminary Results of Antidumping Duty Administrative Review, Notice of Partial Rescission of Antidumping Duty Administrative Review, Notice of Intent to Revoke in Part: Certain Individually Quick Frozen Red Raspberries from Chile*, 72 FR 44112 (August 7, 2007) (*Prelim-Raspberries from Chile*) (*unchanged in Final–Raspberries from Chile*, 72 FR at 70297). See also *SAA* at 870. Further, ''affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' See *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997). See also *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380–84 (CAFC 2003).

Because the non–responding companies Christian Feddersen GmbH & Co. KG, Lentz & Schmahl GmbH, and Societe Nexans – could have provided data concerning the quantity and value of their sales of subject merchandise to the United States during the period of review but did not do so, we determine that they have failed to cooperate by not acting to the best of their ability. See *Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination to Revoke Order in Part: Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 69 FR 55574 (September 15, 2004) (*AFBs 14*). We informed them in our requests for information that, if they did not respond, we may proceed on the basis of the use of the facts available. Therefore, we conclude that the use of an adverse inference is warranted in applying the use of facts otherwise available to these companies.

Furthermore, with respect to SKF Germany and its largest supplier, although we provided SKF Germany's supplier with notice informing it of the consequences of its failure to respond adequately to our request for its COP data (see our November 28, 2007, letter), it did not provide us with the relevant cost data in a timely manner. This constitutes a failure of the supplier to cooperate to the best of its ability to comply with a request for information by the Department within the meaning of section 776(b) of the Act. Further, because we rejected the supplier's submission as untimely, there is no information on the record for us to consider and, therefore, section 782(e) of the Act is not applicable. Based on the above, we have preliminarily determined that SKF Germany's largest supplier, as a producer of subject merchandise, failed to cooperate to the best of its ability and, therefore, in selecting from among the facts otherwise available, an adverse inference is warranted. See *Prelim–Raspberries from Chile*, 72 FR 44114 (unchanged in *Final–Raspberries from Chile*, 72 FR at 70297). See also *Notice of Preliminary Results of Antidumping Duty Administrative Review, Notice of Intent to Revoke in Part: Individually Quick Frozen Red Raspberries from Chile*, 71 FR 45000 (August 8, 2006) (unchanged in *Notice of Final Results of Antidumping Duty Administrative Review, and Final Determination to Revoke the Order In Part: Individually Quick Frozen Red Raspberries from Chile* (72 FR 6524, February 12, 2007)).

C. Selection and Corroboration of Information Used as Facts Available

As facts available with an adverse inference, we have selected the rates of 66.42 percent for France, 70.41 percent for Germany, 69.99 percent for Italy, and 60.15 percent for the United Kingdom.

Section 776(c) of the Act provides that the Department shall corroborate, to the extent practicable, secondary information used for facts available by reviewing independent sources reasonably at its disposal. Information from a prior segment of the proceeding constitutes secondary information. See *SAA* at 870. The word ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. *Id.* To corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. Unlike other types of information such as input costs or selling expenses, however, there are no independent sources for calculated dumping margins. The only source for margins is administrative determinations. Thus, with respect to an administrative review, if the Department chooses as facts available a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period. *AFBs 14*, 69 FR at 55577. With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. See *Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, 6814 (February 22, 1996), where the Department disregarded the highest dumping margin as best information available because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin.

We find that the rates we are using for these preliminary results have probative value. For France and Italy, we corroborated the highest rates calculated in the respective less–than-fair–value investigations. As there is no information on the record of these reviews that demonstrates that the rates selected are not appropriate AFA rates for the non–responsive firms, we preliminarily determine that the rates of 66.42 percent and 69.99 percent for France and Italy, respectively, have probative value and, therefore, are appropriate rates for use as AFA. For the United Kingdom, while the highest rate calculated in the proceeding was 61.14 percent, in this review we have no transaction–specific margins with which to corroborate this rate. We can corroborate 58.20 percent from the 1996/1997 review of the order (*Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 63 FR 33320, (June 18, 1998)) because it fell within the range of margins we calculated for this administrative review and, thus, we have selected this rate as the AFA rate for the United Kingdom.

For Germany, the selected AFA rate of 70.41 percent is the highest rate ever

calculated for a company in any segment of this proceeding.[3] Because the producer of certain merchandise SKF Germany sold to the United States did not provide us with the actual COP data for this review, we examined individual transactions made by SKF Germany of merchandise it purchased from the same supplier in the immediately preceding (2005–06) administrative review and the margins on those transactions in order to determine whether the rate of 70.41 percent was probative. See *Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Wire Rod from the Republic of Korea*, 72 FR 32074 (June 11, 2007) (unchanged in *Final Results of Antidumping Duty Administrative Review: Stainless Steel Wire Rod from the Republic of Korea*, 72 FR 46035 (August 16, 2007)). We found a number of sales with dumping margins falling either above or below the rate of 70.41 percent. Therefore, we preliminarily find that this rate is corroborated to the extent practicable. See *Ta Chen Stainless Steel Pipe, Inc. vs. United States*, 298 F.3d 1330, 1340 (CAFC 2002) (''Because Commerce selected a dumping margin within the range of Ta Chen's actual sales data, we cannot conclude that Commerce 'overreached reality'.'').

For more detail concerning the selection of an AFA rate, see the country–specific Memoranda to Laurie Parkhill regarding corroboration of the respective AFA rates, dated April 30, 2008.

The SKF Group's Acquisition of Bearing Manufacturers

On July 4, 2006, the SKF Group[4] acquired Somecat S.p.A. (Somecat) in Italy and SNFA S.A.S.U. (SNFA) in France. Both Somecat and SNFA had been revoked previously from the antidumping duty orders covering ball bearings from Italy and France, respectively. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 65 FR 49219, 49221 (August 11, 2000). During the course of these administrative reviews, we have reviewed the changes that have transpired since the acquisition of these companies during the period of review by the SKF Group with respect to ball bearings produced in Italy by Somecat and SKF Italy and ball bearings produced in France by SNFA and SKF France for purposes of determining whether it is appropriate to collapse these companies in our reviews of the respective antidumping duty orders covering this merchandise. Pursuant to 19 CFR 351.401(f)(1), we have preliminarily determined that SKF France and SNFA should not be collapsed for purposes of our antidumping analysis in this review; we have also preliminarily determined that Somecat and SKF Italy should be collapsed for purposes of our antidumping analysis in this review. Due to the business–proprietary nature of these decisions, details are provided in country–specific Memoranda to Laurie Parkhill regarding the collapsing of entities, dated April 30, 2008.

The Department normally requests sales and cost data from the entities that the Department determines to collapse in a review. In this case, we have insufficient time to request, obtain, and analyze the necessary sales and cost data to collapse Somecat and SKF Italy fully at this stage of the administrative review. Therefore, we have not asked Somecat and SKF Italy to provide the necessary sales and cost data for this review but we expect to request Somecat and SKF Italy to provide the necessary data for both companies in the next administrative review.

Effective on the publication date of these preliminary results, we will instruct CBP to suspend liquidation and collect a cash deposit of estimated antidumping duties on entries of merchandise produced or exported by Somecat at the weighted–average margin we have calculated for the preliminary results of review for SKF Italy.

Export Price and Constructed Export Price

For the price to the United States, we used export price (EP) or constructed export price (CEP) as defined in sections 772(a) and (b) of the Act, as appropriate. Due to the extremely large volume of U.S. transactions that occurred during the period of review and the resulting administrative burden involved in calculating individual margins for all of these transactions, we sampled CEP sales in accordance with section 777A of the Act. When a firm made more than 10,000 CEP sales transactions to the United States of merchandise subject to a particular order, we reviewed CEP sales that occurred during sample weeks. We selected one week from each two–month period in the review period, for a total of six weeks, and analyzed each transaction made in those six weeks. The sample weeks are as follows: May 14, 2006 - May 20, 2006; July 2, 2006 - July 8, 2006; October 22, 2006 - October 28, 2006; December 10, 2006 - December 16, 2006; January 21, 2007 - January 27, 2007; April 1, 2006 - April 7, 2006. We reviewed all EP sales transactions the respondents made during the period of review.

We calculated EP and CEP based on the packed F.O.B., C.I.F., or delivered price to unaffiliated purchasers in, or for exportation to, the United States. We made deductions, as appropriate, for discounts and rebates. We also made deductions for any movement expenses in accordance with section 772(c)(2)(A) of the Act.

Consistent with section 772(d)(1) of the Act and the *SAA* at 823–824, we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States, which includes commissions, direct selling expenses, and U.S. repacking expenses. In accordance with section 772(d)(1) of the Act, we also deducted those indirect selling expenses associated with economic activities occurring in the United States and the profit allocated to expenses deducted under section 772(d)(1) in accordance with sections 772(d)(3) and 772(f) of the Act. In accordance with section 772(f) of the Act, we computed profit based on the total revenues realized on sales in both the U.S. and home markets, less all expenses associated with those sales. We then allocated profit to expenses incurred with respect to U.S. economic activity based on the ratio of total U.S. expenses to total expenses for both the U.S. and home markets. Finally, we made an adjustment for profit allocated to these expenses in accordance with section 772(d)(3) of the Act.

With respect to subject merchandise to which value was added in the United States prior to sale to unaffiliated U.S. customers, *e.g.*, parts of bearings that were imported by U.S. affiliates of foreign exporters and then further processed into other products which were then sold to unaffiliated parties, we determined that the special rule for merchandise with value added after importation under section 772(e) of the Act applied to all firms that added value in the United States.

Section 772(e) of the Act provides that, when the subject merchandise is imported by an affiliated person and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, we shall determine the

[3] The rate of 70.41 percent is the weighted-average margin we calculated for FAG during the original investigation. See *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 FR 20900 (May 15, 1989).

[4] SKF Italy and SKF France are part of the SKF Group.

CEP for such merchandise using the price of identical or other subject merchandise sold by the exporter or producer to an unaffiliated customer if there is a sufficient quantity of sales to provide a reasonable basis for comparison and we determine that the use of such sales is appropriate. If there is not a sufficient quantity of such sales or if we determine that using the price of identical or other subject merchandise is not appropriate, we may use any other reasonable basis to determine the CEP.

To determine whether the value added is likely to exceed substantially the value of the subject merchandise, we estimated the value added based on the difference between the averages of the prices charged to the first unaffiliated purchaser for the merchandise as sold in the United States and the averages of the prices paid for the subject merchandise by the affiliated purchaser. Based on this analysis, we determined that the estimated value added in the United States by the further–manufacturing firms accounted for at least 65 percent of the price charged to the first unaffiliated customer for the merchandise as sold in the United States. See 19 CFR 351.402(c) for an explanation of our practice on this issue. Therefore, we preliminarily determine that the value added is likely to exceed substantially the value of the subject merchandise for SKF France, SKF Germany, SKF Italy, JTEKT, NTN, and Barden/Schaeffler UK. Also, for these firms, we determine that there was a sufficient quantity of sales remaining to provide a reasonable basis for comparison and that the use of these sales is appropriate. For analysis of the further–manufactured sales, see the company–specific analysis memoranda, dated April 30, 2008. Accordingly, for purposes of determining dumping margins for the sales subject to the special rule, we have used the weighted–average dumping margins calculated on sales of identical or other subject merchandise sold to unaffiliated persons.

For the calculation of NTN's dumping margin, we did not include any zero–priced transactions in our analysis and there was no other record evidence indicating that NTN received consideration for these transactions; we did include in our analysis the so–called ''sample'' sales where NTN did receive compensation. In addition, based on NTN's response to our supplemental questionnaire, we calculated a direct selling expense for NTN's EP sales, attributable to the provision of technical support and other selling–support functions to NTN's EP customer by NTN's U.S. affiliate. Furthermore, we accounted for NTN's re–calculation of its re–packing expense with respect to its reported CEP sales to capture differences in expenses associated with packing materials, packing labor, and packing labor overhead inherent in packing requirements with respect to different customer categories. We also accounted for NTN's re–calculation of its inventory carrying costs incurred in Japan for NTN's EP and CEP sales that it submitted in its response to our supplemental questionnaire. Pursuant to a supplemental questionnaire, NTN provided us with factors that we used to recalculate the EP expenses, repacking, and inventory carrying costs.

There were no other claimed or allowed adjustments to EP or CEP sales by other respondents.

Home–Market Sales

Based on a comparison of the aggregate quantity of home–market and U.S. sales and absent any information that a particular market situation in the exporting country did not permit a proper comparison, we determined that the quantity of foreign like product sold by all respondents in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a)(1) of the Act. Each company's quantity of sales in its home market was greater than five percent of its sales to the U.S. market. Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based normal value on the prices at which the foreign like product was first sold for consumption in the exporting country in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the EP or CEP sales.

Due to the extremely large number of home–market transactions that occurred during the period of review and the resulting administrative burden involved in examining all of these transactions, we sampled sales to calculate normal value in accordance with section 777A of the Act. When a firm had more than 10,000 home–market sales transactions on a country–specific basis, we used sales in sample months that corresponded to the sample weeks which we selected for U.S. CEP sales, sales in a month prior to the period of review, and sales in the month following the period of review. The sample months were February, May, July, October, and December 2006 and January, April, and May 2007.

The Department may calculate normal value based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the price at which sales are made to parties not affiliated with the exporter or producer, *i.e.*, sales at arm's–length prices. See 19 CFR 351.403(c). We excluded sales to affiliated customers for consumption in the home market that we determined not to be arm's–length prices from our analysis. To test whether these sales were made at arm's–length prices, we compared the prices of sales of comparable merchandise to affiliated and unaffiliated customers, net of all rebates, movement charges, direct selling expenses, and packing. Pursuant to 19 CFR 351.403(c) and in accordance with our practice, when the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise comparable to that sold to the affiliated party, we determined that the sales to the affiliated party were at arm's–length prices. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186 (November 15, 2002). We included in our calculation of normal value those sales to affiliated parties that were made at arm's–length prices.

Cost of Production

In accordance with section 773(b) of the Act, we disregarded below–cost sales in the 2005–2006 reviews with respect to ball bearings produced in the respective countries and sold by the following firms: SKF France; SKF Germany, GRW (Germany); SKF Italy; JTEKT, NTN (Japan); Barden/Schaeffler UK. See *AFBs 17*, 72 FR at 58054. These reviews represent the last completed segment for each respondent selected for individual examination. Therefore, for the instant review, we have reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value in these reviews may have been made at prices below the COP, as provided by section 773(b)(2)(A)(ii) of the Act. Pursuant to section 773(b)(1) of the Act, we conducted COP investigations of sales by these firms in the respective home markets.

In accordance with section 773(b)(3) of the Act, we calculated the COP based on the sum of the costs of materials and fabrication employed in producing the foreign like product, the selling, general, and administrative (SG&A) expenses, and all costs and expenses incidental to packing the merchandise. In our COP analysis, we used the home–market

sales and COP information provided by each respondent in its questionnaire responses.

After calculating the COP and in accordance with section 773(b)(1) of the Act, we tested whether home–market sales of the foreign like product were made at prices below the COP within an extended period of time in substantial quantities and whether such prices permitted the recovery of all costs within a reasonable period of time. We compared model–specific COPs to the reported home–market prices less any applicable movement charges, discounts, and rebates.

Pursuant to section 773(b)(2)(C) of the Act, when less than 20 percent of a respondent's sales of a given product were at prices less than the COP, we did not disregard any below–cost sales of that product because the below–cost sales were not made in substantial quantities within an extended period of time. When 20 percent or more of a respondent's sales of a given product during the period of review were at prices less than the COP, we disregarded the below–cost sales because they were made in substantial quantities within an extended period of time pursuant to sections 773(b)(2)(B) and (C) of the Act and because, based on comparisons of prices to weighted–average COPs for the period of review, we determined that these sales were at prices which would not permit recovery of all costs within a reasonable period of time in accordance with section 773(b)(2)(D) of the Act. See the analysis memoranda for SKF France, SKF Germany, GRW, SKF Italy, JTEKT, NTN, and Barden/Schaeffler UK, dated April 30, 2008. Based on this test, we disregarded below–cost sales with respect to SKF France, SKF Germany, GRW, SKF Italy, JTEKT, NTN, and Barden/Schaeffler UK.

Model–Match Methodology

For all respondents, we compared U.S. sales with sales of the foreign like product in the home market. Specifically, in making our comparisons, we used the following methodology. If an identical home–market model was reported, we made comparisons to weighted–average home–market prices that were based on all sales which passed the COP test of the identical product during the relevant month. We calculated the weighted–average home–market prices on a level of trade–specific basis. If there were no contemporaneous sales of an identical model, we identified the most similar home–market model. To determine the most similar model, we limited our examination to models sold in the home market that had the same bearing design, load direction, number of rows, and precision grade. Next, we calculated the sum of the deviations (expressed as a percentage of the value of the U.S. characteristics) of the inner diameter, outer diameter, width, and load rating for each potential home–market match and selected the bearing with the smallest sum of the deviations. If two or more bearings had the same sum of the deviations, we selected the model that was sold at the same level of trade as the U.S. sale and was the closest contemporaneous sale to the U.S. sale. If two or more models were sold at the same level of trade and were sold equally contemporaneously, we selected the model that had the smallest difference–in-merchandise adjustment. Finally, if no bearing sold in the home market had a sum of the deviations that was less than 40 percent, we concluded that no appropriate comparison existed in the home market and we used the constructed value of the U.S. model as normal value. For a full discussion of the model–match methodology for these reviews, see *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 FR 54711 (September 16, 2005) (*AFBs 15*), and the accompanying Issues and Decision Memorandum at Comments 2, 3, and 5 and *Antifriction Bearings and Parts Thereof from France, et al.: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Reviews*, 70 FR 25538, 25542 (May 13, 2005).

Normal Value

Home–market prices were based on the packed, ex–factory, or delivered prices to affiliated or unaffiliated purchasers. When applicable, we made adjustments for differences in packing and for movement expenses in accordance with sections 773(a)(6)(A) and (B) of the Act. We also made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411 and for differences in circumstances of sale in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. For comparisons to EP, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from, and adding U.S. direct selling expenses to, normal value. For comparisons to CEP, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from normal value. We also made adjustments, when applicable, for home–market indirect selling expenses to offset U.S. commissions in EP and CEP calculations.

For NTN's sales of samples in the home market, we have determined that these sales were made outside the ordinary course of trade and have excluded them from our calculation of normal value. Furthermore, we accounted for NTN's re–calculation of its packing expense for reported home–market sales to capture differences in expenses associated with packing materials inherent in packing requirements with respect to different customer categories. In addition, we accounted for NTN's re–calculation of its inventory carrying costs incurred in the home market for its home–market sales that it submitted in its response to our supplemental questionnaire.

For JTEKT, consistent with prior reviews, we denied certain negative home–market billing adjustments that JTEKT granted on a model–specific basis but reported on a broad customer–specific basis. See, *e.g., AFBs 14*, and the accompanying Issues and Decision Memorandum at Comment 21, and *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews and Intent to Rescind Review in Part*, 72 FR 31271 (June 6, 2007) (*Preliminary AFBs 17*) at 72 FR 31275, unchanged in *AFBs 17*.

In the two most recent administrative reviews of JTEKT, we examined the relationship between JTEKT and one of its affiliated home–market firms and determined that it was appropriate to collapse the two companies as one entity. See, *e.g.*, *AFBs 16* at Comment 18 and *Preliminary AFBs 17*, 72 FR at 31275, unchanged in *AFBs 17*. Upon examining the relationship between the two companies in this review, we have determined that it is appropriate to continue to collapse these two companies. See the preliminary analysis memorandum for JTEKT, dated April 30, 2008, for further details that include reference to JTEKT's business–proprietary information.

Finally, with respect to JTEKT, consistent with our determination in *AFBs 17* (see the final analysis memorandum for JTEKT, dated October 4, 2007, at page 2), we revised its calculation of inventory carrying costs (ICCs) incurred in the home market so that the ICCs for home–market sales are calculated on the same basis as the ICCs for U.S. sales. See the preliminary analysis memorandum for JTEKT, dated April 30, 2008, for details of this recalculation.

In accordance with section 773(a)(1)(B)(i) of the Act, we based normal value, to the extent practicable, on sales at the same level of trade as the EP or CEP. If normal value was calculated at a different level of trade, we made an adjustment, if appropriate and if possible, in accordance with section 773(a)(7)(A) of the Act. See the ''Level of Trade'' section below.

Constructed Value

In accordance with section 773(a)(4) of the Act, we used constructed value as the basis for normal value when there were no usable sales of the foreign like product in the comparison market. We calculated constructed value in accordance with section 773(e) of the Act. We included the cost of materials and fabrication, SG&A expenses, U.S. packing expenses, and profit in the calculation of constructed value. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses and profit on the amounts incurred and realized by each respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the home market.

When appropriate, we made adjustments to constructed value in accordance with section 773(a)(8) of the Act, 19 CFR 351.410, and 19 CFR 351.412 for circumstance–of-sale differences and level–of-trade differences. For comparisons to EP, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from and adding U.S. direct selling expenses to constructed value. For comparisons to CEP, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from constructed value. We also made adjustments, when applicable, for home–market indirect selling expenses to offset U.S. commissions in EP and CEP comparisons.

When possible, we calculated constructed value at the same level of trade as the EP or CEP. If constructed value was calculated at a different level of trade, we made an adjustment, if appropriate and if possible, in accordance with sections 773(a)(7) and (8) of the Act.

Level of Trade

To the extent practicable, we determined normal value for sales at the same level of trade as the U.S. sales (either EP or CEP). When there were no sales at the same level of trade, we compared U.S. sales to home–market sales at a different level of trade. The normal–value level of trade is that of the starting–price sales in the home market. When normal value is based on constructed value, the level of trade is that of the sales from which we derived SG&A and profit.

To determine whether home–market sales are at a different level of trade than U.S. sales, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison–market sales were at a different level of trade from that of a U.S. sale and the difference affected price comparability, as manifested in a pattern of consistent price differences between the sales on which normal value is based and comparison–market sales at the level of trade of the export transaction, we made a level–of-trade adjustment under section 773(a)(7)(A) of the Act. See, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate from South Africa*, 62 FR 61731, 61732 (November 19, 1997).

Where the respondent reported no home–market levels of trade that were equivalent to the CEP level of trade and where the CEP level of trade was at a less advanced stage than any of the home–market levels of trade, we were unable to calculate a level–of-trade adjustment based on the respondent's home–market sales of the foreign like product. Furthermore, we have no other information that provides an appropriate basis for determining a level–of-trade adjustment. For respondents' CEP sales, to the extent possible, we determined normal value at the same level of trade as the U.S. sale to the first unaffiliated customer and made a CEP–offset adjustment in accordance with section 773(a)(7)(B) of the Act. The CEP–offset adjustment to normal value was subject to the so–called ''offset cap'', calculated as the sum of home–market indirect selling expenses up to the amount of U.S. indirect selling expenses deducted from CEP (or, if there were no home–market commissions, the sum of U.S. indirect selling expenses and U.S. commissions).

For a company–specific description of our level–of-trade analyses for these preliminary results, see Memorandum to Laurie Parkhill entitled ''Ball Bearings and Parts Thereof from Various Countries: 2006/2007 Level–of-Trade Analysis,'' dated April 30, 2008, on file in the CRU, room 1117.

Preliminary Results of Reviews

As a result of our reviews, we preliminarily determine that the following percentage weighted–average dumping margins on ball bearings and parts thereof from various countries exist for the period May 1, 2006, through April 30, 2007:

FRANCE

Company	Margin (percent)
Christian Feddersen GmbH & Co. KG	66.42
Lentz & Schmahl GmbH	66.42
SKF France	11.17
Societe Nexans	66.42

GERMANY

Company	Margin
Christian Feddersen GmbH & Co. KG	70.41
GRW	0.12
Lentz & Schmahl GmbH	70.41
SKF Germany	12.41
Societe Nexans	70.41

ITALY

Company	Margin
Christian Feddersen GmbH & Co. KG	69.99
Lentz & Schmahl GmbH	69.99
SKF Italy (and Somecat)	7.06
Societe Nexans	69.99

JAPAN

Company	Margin
Aisin Seiki Company, Ltd.	10.30
Canon, Inc	10.30
JTEKT	8.02
Nachi–Fujikoshi Corp.	10.30
Nippon Pillow Block Company Ltd.	10.30
NTN	12.58
Sapporo Precision, Inc	10.30
Toyota Motor Corp./Toyota Industries Corp.	10.30
Yamazaki Mazak Trading Company	10.30

UNITED KINGDOM

Company	Margin
Barden/Schaeffler UK	0.28
Christian Feddersen GmbH & Co. KG	58.20
Lentz & Schmahl GmbH	58.20
Rolls Royce PLC	0.28
Societe Nexans	58.20

Comments

We will disclose the calculations used in our analysis to parties to these reviews within five days of the date of publication of this notice. Any interested party may request a hearing within 30 days of the date of publication

of this notice. A general–issues hearing, if requested, and any hearings regarding issues related solely to specific countries, if requested, will be held at the main Department building at times and locations to be determined.

Interested parties who wish to request a hearing or to participate if one is requested must submit a written request to the Assistant Secretary for Import Administration within 30 days of the date of publication of this notice. Requests should contain the following: (1) the party's name, address, and telephone number; (2) the number of participants; (3) a list of issues to be discussed. See 19 CFR 351.310(c).

Issues raised in hearings will be limited to those raised in the respective case and rebuttal briefs. Case briefs from interested parties and rebuttal briefs, limited to the issues raised in the respective case briefs, may be submitted not later than the dates shown below for general issues and the respective country–specific reviews. Parties who submit case briefs or rebuttal briefs in these proceedings are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument. Parties are also encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited.

Case	Briefs due	Rebuttals due
General Issues	June 11, 2008	June 18, 2008
France	June 12, 2008	June 19, 2008
Germany	June 13, 2008	June 20, 2008
Italy	June 16, 2008	June 23, 2008
Japan	June 17, 2008	June 24, 2008
United Kingdom	June 18, 2008	June 25, 2008

The Department will issue the final results of these administrative reviews, including the results of its analysis of issues raised in any such written briefs or at the hearings, if held, not later than 120 days after the date of publication of this notice.

Assessment Rates

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an exporter/importer (or customer)-specific assessment rate or value for merchandise subject to these reviews as described below. We will issue instructions to CBP 15 days after publication of the final results of these reviews.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (*Assessment of Antidumping Duties*). This clarification will apply to entries of subject merchandise during the period of review produced by companies included in these preliminary results of reviews for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Assessment of Antidumping Duties*.

For the responsive companies which were not selected for individual review, we will instruct CBP to apply the rates listed above to all entries of subject merchandise from such firms.

For companies for which we are relying on total AFA to establish a dumping margin, we will instruct CBP to apply the assigned dumping margins to all entries of subject merchandise during the POR that were produced or exported by the companies.

Export–Price Sales

With respect to EP sales, for these preliminary results, we divided the total dumping margins (calculated as the difference between normal value and EP) for each exporter's importer or customer by the total number of units the exporter sold to that importer or customer. We will direct CBP to assess the resulting per–unit dollar amount against each unit of merchandise in each of that importer's/customer's entries under the relevant order during the review period.

Constructed Export–Price Sales

For CEP sales (sampled and non–sampled), we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct CBP to assess the resulting percentage margin against the entered customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period. See 19 CFR 351.212(b).

Cash–Deposit Requirements

In order to derive a single weighted–average margin for each respondent, we weight–averaged the EP and CEP weighted–average deposit rates (using the EP and CEP, respectively, as the weighting factors). To accomplish this when we sampled CEP sales, we first calculated the total dumping margins for all CEP sales during the review period by multiplying the sample CEP margins by the ratio of total days in the review period to days in the sample weeks. We then calculated a total net value for all CEP sales during the review period by multiplying the sample CEP total net value by the same ratio. Finally, we divided the combined total dumping margins for both EP and CEP sales by the combined total value for both EP and CEP sales to obtain the deposit rate.

Furthermore, the following deposit requirements will be effective upon publication of the notice of final results of administrative reviews for all shipments of ball bearings and parts thereof entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) the cash–deposit rates for the reviewed companies will be the rates established in the final results of reviews; (2) for previously reviewed or investigated companies not listed above, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in these reviews, a prior review, or the less–than-fair–value investigations but the manufacturer is, the cash–deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) the cash–deposit rate for all other manufacturers or exporters will continue to be the all–others rate for the relevant order made effective by the final results of review published on July 26, 1993. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty*

Administrative Reviews and Revocation in Part of an Antidumping Duty Order, 58 FR 39729, 39730 (July 26, 1993). For ball bearings from Italy, see *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 66472, 66521 (December 17, 1996). These rates are the all–others rates from the relevant less–than-fair–value investigations. These deposit requirements, when imposed, shall remain in effect until further notice.

Effective the publication date of these preliminary results, we will instruct CBP to suspend liquidation and collect a cash deposit of estimated antidumping duties on entries of merchandise produced or exported by Somecat at the weighted–average margin we have calculated for the preliminary results of review for SKF Italy.

Notification to Importer

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

These preliminary results of administrative reviews are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 30, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–10078 Filed 5–7–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–428–801

Ball Bearings and Parts Thereof from Germany: Preliminary Results of Antidumping Duty Changed–Circumstances Review

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

SUMMARY: On March 11, 2008, pursuant to section 751(b) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216 and 351.221(c)(3), the Department of Commerce initiated a changed–circumstances review of the antidumping duty order on ball bearings and parts thereof from Germany with respect to myonic GmbH. See *Initiation of Antidumping Duty Changed–Circumstances Review: Ball Bearings and Parts Thereof from Germany*, 73 FR 12953 (March 11, 2008) (myonic Initiation). After reviewing information on the record, we have preliminarily concluded that myonic GmbH is the successor–in-interest to Miniaturkugellager Gesellschaft mit beschränkter Haftung and, as a result, should be accorded the same treatment previously accorded Miniaturkugellager Gesellschaft mit beschränkter Haftung with regard to the antidumping duty order on ball bearings and parts thereof from Germany. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: May 7, 2008.

FOR FURTHER INFORMATION CONTACT: Richard Rimlinger at (202) 482–4477, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On January 31, 2008, myonic GmbH (myonic) asked the Department to initiate and conduct a changed–circumstances review to confirm that myonic is the successor–in-interest to Miniaturkugellager Gesellschaft mit beschränkter Haftung (MKL) for purposes of determining antidumping–duty liabilities subject to this order. On March 11, 2008, we initiated a changed–circumstances review of the antidumping duty order on ball bearings and parts thereof from Germany with respect to myonic. See *myonic Initiation*. On March 13, 2008, we sent myonic a supplemental questionnaire requesting further information. On March 24, 2008, we received a timely response to our supplemental questionnaire. On March 27, 2008, we sent myonic a second supplemental questionnaire. On April 8, 2008, we received a timely response to our second supplemental questionnaire. We have not received comments from any other interested parties.

Scope of the Order

The products covered by this order are ball bearings and parts thereof. These products include all bearings that employ balls as the rolling element. Imports of these products are classified under the following categories: antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.

Imports of these products are classified under the following *Harmonized Tariff Schedules of the United States* (HTSUS) subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

As a result of recent changes to the HTS, effective February 2, 2007, the subject merchandise is also classifiable under the following additional HTS item numbers: 8708.30.5090, 8708.40.7500, 8708.50.7900, 8708.50.8900, 8708.50.9150, 8708.50.9900, 8708.80.6590, 8708.94.75, 8708.95.2000, 8708.99.5500, 8708.99.68, and 8708.99.8180.

Successor–in-Interest Determination

In a changed–circumstances review involving a successor–in-interest determination, the Department typically examines several factors including, but not limited to, changes in the following: (1) management; (2) production facilities; (3) supplier relationships; (4) customer base. See *Certain Cut–to-Length Carbon Steel Plate from Romania: Initiation and Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review*, 70 FR 22847 (May 3, 2005). While no single factor or combination of factors will necessarily be dispositive, generally the Department will consider the new company to be the successor to the predecessor if the resulting operations are essentially the same as those of the predecessor company. See, *e.g., Notice of Initiation of Antidumping Duty Changed Circumstances Review: Certain Forged Stainless Steel Flanges from India*, 71 FR 327 (January 4, 2006). Thus, if the record demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, the Department may assign the new company the cash–deposit rate of its predecessor. See, *e.g., Fresh and Chilled Atlantic Salmon from Norway: Final Results of Changed Circumstances*

Antidumping Duty Administrative Review, 64 FR 9979, 9980 (March 1, 1999).

In its January 31, 2008, submission, myonic provided information to demonstrate that myonic is the successor–in-interest to MKL. Myonic submitted a notarized copy of the minutes from the December 11, 2001, meeting of myonic's shareholders memorializing the name change from MKL to myonic. See exhibit D of myonic's January 31, 2008, submission. Myonic also submitted its Articles of Association demonstrating that myonic continued to produce and market subject merchandise after the name change. See exhibit E of myonic's January 31, 2008, submission. Further, myonic provided a letter it sent to its customers informing them of the name change and that the company's production of subject merchandise would continue. See exhibit F of myonic's January 31, 2008, submission. Myonic also submitted its June 19, 2006, Articles of Association demonstrating that on June 1, 2006, all stock of myonic was purchased by myonic Holding GmbH. See exhibit G of myonic's January 31, 2008, submission.

Additional information in myonic's March 24, 2008, and April 8, 2008, submissions shows that myonic's management, production facilities, suppliers, and customer base are consistent with those of MKL. As such, we conclude that myonic's request for a changed–circumstances review demonstrates that no major changes have occurred with respect to MKL's management, production facilities, suppliers, or customer base as a result of MKL's name change to myonic or the purchase of all of myonic's stock by myonic Holding GmbH. Therefore, we preliminarily find that myonic is the successor–in-interest to MKL and, as such, is entitled to MKL's cash–deposit rate with respect to entries of subject merchandise.

Public Comment

Any interested party may request a hearing within 14 days of publication of this notice. See 19 CFR 351.310(c). Any hearing, if requested, will be held 28 days after the date of publication of this notice or the first working day thereafter. Interested parties may submit case briefs and/or written comments not later than 14 days after the date of publication of this notice. See 19 CFR 351.309(c)(1)(ii). Rebuttal briefs and rebuttals to written comments, which must be limited to issues raised in such briefs or comments, may be filed not later than 5 days after the deadline for submitting the case briefs. See 19 CFR 351.309(d). Parties who submit case briefs or rebuttal briefs in this changed–circumstances review are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument. Parties should also submit an electronic version of their case and rebuttal briefs. Consistent with 19 CFR 351.216(e), we will issue the final results of this changed–circumstances review no later than 270 days after the date on which this review was initiated or within 45 days of publication of these preliminary results if all parties to the proceeding agree to our preliminary finding.

We are issuing and publishing these preliminary results notice in accordance with sections 751(b)(1) and 777(i) of the Act and 19 CFR 351.216 and 351.221(c)(3).

Dated: May 1, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–10161 Filed 5–6–08; 8:45 am]

BILLING CODE: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(C–580–837)

Certain Cut–to–Length Carbon–Quality Steel Plate from the Republic of Korea: Notice of Rescission of Countervailing Duty Administrative Review

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

EFFECTIVE DATE: May 7, 2008.

FOR FURTHER INFORMATION CONTACT: Jolanta Lawska, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–8362.

SUPPLEMENTARY INFORMATION:

Background: On February 29, 2008, Dongkuk Steel Mill Co., Ltd. (DSM) (respondent) requested that the Department of Commerce (the Department) conduct an administrative review of the countervailing duty order on certain cut–to-length carbon–quality steel plate from Korea with respect to DSM for the period of January 1, 2007, through December 31, 2007.

On March 31, 2008, the Department initiated the review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 16837 (March 31, 2008). On April 4, 2008, DSM withdrew its request for a review pursuant to section 19 CFR 351.213(d)(1).

Scope of Order

The products covered by this order are certain hot–rolled carbon–quality steel: (1) universal mill plates (*i.e.*, flat–rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a nominal or actual thickness of not less than 4 mm, which are cut–to–length (not in coils) and without patterns in relief), of iron or non–alloy–quality steel; and (2) flat–rolled products, hot–rolled, of a nominal or actual thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are cut–to–length (not in coils). Steel products to be included in the scope of the order are of rectangular, square, circular or other shape and of rectangular or non–rectangular cross–section where such non–rectangular cross–section is achieved subsequent to the rolling process (*i.e.*, products which have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Steel products that meet the noted physical characteristics that are painted, varnished or coated with plastic or other non–metallic substances are included within this scope. Also, specifically included in the scope of the order are high strength, low alloy (HSLA) steels. HSLA steels are recognized as steels with micro–alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. Steel products to be included in this scope, regardless of Harmonized Tariff Schedule of the United States (HTSUS) definitions, are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is two percent or less, by weight; and (3) none of the elements listed below is equal to or exceeds the quantity, by weight, respectively indicated: 1.80 percent of manganese, or 1.50 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.41 percent of titanium, or 0.15 percent of vanadium, or 0.15 percent zirconium. All products that meet the written physical description, and in which the chemistry quantities do not equal or exceed any one of the levels listed above, are within the scope

of this order unless otherwise specifically excluded. The following products are specifically excluded from the order: (1) products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances; (2) SAE grades (formerly AISI grades) of series 2300 and above; (3) products made to ASTM A710 and A736 or their proprietary equivalents; (4) abrasion–resistant steels (*i.e.*, USS AR 400, USS AR 500); (5) products made to ASTM A202, A225, A514 grade S, A517 grade S, or their proprietary equivalents; (6) ball bearing steels; (7) tool steels; and (8) silicon manganese steel or silicon electric steel.

The merchandise subject to the order is currently classifiable under the HTSUS under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7225.40.3050, 7225.40.7000, 7225.50.6000, 7225.99.0090, 7226.91.5000, 7226.91.7000, 7226.91.8000, 7226.99.0000.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise covered by the order is dispositive.

Rescission of Review

If a party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review, the Secretary will rescind the review, in whole or in part, pursuant to 19 CFR 351.213(d)(1). In this case, DSM withdrew its request for an administrative review within 90 days from the date of initiation. No other interested party requested a review of DSM and we have received no comments regarding the respondent's withdrawal of its request for a review. Therefore, consistent with 19 CFR 351.213(d)(1), we are rescinding this review of the countervailing duty order on certain cut–to-length carbon–quality steel plate from Korea with respect to DSM.

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the publication of this notice. The Department will direct CBP to assess countervailing duties at the cash deposit rate in effect on the date of entry for entries during the period January 1, 2007, through December 31, 2007.

This notice is in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended and 19 CFR 251.213(d)(4).

Dated: April 30, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–10090 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Malcolm Baldrige National Quality Award Board of Overseers

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that there will be a meeting of the Board of Overseers of the Malcolm Baldrige National Quality Award on June 4, 2008. The Board of Overseers is composed of eleven members prominent in the fields of quality, innovation, and performance excellence and appointed by the Secretary of Commerce, assembled to advise the Secretary of Commerce on the conduct of the Baldrige Award. The purpose of this meeting is to discuss and review information received from the National Institute of Standards and Technology with the members of the Judges Panel of the Malcolm Baldrige National Quality Award. The agenda will include: Baldrige Program budget update; Revisions to the award eligibility rules; Baldrige Collaborative activities; and the Baldrige Body of Knowledge and Baldrige Fellows Initiatives.

DATES: The meeting will convene June 4, 2008, at 8:30 a.m. and adjourn at 3 p.m. on June 4, 2008.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, Administration Building, Lecture Room A, Gaithersburg, Maryland 20899. All visitors to the National Institute of Standards and Technology site will have to pre-register to be admitted. Please submit your name, time of arrival, e-mail address and phone number to Diane Harrison no later than Tuesday, June 3, 2008, and she will provide you with instructions for admittance. Ms. Harrison's e-mail address is *diane.harrison@nist.gov* and her phone number is (301) 975–2361.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, National Quality Program, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2361.

Dated: May 1, 2008.

James M. Turner,

Deputy Director.

[FR Doc. E8–10092 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–AW65

Atlantic Highly Migratory Species; Atlantic Shark Management Measures

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

ACTION: Stock Status Determinations; Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS); request for comments.

SUMMARY: Based on the 2007 small coastal sharks (SCS) stock assessment, NMFS is declaring blacknose sharks to be overfished with overfishing occurring. As such, NMFS announces its intent to prepare an EIS under the National Environmental Policy Act (NEPA). This EIS would assess the potential effects on the human environment of the proposed action taken to rebuild blacknose sharks and prevent overfishing per the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The EIS would amend the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) and examine management alternatives available to rebuild blacknose sharks. NMFS is requesting comments on a range of commercial and recreational management measures in both directed and incidental fisheries including, but not limited to, quota levels, regional and seasonal quotas, retention limits, minimum sizes, and time/area closures.

DATES: Comments on this action must be received no later than 5 p.m., local time, on August 5, 2008.

ADDRESSES: Written comments on this action should be mailed to Karyl Brewster-Geisz, Highly Migratory Species Management Division by any of the following methods:

• Email: *SCS__Scoping@noaa.gov*.

• Written: 1315 East-West Highway, Silver Spring, MD 20910. Please mark the outside of the envelope ''Scoping Comments on Amendment 3 to HMS FMP.''

• Fax: (301) 713–1917.

For a copy of the stock assessments, please contact Jessica Beck (301) 713–2347.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz (301) 713–2347 or Jackie Wilson (240) 338–3936.

SUPPLEMENTARY INFORMATION:

The Atlantic shark fisheries are managed under the authority of the Magnuson-Stevens Act. The Consolidated HMS FMP is implemented by regulations at 50 CFR part 635.

Determination of Overfished Shark Fisheries

NMFS' determination of the status of a stock relative to overfishing and an overfished condition is based on both the removal of fish from the stock through overfishing (the exploitation rate) and the current stock size. Thresholds used to determine the status of Atlantic HMS are fully described in Chapter 3 of the 1999 FMP for Atlantic Tunas, Swordfish, and Shark. A species is considered overfished when the current biomass is less than the minimum stock size threshold. The minimum stock size threshold is determined based on the natural mortality of the stock and the biomass at maximum sustainable yield (B_{MSY}). Maximum sustainable yield is the maximum long-term average yield that can be produced by a stock on a continuing basis. The biomass can be lower than B_{MSY}, and the stock not declared overfished as long as the biomass is above the biomass at the minimum stock size threshold.

Overfishing may be occurring on a species if the current fishing mortality is greater than the fishing mortality (F) at maximum sustainable yield (F_{MSY}) ($F>F_{MSY}$). In the case of F, the maximum fishing mortality threshold is F_{MSY}. Thus, if F exceeds F_{MSY}, the stock is experiencing overfishing.

A. Small Coastal Sharks (SCS)

The latest 2007 stock assessment of SCS in the U.S. Atlantic and Gulf of Mexico was recently completed (72 FR 63888, November 13, 2007). This peer-reviewed assessment, which was conducted according to the Southeast Data, Assessment, and Review (SEDAR) process, provides an update from the 2002 stock assessment on the status of SCS stocks and projects their future abundance under a variety of catch levels in the U.S. Atlantic Ocean, Gulf of Mexico, and Caribbean Sea. The 2007 assessment includes updated catch estimates, new biological data, and a number of fishery-independent catch rate series, as well as fishery-dependent catch rate series.

The peer reviewers determined that the data used in the 2007 stock assessment of the SCS complex and the individual species within the complex were considered the best available at the time and the assessment was considered adequate. However, because the species were individually assessed, the peer reviewers recommended using species-specific results rather than on the aggregated SCS complex results. As a result of this recommendation, and because the stock assessment covered all SCS species, NMFS will no longer provide status updates or determinations on the SCS complex as a whole.

B. Finetooth Sharks

According to the 2002 SCS stock assessment, finetooth sharks were experiencing overfishing. However, the 2007 SCS stock assessment found that finetooth sharks are not overfished ($N_{2005}/N_{MSY} = 1.80$) and overfishing is not occurring ($F_{2005}/F_{MSY} = 0.17$) (Table 1). Based on this, NMFS has determined that finetooth sharks are not overfished and no overfishing is occurring. However, NMFS also notes that while the peer reviewers agreed that it is reasonable to conclude that the stock is not currently overfished, they also indicated that given the limited data available on the population dynamics for finetooth, management should be cautious.

C. Blacknose Sharks

The 2002 SCS stock assessment found that blacknose were not overfished and overfishing was not occurring. However, the 2007 stock assessment for blacknose sharks indicates that spawning stock fecundity (SSF), i.e., number of reproductive-age individuals in a population, in 2005 and during 2001–2005 was smaller than SSF_{MSY} ($SSF_{2005}/SSF_{MSY} = 0.48$) (Table 1). Therefore, NMFS has determined that blacknose sharks are overfished. In addition, the estimate of fishing mortality rate in 2005 and the average for 2001–2005 was greater than F_{MSY}, and the ratio was substantially greater than 1 in both cases ($F_{2005}/F_{MSY} = 3.77$). Based on these results, NMFS has determined that blacknose sharks are experiencing overfishing. The assessment recommended a rebuilding plan with 70 percent probability of recovering to SSF_{MSY} by 2019. This recommended rebuilding time is 11 years from 2009. A constant TAC of 19,200 individuals would lead to rebuilding with 70 percent probability by 2027. The constant TAC also allows for rebuilding with 50 percent confidence by 2024.

D. Atlantic Sharpnose Sharks

The 2002 SCS stock assessment found that Atlantic sharpnose sharks were not overfished and overfishing was not occurring. The 2007 assessment for Atlantic sharpnose sharks also indicated that the stock is not overfished ($SSF_{2005}/SSF_{MSY} = 1.47$) and that no overfishing is occurring ($F_{2005}/F_{MSY} = 0.74$) (Table 1). Based on these results, NMFS has determined that the Atlantic sharpnose sharks are not overfished with no overfishing occurring. However, because estimates of F from the assessment indicate that F is close to, but presently below, F_{MSY} (i.e., overfishing is not occurring), the peer reviewers suggest setting a threshold for F to keep it below the F_{MSY} threshold to prevent overfishing in the future.

E. Bonnethead Sharks

Based on the bonnethead stock assessment, the peer reviewers determined that bonnethead sharks are not overfished ($SSF_{2005}/SSF_{MSY} = 1.13$). In addition, the estimate of fishing mortality rate in 2005 was less than F_{MSY}, ($F_{2005}/F_{MSY} = 0.61$) (Table 1), thus overfishing was not occurring. As a result, NMFS has determined that bonnethead sharks are not overfished with no overfishing occurring. However, fishing mortality rates in the recent past have fluctuated above and below F_{MSY}.

Copies of the 2007 SCS stock assessment are available for review (see **ADDRESSES**).

TABLE 1. SUMMARY TABLE OF BIOMASS AND FISHING MORTALITY FOR SMALL COASTAL SHARKS SCS).

Source: SEDAR 13 Stock Assessment Panel, July 9, 2007. Age-structured State-Space Age-Structured Production Models (SPASMs) were used for bonnethead, Atlantic sharpnose, and blacknose sharks. Surplus production Bayesian Surplus Production (BSP) models were used for the SCS complex and finetooth sharks.

Species	Current Relative Biomass Level*	Current Biomass (N_{2005})	Stock Abundance (N_{MSY})	Minimum Stock Size Threshold (MSST)	Current Relative Fishing Mortality Rate (F_{2005}/F_{MSY})	Maximum Fishing Mortality Threshold (F_{MSY})	Outlook
Atlantic Sharpnose Sharks	1.47 (SSF_{2005}/SSF_{MSY})	5.96E+06	4.45E+06	4.09E+06	0.74	0.19	Not overfished; overfishing is not occurring
Blacknose Sharks	0.48 (SSF_{2005}/SSF_{MSY})	3.49E+05	5.7E+05	4.3E+05	3.77	0.07	Overfished; Overfishing is occurring
Bonnethead Sharks	1.13 (SSF_{2005}/SSF_{MSY})	1.59E+06	1.92E+06	1.4E+06	0.61	0.31	Not overfished; overfishing is not occurring
Finetooth Sharks	1.80 (N_{2005}/N_{MSY})	6.00E+06	3.20E+06	2.4E+06	0.17	0.03	Not overfished; Overfishing is not occurring

*Spawning stock fecundity (SSF) or spawning stock number (SSN) was used as a proxy of biomass when biomass (B) does not influence pup production in sharks. For finetooth stocks, N was used to estimate biomass levels due to data limitations; therefore, only surplus production models were run.

Request for Comments

Currently, both commercial and recreational fishermen may target Atlantic sharpnose, blacknose, finetooth, and bonnethead sharks. Commercial regulations for SCS species include, but are not limited to, no retention limit for directed permit holders, 16 pelagic and SCS species combined per vessel per trip for incidental permit holders, and annual quota of 454 mt dw split between three regions (North Atlantic, South Atlantic, and Gulf of Mexico). Amendment 2 to the Consolidated HMS FMP proposed combining the SCS regions into one (71 FR 41392). Recreational regulations for SCS species include, but are not limited to, retention limit of 1 shark per vessel per trip with a 4.5–ft (54–in) fork length minimum size, plus 1 Atlantic sharpnose and 1 bonnethead per person per trip (no minimum size).

NMFS anticipates changes to shark management as a result of the latest SCS stock assessment and requests comments on a variety of management options for this action. Specifically, NMFS requests comments on commercial management options including, but not limited to, quota levels, regional and seasonal quotas, trip limits, minimum sizes, quota monitoring, authorized gears, permit structure, and prohibited species. In addition, NMFS is seeking comments on recreational management options including, but not limited to, retention limits, minimum sizes, authorized gears, and landing requirements. NMFS also seeks comments on display quotas and collection of sharks through exempted fishing permits, display permits, and scientific research permits. Comments received on this action will assist NMFS in determining the options for rulemaking to conserve and manage shark resources and shark fisheries, consistent with the Magnuson-Stevens Act and the Consolidated HMS FMP. Specifically, comments are requested on management measures to reduce fishing mortality on blacknose sharks in shrimp trawl fisheries because a significant proportion of fishing mortality is occurring in these fisheries as bycatch.

NMFS will hold scoping meetings to gather public comment on the implementation of new management measures for SCS (time and location details of which will be announced in a subsequent **Federal Register** notification).

Based on the 2007 stock assessment, NMFS believes the implementation of new management measures via an amendment to the Consolidated HMS FMP is necessary to rebuild blacknose sharks. NMFS anticipates completing this amendment and any related documents by January 1, 2010.

Dated: May 1, 2008.

Emily H. Menashes

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 08–1225 Filed 5–2–08; 2:04 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Federal Consistency Appeals by Weaver's Cove Energy, LLC, and Mill River Pipeline, LLC

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (Commerce).

ACTION: Notice of closure—administrative appeal decision records.

SUMMARY: This announcement provides notice that the decision records for two administrative appeals filed with the Department of Commerce by Weaver's Cove Energy, LLC, and Mill River Pipeline, LLC, have been closed.

DATES: The decision records for these two administrative appeals were closed on May 5, 2008.

ADDRESSES: Materials from the appeal records are available at the Internet site *http://www.ogc.doc.gov/czma.htm* and at the Office of General Counsel for Ocean Services, National Oceanic and Atmospheric Administration, U.S.

Department of Commerce, 1305 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Brett Grosko, Attorney-Advisor, Office of General Counsel for Ocean Services, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, via e-mail at *Brett.Grosko@noaa.gov,* or 301–713–7384.

SUPPLEMENTARY INFORMATION: On August 27, 2007, Weaver's Cove Energy, LLC, and Mill River Pipeline, LLC, separately filed notices of appeal with the Secretary of Commerce (Secretary) pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972 (CZMA), as amended, 16 U.S.C. 1451 *et seq.*, and the Department of Commerce's implementing regulations, 15 CFR part 930, subpart H. These appeals were taken from objections by the Commonwealth of Massachusetts to the issuance of certain federal licenses necessary to construct and operate a liquefied natural gas terminal and two associated natural gas pipelines, to be located in Fall River, Massachusetts. Both appeals request the Secretary override the State's objections on grounds the proposed project allegedly is consistent with the objectives of the CZMA, and necessary in the interest of national security. Decisions for CZMA administrative appeals are based on information contained in the decision record for the appeal. These two appeals have been consolidated for decision.

Under the CZMA, the decision record for an appeal must close no later than 220 days after notice of the appeal was first published in the **Federal Register**. 16 U.S.C. 1465. Notice of closure must be published in the **Federal Register**. Consistent with this requirement, notice is hereby provided that the decision records for these appeals were closed on May 5, 2008. No further information, briefs or comments will be considered in deciding these appeals.

A final decision on these appeals must be issued no later than 60 days after the date of the publication of this notice. 16 U.S.C. 1465(c)(1). The deadline may be extended by publishing (within the 60-day period) a subsequent notice explaining why a decision cannot be issued within that time frame. 16 U.S.C. 1465(c)(1). In this event, a final decision must be issued no later than 15 days after the date of publication of the subsequent notice. 16 U.S.C. 1465(c)(2).

Additional information about these appeals and the CZMA appeals process is available from the Department of Commerce CZMA appeals Web site: *http://www.ogc.doc.gov/czma.htm.*

[Federal Domestic Assistance Catalog No. 11.419 Coastal Zone Management Program Assistance.]

Dated: May 1, 2008.

Joel La Bissonniere,

Assistant General Counsel for Ocean Services.

[FR Doc. E8–10012 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XH64

Endangered Species; File No. 1614–01

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

ACTION: Notice; issuance of permit modification.

SUMMARY: Notice is hereby given that the NOAA Fisheries Northeast Region Protected Resources Division (Responsible Party: Mary Colligan), One Blackburn Drive, Gloucester, MA 01930, has been issued a modification to scientific research Permit No. 1614.

ADDRESSES: The modification and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521;

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9300; fax (978)281–9394; and

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

FOR FURTHER INFORMATION CONTACT: Brandy Belmas or Jennifer Skidmore, (301)713–2289.

SUPPLEMENTARY INFORMATION: On March 25, 2008, notice was published in the **Federal Register** (73 FR 15741) that a modification of Permit No. 1614, issued February 28, 2008 (73 FR 11873), had been requested by the above-named organization. The requested modification has been granted under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

In addition to all activities authorized under Permit No. 1614, this modification increases the number of dead, captive bred shortnose sturgeon (*Acipenser brevirostrum*) received from authorized U.S. facilities up to 350 individuals each year. Obtaining these additional sturgeon will aid researchers in meeting their research objectives, which include reviewing shortnose sturgeon research procedures and developing necropsy protocols.

Issuance of this modification, as required by the ESA was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: May 2, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–10108 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XH71

Marine Mammals; File No. 540–1811

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 Mr. John Calambokidis, Cascadia Research Collective, Waterstreet Building, 218 1/2 West Fourth Avenue, Olympia, WA 89501, has requested an amendment to scientific research Permit No. 540–1811.

DATES: Written, telefaxed, or e-mail comments must be received on or before June 6, 2008.

ADDRESSES: The amendment request and related documents are available for review upon written request or by appointment: (See **SUPPLEMENTARY INFORMATION**).

Written comments or requests for a public hearing on this request should be submitted 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 amendment 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. 731–1774.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Carrie Hubard, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 540–1811, issued on March 31, 2006, and most recently amended on June 16, 2006, is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the Regulations Governing the Taking, Importing, and Exporting of Endangered and Threatened Species (50 CFR 222–226).

Permit No. 540–1811, issued to John Calambokidis, currently authorizes aerial and vessel surveys, photo-identification, behavioral observations, tagging (using suction-cup attached tags), biopsy, video and acoustic recording, and incidental harassment of all species of odontocetes and baleen whales in the North Pacific Ocean. The purpose of the modification is to enhance the examination of movements (for stock structure assessment) and habitat use of: blue (*Balaenoptera musculus*), fin (*B. physalus*), sei (*B.a borealis*), gray (*Eschrichtius robustus*), sperm (*Physeter macrocephalus*), Bryde's (*B. edeni*), humpback (*Megaptera novaeangliae*) and minke (*B. acutorostrata*) whales, Mesoplodon beaked whales (*Mesoplodon* spp), Cuvier's (*Ziphius cavirostris*) and Baird's (*Berardius bairdii*) beaked whales, and bottlenose (*Tursiops truncatus*) and Risso's (*Grampus griseus*) dolphins via dart tagging. For each species, an addition of 20 takes by dart tagging are requested, with the exception of sei whales, where only 5 takes are requested. Additionally, an increase in the number of biopsy and suction-cup tagging takes (between 10 - 40 takes) for several cetacean species (fin, sperm, and short-finned pilot whales (*Globicephala macrorhynchus*) and Baird's, Cuvier's, and Mesoplodon beaked whales) are being requested in order to better increase understanding of stock structure and behavior. Takes by Level B harassment (e.g., incidental harassment of non-target animals) are already authorized under Permit No. 540–1811 and no additional Level B harassment takes are requested. Dart tagging will occur concurrently with already permitted activities (i.e., vessel surveys, photo-identification, suction-cup tagging etc), primarily in Californian waters, though some species may be tagged opportunistically elsewhere where activities are authorized (i.e., U.S. and international waters of the Pacific including Alaska, Washington, Oregon, and other U.S. territories). The amended permit, if issued, would be valid until the permit expires on April 14, 2011.

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.

Documents may be reviewed in the following locations:

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;

Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426;

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

Dated: May 1, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–10104 Filed 5–6–08; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Concept Release on the Appropriate Regulatory Treatment of Event Contracts

AGENCY: Commodity Futures Trading Commission.

ACTION: Request for Public Comment.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is soliciting comment on the appropriate regulatory treatment of financial agreements offered by markets commonly referred to as event, prediction, or information markets.[1] For ease of reference and to avoid classification issues, these financial agreements are referred to herein as event contracts. In general, event contracts are neither dependent on, nor do they necessarily relate to, market prices or broad-based measures of economic or commercial activity.[2] Rather, event contracts may be based on eventualities and measures as varied as the world's population in the year 2050, the results of political elections, or the outcome of particular entertainment events.[3] The Commission's staff has received a substantial number of requests for guidance on the propriety of trading various event contracts under the regulatory rubric of the Commodity Exchange Act (CEA or Act). Given the substantive and practical concerns that may arise from applying federal regulation to event contracts and markets, the Commission believes that it is appropriate to solicit and consider the public's comments in advance of issuing any definitive guidance.

DATES: Comments must be received by July 7, 2008.

ADDRESSES: Comments should be sent to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Attention: Office of the Secretariat. Comments may be sent by facsimile to 202.418.5521, or by e-mail to *secretary@cftc.gov*. Reference should be made to the ''Concept Release on the Appropriate Regulatory Treatment of Event Contracts.'' Comments may also be submitted through the Federal eRulemaking Portal at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Bruce Fekrat, Special Counsel, Office of the Director (telephone 202.418.5578, e-mail *bfekrat@cftc.gov*), Division of

[1] *See* Michael Gorham, *Event Markets Campaign for Respect*, Futures Industry Magazine (Jan./Feb. 2004); Justin Wolfers and Eric W. Zitzewitz, *Prediction Markets*, 18 J. Econ. Persp. 107 (Spring 2004); Robert W. Hahn and Paul C. Tetlock, *Using Information Markets to Improve Public Decision Making*, AEI-Brookings Joint Center for Regulatory Studies Working Paper 04–18 (March 2005); Hal R. Varian, *Can Markets Be Used to Help People Make Nonmarket Decisions?*, The New York Times (May 8, 2003).

[2] The term event contract is not intended to encompass contracts that generate trading prices that predictably correlate with market prices or broad-based measures of economic or commercial activity, or contracts which substantially replicate other commodity derivatives contracts, such as binary options on exchange rates or the price of crude oil. The aforementioned contracts are unambiguously subject to CFTC regulation.

[3] *See, e.g.*, Retired claims list at the Foresight Exchange, available at *http://www.ideosphere.com/fx-bin/ListClaims*.

Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Purpose of the Release

Since 2005, the Commission's staff has received a substantial number of requests for guidance on the propriety of offering and trading financial agreements that may primarily function as information aggregation vehicles. These event contracts generally take the form of financial agreements linked to eventualities or measures that neither derive from, nor correlate with, market prices or broad economic or commercial measures. Event contracts have been based on a wide variety of interests including the results of presidential elections, the accomplishment of certain scientific advances, world population levels, the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages. In response to the various requests for guidance, and to promote regulatory certainty, the Commission has commenced a comprehensive review of the Act's applicability to event contracts and markets. To further its review, the Commission is issuing this release to solicit the expertise of interested persons, including CFTC-registered markets, exempt markets, over-the-counter derivatives dealers, capital market participants, legal practitioners, state and federal regulatory authorities, academicians and research institutions with respect to the practical and regulatory issues relevant to regulating event contracts and markets.

Broadly speaking, the Commission must determine:

1. Whether event contracts are within the Commission's jurisdiction and if so, why (or why not)?

2. If event contracts are within the Commission's jurisdiction, should there be exemptions or exclusions applied to them and if so, why (or why not)?

3. How should the Commission address the potential gaming aspects of some event contracts and the possible pre-emption of state gaming laws?

The Commission urges interested persons to provide detailed and comprehensive comments that will assist the Commission in conducting its review and analysis of the Commission's regulatory purview over event contracts, the interests that may appropriately underlie Commission-regulated transactions, and the appropriate regulatory treatment of markets that may offer event contracts.

B. CFTC Experience With Event Contracts

The Iowa Electronic Markets (IEM), an electronic trading facility that functions as an experimental and academic program, is one of the better known and oft discussed real-money event markets currently in operation.[4] The IEM operates in part pursuant to a 1993 no-action letter issued by Commission staff which, without asserting jurisdiction or describing the potential parameters of the Commission's regulatory purview over the market, allows the IEM to list various event contracts subject to certain conditions and limitations for covered contracts.[5]

The IEM continues to be most recognized for its presidential election contracts. The IEM offers a vote share contract and a winner-take-all contract for the 2008 U.S. presidential election cycle. Its vote share contract is ultimately associated with the candidates that will be nominated by each party. Each vote share contract has a maximum value of $1 and a contract payout that is directly based on the percentage of the popular vote received by each of the two major party candidates. For instance, a contract for a candidate who receives 40% of the popular votes cast for both candidates will be worth $.40 at settlement.

In contrast, the IEM's 2008 presidential election winner-take-all contract will have a value of either $1 or $0 at settlement. The IEM's winner-take-all-contract is also associated with a specific candidate, but instead of having a payout that is tied to a particular percentage of the popular vote received by each candidate, the contract will distribute a fixed payout of $1 to its holder if and only if the candidate referenced by the contract receives a greater percentage of the popular vote cast. Although the IEM's presidential election contracts are imperfect vehicles for the discovery of information, there is some consensus on the question of whether the IEM's contracts can function capably as predictive tools.[6] Indeed, trading data generated by some IEM presidential election contracts arguably have produced better predictive indicators than data obtained from professional polling organizations.[7]

II. Commodity Options and Futures and the Attributes of Event Contracts

The Commission, with some exceptions, has exclusive jurisdiction over two relevant types of derivative instruments—commodity options and commodity futures contracts. Section 4c(b) of the Act gives the Commission plenary jurisdiction over commodity options, and provides that ''[n]o person shall * * * enter into * * * any transaction involving any commodity regulated under this Act which is of the character of, or is commonly known to the trade as, an option * * * contrary to any rule, regulation or order of the Commission[.]'' Section 2(a)(1)(A) of the Act provides that the Commission shall have exclusive jurisdiction with respect to accounts, agreements, and transactions (including options) involving contracts of sale of a commodity for future delivery. Event contracts, depending on their underlying interests, can be designed to exhibit the attributes of either options or futures contracts.

A significant number of event contracts are structured as all-or-nothing binary transactions commonly described as binary options.[8] Binary event contracts typically pay out a fixed amount when an outcome either occurs or does not occur. The trading of such contracts can facilitate the discovery of information by assigning probabilities, through market-derived prices, to discrete eventualities. For example, a binary contract based on whether a particular person will run for the presidency in 2012, can pay a fixed $100 to its buyer if and only if that individual runs for the presidency in 2012. If the contract's traders believe that the likelihood of the individual's candidacy in 2012 is around 17 percent, the price of the contract will be around

[4] The IEM is run by the University of Iowa Departments of Accounting and Economics and the University's College of Business Administration.

[5] CFTC Staff Letter No. 93–66 [1992–1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,785 (June 18, 1993). This no-action letter superseded the operative terms of a more limited letter issued to the IEM in 1992. The 1993 letter's relief extends to IEM contracts based on political elections, economic indicators, and certain currency exchange rates. The letter requires that the IEM limit access to any one submarket to between 1,000 and 2,000 traders. The letter also sets the maximum amount that any single participant can risk in any one submarket at five hundred dollars. The letter makes clear that relief is premised on, among other factors, the IEM's representations concerning the market's specific manner of operation and academic purpose, and the assurance that the IEM will not receive any profit or other form of compensation from its activities.

[6] *See, e.g.*, Michael Abramowicz, *Information Markets, Administrative Decision Making, and Predictive Cost-Benefit Analysis*, 71 U. Chi. L. Rev. 933, 950 (2004).

[7] *See* Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. Rev. 962, 1029–31 (June 2005).

[8] *See, e.g.*, Intrade Prediction Markets, Current Events Contracts at *http://www.intrade.com/jsp/intrade/contractSearch/*.

$17, and will approximate the market's consensus expectation of the individual's candidacy.

In addition to binary event transactions, the term event contract has also been used to identify transactions, based on interests other than market prices, which resemble futures contracts. For instance, these types of event contracts can price consensus estimates of moving values, such as the number of hours the average U.S. resident spends in traffic or the share of votes that a particular candidate for political office may receive. Unlike binary transactions, and similar to any commodity futures contract, this type of contract creates continuous and ongoing obligations that are linked to moving measures or levels, as opposed to being dependent on the outcome of a single discrete occurrence.

III. The Commission's Regulatory Purview

As discussed above, with some limited exceptions, the regulatory purview of the Act extends to and includes transactions that are either structured as options or futures when such transactions involve interests that constitute commodities under the Act. Section 1a(4) of the Act defines commodity in two distinct ways. First, Section 1a(4) specifically enumerates certain articles or goods as commodities.[9] Second, Section 1a(4) defines the term commodity as including those articles or goods, and services, rights or interests, ''in which contracts for future delivery are presently or in the future dealt in.'' Therefore, an underlying interest that is not enumerated in Section 1a(4) may be a statutory commodity under the Act if it reasonably can underlie a futures contract on a forward looking basis.[10]

In addition to Section 1a(4), Section 1a(13) of the Act identifies certain interests as excluded commodities and thereby gives further shape to the statutory definition of commodity.[11] The Section 1a(13) definition of excluded commodity is composed of four subsections. The third subsection defines the term to include any economic or commercial index that is based on prices, rates, values, or levels not within the control of any party to the relevant contract. The fourth subsection of Section 1a(13) provides that an excluded commodity includes an occurrence, extent of an occurrence, or contingency associated with a financial or economic consequence that is not within the control of the parties to the relevant transaction.

For the purpose of discussion and analysis, the types of event contracts that Commission staff has reviewed can be categorized, albeit imperfectly, as contracts that are based on narrow commercial measures and events, contracts based on certain environmental measures and events, and contracts based upon general measures and events. Narrow commercial measures quantify and reflect the rate, value, or level of particularized commercial activity, such as a specific farmer's crop yield. Narrow commercial events, on the other hand, are events that might, in and of themselves, have commercial implications, such as changes in corporate officers or corporate asset purchases.

Environmental measures can be characterized as quantifications of weather phenomena, such as the volatility of precipitation or temperature levels, that do not predictably correlate to commodity market prices or other measures of broad economic or commercial activity. By comparison, environmental events can include the formation of a specific type of storm, within an identifiable geographic region, the likelihood of which will not predictably correlate to commodity market prices or measures of broad economic or commercial activity.

General measures can be described as measures that are not commercial or environmental measures. As such, general measures do not quantify the rate, value, or level of any commercial or environmental activity and can, for example, include the number of hours that U.S. residents spend in traffic annually or the vote-share of a particular presidential candidate. Similarly, general events, such as whether a Constitutional amendment will be adopted or whether two celebrities will decide to marry, can be described as events that do not reflect the occurrence of any commercial or environmental event. The category of general measures and events can be further divided into a multitude of subcategories, such as political or entertainment measures or events.

Since 1992, Commission-regulated exchanges have listed for trading a variety of commodity futures and options contracts with payout terms based on interests other than price-based interests. These contracts involve interests as diverse as regional insured property losses, the count of bankruptcies, temperature volatilities, corporate mergers, and corporate credit events.[12] While not strictly price-based, the interests underlying these contracts have been viewed by Commission staff as having generally-accepted and predictable financial, commercial or economic consequences. In other words, unlike the interests that event contracts cover, these underlying interests have been viewed as measures and occurrences that reasonably could be expected to correlate to market prices or other broad-based commercial or economic measures or activities.

IV. Further Statutory Background

Federal regulations were initially applied to commodity derivatives trading in 1921.[13] At that time, Congress

[9] 7 U.S.C. 1a(4). Section 1a(4) of the Act enumerates the following commodities: wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice.

[10] *See United States* v. *Valencia*, No. H–03–024, 2003 WL 23174749 at *8 (S.D. Tex Aug. 25, 2003) (noting that the determination of whether West Coast natural gas is ''a commodity in which contracts for future delivery are presently or in the future dealt in,'' is a fact question, and that ''there is no evidence that West Coast gas could not in the future be traded on a futures exchange.'').

[11] 7 U.S.C. 1a(13). Section 1a(13) of the Act provides that:

The term ''excluded commodity'' means—

(i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure;

(ii) any other rate, differential, index, or measure of economic or commercial risk, return, or value that is—

(I) not based in substantial part on the value of a narrow group of commodities not described in clause (i); or

(II) based solely on one or more commodities that have no cash market;

(iii) any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or

(iv) an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is—

(I) beyond the control of the parties to the relevant contract, agreement, or transaction; and

(II) associated with a financial, commercial, or economic consequence.

[12] For example, the Chicago Board of Trade's catastrophe single event insurance option contracts (which are no longer listed) paid out a fixed amount if and only if insured property damage exceeded $10 billion for a specific region during a specified interval of time.

[13] *See, e.g., Hearing on Futures Trading Before the House Committee on Agriculture*, 66th Cong., 3rd Sess. 1043 (1921); *Hearings on H.R. 5676 Before the Senate Committee on Agriculture and Forestry*, 67th Cong., 1st Sess. 452 (1921); *Hearings on Futures Trading Before the House Committee on Agriculture*, 67th Cong. 1st Sess. 7–9 (1921); 61 Cong. Rec. 4761 (1921) (remarks of Senator Capper, the sponsor of the Senate bill which became the Futures Trading Act of 1921 (later restyled as the Grain Futures Act of 1922 when found to be unconstitutional for its use of taxation to penalize off-exchange futures trading)).

acknowledged that commodity futures markets could benefit commerce by facilitating the hedging of commercial risks and the discovery of reliable commodity prices.[14] The Grain Futures Act of 1922, the forerunner to the CEA, consequently was enacted to promote the financial vitality of futures trading by limiting price manipulations and other disturbances that were prevalent at the time and widely perceived to result from excessive speculation.[15]

In identifying the national public interests that render federal regulation necessary, the Act focuses on the commercial benefits that well-functioning derivatives markets can provide by broadly expressing their critical functions. Customarily, hedging and price basing have been identified as two critical functions of the commodity derivatives markets.[16] For instance, Section 3 of the Act, as amended by the Commodity Futures Modernization Act of 2000 (CFMA),[17] finds that transactions subject to the CEA are affected with the national public interest because they provide a means for ''managing and assuming price risks.'' Section 3 of the Act also identifies price discovery and price dissemination as separate public interests warranting Federal regulation.[18]

Although repealed by the CFMA, former Section 5(g)[19] of the Act may be relevant to analyzing the findings and purposes discussed in Section 3 of the Act. Former Section 5(g) provided that the Commission could not designate a board of trade as a contract market unless the board of trade demonstrated that transactions for future delivery in the commodity for which designation as a contract market was sought ''will not be contrary to the public interest.''[20] The public interest test of Section 5(g) included an ''economic purpose'' test, subject to a final test of the public interest.[21] The economic purpose test applied under former Section 5(g) was used to prohibit the trading of certain contracts. Notably, the economic purpose test regarding contracts appropriate for trading on a futures exchange was not necessarily congruent with the scope of the Commission's jurisdiction. Accordingly, while futures contracts that failed the economic purpose test were prohibited from trading on futures exchanges and thus illegal because of the on-exchange trading requirement, they (and any instrument with identical terms) remained futures contracts, fully subject to the Commission's jurisdiction.

By enacting the CFMA, Congress sought ''to promote innovation for futures and derivatives and to reduce systemic risk by enhancing legal certainty in the markets for certain futures and derivatives transactions[.]''[22] As demonstrated by the IEM, innovative event markets have the capacity to facilitate the discovery of information, and thereby provide potential benefits to the public. Subject to certain exceptions, Section 4(c)(1) of the Act gives the Commission the authority to ''promote responsible economic or financial innovation and fair competition'' by exempting any transaction or class of transactions from any of the provisions of the Act, including the requirement that they trade on Commission-regulated markets, where the Commission determines that such action would be consistent with the public interest. Pursuant to Section 4(c), Congress gave to ''the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.''[23] Under Section 4(c), the Commission has the discretion to grant an exemption to certain classes of transactions without having to make a determination that such transactions are subject to the Act in the first instance.[24] Notably, the Commission can use its Section 4(c)

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[14] *See* S. Rep. No. 871 (August 23, 1922). The Congressional record is replete with discussion of the commercial importance of commodity futures trading. The record suggests that commercial interests must be able to look to properly functioning commodity futures markets for market information and products that facilitate the making of marketing, financing, and distribution decisions. S. Rep. No. 93–1131, at 12 (1974). The Congressional record also indicates that an initial purpose behind regulating commodity futures trading was to secure fair and orderly markets for producers and other commercial participants who used the markets for price basing and hedging. *Hearings on S. 2485, S. 2578, S. 2837 and H.R. 1311 before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. at 234 (1974); *see also* 80 Cong. Rec. 10739 (April 11, 1974).

[15] *E.g.*, 61 Cong. Rec. 4761–4763 (1921) (remarks of Senator Capper); 61 Cong. Rec. 1379 (1921) (remarks of Rep. Bland); 61 Cong. Rec. 1313–1314 (remarks of Rep. Tincher, the sponsor of the House bill which became the 1921 Act); 61 Cong. Rec. 1376 (1921) (remarks of Rep. Gensman).

[16] Hedging occurs when positions acquired are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise. *See, e.g.*, 17 CFR 1.3(z) (definition of bona fide hedging). Price basing, a function of price discovery and dissemination, can occur when commercial entities enter into transactions in a particular commodity based upon commodity futures prices for that or a related commodity, oftentimes at a differential.

[17] Appendix E, section 108, Pub. L. 106–554, 114 Stat. 2763.

[18] The hedging and price basing purposes of commodity futures trading are emphasized in other provisions of the Act as well. *See, e.g.*, 7 U.S.C. 6a, 6b, and 6c. As a matter of background, the provision in the Grain Futures Act that was the forerunner of current CEA Section 3 provided that:

> Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as ''futures'' are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein.
>
> Grain Futures Act, ch. 369, 42 Stat. 998 (Sept. 21, 1922). In 1936, Congress restyled the Grain Futures Act as the Commodity Exchange Act and amended this provision to substitute the word ''commodity'' for ''grain.'' Pub. L. 74–675, section 2, 49 Stat. 1491 (June 15, 1936).

[19] 7 U.S.C. 7(g), *as amended* by the Commodity Futures Trading Commission Act of 1974, Pub. L. 93–463, 88 Stat. 1389 (1974). In 1992, Section 5(g) was redesignated Section 5(7) of the Act. *See* Futures Trading Practices Act of 1992, Pub. L. 102–546, 106 Stat. 3590 (1992). The CFMA repealed all of former Section 5 of the Act, including Section 5(g) (redesignated as Section 5(7)), and replaced it with current Section 5. Section 5 was radically restructured by the CFMA to provide for designation criteria and core principles with which a DCM must comply. Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

[20] The House Committee on Agriculture stressed that contracts that could be expected to be used almost entirely for speculation would be against the public interest. H.R. Rep. No. 975, 93 Cong., 2d Sess. 29 (1974).

[21] *See* H.R. Rep. No. 1383, 93d Cong., 2d Sess. 36 (1974).

[22] House Report No. 106–711(III) September 6, 2000.

[23] House Conference Report 102–978, 1992 U.S.C.C.A.N. 3179, 3213.

[24] With respect to the exercise of this discretion, the House-Senate Conference Committee responsible for the review of Section 4(c) stated that:

> The Conferees do not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption is sought is subject to the Act. Rather, this provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is not straightforward. Rather than making a finding as to whether a product is or is not a futures contract, the Commission in appropriate cases may proceed directly to issuing an exemption.
>
> Conf. Report at 3214–3215. Although Section 4(c) only speaks to futures contracts, Section 4c(b) of the Act, the Commission's plenary authority to regulate transactions that involve commodity options, provides the Commission with comparable exemptive authority for options.

exemptive authority not only on a case-by-case, or product-by-product basis, but may also use the authority to establish a set of regulatory provisions applicable to a defined class of products.

V. Issues for Comment

A. Request for Comment

The following questions consider the Commission's regulatory purview over event contracts, the interests that may appropriately underlie Commission-regulated transactions, and the appropriate regulatory treatment of event contracts. The Commission encourages comments on the specific questions posed, as well as the broad range of issues raised in this concept release. In providing comments, please describe your relevant experience and discuss in detail the facts and legal provisions that support your conclusions. Furthermore, please consider the Commission's mandate to protect commodity futures and options markets and customers, and ensure the integrity of the commodity derivatives marketplace, as well as the expected effects of any Commission action on competition, efficiency, innovation and the financial integrity of transactions. Any recommendation with respect to the regulatory treatment of event contracts and markets should be consistent with and supported by the Act, practical, and amenable to effective and efficient implementation.

B. Public Interest

1. What public interests are served by event contracts that are designed and will principally be traded for information aggregation purposes and not for commercial risk management or pricing purposes?

2. How are these interests consistent with the public interest goals embodied in the Act?

3. What calculations, analyses, variables, and factors could be used to objectively determine the social value of information to the general public that may be discovered through trading in event contracts? Should this be a factor in determining whether the Commission plays a role in regulating these markets?

C. Jurisdictional Determinations

4. What characteristics or traits are common to or should be used to identify event contracts and event markets?

5. How do these characteristics and traits differ from those of commodity futures and options contracts that customarily have been regulated by the Commission? How are they similar?

6. Are there criteria based on the provisions of the Act that could be used to make jurisdictional determinations with respect to event contracts and markets?

7. Given the purposes and history of the Act, would it be appropriate for the Commission to apply a test premised on commercial risk management or pricing functions to demarcate the Commission's jurisdiction over particular contracts? If so, what factors could be used to make such a determination?

8. Given the purposes and history of the Act, would it be appropriate for the Commission to apply any test premised on the economic purpose of certain types of transactions to demarcate the Commission's jurisdiction over particular contracts? If so, what factors could be used to make such a determination?

9. What calculations, analyses, variables and factors would be appropriate in determining whether the impact of an occurrence or contingency will result in a financial, commercial or economic consequence that is identified in Section 1a(13) of the Act?

10. What calculations, analyses, variables, and factors would be appropriate in determining whether an economic or commercial index that is based on prices, rates, values, or levels should or should not qualify as an excluded commodity under Section 1a(13) of the Act?

11. What identifiable factors, statutorily based or otherwise, limit the events and measures that may underlie event contracts when such contracts are treated as Commission-regulated transactions?

12. What objective and readily identifiable factors, statutorily based or otherwise, could be used to distinguish event contracts that could appropriately be traded under Commission oversight from transactions that may be viewed as the functional equivalent of gambling?

13. The Commission notes that Section 12(e) of the Act generally provides that the CEA supersedes and preempts other laws, including state and local gaming and bucket shop laws, with respect to transactions executed on or subject to the rules of a Commission-regulated market, or with respect to transactions exempted from the Act pursuant to the Commission's exemptive authority under Section 4(c) of the Act. What are the implications of possibly preempting state gaming laws with respect to event contracts and markets that are treated as Commission-regulated or exempted transactions?

14. Should certain underlying events or measures—such as those based on assassinations or terrorist activities—be prohibited altogether due to the social perception and impact of such events? What statutory or other legal basis would support this treatment?

15. Are there event contracts, such as political event contracts, that should be prohibited from trading under the Act, or that deserve separate treatment or consideration, due to the nature and importance of their outcomes? What statutory or other legal basis would support this treatment?

D. Legal Implementation

16. Is it appropriate for the Commission to direct certain or all event contracts onto markets that are regulated differently from and perhaps less stringently than DCMs? For example, it may be warranted or necessary to treat event markets that aggregate information solely for academic or research purposes, event markets set-up for internal corporate purposes, or event markets that offer exceedingly low notional value contracts to traders differently than markets that possess the attributes of traditional DCMs.

17. Is it appropriate for the Commission to use the Section 4(c) exemptive authority of the Act for implementing a regulatory scheme for event contracts and markets? In this regard, the Commission notes that it has the discretion to grant an exemption under Section 4(c) to certain classes of transactions without having to make a determination as to whether such transactions are subject to the Act in the first instance.

18. Is the issuance of staff no-action relief, such as the relief issued to the IEM, an appropriate or preferable means for establishing regulatory certainty for event contracts and markets? Is a policy statement appropriate or preferable?

19. What are the benefits and drawbacks of permitting certain event markets to operate pursuant to Commission established conditions that are similar to the conditions under which the IEM operates?

E. Market Participants

20. Would it be appropriate to allow market participants, and in particular, retail customers, to trade on Commission-regulated event markets with the knowledge that the Commission may not be able to effectively monitor the measures or events that underlie certain event contracts?

21. What unique protections and prophylactic measures are appropriate or necessary for the protection of retail users of event contracts and markets?

22. What are the implications of permitting the intermediation of event

contracts, including intermediation on behalf of retail market participants, both with respect to trade execution and clearing?

23. Are there any types of trader or intermediary conduct, peculiar to event contracts and markets, that should be prohibited or monitored closely by regulators?

24. What other factors could impact the Commission's ability, given its limited resources, to properly oversee or monitor trading in event contracts?

Issued in Washington, DC, on May 1, 2008 by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E8–9981 Filed 5–6–08; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–49]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCAIDBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–49 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: April 29, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

APR 21 2008
In reply refer to:
USP003451-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-49, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to Canada for defense articles and services estimated to cost $375 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,
Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Same ltr to:
House
Committee on Foreign Affairs
Committee on Armed Services
Committee on Appropriations

Senate
Committee on Foreign Relations
Committee on Armed Services
Committee on Appropriations

Transmittal No. 08-49

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) Prospective Purchaser: Canada

(ii) Total Estimated Value:

Major Defense Equipment*	$125 million
Other	$250 million
TOTAL	$375 million

(iii) Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: six CH-47D CHINOOK Helicopters with 12 (2 per helicopter) T55-GA-714A Turbine engines, 4 M240H Machine Guns, 30 AN/AVS-6/7(V)1 Aviation Night Vision Imaging Systems, and 2 spare T-55-GA-714A Turbine engines, mission equipment, communication and navigation equipment, ground support equipment, spare and repair parts, special tools and test equipment, technical data and publications, site survey, Quality Assurance Team support, contractor technical and logistics personnel services, and other related elements of logistics support.

(iv) Military Department: Army (ZXN)

(v) Prior Related Cases, if any: none

(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none

(vii) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached

(viii) Date Report Delivered to Congress: APR 2 1 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Canada - CH-47D CHINOOK Helicopters

The Government of Canada has requested a possible sale of six CH-47D CHINOOK Helicopters with 12(2 per helicopter) T55-GA-714A Turbine engines, 4 M240H Machine Guns, 34) AN/A VS-6/7(V)1 Aviation Night Vision Imaging Systems, and 2 spare T-55-GA-714A Turbine engines, mission equipment, communication and navigation equipment, ground support equipment, spare and repair parts, special tools and test equipment, publications and technical data, site survey, Quality Assurance Team support, contractor technical and logistics personnel services, and other related elements of logistics support. The estimated cost is $375 million.

This proposed sale will contribute to the foreign policy and national security objectives of the United States by improving the military capabilities of Canada and furthering weapon system standardization and interoperability with U.S. forces. Canadian deployments in support of peacekeeping and humanitarian operations have made a significant impact to global political and economic stability and have served U.S. national security interests.

Canada needs these helicopters to enhance its capabilities in the Global War on Terrorism (GWOT). Having the same configuration as the U.S. would greatly contribute to Canada's military capability by making it a more sustainable coalition force to support GWOT. The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractors will be: The Boeing Company in Ridley Park, PA; Honeywell, Inc. in Phoenix, AZ; and FN Enterprise in Lubbock, TX. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of contractor representatives to Canada and in the theater of operations for an unspecified amount of time. Also, approximately 6 U.S. Government personnel will participate in program management and technical reviews in-country for one to two-week intervals twice annually to support site surveys and delivery of the CH-47D helicopters in-country.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-49

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The CH-47D CHINOOK medium lift helicopter is a cargo helicopter, remanufactured from CH-47A, B, and C aircraft. The avionics system in the CH-47D consists of the communications equipment providing high frequency (AN/ARC-220), VHF AM/FM (AN/ARC-186) and UHF-AM (AN/ARC-1) communications. The voice secure equipment consists of the TSECIKY-58 or the TSECIKY-100. The navigation equipment includes ADF, VOR ILS Marker Beacon (AN/ARN-123), Doppler/GPS (AN/ASN-128), and VHF Homing (AN/ARC-201D) devices. Transponder equipment (AN/APX-1 18) consists of an 1FF receiver with inputs from the barometric altimeter for altitude encoding. Mission equipment consists of the radar signal detecting set, (AN/APR-39A(V)1). The M-130 flare dispenser launches flares against threats identified by the radar signal detecting set.

a. The AN/ARC-1 Have Quick II variant radio is the U.S. Air Force and U.S. Army standard avionics radio. The AN/ARC-164 provides effective, proven anti-jam Ultra High Frequency (UHF) voice communication. Performance capabilities, vulnerabilities and weaknesses, Electric Countermeasures/Electric CounterCountermeasures (ECM/ECCM) capabilities and frequencies, and operational characteristics and data are classified Secret.

b. The AN/ARC-201D Single Channel Ground and Airborne Radio System (SINCGARS) is a tactical airborne radio subsystem that provides secure, anti-jam voice and data communication. The enhanced Data Modes (EDM) of the radio employs a Reed-Solomon Forward Error Correction (FEC) technique that provides enhanced bit-error-rate performance. The EDM Packet Data Mode supports packet data transfer from the airborne host computer to another airborne platform or the ground-based equivalent S1NCGARS system. Performance capabilities, ECM/ECCM specifications and Engineering Change Orders (ECOs) are classified Secret.

c. The AN/ARC-231 is an airborne VHF/UHF LOS and DAMA SATCOM3 communication system. This system supports the DoD requirements for airborne, multi-band, multi-mission, secure anti-jam. voice, data and imagery. It provides network-capable communications in a compact radio set. This is accomplished using DoD MIL-STD software/ waveforms to ensure maximum interoperability across joint force operations.

d. The AN/ARC-220 is a High Frequency (HF) radio that provides secure and non-secure voice and data communications with automatic link establishment (ALE). The system will provide communications between aircraft flying nap-of-the-earth (NOE) profiles, other aircraft, and ground radios. The radio system

will provide aircraft with the capability for continuous and reliable, secure and non-secure communications at non-line-of-sight (NLOS) distances. The radio incorporates the latest state-of-the-art breakthroughs to include ALE and electronic counter-countermeasures (ECCM). The ground configuration of the HF radio is designated as the AN/VRC-100(V)1. The hardware, software, performance capabilities, Engineering Change Orders (ECOs), vulnerabilities and weaknesses, ECMJECCM performance, and system vulnerabilities and weaknesses are classified Secret.

e. The TSEC KY-58 voice secure equipment is used with the FM Command Radio to provide secure two-way communication. It is communication security (COMSEC) equipment that has sensitive technology and is classified Confidential if software fill is installed.

f. The TSEC KY-100 voice secure equipment is used with the FM Command Radio to provide secure two-way communication. It is COMSEC Equipment that has sensitive technology and is classified Secret if software fill is installed.

g. The AN/APR-39 Series Radar Detecting Set (RDS) are sensitive items and classified Secret if the Unit Data Module has threat data software installed. It uses a digital processor and alphanumeric display to provide warning of radar directed air defense threat systems. The system is capable of detecting all pulse radar normally associated with hostile surface-to-air missiles, airborne intercepts and anti-aircraft weapon systems. The software for this system determines the classification. Normally a customer has specific software developed to meet its requirements.

h. The AN/APX-118 transponder system provides automatic radar identification of the helicopter. The system receives, decodes, and replies to interrogations on modes 1,2,3/A,4.C and S from all suitable equipped challenging airborne and ground facilities. The receiver operates on 1,304) MHZ and the transmitter section operates on a frequency of 1090MHZ. Because these frequencies are in the UHF band, the operational range is limited to line-of-site. The transponder is classified SECRET if MODE IV or MODE S fill is installed in the equipment with a crypto device.

i. The AN/ARC-186 provides communication in the VHF, AM, and FM bands. Up to 20 channels plus two guard channels can be pre-stored hi the set. The set operates on AM/FM modes, and the frequency AM reception is between 108.00 and 151.975 MHZ. The AM receiver transmits between 116.000 and 151.975 MHZ and the FM transmitter receives with a homing range of 30.000 to 87.975 MHZ.

j. The AN/A VS-6/7(V)1 is a lightweight, high performance passive third generation image intensifier system designed specifically for use by helicopter pilots during night flights. It is designed to recognize terrain obstacles at an altitude of 200 feet and below, at a maximum speed of 150 knots, and at light level down to overcast starlight. The system mounts on an SPH-4 helmet using a mount assembly that replaces the normal visor. It consists of a binocular system with each monocular unit composed of an objectives lens assembly, an 18mm third generation image intensifier tube assembly, and an eyepiece assembly. The Heads Up Display is a modification to the AN/A VS-6 system. It will collect and display critical flight information from aircraft sensors and convert this information into visual imagery. This system will allow continuous heads-up flight by the pilot while reducing the pilots need to look inward at the flight instrument panel.

2. The ramifications of this technology getting into the hands of an adversary are severe. Software such as the Emitters Information Display (EID) software of the APR-39 system could provide an adversary with critical information on how our US. Army Survivability Equipment (ASE) systems detect threats and what threats we are attempting to defeat. The same is true for the Identification Friend or Foe (1FF) systems, which allow us to know if an aircraft is friendly or a threat. Should a fill device or crypto asset (KY.58 or KY 100) with the accompanying radio system become compromised it would enable an adversary to intercept our communications, both verbal and encrypted.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. E8–9827 Filed 5–6–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–51]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–51 with attached transmittal, policy justification, and Sensitivity of Technology.

April 29, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

APR 21 2008
In reply refer to:
USP003760-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-51, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to Australia for defense articles and services estimated to cost $58 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,
Richard J. Millies
Deputy Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Same ltr to:

House
Committee on Foreign Affairs
Committee on Armed Services
Committee on Appropriations

Senate
Committee on Foreign Relations
Committee on Armed Services
Committee on Appropriations

Transmittal No. OS-Si

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amefided

(1) Prospective Purchaser: Australia

(ii) Total Estimated Value:

Major Defense Equipment*	$33 million
Other	$25 million
TOTAL	$58 million

(ii) Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: 2,400 Modular Artillery Charge Systems (MACS), 250 XM982 Block Ia-i Excalibur Unitary Projectiles with base bleed units, 43 Portable Excalibur Fire Control Systems (PEFCS), 43 ANIPRC-119 Single Channel Ground and Airborne Radio System (SINCGARS) w/o GPS, training ammunition, containers, support equipment, spare and repair parts, publications and technical data, maintenance, personnel training and training equipment, U.S. Government and contractor representatives', engineering and technical support services, and other related elements of logistics support.

(iv) Military Department: Army (UCX)

(v) Prior Related Cases, if any: FMS case UCD - $37 million - pending

(vi) Sales Cormnission, Fee, etc., Paid, Offered, or Agreed to be Paid: none

(vii) Sensitivity of Technology Contained in the Defense Articles or Defense Services Proposed to be Sold: See Annex attached

(viii) Date Report Delivered to Congress: APR 2 1 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Australia - Modular Artillery Charge System, M982 Block Ia-2 Excalibur Projectiles

The Government of Australia requested a possible sale of 2,400 Modular Artillery Charge Systems (MACS), 250 XM982 Block Ia-i Excalibur Unitary Projectiles with base bleed units, 43 Portable Excalibur Fire Control Systems (PEFCS), 43 AN/PRC119 Single Channel Ground and Airborne Radio System (SINCGARS) w/o GPS, training ammunition, containers, support equipment, spare and repair parts, publications and technical data, maintenance, personnel training and training equipment, U.S. Government and contractor representatives' engineering and technical support services, and other related elements of logistics support. The estimated cost is $58 million.

Australia is one of our most important allies in the Western Pacific. The strategic location of this political and economic power contributes significantly to ensuring peace and economic stability in the region. Australia's efforts in peacekeeping and humanitarian operations in Iraq and in Afghanistan have had a significant impact on regional, political, and economic stability and have served U.S. national security interests. This proposed sale is consistent with those objectives and facilitates burden sharing with our affies.

The proposed sale will enhance Australia's defensive capabilities and increase interoperability with United States and multi-national forces supporting coalition operations. The country will have no difficulty absorbing this new capability into its military.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The principal contractors will be:

Raytheon Missile Systems (Excalibur)	Tucson, Arizona
ITT (SINCGARS)	Roanoke, Virginia
General Dynamics Armament and Technical Products (MACS)	Camden, Arkansas

There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of eight contractor representatives (two in-country for a period of two weeks each), and six U.S. government representatives (two in-country for a period of one-two weeks each).

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-51

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The XM982 Excalibur Projectile is a family of precision, extended-range modular projectiles incorporating three unique payload capabilities divided into Block configurations. Block I consists of high-explosive, fragmenting, or penetrating unitary munitions to enhance traditional fire support operations with increased range, improved accuracy, and reduced collateral damage against personnel, light material, and structure targets. It provides capability to attack all three key target sets, soft and armored vehicles, and reinforced bunkers, out to ranges exceeding current 155mm family of artillery munitions. An internal Global Positioning System (GPS) updates the inertial navigation system, providing precision guidance and improved accuracy. Excalibur is effective in all weather and terrain. The target, platform location, and GPS-specific data are inductively entered into the projectile's mission computer, located in the nose of the projectile.

2. The XM982 and M982 projectile and components are Unclassified; however, the terminal effects, target effects, GPS Anti-Jam vulnerabiities and render safe procedures are classified Secret. The Modular Artillery Charge System is Unclassified. Embedded within the XM982 and M982 projectiles are fuze components with technologies (the know-how, documentation, software) considered critical, the disclosure of which could result in an adversary developing countermeasures to cause premature operation of the fuze, thus lessening the effect of the projectile. The hardware, software, and data identified are classified to protect vulnerabiities, design and performance parameters, and similar critical information.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. E8–9828 Filed 5–6–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2008–OS–0045]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Deputy Under Secretary of Defense for Industrial Policy (ODUSD(IP)) announces a proposed information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by July 7, 2008.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail: Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection, please write to the Office of the Deputy Under

Secretary of Defense for Industrial Policy, 241 18th Street South, Crystal Square 4, Suite 501, ATTN: Dawn Vehmeier, Arlington, VA 22202, or e-mail us at *Industrial_Policy@osd.mil*.

Title, Associated Form, and OMB Number: Foreign Sourcing for Defense Applications; OMB Number 0704–0419.

Needs and Uses: The Deputy Under Secretary of Defense (Industrial Policy) has been assigned responsibility to determine the extent of foreign sourcing and any relevant impact to on-going programs producing precision munitions, consumables and selected high interest force protection programs.

Affected Public: Business or other for profit.

Number of Respondents: 500.

Responses Per Respondent: 1.

Annual Responses: 500.

Average Burden Per Response: 5 hours.

Annual Burden Hours: 2,500.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Specifically, ODUSD(IP) will evaluate the: (1) Extent of foreign sourcing within a sampling of operationally-important products; (2) impact of foreign sourcing on military readiness; and (3) extent to which DoD actions encourage or discourage use of foreign sources. To ensure that it addresses emerging foreign sourcing issues, the Department of Defense (DoD) will collect information from prime contractors and first and second tier subcontractors.

Dated: May 1, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–10073 Filed 5–6–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2008–HA–0046]

Proposed New Collection, Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Notice.

In compliance with Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995, the Office the Assistant Secretary of Defense for Health Affairs announces a proposed new information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by July 7, 2008.

ADDRESSES: You may submit comments, identified by docket number and or RIN number and title, by either of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers of contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Office of the Assistant Secretary of Defense for Health Affairs, Force Health Protection and Readiness, ATTN: Caroline Miner, 5113 Leesburg Pike, Suite 901, Falls Church, VA, 22041, or call (703) 575–2677.

Title; Associated Form; and OMB Number: Researcher Responsibilities Form; OMB Number 0720–TBD.

Needs and Uses: This collection instrument serves to document researcher's understanding and acceptance of the regulatory and ethical responsibilities for including humans as subjects in research. Principal and co-principal investigators must have the proposed, signed form on file before they may engage in research conducted, sponsored, or supported by entities under the purview of the Under Secretary of Defense for Personnel and Readiness.

Affected Public: Federal government; business or other for-profit; not-for-profit institutions.

Annual Burden Hours: 293.

Number of Respondents: 585.

Responses Per Respondent: 1.

Average Burden Per Response: .50.

Frequency: On occasion; original document submitted one time per researcher. Once their document is on file, a researcher may reaffirm their commitment every three years electronically if they remain engaged in human subject research.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Federal Government institutions wishing to conduct, sponsor, or support research on human subjects must first submit for approval to duly designated authorities an Assurance that they will comply with established guidelines in such research. Such Assurances are granted by components of DoD and by the Department of Health and Human Services (HHS). New DoD guidance now requires principal and co-principal investigators individually and explicitly to acknowledge that they understand and accept responsibility for protecting the rights and welfare of human research subjects. All principal and co-principal investigators engaged in research supported or conducted under the purview of the Under Secretary of Defense for Personnel and Readiness must read and sign a document that attests to their commitment to abide by the provisions of: (a) *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research;* (b) the U.S. Department of Defense (DoD) regulations for the protection of human subjects at Title 32, Code of Federal Regulations, Part 219 and DoD Directive 3216.02; (c) the Assurance of the engaged institution; relevant institutional policies and procedures where appropriate; and other Federal, State, or local regulations where appropriate. The Office of the Assistant Secretary of Defense for Health Affairs announces the intent to establish and use a new document format for this purpose and seeks public comment on the provisions thereof. Respondents are professionals who have been designated as principal or co-principal investigators. When preparing to initiate work on their first human subject research protocol, each principal investigator and co-principal investigators must assure they have the proposed Researcher Responsibilities form on file with the Office of the Under

Secretary of Defense for Personnel and Readiness Component Designated Official Office. In the first year this may require new forms from approximately 585 investigators, most already doing research. After the first year, the burden will level off to approximately 85. The form is two pages in length including statements agreed to and half a page for respondent signature and contact information. Respondents generally will be required to have the signed form scanned and forwarded electronically. The form will be filed electronically and form completion will be logged into a database. After three years, if a researcher still is engaged in research with the Office of the Under Secretary of Defense for Personnel and Readiness, he/she will be asked to reaffirm his/her commitment electronically. This information collection does not involve sensitive personal information and requires no special confidentiality measures.

Dated: May 1, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–10074 Filed 5–6–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Threat Reduction Advisory Committee Closed Meeting

AGENCY: Defense Threat Reduction Agency, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics); Department of Defense.

ACTION: Federal Advisory Committee meeting notice; correction.

SUMMARY: The Department of Defense published an announcement of a closed session of the Threat Reduction Advisory Committee on April 23, 2008 (73 FR 21920–21921). The meeting date was incorrect. This notice is being published to provide the correct meeting date of June 26, 2008. All other information in the previous notice remains the same.

DATES: Thursday, June 26, 2008 (8 a.m. to 4 p.m.).

FOR FURTHER INFORMATION CONTACT: Contact Mr. Eric Wright, Defense Threat Reduction Agency/AST, 8725 John J. Kingman Road, MS 6201, Fort Belvoir, VA 22060–6201, Phone: (703) 767–5717, Fax: (703) 767–5701, E-mail: *eric.wright@dtra.mil.*

Dated: May 1, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–10070 Filed 5–6–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Intent To Prepare an Environmental Impact Statement (EIS) for Grow the Army (GTA) Actions at Fort Carson, CO

AGENCY: Department of the Army, DoD.

ACTION: Notice of Intent (NOI).

SUMMARY: As part of the GTA effort, the U. S. Army intends to prepare an EIS to analyze the environmental and socioeconomic impacts resulting from the decision to station a new Infantry Brigade Combat Team (IBCT) at Fort Carson. The EIS will also analyze Fort Carson's Butts Army Airfield (BAAF) as a potential location for stationing a Combat Aviation Brigade (CAB) in the future.

ADDRESSES: For questions regarding the EIS, please contact Ms. Deb Owings or Ms. Robin Renn, Fort Carson National Environmental Policy Act Coordinators, 1638 Elwell Street, Building 6236, Fort Carson, CO 80913–4000. Written comments may be mailed to that address or e-mailed to *CARSDECAMNEPA@conus.army.mil.*

FOR FURTHER INFORMATION CONTACT: Ms. Dee McNuff, Fort Carson Public Affairs Office at (719) 526–1269, during normal business hours.

SUPPLEMENTARY INFORMATION: Fort Carson consists of approximately 137,000 acres of DOD-managed land south of Colorado Springs (east of the Rocky Mountain Front Range) and occupies portions of El Paso, Pueblo, and Fremont counties. The Pinon Canyon Maneuver Site (PCMS) is the primary maneuver training area for Fort Carson. In addition to the units stationed there, Fort Carson and the PCMS also provide training to Reserve units and the National Guard. The PCMS is located approximately 150 miles southeast of Fort Carson and consists of approximately 235,000 acres.

The stationing of additional BCTs and other force structure realignment actions across the Army was analyzed in the 2007 Final Programmatic EIS for Army Growth and Force Structure Realignment. The Record of Decision determined that Fort Carson would receive an additional IBCT contingent on site specific NEPA analysis. The Fort Carson GTA EIS will analyze environmental and socioeconomic impacts as a result of this decision. Also analyzed will be the potential stationing of a CAB and newly identified projects that would be required to support GTA actions.

Implementing these requirements would involve constructing new facilities at Fort Carson to support an IBCT (approximately 4,500 additional Soldiers and their dependents), the potential stationing of a CAB (approximately 2,800 Soldiers and their dependents) and upgrading ranges. Increased use of live-fire training ranges and maneuver areas would occur at Fort Carson and the PCMS.

The Fort Carson GTA EIS will analyze the impact of several alternatives including the No Action Alternative. Alternatives to be examined by the EIS may consist of alternative siting locations within Fort Carson for facility/utility construction projects, renovation and use of existing facilities. The EIS will also examine increases in land use intensity resulting from training activities connected with GTA stationing decisions. Under the No Action Alternative, the stationing of a new IBCT and CAB at Fort Carson would not be implemented.

Impacts analyzed will include a wide range of environmental resource areas including, but not limited to, air quality, traffic, noise, water resources, biological resources, cultural resources, socioeconomics, utilities, land use, solid and hazardous materials/waste, and cumulative environmental effects. Additional resources and conditions may be identified as a result of the scoping process initiated by this NOI.

The public will be invited to participate in the scoping process which includes several scoping meetings to provide input on the proposed actions and alternatives in the EIS. The public will also be invited to review and comment on the Draft EIS. These public involvement opportunities will be announced in the local news media. Comments from the public will be considered before any decision is made regarding implementing the proposed action at Fort Carson.

Dated: May 1, 2008.

Addison D. Davis, IV,

Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health).

[FR Doc. E8–10007 Filed 5–6–08; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers;

Notice of Availability of Supplemental Draft Environmental Impact Statement for the Proposed Rio del Oro Specific Plan Project, in the City of Rancho Cordova, Sacramento County, CA

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of availability.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA), the U.S. Army Corps of Engineers (USACE), Sacramento District published a notice in the **Federal Register** on December 8, 2006 (71 FR 71142–71143), informing the public of the availability of the Draft Environmental Impact Statement (DEIS) for the Rio del Oro Specific Plan Project. USACE, Sacramento District has prepared a Supplemental Draft Environmental Impact Statement (SDEIS) in response to new information. It is now available for review and comment.

The SDEIS provides new information and additional analyses related to utilities and service systems (specifically, water supply) and biological resources. Like the 2006 DEIS, the SDEIS analyzes the potential effects of implementing each of five alternative scenarios for a mixed-use development in the approximately 3,828-acre Rio del Oro Specific Plan area, in the City of Rancho Cordova, Sacramento County, CA. The alternatives considered in detail in the SDEIS are: (1) Proposed Project/Proposed Action (i.e., Proposed Project Alternative), the Applicants' Preferred Alternative; (2) High Density (Increased Densities Consistent with Sacramento Area Council of Governments Blueprint); (3) Impact Minimization; (4) No Federal Action (No Section 404 of the Clean Water Act Permit); and (5) No Project/No Action (No development).

DATES: All written comments must be postmarked on or before July 6, 2008. A public hearing will be held on May 22, 2008 at 6 p.m. at the Rancho Cordova City Hall, located at 2729 Prospect Park Drive, Suite 220, Rancho Cordova, CA 95670. Oral and written comments will be accepted at the public hearing. Written and oral comments will be given equal weight and all comments received or postmarked by the date of the hearing, or by the above date in the absence of a hearing, will be considered by the Corps in preparing the Final EIS. Comments received or postmarked after the date of the hearing, or after the above date in the absence of a hearing, will be considered to the extent practicable.

ADDRESSES: Comments may be submitted in writing to: Kathleen Dadey, U.S. Army Corps of Engineers, Sacramento District, Regulatory Branch, 1325 J Street, Room 1480, Sacramento, CA 95814–2922, or via e-mail to *Kathleen.A.Dadey@usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: Kathleen Dadey at (916) 557–7253.

SUPPLEMENTARY INFORMATION: The environmental effects of five alternatives were evaluated in detail in the 2006 DEIS. Under the Proposed Project/Proposed Action (Proposed Project Alternative), buildout of the project would occur in five phases over 25–30 years. The project provides for construction of approximately 11,601 residential dwelling units in three residential land use classifications on 1,920 acres, along with commercial land uses, neighborhood parks, and other uses such as a landscape corridor and greenbelt, and several public schools. New utilities and communications infrastructure would be installed and new roadways and on- and off-site infrastructure improvements would be completed. The project designates a 507-acre wetland preserve area and two elderberry preserve areas on the site. The four alternatives to the Proposed Project/Proposed Action described in the 2006 DEIS are as follows:

(1) The High Density Alternative embraces the concept of ''Smart Growth,'' consistent with the Sacramento Area Council of Governments Regional Blueprint. Under Smart Growth principles, areas planned for development are developed at higher densities. Although these higher densities may result in greater localized impacts on resources, the overall area of disturbance is reduced by concentrating development in particular locations.

(2) The Impact Minimization Alternative would reconfigure project components to reduce impacts to waters of the United States, including wetlands and high-quality biological habitat.

(3) The No Federal Action Alternative was designed to allow some development of the project site while avoiding the placement of dredged or fill material into waters of the United States.

(4) The No Project/No Action Alternative would preclude development of the project; under this alternative, the majority of the project site would remain under the jurisdiction of the City of Rancho Cordova.

After the 2006 DEIS was issued, USACE, Sacramento District determined that the water supply and biological resources portions of the DEIS should be supplemented, as described below.

The SDEIS includes a revised water-supply analysis that describes the various sources of water for the project, including short-term sources for development of Phase 1 and long-term water supplies for all phases of development, and impacts associated with providing water to the project. The analysis addresses the following elements set forth in the case of *Vineyard Area Citizens for Responsible Growth, Inc.* v. *City of Rancho Cordova,* 40 Cal. 4th 412 (2007), which was decided after the 2006 DEIS was released:

- Reasonable likelihood of the water sources proving available.
- Identification and quantification of water demand from project and cumulative development.
- Reasonable likelihood of identified water supply meeting the demands of project and cumulative development.
- Analysis of alternative sources of water and project contingencies (including curtailment) if water-supply sources are not reasonably likely.
- Impacts of water-supply infrastructure.

The revised water-supply analysis in the SDEIS also includes consideration of potentially significant impacts that could result from constructing a new water conveyance pipeline and booster pump station, as well as potentially significant impacts that could occur from curtailment of development as a mitigation measure. These impacts were not discussed as part of the 2006 DEIS.

The SDEIS also contains a revised biological resources section that incorporates information responding to comments raised during the DEIS public-review period to ensure that the analysis considers significant, relevant public comments. This section also contains new information related to additional biological resource studies that have been performed by the applicants since the DEIS was circulated, and some of the mitigation measures have been expanded or clarified. The expanded mitigation measures do not result in new significant impacts. The biological resources section also contains additional analysis of project consistency with the biological resources goals in the City of Rancho Cordova's general plan.

USACE invites full public participation to promote open communication and better decision-making. All persons and organizations that have an interest in the Rio del Oro Specific Plan Project are urged to

participate in the NEPA process. A public hearing will be held as described in the **DATES** section. This hearing will be announced in advance through notices, media news releases, and/or mailings.

Copies of the SDEIS may be reviewed at the following locations: 1. U.S. Army Corps of Engineers, Sacramento District Web Site: *http://www.spk.usace.army.mil/;* 2. City of Rancho Cordova City Hall, 2729 Prospect Park Drive, Rancho Cordova, CA 95670; 3. City of Rancho Cordova Planning Department Web site: *http://www.cityofranchocordova.org/Index.aspx?page=128.*

Dated: April 29, 2008.

Christine Altendorf,

Acting District Engineer.

[FR Doc. E8–10216 Filed 5–6–08; 8:45 am]

BILLING CODE 3710–EZ–P

DEPARTMENT OF EDUCATION

Office of Elementary and Secondary Education; Overview Information; Advanced Placement Incentive Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2008

Catalog of Federal Domestic Assistance (CFDA) Number: 84.330C.

DATES: *Applications Available:* May 7, 2008.

Deadline for Notice of Intent To Apply: June 6, 2008.

Deadline for Transmittal of Applications: July 7, 2008.

Deadline for Intergovernmental Review: September 4, 2008.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Advanced Placement Incentive (API) program awards competitive grants designed to increase the successful participation of low-income students in advanced placement courses and tests. The program expands opportunities for low-income students to take college-level classes and earn college credit while still in high school. The program also supports efforts to raise the rigor of the academic curriculum for all students attending high-poverty high schools.

Priority: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from section 1705(c) of the ESEA (20 U.S.C 6535(c)).

Absolute Priority: For FY 2008 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Implementation of Advanced Placement Programs in High-Poverty Schools.

This priority supports projects that expand access for low-income individuals to advanced placement programs by:

(1) Developing, enhancing, or expanding advanced placement programs in English, mathematics, and science in high schools with a high concentration of low-income students and a pervasive need for access to advanced placement programs;

(2) Involving business and community organizations in the activities to be assisted; and

(3) Providing matching funds from State, local, or other sources to pay for the costs of activities to be assisted.

Note: In order to meet this absolute priority, an application must identify the specific high schools that will receive project services, and provide evidence that those schools have a high concentration of low-income students.

Competitive Preference Priorities: Within this absolute priority, we give competitive preference to applications that address the following priorities.

Competitive Preference Priority 1: This priority is from the notice of final priorities for discretionary grant programs published in the **Federal Register** on October 11, 2006 (71 FR 60045).

Under 34 CFR 75.105(c)(2)(i) we award up to an additional 4 points to an application, depending on how well the application meets this priority.

This priority is:

Critical-Need Languages.

This priority supports projects that support activities to enable students to achieve proficiency or advanced proficiency or to develop programs in one or more of the following less commonly taught languages: Arabic, Chinese, Korean, Japanese, Russian, and languages in the Indic, Iranian, and Turkic language families.

Competitive Preference Priority 2: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from section 1705(c) of the ESEA (20 U.S.C. 6535(c)).

Under 34 CFR 75.105(c)(2)(i) we award an additional 1 point to an application that meets this priority.

This priority is:

On-Line Advanced Placement Courses.

This priority supports projects that demonstrate an intent to carry out activities to increase the availability of, and participation in, on-line advanced placement courses.

Within this absolute priority, we are particularly interested in applications that address the following invitational priority.

Invitational Priority: For FY 2008 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1), we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Training and Incentives for Advanced Placement Teachers.

This priority supports projects that seek to increase the successful participation of low-income individuals in advanced placement courses and tests by:

(1) Compensating teachers of advanced placement courses for completing intensive professional development that enhances their knowledge of the advanced placement subjects they teach; and

(2) Providing financial incentives that reward teachers of advanced placement courses for the successful performance of their students on advanced placement tests.

Program Authority: 20 U.S.C. 6535–6537.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 97, 98, and 99. (b) The notice of final priorities for discretionary grant programs published in the **Federal Register** on October 11, 2006 (71 FR 60045).

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $12,400,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2009 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $93,040–975,163.

Estimated Average Size of Awards: $590,476.

Maximum Award: We will reject any application that proposes a budget exceeding $1,000,000 for a single budget period of 12 months. The Assistant Secretary for Elementary and Secondary Education may change the maximum amount through a notice published in the **Federal Register** .

Estimated Number of Awards: 21.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:*

(a) State educational agencies (SEAs);

(b) Local educational agencies (LEAs), including charter schools that are considered LEAs under State law; or

(c) National nonprofit educational entities with expertise in advanced placement services.

Note: In the case of an eligible entity that is an SEA, the SEA may use API grant funds to award subgrants to LEAs to enable those LEAs to carry out authorized activities that support the absolute priority for this competition.

2. a. *Cost Sharing or Matching:* In order to meet the absolute priority for this competition, an applicant must provide matching funds from State, local, or other sources to pay for the costs of activities to be assisted.

b. *Supplement-Not-Supplant:* Funds provided under this program must be used only to supplement, and not supplant, other non-Federal funds that are available to assist low-income individuals in paying advanced placement test fees or to expand access to advanced placement or pre-advanced placement courses (20 U.S.C. 6536). This restriction also has the effect of allowing projects to recover indirect costs only on the basis of a restricted indirect cost rate, according to the requirements in 34 CFR 75.563 and 34 CFR 76.564 through 76.569.

3. *Other: Definitions.* The following definitions are taken from the API program authorizing statute in Title I, Part G of the ESEA (20 U.S.C. 6537). They are repeated in this application notice for the convenience of the applicant.

(a) The term *advanced placement test* means an advanced placement test administered by the College Board or approved by the Secretary.

Note: The Department approves advanced placement tests administered by the International Baccalaureate Organization. As part of the grant application process, applicants may request approval of tests from other educational entities that provide comparable programs of rigorous academic courses and testing through which students may earn college credit.

(b) The term *high concentration of low-income students,* used with respect to a school, means a school that serves a student population 40 percent or more of whom are low-income individuals.

(c) The term *low-income individual* means an individual who is determined by an SEA or LEA to be a child, ages 5 through 19, from a low-income family on the basis of data used by the Secretary to determine allocations under section 1124 of the ESEA, data on children eligible for free or reduced-price lunches under the National School Lunch Act, data on children in families receiving assistance under Part A of Title IV of the Social Security Act, or data on children eligible to receive medical assistance under the Medicaid program under Title XIX of the Social Security Act, or through an alternate method that combines or extrapolates from those data.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet, or from the program office.

To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from the program office, contact: Ivonne Jaime, U.S. Department of Education, 400 Maryland Avenue, SW., LBJ Building, Room 3W246, Washington, DC 20202–6200. Telephone: (202) 260–1519 or by e-mail: *AdvancedPlacementProgram@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at: 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Alternative Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We encourage you to limit the narrative to the equivalent of no more than 40 pages and suggest that you use the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative. Titles, headings, footnotes, quotations, references, and captions, as well as text in charts, tables, figures, and graphs, can be single spaced.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- *Use one of the following fonts:* Times New Roman, Courier, Courier New, or Arial.
- Number all pages consecutively using the style 1 of 40, 2 of 40, and so forth.
- Include a Table of Contents with page references.

The suggested page limit does not apply to the Table of Contents; forms; the budget section, including the narrative budget justification; the assurances and certifications; the one-page abstract; the resumes; or letters of support. However, the suggested page limit does apply to all of the application narrative section. We further encourage applicants to limit to no more than 20 pages any attachments or appendices that are not resumes or letters of support.

3. *Submission Dates and Times*:

Applications Available: May 7, 2008.

Deadline for Notice of Intent to Apply: June 6, 2008. We will be able to develop a more efficient process for reviewing grant applications if we have a better understanding of the number of entities that intend to apply for funding.

Therefore, we strongly encourage each potential applicant to send a notification of its intent to apply for funding to *AdvancedPlacementProgram@ed.gov* by June 6, 2008. The notification of intent to apply for funding is optional. Applicants that do not supply this e-mail notification may still apply for funding.

Deadline for Transmittal of Applications: July 7, 2008.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application

process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: September 4, 2008.

4. *Intergovernmental Review*: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions*: We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Advanced Placement Incentive Program, CFDA Number 84.330C, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Advanced Placement Incentive Program at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.330, not 84.330C).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not consider your application if it is date and time stamped by the Grants.gov system later than 4:30 p.m., Washington, DC time, on the application deadline date. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*
- To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf).* You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).
- You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30 p.m.,

Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; and
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Ivonne Jaime, U.S. Department of Education, 400 Maryland Avenue, SW., LBJ Building, Room 3W246, Washington, DC 20202–6200. FAX: (202) 205–4921.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.330C), 400 Maryland Avenue, SW., Washington, DC 20202–4260 or

By mail through a commercial carrier:

U.S. Department of Education, Application Control Center, Stop 4260, Attention: (CFDA Number 84.330C), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.330C), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from 34 CFR 75.210 and, where otherwise noted, sections 1702 and 1705 of the ESEA (20 U.S.C. 6532 and 6535).

Note: The maximum score for all selection criteria is 95 points. The points or weights assigned to each criterion or subcriterion are indicated in parentheses.

Need for the Project

In determining need for the proposed project, we will consider the following factors:

(1) The extent to which the application demonstrates a pervasive need for access to advanced placement incentive programs by low-income individuals (5 points) (20 U.S.C. 6535(c)(1)); and

(2) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses (10 points).

Quality of Project Design

In determining the quality of the design of the proposed project, we will consider the following factors:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable (5 points);

(2) The extent to which the proposed project will increase the rate at which secondary school students participate in

advanced placement courses and increase the numbers of students who receive advanced placement test scores for which college academic credit is awarded (20 points) (20 U.S.C. 6532(7));

(3) The extent to which the proposed activities constitute a coherent, sustained program of training in the field (15 points); and

(4) The extent to which there is effective coordination and articulation between grade levels to prepare students for academic achievement in advanced placement courses (15 points) (20 U.S.C. 6535(d)(C)).

Quality of the Management Plan

In determining the quality of the management plan for the proposed project, we will consider the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks (8 points);

(2) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project (5 points); and

(3) The extent to which the applicant demonstrates that it will have the capacity to report annually the data required by section 1705(f) of the ESEA (4 points).

Adequacy of Resources

In determining the adequacy of resources for the proposed project, we will consider the extent to which the applicant assures the availability of matching funds from State, local, or other sources to pay for the cost of activities to be assisted by the proposed project (20 U.S.C. 6535(c)(3))(8 points).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Grant Administration:* Applicants should budget for a two-day meeting for project directors to be held annually in Washington, DC. In addition to setting aside funds for travel, hotel, and per diem costs for these meetings, applicants should budget for an estimated $500 per participant for the costs of materials and technical assistance products and services that will be delivered during these meetings.

4. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to: *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* The Department has established six performance measures for assessing the effectiveness of the API program in improving the successful participation in advanced placement courses and tests by students attending public high schools served by API grants. These measures are:

(1) The number of students who enrolled in an advanced placement course at each school served by an API grant, disaggregated by subject.

(2) The number of low-income individuals who enrolled in an advanced placement course at each school served by an API grant, disaggregated by subject.

(3) The number of advanced placement tests taken by students at each school served by an API grant, disaggregated by subject, divided by the number of seniors enrolled in each school at or around October 1.

(4) The number of advanced placement tests taken by low-income individuals at each school served by an API grant, disaggregated by subject.

(5) The scores students at each school served by an API grant earned on advanced placement tests, disaggregated by subject.

(6) The scores low-income individuals at each school served by an API earned on advanced placement tests, disaggregated by subject.

These measures constitute the Department's measures of success for this program. Consequently, applicants for a grant under this program are advised to give careful consideration to these measures in identifying their goals and objectives and conceptualizing the approach and evaluation of their proposed projects. If funded, applicants will be asked to collect and report data in their performance and final reports about progress toward these measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Ivonne Jaime, U.S. Department of Education, 400 Maryland Avenue, SW., LBJ Building, Room 3W246, Washington, DC 20202–6200. Telephone: (202) 260–1519 or by e-mail: *AdvancedPlacementProgram@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Alternative Format: Individuals with disabilities can obtain this document and a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: May 2, 2008.

Kerri L. Briggs,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. E8–10106 Filed 5–6–08; 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 July 7, 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: May 1, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.
Title: High School Graduation Confirmation Study.
Frequency: One Time.
Affected Public: Individuals or household; State, Local, or Tribal Gov't, SEAs or LEAs.
Reporting and Recordkeeping Hour Burden:
Responses: 5,130.
Burden Hours: 1,845.
Abstract: This study will be conducted as a part of the October Current Population Survey October education supplement. The purpose is to confirm the accuracy of reporting by household respondents of high school graduation status of household members by contacting reported school from which household members ages 18 to 24 were reported graduating.

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 3678. 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. E8–10087 Filed 5–6–08; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, June 5, 2008, 9 a.m.–5 p.m.; Friday, June 6, 2008, 8:30 a.m.–4 p.m.

ADDRESSES: Red Lion Hotel Hanford House, 802 George Washington Way, Richland, Washington 99352, Phone: (509) 946–7611, Fax: (509) 943–8564.

FOR FURTHER INFORMATION CONTACT: Erik Olds, Federal Coordinator, Department of Energy Richland Operations Office, 2440 Stevens Drive, P.O. Box 450, H6–60, Richland, WA 99352; Phone: (509) 372–8656; or E-mail: *Theodore_E_Erik_Olds@orp.doe.gov*.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

- State of Columbia River;
- Uniform Safety Systems throughout Hanford;
- Configuration Control of Critical Assumptions;
- Rattlesnake Mountain;
- Update on Office of River Protection's Integrated System Plan;
- Update on Tri-Party Agreement Negotiations;
- Update from Hanford Advisory Board Leadership Retreat and Board work priorities;
- Science and Technology Roadmap;
- Update on Nuclear Regulatory Commission and their review of the regulatory processes of the Waste Treatment Plant;
- Recap of EM SSAB Chairs Meeting held on April 23–24, 2008 in Richland, Washington;
- Committee Updates including: Tank Waste Committee; River and Plateau Committee; Health, Safety and Environmental Protection Committee; Public Involvement Committee; and Budgets and Contracts Committee.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Erik Olds' office at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals

wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Erik Olds' office at the address or phone number listed above. Minutes will also be available at the following Web site: *http://www.hanford.gov/?page=413&parent=397.*

Issued at Washington, DC, on May 1, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–10098 Filed 5–6–08; 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.

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: May 15, 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. 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 May 2, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–10096 Filed 5–6–08; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R09–OAR–2008–0325; FRL–8562–4]

Adequacy Status of Motor Vehicle Emissions Budgets in Submitted Coachella Valley 8-hour Ozone Early Progress Plan for Transportation Conformity Purposes; California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Adequacy.

SUMMARY: In this notice, EPA is notifying the public that the Agency has found that the motor vehicle emissions budgets for 8-hour ozone in the Coachella Valley 8-hour Ozone Early Progress Plan are adequate for transportation conformity purposes. The Coachella Valley 8-hour Ozone Early Progress Plan was submitted to EPA on March 24, 2008 by the California Air Resources Board as a revision to the California State Implementation Plan (SIP). As a result of our adequacy findings, the Southern California Association of Governments and the U.S. Department of Transportation must use these budgets in future conformity analyses once the finding becomes effective.

DATES: This finding is effective May 22, 2008.

FOR FURTHER INFORMATION CONTACT: Rebecca Rosen, U.S. EPA, Region IX, Air Division AIR–2, 75 Hawthorne Street, San Francisco, CA 94105–3901; (415) 947–4154 or *rosen.rebecca@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Today's notice is simply an announcement of a finding that we have already made. EPA Region IX sent a letter to the California Air Resources Board on April 16, 2008 stating that the motor vehicle emissions budgets in the submitted Coachella Valley 8-hour Ozone Early Progress Plan for 2012 are adequate. The finding is available at EPA's conformity Web site: *http://www.epa.gov/otag/stateresources/transconf/adequacy.htm.* The adequate motor vehicle emissions budgets are provided in the following table:

MOTOR VEHICLE EMISSIONS BUDGETS

Budget year	Volatile organic compounds [1] (tons per day)	Nitrogen oxides (tons per day)
2012	7	26

[1] The plan uses a comparable State term, reactive organic gases (ROG).

Transportation conformity is required by Clean Air Act section 176(c). EPA's conformity rule requires that transportation plans, transportation improvement programs, and projects conform to state air quality implementation plans (SIPs) and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). We have described our process for determining the adequacy of submitted SIP budgets in our July 1, 2004 preamble starting at 69 FR 40038 and we used the information in these resources in making our adequacy determination. Please note that an adequacy review is separate from EPA's completeness review, and should not be used to prejudge EPA's ultimate approval action for the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

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

Dated: April 16, 2008.

Laura Yoshii,

Deputy Regional Administrator, Region IX.

[FR Doc. E8–9959 Filed 5–6–08; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8563–8]

EPA Science Advisory Board; Notification of a Public Teleconference Meeting of the Chartered Science Advisory Board

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public teleconference meeting of the Chartered EPA Science Advisory Board to review a draft report from the SAB's Radiation Advisory Committee Augmented for the review of the draft Multi-Agency Radiation Survey and Assessment of Materials and Equipment (MARSAME) Manual.

DATES: The SAB will hold the public teleconference on May 29, 2008. The teleconference will be held from 1:30 p.m. to 3 p.m. (Eastern Time).

ADDRESSES: The meeting will be conducted by telephone conference only.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to obtain general information concerning this public teleconference or meeting should contact Mr. Thomas O. Miller, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via telephone/voice mail: (202) 343–9982; fax: (202) 233–0643; or e-mail at: *miller.tom@epa.gov.* General information concerning the EPA Science Advisory Board can be found on the SAB Web Site at: *http://www.epa.gov./sab.*

SUPPLEMENTARY INFORMATION: The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the EPA SAB will hold a public teleconference meeting to conduct a quality review the SAB Panel's draft *Report on EPA's Draft Entitled ''Multi-Agency Radiation Survey and Assessment of Materials and Equipment (MARSAME) Manual,''* of December 2006.

Background: The EPA SAB Radiation Advisory Committee (RAC), augmented with additional experts, reviewed the *''Multi-Agency Radiation Survey and Assessment of Materials and Equipment (MARSAME) Manual,'' Draft Report for Comment, December 2006.* A multi-agency work group with participation by staff from the U.S. Department of Energy, U.S. Nuclear Regulatory Commission, U.S. Department of Defense and U.S. EPA prepared the manual. The multi-agency work group has been active since 1995 and prepares radiological guidance documents. The draft MARSAME manual complements MARSSIM (a surficial soils radiation survey manual) by providing a process for surveying potentially radioactive material and equipment (M&E). It provides guidance to determine whether M&E are sufficiently free of radionuclide contamination to be admitted to or removed from a site. Additional information on this review can be obtained on the EPA SAB Web Site at: *http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommitteesSubcommittees/Radiation%20Advisory%20Committee* and in the **Federal Register** at 72 FR 11356–11358 on the Web at: *http://www.epa.gov/fedrgstr/EPA-SAB/2007/March/Day-13/sab4562.htm.*

The purpose of this upcoming teleconference is for the Chartered SAB to conduct a quality review of the draft Panel report.

Availability of Materials: The draft agenda and other materials will be posted on the SAB Web Site at *http://www.epa.gov/sab* prior to the meeting. For questions and information concerning the Agency's draft document on this topic please contact Dr. Mary E. Clark of the U.S. EPA, ORIA by telephone at (202) 343–9348, fax at (202) 243–2395, or e-mail at: *clark.marye@epa.gov.*

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the Chartered SAB's consideration during this quality review meeting. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public SAB teleconference will be limited to three minutes per speaker, with no more than a total of one-half hour for all speakers. At face-to-face meetings, presentations will be limited to five minutes, with no more than a total of one hour for all speakers. To be placed on the public speaker list, interested parties should contact Mr. Thomas O. Miller, DFO, in writing (preferably via e-mail), by May 21, 2008, at the contact information noted above. *Written Statements:* Written statements should be received in the SAB Staff Office by May 21, 2008, so that the information may be made available to the SAB for their consideration prior to the teleconference meeting. Written statements should be supplied to the DFO via e-mail to *miller.tom@epa.gov* (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM-PC/Windows 98/2000/XP format).

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Thomas O. Miller at (202) 343–9982 or *miller.tom@epa.gov.* To request accommodation of a disability, please contact Mr. Miller preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: April 30, 2008.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E8–10138 Filed 5–6–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8563–4]

Meeting of the Total Coliform Rule Distribution System Advisory Committee—Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Under section 10(a)(2) of the Federal Advisory Committee Act, the United States Environmental Protection Agency (EPA) is giving notice of a meeting of the Total Coliform Rule Distribution System Advisory Committee (TCRDSAC). The purpose of this meeting is to discuss the Total Coliform Rule (TCR) revision and information about distribution systems issues that may impact water quality.

The TCRDSAC advises and makes recommendations to the Agency on revisions to the TCR, and on what information should be collected, research conducted, and/or risk management strategies evaluated to better inform distribution system contaminant occurrence and associated public health risks.

Topics to be discussed in the meeting include options for revising the Total Coliform Rule, for example, rule

construct, monitoring provisions, system categories, action levels, investigation and follow-up, public notification, and other related topics. In addition, the Committee will discuss possible recommendations for research and information collection needs concerning distribution systems and topics for upcoming TCRDSAC meetings.

DATES: The public meeting will be held on Wednesday, May 21, 2008 (8:30 a.m. to 6 p.m., Eastern Time (ET)) and Thursday, May 22, 2008 (8 a.m. to 3 p.m., ET). Attendees should register for the meeting by calling Kate Zimmer at (202) 965–6387 or by e-mail to *kzimmer@resolv.org* no later than May 16, 2008.

ADDRESSES: The meeting will be held at The Churchill Hotel, 1914 Connecticut Ave., NW., Washington, DC 20009.

FOR FURTHER INFORMATION CONTACT: For general information, contact Kate Zimmer of RESOLVE at (202) 965–6387. For technical inquiries, contact Sean Conley (*conley.sean@epa.gov,* (202) 564–1781), Standards and Risk Management Division, Office of Ground Water and Drinking Water (MC 4607M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; fax number: (202) 564–3767.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The Committee encourages the public's input and will take public comment starting at 5:30 p.m. on May 21, 2008, for this purpose. It is preferred that only one person present the statement on behalf of a group or organization. To ensure adequate time for public involvement, individuals interested in presenting an oral statement may notify Crystal Rodgers-Jenkins, the Designated Federal Officer, by telephone at (202) 564–5275, no later than May 16, 2008. Any person who wishes to file a written statement can do so before or after a Committee meeting. Written statements received by May 16, 2008, will be distributed to all members before any final discussion or vote is completed. Any statements received on May 19, 2008, or after the meeting will become part of the permanent meeting file and will be forwarded to the members for their information.

Special Accommodations

For information on access or accommodations for individuals with disabilities, please contact Crystal Rodgers-Jenkins at (202) 564–5275 or by e-mail at *rodgers-jenkins.crystal@epa.gov.* Please allow at least 10 days prior to the meeting to give EPA as much time to process your request.

Dated: May 1, 2008.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. E8–10118 Filed 5–6–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2008–0358; FRL–8364–5]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from March 24, 2008 through April 11, 2008, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before June 6, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2007–0358, by one of the following methods:

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

• *Mail*: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Hand Delivery*: OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2009–0358. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2008–0358. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. 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 electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT

Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division, Office of Pollution Prevention and Toxics (7408M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Why is EPA Taking this Action?

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from March 24, 2008 through April 11, 2008, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Report for PMNs

This status report identifies the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit II. to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

I. 52 PREMANUFACTURE NOTICES RECEIVED FROM: 03/24/08 TO 04/11/08

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–08–0315	03/21/08	06/18/08	CBI	(G) Additive for plastics	(G) Hexanedioic acid, polymer with diol and a monohydric alcohol
P–08–0316	03/21/08	06/18/08	CBI	(G) Color dispersant	(G) Polyether polyphosphate ester
P–08–0317	03/21/08	06/18/08	CBI	(G) Color dispersant	(G) Polyether polyalcohol derivative
P–08–0318	03/24/08	06/21/08	CBI	(G) Crystal stabilizer in pigment	(G) 3-hydroxy-4-[(4-methyl-3-substituted)azo]-2-naphthalenecarboxylic acid, calcium salt (1:1)
P–08–0319	03/24/08	06/21/08	CBI	(G) Component of an industrial coating	(G) Urethane diol
P–08–0320	03/24/08	06/21/08	CBI	(G) Component of an industrial coating	(G) Urethane diol

I. 52 PREMANUFACTURE NOTICES RECEIVED FROM: 03/24/08 TO 04/11/08—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–08–0321	03/24/08	06/21/08	CBI	(G) Component of an industrial coating	(G) Urethane diol
P–08–0322	03/24/08	06/21/08	CBI	(G) Component of an industrial coating	(G) Urethane diol
P–08–0323	03/24/08	06/21/08	CBI	(G) Component of an industrial coating	(G) Urethane diol
P–08–0324	03/24/08	06/21/08	CBI	(G) Component of an industrial coating	(G) Urethane diol
P–08–0325	03/24/08	06/21/08	Werner G. Smith, Inc.	(S) Metal working lubricant	(S) Hexanedioic mixed 4-methyl-2-propylhexyl and 5-methyl-2-propylhexyl and 2-propylheptyl esters
P–08–0326	03/25/08	06/22/08	CBI	(G) Moisture curing polyurethane adhesive	(G) Isocyanate terminated urethane polymer
P–08–0327	03/25/08	06/22/08	CBI	(G) Site limited intermediate	(G) Halogenated aromatic ester derivatives
P–08–0328	03/25/08	06/22/08	Swan Chemical Inc.	(G) (1) Property modifier in electronics, contained use; (2) Property modifier in polymer composites, contained use	(S) Single-walled carbon nanotubes
P–08–0329	03/25/08	06/22/08	CBI	(G) Dispersant	(G) Polyurethane derivative
P–08–0330	03/26/08	06/23/08	CBI	(G) Dispersive use.	(G) Modified olefins
P–08–0331	03/26/08	06/23/08	CBI	(G) Dispersive use.	(G) Modified olefins
P–08–0332	03/26/08	06/23/08	CBI	(G) Dispersive use.	(G) Modified olefins
P–08–0333	03/27/08	06/24/08	CBI	(S) Hot melt adhesive for metal-metal applications; hot melt adhesive for automotive parts; hot melt adhesive for medical device; hot melt adhesive for electronics	(G) Fatty acids, C_{18}-unsaturated, dimers, polymer with alkyldioic acids, ethylenediamine, dialkylcyclicdiamine, and tall-oil fatty acid
P–08–0334	03/27/08	06/24/08	CBI	(S) Hot melt adhesive for metal-metal applications; hot melt adhesive for automotive parts; hot melt adhesive for medical device; hot melt adhesive for electronics	(G) Fatty acids, C_{18}-unsaturated, dimers, polymer with alkyldioic acids, ethylenediamine, alkyoxydiamine, cyclicdiamine, and tall-oil fatty acid
P–08–0335	03/27/08	06/24/08	CBI	(S) Hot melt adhesive for metal-metal applications; hot melt adhesive for automotive parts; hot melt adhesive for medical device; hot melt adhesive for electronics	(G) Fatty acids, C_{18}-unsaturated, dimers, polymer with alkyldioic acid, ethylenediamine, dialkyloxydiamine, and tall-oil fatty acid
P–08–0336	03/27/08	06/24/08	Triangle Digital Inx Co.	(G) Polymer dispersant	(G) Polymer with e-caprolactone, hydroxystearic acid, methyldiethaholamine and dicyclohehylmethane diisocyanate
P–08–0337	03/27/08	06/24/08	Inx International Ink Co.	(G) Resin for inkjet inks	(G) Polymer of alkenoic acid, carbomonocyclic acrylate and methacrylic acid
P–08–0338	03/27/08	06/24/08	Inx International Ink Co.	(G) Resin for inkjet inks	(G) Polymer of alkenoic acid, substituted ethene and alkyl acrylate
P–08–0339	03/28/08	06/25/08	CIBA Corporation	(G) Oil drilling additive	(G) Dimethylamino alkyl acrylate/dimethylamino alkyl methacrylate polyquaternium ammonium salt
P–08–0340	03/31/08	06/28/08	CBI	(S) Hardener component for epoxy coating	(G) 1,2-ethanediamine, *N*1,*N*2-bis(2-aminoethyl), polymer with haloalkyloxirane and polyoxyalkane
P–08–0341	03/31/08	06/28/08	Firmenich Inc.	(S) Aroma for use in fragrance mixtures, which in turn are used in perfumes, soaps, cleansers, etc.	(S) Extractives and their physically modified derivatives psidium guajava. Oils, guava, psidium guajava
P–08–0342	03/31/08	06/28/08	Firmenich Inc.	(S) Aroma for use in fragrance mixtures, which in turn are used in perfumes, soaps, cleansers, etc.	(S) Extractives and their physically modified detrivatives mangifera indica. Oils, mango
P–08–0343	03/31/08	06/28/08	Symrise Inc	(G) Additive for consumer use products; dispersive use	(S) Cyclopentene, 2-(ethoxymethyl)-1-methyl-3-(1-methylethenyl)-
P–08–0344	03/31/08	06/28/08	Symrise Inc	(G) Additive for consumer use products; dispersive use	(S) 1,3-dioxepin, 4,7-dihydro-2-(1,1,4-trimethyl-3-pentenyl)-
P–08–0345	03/31/08	06/28/08	CBI	(G) Additive for plastics	(G) Hexanedioic acid, polymer with diol and a monobasic acid
P–08–0346	04/02/08	06/30/08	CBI	(S) Chemical injection fastening system	(G) Isocyanic acid, alkylene ester, propylene glycol monomethacrylate-blocked

I. 52 PREMANUFACTURE NOTICES RECEIVED FROM: 03/24/08 TO 04/11/08—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–08–0347	04/01/08	06/29/08	CBI	(G) Surfactant for pet care, hard surface cleaner, and liquid dish soaps applications; solvent for industrial cleaning applications	(G) Alkyl lactyl lactate
P–08–0348	03/26/08	06/23/08	CBI	(G) Intermediate	(S) Phosphine, 1,1′-[(1r)-[1,1′-binaphthalene]-2-2′-diyl]bis[1,1-diphenyl-
P–08–0349	03/26/08	06/23/08	CBI	(G) Intermediate	(S) Phosphine, 1,1′-[(1s)-[1,1′-binaphthalene]-2-2′-diyl]bis[1,1-diphenyl-
P–08–0350	03/26/08	06/23/08	CBI	(G) Intermediate	(S) Phosphine, 1,1′-[1,1′-binaphthalene]-2-2′-diylbis[1,1-diphenyl-
P–08–0351	04/03/08	07/01/08	Henkel Corporation	(S) Polyurethane adhesive for lamination and assembly	(G) Isocyanate terminated polyurethane
P–08–0352	04/03/08	07/01/08	CBI	(G) Component of industrial use coating	(G) Alkyl acrylate polymer with inorganic acid and alkoxyethyl acrylate, alkyl ester
P–08–0353	04/03/08	07/01/08	CBI	(S) Fragrances for toiletries; fragrances for cosmetics; fragrance for household detergents; fragrances for other household goods	(S) Propanoic acid, 2,2-dimethyl-, 3-methyl-3-buten-1-yl ester
P–08–0354	04/02/08	06/30/08	CBI	(G) Paint additive	(G) 2-propenoic acid, 2-methyl-, methyl ester, polymer with butyl propenoate and substituted-propyl 2-methyl-2-propenoate, 2,2′-(1,2-diazenediyl)bis[2-methylbutanenitrile]-initiated
P–08–0355	04/04/08	07/02/08	Evonik-Degussa Corporation	(S) Extrusion of tubing systems; injection molded semi-finished articles	(G) Polymer of alkanedioic acid and alkane diamine
P–08–0356	04/04/08	07/02/08	Firmenich Inc	(S) Aroma for use in fragrance mixtures, which in turn are used in perfumes, soaps, cleansers, etc.	(S) Extractives and their physically modified derivatives. carica papaya. Oils, papaya
P–08–0357	04/04/08	07/02/08	CBI	(G) Polyol resin (open, non-dispersive)	(G) Polyol
P–08–0358	04/04/08	07/02/08	The Lubrizol Corporation	(S) Metalworking fluid additive (lubricity and emulsification)	(G) Alkoxylated glycerine, alkyl ester
P–08–0359	04/08/08	07/06/08	CBI	(G) Coatings component	(G) Alkyl alcohol reaction product with alkyl diisocyanate
P–08–0360	04/08/08	07/06/08	CBI	(G) Open, non-dispersive use in printing applications	(G) Polyalkylene carboxylate copolymer salt
P–08–0361	04/08/08	07/06/08	CBI	(G) Open, non-dispersive use in printing applications	(G) Polyalkylene carboxylate copolymer salt
P–08–0362	04/08/08	07/06/08	CBI	(G) Open, non-dispersive use in printing applications	(G) Polyalkylene carboxylate copolymer salt
P–08–0363	04/08/08	07/06/08	CBI	(G) Open, non-dispersive use in printing applications	(G) Polyalkylene carboxylate copolymer salt
P–08–0364	04/09/08	07/07/08	CBI	(G) Coatings, adhesives and photopolymer printing plates	(G) Hydrogenated polybutadiene acrylate
P–08–0365	04/09/08	07/07/08	CBI	(G) Coatings, adhesives and photopolymer printing plates	(G) Hydrogenated polybutadiene acrylate

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the Notices of Commencement to manufacture received:

II. 26 NOTICES OF COMMENCEMENT FROM: 03/24/08 TO 04/11/08

Case No.	Received Date	Commencement Notice End Date	Chemical
P–02–0621	04/01/08	03/17/08	(G) Polyester polyurethane
P–05–0604	04/02/08	03/10/08	(S) Fatty acids, $C_{16–18}$, reaction products with disodium carbonate and lactic acid
P–05–0648	04/09/08	03/28/08	(S) Phosphorus acid, mixed C_{10}-rich $C_{9–11}$-isoalkyl and 4-(1-methyl-1-phenylethyl)phenyl triesters
P–06–0005	04/08/08	10/07/07	(G) Aromatic urethane
P–06–0662	03/27/08	03/16/08	(G) Polyester polyurethane

II. 26 NOTICES OF COMMENCEMENT FROM: 03/24/08 TO 04/11/08—Continued

Case No.	Received Date	Commencement Notice End Date	Chemical
P–07–0176	04/07/08	03/19/08	(G) Oil/phenolic modified resin
P–07–0217	03/26/08	03/06/08	(G) Toluene halo alkyl sulfo derivative
P–07–0277	03/26/08	03/14/08	(G) Alkyl salicylate, metal salt
P–07–0306	04/03/08	03/03/08	(S) Siloxanes and silicones, di-me, 3-(2-hydroxyethoxy) propyl group-terminated, polymers with 1,4-butanediol, 1,4-cyclohexanedimethanol, 1,3-dioxolan-2-one, 1,6-hexanediol and 1,1′-methylenebis[isocyanatobenzene]
P–07–0417	04/09/08	03/13/08	(G) Modified thiophene polymer
P–07–0467	03/24/08	02/25/08	(G) Reaction product of a substituted pyridine, paraformaldehyde, hydrochloric acid, and an alkylamine
P–07–0548	04/04/08	03/17/08	(G) Aliphatic polyurethane resin
P–07–0565	03/28/08	03/17/08	(G) Polyester polyether urethane block copolymer
P–07–0603	04/04/08	03/26/08	(G) Reaction product of 2-propenoic acid, 2-methyl-, monoester and a proprietary isocyanate
P–07–0628	04/09/08	04/02/08	(G) Blocked aromatic isocyanate
P–07–0672	04/07/08	03/20/08	(G) Polyethylene glycol ether acid
P–07–0704	04/01/08	02/04/08	(G) Waterborne polyurethane
P–08–0049	03/25/08	02/28/08	(G) 2-propenoic acid, 2-methyl-, polymer with alkyl 2-propenoate, ethenylbenzene and 2-propenoic acid, metal salt, peroxycompound-initiated
P–08–0055	04/04/08	03/17/08	(G) Aqueous hydroxyl-functional polyester polyacrylate dispersion
P–08–0057	04/02/08	03/17/08	(G) Polyalphaolefins; paos
P–08–0062	04/08/08	02/05/08	(G) Urethane modified vegetable oil, epoxidized polymer
P–08–0077	03/31/08	02/28/08	(S) Ferrate(1-), bis[4-[2-[5-(1,1-dimethylethyl)-2-(hydroxy-.kappa.o)phenyl]diazenyl]-.kappa.*N*1]-3-(hydroxy-.kappa.o]-*N*-phenyl-2-naphthalenecarboxamidato(2-)], hydrogen (1:1)
P–08–0119	04/01/08	03/18/08	(G) 1-alkanaminium, *N*-(carboxymethyl)-3-(formylamino)-*N,N*-dimethyl-, inner salt
P–08–0120	04/07/08	03/18/08	(G) Ketamine resin
P–08–0133	03/31/08	03/24/08	(S) Octanal, 6-methoxy-2,6-dimethyl-
P–96–0445	03/24/08	03/10/08	(G) Isocyanate-terminated polyester polyurethane prepolymer

List of Subjects

Environmental protection, Chemicals, Premanufacturer notices.

Dated: April 29, 2008.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. E8–10141 Filed 5–6–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0513; FRL–8150–1]

Triclosan Risk Assessment; Notice of Availability and Risk Reduction Options

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's risk assessment(s), and related documents for the pesticide triclosan, and opens a public comment period on these documents (Phase 3 of 4Phase Process). The public is encouraged to suggest risk management ideas or proposals to address the risks identified. EPA is developing a Reregistration Eligibility Decision (RED) for triclosan through a modified, 4-Phase public participation process that the Agency uses to involve the public in developing pesticide reregistration decisions. Through this program, EPA is ensuring that all pesticides meet current health and safety standards.

DATES: Comments must be received on or before July 7, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–0513, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bld.g), 2777 S. Crystal Drive, Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–0513. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The Federal regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be

able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov web site to view the docket index or access available documents. 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Drive, Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Heather Garvie,Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308–8154; fax number: (703) 308–0034; e-mail address: *garvie.heather@*epa.gov

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What Action is the Agency Taking?

EPA is releasing for public comment its human health and environmental fate and effects risk assessments and related documents for triclosan, and soliciting public comment on risk management ideas or proposals. Triclosan is currently registered as an antimicrobial agent for use in the manufacture of a variety of products as a materials preservative in paints, fabrics, and plastics, tents, tile and in commercial, institutional, and industrial premises and equipment such as conveyor belts, and ice machines. EPA developed the risk assessment(s) and risk characterization for triclosan through a modified version of its public process for making pesticide reregistration eligibility and tolerance reassessment decisions. Through these programs, EPA is ensuring that pesticides meet current standards under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

The primary use sites for triclosan are use as a materials preservative in paints, fabrics, and plastics, tents, tile and in commercial, institutional, and industrial premises and equipment. EPA is providing an opportunity, through this notice, for interested parties to provide comments and input on the Agency's risk assessment for triclosan. Such comments and input could address, for example, the availability of additional data to further refine the risk assessments, such as an acute freshwater invertebrate study, and information on the quantity of triclosan degradates (e.g., triclosan methyl) occurring in surface waters, biosolids, soil, fish, or shellfish from triclosan antimicrobial pesticide use. This information could refine the Agency's risk assessment methodologies and assumptions as applied to this specific pesticide.

Through this notice, EPA also is providing an opportunity for interested parties to provide risk management proposals or otherwise comment on risk management for triclosan. There are risks of concern associated with the use of triclosan from occupational exposure for workers applying paint, using some application methods; and the application of triclosan in paper making. In targeting these risks of concern, the Agency solicits information on effective and practical risk reduction measures.

EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical, unusually high exposure to triclosan, compared to the general population.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004 (69 FR 26819)(FRL–7357–9), explains that in conducting these programs, the Agency is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of the issues, and degree of public concern associated with each pesticide. For triclosan, a modified, 4-Phase process with 1 comment period and ample opportunity for public consultation seems appropriate in view of its refined risk assessment, and/or other factors. However, if as a result of comments received during this comment period EPA finds that additional issues warranting further discussion are raised, the Agency may lengthen the process and include a second comment period, as needed.

All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. Comments will become part of the Agency Docket for triclosan. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

B. What is the Agency's Authority for Taking this Action?

Section 4(g)(2) of FIFRA as amended directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product-specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

Section 408(q) of the FFDCA, 21 U.S.C. 346a(q), requires EPA to review tolerances and exemptions for pesticide residues in effect as of August 2, 1996, to determine whether the tolerance or exemption meets the requirements of section 408(b)(2) or (c)(2) of FFDCA. This review is to be completed by August 3, 2006.

List of Subjects

Environmental protection, Pesticides and pests, antimicrobials, triclosan.

Dated: April 29, 2008.

Frank Sanders,

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. E8–9945 Filed 5–6–07; 8:45 a.m.]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

April 30, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Pursuant to the PRA, no person shall be subject to any penalty for failing to comply with a collection of information 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 July 7, 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: Interested parties may submit all PRA comments by email 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, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at 202–418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0674.

Title: Section 76.1618, Basic Tier Availability.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 8,250 respondents; 8,250 responses.

Estimated Time per Response: 2.25 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in Section 4(i) and Section 632 of the Communications Act of 1934, as amended.

Total Annual Burden: 18,563 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: 47 CFR 76.1618 states that a cable operator shall provide written notification to subscribers of the availability of basic tier service to new subscribers at the time of installation. This notification shall include the following information: (a) That basic tier service is available; (b) the cost per month for basic tier service; and (c) a list of all services included in the basic service tier. These notification requirements are to ensure the subscribers are made aware of the availability of basic cable service at the time of installation.

Federal Communications Commission.

Jacqueline Coles,

Associate Secretary.

[FR Doc. E8–10111 Filed 5–6–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

May 2, 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, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (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 Paperwork Reduction Act (PRA) comments should be submitted on or before June 6, 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 contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC or via Internet at *Cathy.Williams@fcc.gov* or *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.''

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0407.

Type of Review: Revision of a currently approved collection.

Title: Application for Extension of Time to Construct a Digital Television Broadcast Station, FCC Form 337; Section 73.3598, Period of Construction.

Form Number: FCC Form 337.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents/Responses: 160 respondents; 180 responses.

Estimated Time per Response: 0.25 hours—3 hours.

Frequency of Response: On occasion reporting requirement; Recordkeeping requirement.

Nature of Response: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in 154(i), 303, 308, 309, 319 and 337 of the Communications Act of 1934, as amended.

Total Annual Burden: 263 hours.

Total Annual Cost: $37,000.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Congress has mandated that after February 17, 2009, full-power television broadcast stations must transmit only in digital signals, and may no longer transmit analog signals. On December 22, 2007, the Commission adopted a Report and Order in the matter of the Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MB Docket No. 07–91, FCC 07–228, to establish the rules, policies and procedures necessary to complete the nation's transition to Digital TV (DTV). With the DTV transition deadline less than 14 months away, the Commission must ensure that broadcasters meet their statutory responsibilities and complete construction of, and begin operations on, the facility on their final, post-transition (digital) channel that will reach viewers in their authorized service areas by the statutory transition deadline, when they must cease broadcasting in analog. The Commission wants to ensure that no consumers are left behind in the DTV transition. Specifically, the Report and Order requires the following:

- *Extension Requests.* Stations with a construction deadline on or before February 17, 2009 may file a request for an extension of time to construct their final, post-transition (DTV) facility using FCC Form 337.
- *Revisions to FCC Form 337.* FCC Form 337 was revised to reflect the stricter standard of review.
- *Tolling Requests.* Stations with a construction deadline occurring February 18, 2009 or later may file a notification of an event that would toll their deadline to construct their final, post-transition (DTV) facility using FCC Informal Application Form.

OMB Control Number: 3060–1105.

Title: Digital TV Transition Status Report.

Form Number: FCC Form 387.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents/Responses: 781 respondents; 1,953 responses.

Frequency of Response: On occasion reporting requirement.

Estimated Time per Response: 2 hours.

Total Annual Burden: 3,906 hours.

Total Annual Costs: $1,367,100.

Nature of Response: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 1, 4(i) and (j), 7, 301, 302, 303, 307, 308, 309, 312, 316, 318, 319, 324, 325, 336 and 337 of the Communications Act of 1934, as amended.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Congress has mandated that after February 17, 2009, full-power television broadcast stations must transmit only in digital signals, and may no longer transmit analog signals. On December 22, 2007, the Commission adopted a Report and Order, In the Matter of the Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MB Docket No. 07–91, FCC 07–228, to establish the rules, policies and procedures necessary to complete the nation's transition to Digital TV (DTV). With the DTV transition deadline less than 14 months away, the Commission must ensure that broadcasters meet their statutory responsibilities and complete construction of, and begin operations on, the facility on their final, post-transition (digital) channel that will reach viewers in their authorized service areas by the statutory transition deadline, when they must cease broadcasting in analog. The Commission wants to ensure that no consumers are left behind in the DTV transition.

This Report and Order requires all full-power television stations to file a DTV Transition Status Report using FCC

Form 387 on or before February 19, 2008. In addition, stations must update these forms as events warrant and, by October 20, 2008, if they have not by that date reported the completion of their transition, i.e., that they have begun operating their full facility as authorized by the post-transition DTV Table Appendix B, stations must provide the specific details of their current transition status, any additional steps necessary for digital-only operation upon expiration of the February 17, 2009 transition deadline, and a timeline for making those steps.

Federal Communications Commission.

Jacqueline Coles,

Associate Secretary.

[FR Doc. E8–10113 Filed 5–6–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (*http://www.fmc.gov*) or contacting the Office of Agreements (202–523–5793 or *tradeanalysis@fmc.gov*).

Agreement No.: 011996–001.

Title: Gulf, Central America and Caribbean Vessel Sharing Agreement.

Parties: Compania Sud Americana de Vapores (''CSAV'') and Compania Chilena de Navegacion Interoceanica S.A. (''CCNI'').

Filing Party: Walter H. Lion, Esq.; McLaughlin & Stern, LLP; 260 Madison Ave; New York, NY 10016.

Synopsis: The amendment extends the time for providing notice of withdrawal to April 19, 2009.

Agreement No.: 012040.

Title: CSAV Group / ECSA Space Charter Agreement.

Parties: Compania Libra de Navegacao (Libra); Compania Libra de Navegacion Uruguay S.A. (CLNU); Compania Sud Americana de Vapores, S.A. (CSAV); Hanjin Shipping Co., Ltd.; Kawasaki Kaisen Kaisha, Ltd.; and Yang Ming Marine Transport Corp.

Filing Party: Walter H. Lion, Esq.; McLaughlin & Stern, LLP; 260 Madison Avenue; New York, NY 10016.

Synopsis: The agreement authorizes Libra, CLNU, and CSAV to charter space to the other parties in the trade between U.S. East Coast ports and ports in Argentina, Brazil, Paraguay, Uruguay and Venezuela.

Agreement No.: 201112–001.

Title: Lease and Operating Agreement.

Parties: Philadelphia Regional Port Authority and Kinder Morgan Liquids Terminals, LLC.

Filing Party: Paul D. Coleman, Esq.; Hoppel, Mayer & Coleman; 1050 Connecticut Ave. NW., 10th Floor; Washington, DC 20036.

Synopsis: The amendment provides for rent for the renewal period, revises provisions on dredging, and revises the amount of dockage.

Agreement No.: 201118–001.

Title: Lease and Operating Agreement.

Parties: Philadelphia Regional Port Authority and Penn Warehousing and Distribution, Inc.

Filing Party: Paul D. Coleman, Esq.; Hoppel, Mayer & Coleman; 1050 Connecticut Ave. NW., 10th Floor; Washington, DC 20036.

Synopsis: The amendment extends the lease until December 31, 2023, establishes conditions for renewal, sets a minimum number of vessel calls, establishes new fees, and make other miscellaneous changes.

Dated: May 2, 2008.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–10148 Filed 5–6–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Notice of Meeting

Agency Holding the Meeting: Federal Maritime Commission.

Time and Date: May 7, 2008—10 a.m.

Place: 800 North Capitol Street, NW., First Floor Hearing Room, Washington, DC.

Status: Part of the Meeting will be held in Open Session and the remainder of the meeting will be held in Closed Session.

Matters To Be Considered

Open Session

1. Docket No. 06–05—*Verucci Motorcycles LLC* v. *Senator International Ocean LLC.*

Closed Session

1. FMC Agreement No. 201178—Los Angeles/Long Beach Port Terminal Operator Administration and Implementation Agreement.

FOR FURTHER INFORMATION CONTACT: Karen V. Gregory, Assistant Secretary, (202) 523–5725.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–9872 Filed 5–6–08; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR Part 515, effective on the corresponding date shown below:

License Number: 001454F.

Name: Aarid Consolidators and Forwarders, Inc.

Address: 1340 Chesapeake Ave., Baltimore, MD 21226.

Date Revoked: December 31, 2007.

Reason: Surrendered license voluntarily.

License Number: 004476F.

Name: Arthur L. Griffin dba Pathfinder Logistics.

Address: 34233 Pacific Highway So., Ste. 127, Federal Way, WA 98003–1978.

Date Revoked: April 13, 2008.

Reason: Failed to maintain a valid bond.

License Number: 017753N.

Name: Associated Consolidators Express dba A.C.E. Balikbayan Boxes Direct.

Address: 1273 Industrial Parkway, #290, Hayward, CA 94544.

Date Revoked: April 3, 2008.

Reason: Failed to maintain a valid bond.

License Number: 020090F.

Name: Caribbean Enterprises Inc.

Address: 1032 River Street, Hyde Park, MA 02136.

Date Revoked: April 20, 2008.

Reason: Failed to maintain a valid bond.

License Number: 002259F.

Name: Donald T. Maley dba Empire Sea-Air Company.

Address: 195 N. Village Ave., Apt. 2D, Rockville Ctr., NY 11570.

Date Revoked: April 13, 2008.

Reason: Failed to maintain a valid bond.

License Number: 020341NF.

Name: Miami International Freight, Inc.

Address: 6109 NW 72nd Ave., Miami, FL 33166.
Date Revoked: April 10, 2008.
Reason: Failed to maintain valid bonds.
License Number: 020906N.
Name: National Consolidation & Distribution Inc.
Address: 400 Maltese Drive, Totowa, NJ 07512.
Date Revoked: April 12 2008.
Reason: Failed to maintain a valid bond.
License Number: 018676NF.
Name: Skysea Freight International USA LLC.
Address: 2250 East Devon Ave., Ste. 230, Des Plaines, IL 60018.
Date Revoked: April 3, 2008.
Reason: Failed to maintain valid bonds.
License Number: 002816F.
Name: Total Ex-Port, Inc.
Address: 10 Fifth Street, Valley Stream, NY 11581.
Date Revoked: April 1, 2008.
Reason: Surrendered license voluntarily.
License Number: 019333N.
Name: Yudong Logistics, Inc.
Address: 690 Knox Street, #220, Torrance, CA 90502.
Date Revoked: April 9, 2008.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E8–10132 Filed 5–6–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984, as amended (46 U.S.C. chapter 409 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants:

Transports P. Fatton Inc. dba Fatton U.S.A, 145 Hook Creek Blvd., Bldg. AS, Valley Stream, NY 11581. Officers: Jean-Christophe Debay, Vice President (Qualifying Individual), Guillaume Fatton, President.

ACS Logistics, Inc., 5005 W. Royal Lane, Ste. 198, Irving, TX 75063. Officer: Sazon Maxwell, Asst. Secretary (Qualifying Individual).

Accu-Rate Shipping Inc., 880 Apollo Street, Ste. 101, El Segundo, CA 90245. Officers: Peter Porse, President (Qualifying Individual) Kenji, Go, Vice President.

Angel Freight Services, Inc., 565 Kokea Street, #G–2, Honolulu, HI 96817. Officers: Arturo M. Angel, President (Qualifying Individual), Meryline Angel, Vice President.

Allegheny Ocean Transport Incorporated, 5389 CV Jackson Rd., Ste. #1, Dublin, VA 24084. Officers: James R. Loux, President (Qualifying Individual), Patricia W. Mowrey, Secretary.

Fastpak Hawaii, 1626 Akahi Street, Honolulu, HI 96819. Erwin A. Gabrillo, Sole Proprietor.

Hai Wae Tong Woon, Inc., 1507 Carmen Drive, Elk Grove Village, IL 60007. Officer: Young S. Lee, President (Qualifying Individual).

Eastern Express Cargo, 10717 Camino Ruiz, Ste. 228, San Diego, CA 92126. Alex De Guzzman, Sole Proprietor.

Westwind Transportation Services Inc., dba Westwind Container Lines, 1225 W. 190th Street, Ste. 300, Gardena, CA 90248. Officer: Gene Nakamura, Vice President.

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants:

G&G International, Inc., 1382 NW 78 Street, Miami, FL 33126. Officers: Rita M. Guzman, President (Qualifying Individual), Diana Lopez, Secretary.

Worldwide Exports, Inc., 377 East Puente Street, Unit 1, Covina, CA 91723. Officers: Alex A. Castano, Vice President (Qualifying Individual), Rosario Castano, President.

Muches Global Industries, Inc., 10535 Rockley Road, Ste. 102, Houston, TX 77099. Officers: Asinobi O. Amadi, President (Qualifying Individual), Queen E. Amadi, Secretary.

A Plus International (U.S.A.) Inc., One Industrial Plaza, Bldg. B, Valley Stream, NY 11581. Officer: Alan Chu, President (Qualifying Individual).

RDM Solutions, Inc., 154–09 148th Ave., Ste. 203, Jamaica, NY 11434. Officer: Mario Ruiz, President (Qualifying Individual).

DT Shipping, Inc., 11203 S. La Cienega Blvd., Los Angeles, CA 90045. Officers: Thuc P. Ly, CFO (Qualifying Individual), Duc Pham, President.

Saturn Freight Systems, Inc., 561 Village Trace, Bldg. 13–A, Marietta, GA 30067. Officers: Guy D. Stark, President (Qualifying Individual), Edward T. Falconer, Vice President.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicant:

Trans Wagon Int'l (U.S.A) Co., Ltd., 20265 Valley Blvd., Ste. C, Walnut, CA 91789. Officer: Su Chin-Tien, President (Qualifying Individual).

Dated: May 2, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–10149 Filed 5–6–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Correction

In the **Federal Register** Notice published April 23, 2008 (73 FR 21953), the reference to Amobeige Shipping Corp. is corrected to read: ''Amobelge Shipping Corp.''

Dated: May 2, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–10122 Filed 5–6–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments

must be received not later than May 21, 2008.

A. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. The Haskell Bancshares, Inc., Employee Stock Ownership Plan, Haskell, Texas, Dan R. Griffith, Andrew Gannaway both of Haskell, Texas, Robert Howard, Abilene, Texas as Trustees; to retain ownership and control of Haskell Bancshares, Inc., Haskell, Texas, and thereby indirectly its subsidiary, Haskell National Bank, Haskell, Texas.

Board of Governors of the Federal Reserve System, May 2, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–10057 Filed 5–6–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 061 0209]

TALX, Inc.; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before May 28, 2008.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''TALX, Inc., File No. 061 0209,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 135-H, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2005).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments that do not contain any nonpublic information may instead be filed in electronic form by following the instructions on the web-based form at *http://secure.commentworks.com/ftc-TALX*. To ensure that the Commission considers an electronic comment, you must file it on that web-based form.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC website, to the extent practicable, at *www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Sean Hughto, FTC Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, (202) 326-2199.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for April 28 2008), on the World Wide Web, at (*http://www.ftc.gov/os/2008/04index.htm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Order (''Agreement'') from TALX Corporation (''Proposed Respondent''). The Consent Agreement settles allegations that TALX has violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in connection with the provision of outsourced UCM services and employer verification services nationwide through a series of consummated acquisitions. Pursuant to the Agreement, TALX has provisionally agreed to be bound by a proposed consent order (''Proposed Consent Order'').

The Proposed Consent Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement's Proposed Consent Order.

The purpose of the Agreement is to remedy anticompetitive effects, alleged in the Commission's Complaint in this matter, that will likely result from the acquisitions by Proposed Respondent of James E. Frick Inc., Johnson & Associates, L.L.C., and certain assets and businesses of Gates McDonald & Company, Sheakley-Uniservice, Inc., UI Advantage, Jon-Jay Associates, Inc., and Employers Unity, Inc.

The Proposed Consent Order provides for relief in two markets where the Commission finds reason to believe that these acquisitions likely will have anticompetitive effects: the national market for outsourced unemployment compensation management (''UCM'') services, and the national market for outsourced employer verification

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

services, also known as the market for verification of income and employment (''VOIE'') services.

The Proposed Consent Order is aimed at expediting the entry and expansion of competitors by, among other things, freeing past, as well as various current, TALX employees to take jobs with competitors and by granting the majority of TALX's present long term contract customers the unilateral right to get out of those contracts and switch to another UCM provider. While the Commission usually typically prefers divestitures that immediately reset market shares (the sale of a plant in the manufacturing context, for example), unique circumstances combine in this matter to make it appropriate for the Commission to accept relief aimed at encouraging the movement of market share to competitors though self-selection by TALX's customers, as opposed to mandating the transfer of arbitrary set of these service contracts. These circumstances include, but are not necessarily limited to, the personal service nature of the product, divergent customer preferences and needs, and the existence of several very small, but nevertheless viable, competitors. The proposed remedy seeks to ensure that the entry and expansion necessary to ensure a competitive market can occur much more quickly than it would absent relief. More specifically, the Proposed Consent Order requires TALX to (a) allow many of its customers with long-term UCM contracts to terminate those contracts at the customers' option, (b) free many of its past and current employees from restrictions that would hamper their ability to be employed by UCM competitors, (c) provide, if requested, to certain former UCM customers of TALX, certain information related to UCM claims work retained by TALX, (d) give notice to certain customers of their right to cancel UCM contracts that are automatically renewed if not cancelled, and (e) not prevent or discourage any entity from supplying goods or services to a UCM competitor of TALX.

The Order also requires TALX to give to the Commission prior notice of future acquisitions in markets for UCM services and VOIE services.

II. The Respondent

TALX is a Missouri corporation that, in May 2007, became a wholly-owned subsidiary of Equifax, Inc. TALX's primary businesses are the provision of UCM services under the name ''UC eXpress,'' and the provision of VOIE services under the name ''The Work Number.''

III. The Complaint

As alleged in the Commission's Complaint, TALX competes in markets for UCM services and VOIE services. UCM services consist, in part, of the managing, administering, and/or processing, on behalf of an employer, of unemployment compensation claims filed with a state or territory. VOIE services consist, in part, of the provision of employment and income verifications including, but not limited to, the collection, maintenance, or dissemination of information concerning the employment status and income of those employees. In order to provide such VOIE services, a VOIE provider must collect and maintain payroll data and other data relating to employment.

The Complaint alleges that the March 2002 acquisitions by TALX of James E. Frick, Inc. and of the UCM services division of Gates McDonald eliminated competition between the two acquired companies in the national market for UCM services. James E. Frick, Inc. and Gates McDonald were the two largest providers of UCM services prior to TALX's acquisition of both companies the same day. The Complaint also alleges that TALX's acquisitions of Johnson and Associates, L.L.C., the UCM assets of Sheakley-Uniservice, Inc., Jon-Jay Associates, and the unemployment tax management business, which includes UCM services, of Employers Unity, Inc. substantially reduced competition in the national market for UCM services.

The Complaint further alleges that TALX substantially reduced competition in the nationwide provision of VOIE services through the acquisitions of James E. Frick, Inc., and the VOIE businesses of Sheakley-Uniservice, Inc. and Employers Unity, Inc.

The Complaint notes that some firms, known as ''alliance partners,'' outsource to TALX some of the UCM services they sell to others. The largest amount of such outsourcing is done by ADP, Inc.

The Complaint alleges that each of the relevant markets is highly concentrated, and the consummated acquisitions increased concentration substantially, whether concentration is measured by the Herfindahl-Hirschman Index (''HHI''), or the number of competitively significant firms remaining in the market.

The Complaint further alleges that entry would not be timely, likely, or sufficient to prevent anticompetitive effects in either of the relevant markets. As alleged in the Complaint, entry into the market for the provision of outsourced UCM services to large multi-state employers is difficult and slow. According to the Complaint, among the factors that make entry into this market difficult and slow are the length of time it normally takes to make a sale, the maturity of the market, and the lengthy period necessary to establish a track record for successfully managing large volumes of unemployment compensation claims. The Complaint also alleges that entry and expansion in the provision of outsourced UCM services to large multi-state employers is made more difficult by the large number of customers that are tied to long-term contracts with terms as long as five-years. Prior to TALX's acquisition of its leading competitors who can serve large employers with multi-state claims, the vast majority of industry contracts were renewable one year relationships. In recent years, TALX has successfully and vigorously pursued three and five year deals with its clients. The prevalence of long-term contracts and non-compete and non-solicitation agreements between TALX and its employees, which substantially reduce the number of experienced and talented employees available to be hired by TALX's competitors and potential competitors, has made entry and expansion more difficult and slow.

The Complaint also alleges that entry into the market for VOIE services is difficult and slow. Among the factors that make entry into this market difficult and slow are, according to the Complaint, the need to acquire a sufficient scale and scope of payroll and employment data to attract and service a sufficient customer base, the difficulty of developing software to automate the VOIE process, and the need to build a reputation for reliability and security.

The Complaint alleges that the consummated acquisitions eliminated competition between TALX, and each of its competitors in the provision of outsourced UCM services and employer verification services nationwide. The Complaint further alleges that the consummated acquisitions enhance opportunities for TALX to increase prices unilaterally and to decrease the quality of services provided in each of the relevant markets. The acquisitions by TALX eliminated the closest competitors able to serve large employers with claims in many states or nationwide.

The Complaint alleges that the consummated acquisitions violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in

connection with the provision of outsourced UCM services and employer verification services nationwide. The Complaint further alleges that the Acquisitions described have eliminated direct and actual competition in the provision of both UCM and employer verification services. The acquisitions by TALX of its competitors have enhanced its ability to increase prices unilaterally and enhanced its ability to decrease the quality of services provided in each of the relevant lines of commerce, according to the Commission's Complaint.

IV. The Proposed Consent Order

As noted above, the Proposed Consent Order provides for relief in markets for UCM services and VOIE services.

Paragraph II. of the Proposed Consent Order prohibits TALX from enforcing against certain current and former employees who accept employment with certain UCM competitors of TALX certain types of covenants not to compete, not to solicit, and not to disclose trade secrets. Paragraph I.P.1. of the Proposed Consent Order lists some of those UCM competitors by name, and Paragraph I.P.2. lists criteria for identifying other such UCM competitors. Paragraphs I.DD., I.FF., and I.TT. of the Propose Consent Order describe the types of restrictions on competition, solicitation, and trade secret disclosure that TALX would not be able to enforce in situations where Paragraph II. of the Proposed Consent Order is applicable.

Paragraph II. of the Proposed Consent Order divides the past and current employees subject to this paragraph into three categories: ''Relevant Current Persons,'' ''Relevant Past Persons,'' and ''Other Relevant Current Persons.'' Appendix F to the Proposed Consent Order lists all of such Relevant Current Persons and divides them into five categories: Customer Relationship Managers, Account Managers, Unemployment Insurance Consultants, Hearing Representatives, and Tax Consultants. The third proviso to Paragraph II. of the Proposed Consent Order limits the number of Relevant Current Persons that are subject to Paragraph II. of the Proposed Consent Order to ten Customer Relationship Managers, four Account Managers, twenty-three Unemployment Insurance Consultants, five Hearing Representatives, and four Tax Consultants. In addition, the applicability of Paragraph II. of the Proposed Consent Order to a Relevant Current Person will end two years after such person's receipt of the notice that TALX is required to send such person pursuant to Paragraph VI.A. of the Proposed Consent Order.

The other two categories of past and current employees, ''Relevant Past Persons,'' and ''Other Relevant Current Persons,'' are defined in Paragraphs I.HH. and I.MM. of the Proposed Consent Order. There is no limit on the number of Relevant Past Persons and Other Relevant Current Persons who are subject to Paragraph II. of the Proposed Consent Order; and that paragraph will apply to those persons for the full ten-year term of the Proposed Consent Order.

Paragraph III. of the Proposed Consent Order provides that TALX must allow certain customers with contracts for UCM services with a term longer than one year to terminate their contracts on 90 days notice if those customers outsource their UCM services to a competitor of TALX. Paragraph I.X. of the Proposed Consent Order specifies the customers covered by Paragraph III. of the Proposed Consent Order. The third proviso to Paragraph III. places an upper limit of $10 million on the ''Total Of Relevant Values Of Terminated Long Term Contracts,'' within the meaning of Paragraph I.XX. of the Proposed Consent Order. In addition, the applicability of Paragraph III. of the Proposed Consent Order to a customer will end three years after such customer's receipt of the notice that TALX is required to send such customer pursuant to Paragraph VI.B. of the Proposed Consent Order.

Paragraph IV. of the Proposed Consent Order provides, that at the request of a ''Former UCM Customer,'' within the meaning of Paragraph I.TT of the Proposed Consent Order. TALX must transfer certain specified customer file information to such customer. The information to be transferred would include data relating to open unemployment compensation claims and to state unemployment tax rates, and include documents generated in preparation for unemployment compensation hearings and appeals.

Paragraph V. of the Proposed Consent Order prevents TALX from entering into agreements that would prevent or discourage any entity from supplying goods or services to a UCM competitor of TALX. This paragraph does not apply to employment agreements.

Paragraphs VI.A., VI..B., and VI.C. of the Proposed Consent Order require TALX to give notice to certain current and former employees and to certain long-term contract customers of their rights under Paragraphs II. and III. of the Order.

Paragraph VI.D. of the Proposed Consent Order requires that TALX notify certain customers of their right to cancel UCM contracts that would otherwise be renewed automatically.

Paragraph VI.E. of the Proposed Consent Order requires the posting on Web sites of specified information concerning the rights of certain current and former employees of TALX and of certain UCM customers of TALX under Paragraphs II. and III. of the Order,

Paragraph VII.A. of the Proposed Consent Order prohibits TALX from entering into, or attempting to enter into, agreements to divide or allocate markets for UCM services.

Paragraph VII.B. of the Proposed Consent Order prohibits TALX from entering into, or attempting to enter into, any agreement requiring ADP, Inc. to subcontract to TALX the rendering of UCM services to a customer if such agreement precedes, rather than follows, ADP, Inc.'s agreement with such customer to provide UCM services. The purpose of Paragraph VII.B. is to increase the ability of TALX's current and future competitors to compete against TALX for the business of providing UCM services to customers of ADP.

Paragraph VIII. of the Proposed Consent Order requires that, for ten (10) years, TALX give the Commission thirty (30) days advance notice before acquiring, or entering into a management contract with, a provider of UCM services or VOIE services.

Paragraph IX. of the Proposed Consent Order appoints Erwin O. Switzer to the position of Monitor/Administrator. The Monitor/Administrator will assist the Commission in monitoring TALX's compliance with the Proposed Consent Order, and will assist certain past and present employees of TALX and certain customers of TALX in exercising their rights under Paragraphs II. and III. of the Order.

Paragraphs X., XI. and XII. of the Proposed Consent Order require TALX to comply with certain reporting requirements to the Commission.

Paragraph XIII. provides that the Proposed Consent Order will terminate ten years after it goes into effect.

By direction of the Commission.

Donald S. Clark,

Secretary.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1401–N]

RIN 0938–AO92

Medicare Program; Inpatient Psychiatric Facilities Prospective Payment System Payment Update for Rate Year Beginning July 1, 2008 (RY 2009)

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice updates the prospective payment rates for Medicare inpatient psychiatric hospital services provided by inpatient psychiatric facilities (IPFs). These changes are applicable to IPF discharges occurring during the rate year beginning July 1, 2008 through June 30, 2009.

DATES: *Effective Date:* The updated IPF prospective payment rates are effective for discharges occurring on or after July 1, 2008 through June 30, 2009.

FOR FURTHER INFORMATION CONTACT:
Dorothy Myrick or Jana Lindquist, (410) 786–4533 (for general information).
Heidi Oumarou, (410) 786–7942 (for information regarding the market basket and labor-related share).
Theresa Bean, (410) 786–2287 (for information regarding the regulatory impact analysis).
Matthew Quarrick, (410) 786–9867 (for information on the wage index).

SUPPLEMENTARY INFORMATION:

Table of Contents

To assist readers in referencing sections contained in this document, we are providing the following table of contents.

Acronyms

Because of the many terms to which we refer by acronym in this notice, we are listing the acronyms used and their corresponding terms in alphabetical order below:

BBRA Medicare, Medicaid and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement Act of 1999, (Pub. L. 106–113).
CBSA Core-Based Statistical Area.
CCR Cost-to-charge ratio.
CMSA Consolidated Metropolitan Statistical Area.
DSM–IV–TR Diagnostic and Statistical Manual of Mental Disorders Fourth Edition—Text Revision.
DRGs Diagnosis-related groups.
FY Federal fiscal year.
ICD–9–CM International Classification of Diseases, 9th Revision, Clinical Modification.
IPFs Inpatient psychiatric facilities.
IRFs Inpatient rehabilitation facilities.
LTCHs Long-term care hospitals.
MedPAR Medicare provider analysis and review file.
MSA Metropolitan Statistical Area.
RY Rate Year.
TEFRA Tax Equity and Fiscal Responsibility Act of 1982, (Pub. L. 97–248).

I. Background

A. Annual Requirements for Updating the IPF PPS

In November 2004, we implemented the IPF PPS in a final rule that appeared in the November 15, 2004 **Federal Register** (69 FR 66922). In developing the IPF PPS, in order to ensure that the IPF PPS is able to account adequately for each IPF's case-mix, we performed an extensive regression analysis of the relationship between the per diem costs and certain patient and facility characteristics to determine those characteristics associated with statistically significant cost differences on a per diem basis. For characteristics with statistically significant cost differences, we used the regression coefficients of those variables to determine the size of the corresponding payment adjustments.

In that final rule, we explained that we believe it is important to delay updating the adjustment factors derived from the regression analysis until we have IPF PPS data that includes as much information as possible regarding the patient-level characteristics of the population that each IPF serves. Therefore, we indicated that we did not intend to update the regression analysis and recalculate the Federal per diem base rate and the patient- and facility-level adjustments until we complete that analysis. Until that analysis is complete, we stated our intention to publish a notice in the **Federal Register** each spring to update the IPF PPS (71 FR 27041).

Updates to the IPF PPS as specified in 42 CFR 412.428 include the following:

- A description of the methodology and data used to calculate the updated Federal per diem base payment amount.
- The rate of increase factor as described in § 412.424(a)(2)(iii), which is based on the excluded hospital with capital market basket under the update methodology of section 1886(b)(3)(B)(ii) of the Act for each year.
- For discharges occurring on or after July 1, 2006, the rate of increase factor for the Federal portion of the IPF's payment, which is based on the rehabilitation, psychiatric, and long-term care (RPL) market basket.
- For discharges occurring on or after October 1, 2005, the rate of increase factor for the reasonable cost portion of the IPF's payment, which is based on the 2002-based excluded hospital market basket.
- The best available hospital wage index and information regarding

whether an adjustment to the Federal per diem base rate, is needed to maintain budget neutrality.

- Updates to the fixed dollar loss threshold amount in order to maintain the appropriate outlier percentage.
- Description of the ICD–9–CM coding and DRG classification changes discussed in the annual update to the hospital inpatient prospective payment system (IPPS) regulations.
- Update to the electroconvulsive therapy (ECT) payment by a factor specified by CMS.
- Update to the national urban and rural cost-to-charge ratio medians and ceilings.
- Update to the cost of living adjustment factors for IPFs located in Alaska and Hawaii, if appropriate.

Our most recent annual update occurred in the May 2007 IPF PPS notice (72 FR 25602) that set forth updates to the IPF PPS payment rates for RY 2008.

This notice does not initiate any policy changes with regard to the IPF PPS; rather, it simply provides an update to the rates for RY 2009 (that is, the prospective payment rates applicable for discharges beginning July 1, 2008 through June 30, 2009). In establishing these payment rates, we update the IPF per diem payment rates that were published in the May 2007 IPF PPS notice in accordance with our established policies.

B. Overview of the Legislative Requirements for the IPF PPS

Section 124 of the Medicare, Medicaid, and SCHIP (State Children's Health Insurance Program) Balanced Budget Refinement Act of 1999, (Pub. L. 106–113) (BBRA) required implementation of the IPF PPS. Specifically, section 124 of the BBRA mandated that the Secretary develop a per diem PPS for inpatient hospital services furnished in psychiatric hospitals and psychiatric units that includes an adequate patient classification system that reflects the differences in patient resource use and costs among psychiatric hospitals and psychiatric units.

Section 405(g)(2) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) extended the IPF PPS to distinct part psychiatric units of critical access hospitals (CAHs).

To implement these provisions, we published various proposed and final rules in the **Federal Register**. For more information regarding these rules, see the CMS Web sites *http://www.cms.hhs.gov/InpatientPsychFacilPPS/* and *http://www.cms.hhs.gov/InpatientpsychfacilPPS/02_regulations.asp*.

C. IPF PPS—General Overview

The November 2004 IPF PPS final rule (69 FR 66922) established the IPF PPS, as authorized under section 124 of the BBRA and codified at subpart N of part 412 of the Medicare regulations. The November 2004 IPF PPS final rule set forth the per diem Federal rates for the implementation year (that is, the 18-month period from January 1, 2005 through June 30, 2006) that provided payment for the inpatient operating and capital costs to IPFs for covered psychiatric services they furnish (that is, routine, ancillary, and capital costs), but not costs of approved educational activities, bad debts, and other services or items that are outside the scope of the IPF PPS. Covered psychiatric services include services for which benefits are provided under the fee-for-service Part A (Hospital Insurance Program) Medicare program.

The IPF PPS established the Federal per diem base rate for each patient day in an IPF derived from the national average daily routine operating, ancillary, and capital costs in IPFs in FY 2002. The average per diem cost was updated to the midpoint of the first year under the IPF PPS, standardized to account for the overall positive effects of the IPF PPS payment adjustments, and adjusted for budget neutrality.

The Federal per diem payment under the IPF PPS is comprised of the Federal per diem base rate described above and certain patient- and facility-level payment adjustments that were found in the regression analysis to be associated with statistically significant per diem cost differences.

The patient-level adjustments include age, DRG assignment, comorbidities, and variable per diem adjustments to reflect higher per diem costs in the early days of an IPF stay. Facility-level adjustments include adjustments for the IPF's wage index, rural location, teaching status, a cost of living adjustment for IPFs located in Alaska and Hawaii, and presence of a qualifying emergency department (ED).

The IPF PPS provides additional payments for: Outlier cases; stop-loss protection (which is applicable only during the IPF PPS transition period); interrupted stays; and a per treatment adjustment for patients who undergo ECT.

A complete discussion of the regression analysis appears in the November 2004 IPF PPS final rule (69 FR 66933 through 66936).

Section 124 of BBRA does not specify an annual update rate strategy for the IPF PPS and is broadly written to give the Secretary discretion in establishing an update methodology. Therefore, in the November 2004 IPF PPS final rule (69 FR 66966), we implemented the IPF PPS using the following update strategy—(1) calculate the final Federal per diem base rate to be budget neutral for the 18-month period of January 1, 2005 through June 30, 2006; (2) use a July 1 through June 30 annual update cycle; and (3) allow the IPF PPS first update to be effective for discharges on or after July 1, 2006 through June 30, 2007.

II. Transition Period for Implementation of the IPF PPS

In the November 2004 IPF PPS final rule, we established § 412.426 to provide for a 3-year transition period from reasonable cost-based reimbursement to full prospective payment for IPFs. The purpose of the transition period is to allow existing IPFs time to adjust their cost structures and to integrate the effects of changing to the IPF PPS.

New IPFs, as defined in § 412.426(c), are paid 100 percent of the Federal per diem payment amount. For those IPFs that are transitioning to the new system, payment is based on an increasing percentage of the PPS payment and a decreasing percentage of each IPF's facility-specific Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) reimbursement rate.

TABLE 1.—IPF PPS TRANSITION BLEND FACTORS

Transition Year	Cost reporting periods beginning on or after	TEFRA rate percentage	IPF PPS federal rate percentage
1	January 1, 2005	75	25
2	January 1, 2006	50	50
3	January 1, 2007	25	75

TABLE 1.—IPF PPS TRANSITION BLEND FACTORS—Continued

Transition Year	Cost reporting periods beginning on or after	TEFRA rate percentage	IPF PPS federal rate percentage
	January 1, 2008	0	100

Changes to the blend percentages occur at the beginning of an IPF's cost reporting period. However, regardless of when an IPF's cost reporting year begins, the payment update will be effective for discharges occurring on or after July 1, 2008 through June 30, 2009. IPFs with cost reporting periods beginning January 1, 2008 will have completed the transition period and will receive 100 percent IPF PPS payments. Other IPFs with cost reporting periods beginning after January 1, 2008, during 2008, will also begin to receive 100 percent IPF PPS payments. This means that beginning January 1, 2009, all IPFs will receive 100 percent IPF PPS payments and the IPF PPS transition period will have ended.

For RY 2009, the transition period established in the November 2004 IPF PPS final rule will no longer be applied.

III. Updates to the IPF PPS for RY Beginning July 1, 2008

The Federal per diem base rate is used as the standard payment per day under the IPF PPS and is adjusted by the applicable wage index factor and the patient- and facility-level adjustments that are applicable to the IPF stay. A detailed explanation of how we calculated the average per diem cost appears in the November 2004 IPF PPS final rule (69 FR 66926).

A. Determining the Standardized Budget-Neutral Federal Per Diem Base Rate

Section 124(a)(1) of the BBRA requires that we implement the IPF PPS in a budget neutral manner. In other words, the amount of total payments under the IPF PPS, including any payment adjustments, must be projected to be equal to the amount of total payments that would have been made if the IPF PPS were not implemented. Therefore, we calculated the budget-neutrality factor by setting the total estimated IPF PPS payments to be equal to the total estimated payments that would have been made under the TEFRA methodology had the IPF PPS not been implemented.

Under the IPF PPS methodology, we calculated the final Federal per diem base rate to be budget neutral during the IPF PPS implementation period (that is, the 18-month period from January 1, 2005 through June 30, 2006) using a July 1 update cycle. We updated the average cost per day to the midpoint of the IPF PPS implementation period (that is, October 1, 2005), and this amount was used in the payment model to establish the budget-neutrality adjustment.

A step-by-step description of the methodology used to estimate payments under the TEFRA payment system appears in the November 2004 IPF PPS final rule (69 FR 66926).

1. Standardization of the Federal Per Diem Base Rate and Electroconvulsive Therapy Rate

In the November 2004 IPF PPS final rule, we describe how we standardized the IPF PPS Federal per diem base rate in order to account for the overall positive effects of the IPF PPS payment adjustment factors. To standardize the IPF PPS payments, we compared the IPF PPS payment amounts calculated from the FY 2002 Medicare Provider Analysis and Review (MedPAR) file to the projected TEFRA payments from the FY 2002 cost report file updated to the midpoint of the IPF PPS implementation period (that is, October 2005). The standardization factor was calculated by dividing total estimated payments under the TEFRA payment system by estimated payments under the IPF PPS. The standardization factor was calculated to be 0.8367.

As described in detail in the May 2006 IPF PPS final rule (71 FR 27045), in reviewing the methodology used to simulate the IPF PPS payments used for the November 2004 IPF PPS final rule, we discovered that due to a computer code error, total IPF PPS payments were underestimated by about 1.36 percent. Since the IPF PPS payment total should have been larger than the estimated figure, the standardization factor should have been smaller (0.8254 vs. 0.8367). In turn, the Federal per diem base rate and the ECT rate should have been reduced by 0.8254 instead of 0.8367.

To resolve this issue, in RY 2007, we amended the Federal per diem base rate and the ECT payment rate prospectively. Using the standardization factor of 0.8254, the average cost per day was effectively reduced by 17.46 percent (100 percent minus 82.54 percent = 17.46 percent).

2. Calculation of the Budget Neutrality Adjustment

To compute the budget neutrality adjustment for the IPF PPS, we separately identified each component of the adjustment, that is, the outlier adjustment, stop-loss adjustment, and behavioral offset.

A complete discussion of how we calculate each component of the budget neutrality adjustment appears in the November 2004 IPF PPS final rule (69 FR 66932 through 66933) and in the May 2006 IPF PPS final rule (71 FR 27044 through 27046).

a. Outlier Adjustment

Since the IPF PPS payment amount for each IPF includes applicable outlier amounts, we reduced the standardized Federal per diem base rate to account for aggregate IPF PPS payments estimated to be made as outlier payments. The outlier adjustment was calculated to be 2 percent. As a result, the standardized Federal per diem base rate was reduced by 2 percent to account for projected outlier payments.

b. Stop-Loss Provision Adjustment

As explained in the November 2004 IPF PPS final rule, we provided a stop-loss payment during the transition from cost-based reimbursement to the per diem payment system to ensure that an IPF's total PPS payments were no less than a minimum percentage of their TEFRA payment, had the IPF PPS not been implemented. We reduced the standardized Federal per diem base rate by the percentage of aggregate IPF PPS payments estimated to be made for stop-loss payments. As a result, the standardized Federal per diem base rate was reduced by 0.39 percent to account for stop-loss payments. Since the transition will be completed for RY 2009, for cost reporting periods beginning on or after January 1, 2008, IPFs will be paid 100 percent PPS and, therefore, the stop loss provision will no longer be applicable. We indicated in the November 2004 IPF PPS final rule that we would remove this 0.39 percent adjustment to the Federal per diem base rate after the transition (69 FR 66932). Therefore, for RY 2009, the Federal per diem base rate and ECT rates will be increased by 0.39 percent.

c. Behavioral Offset

As explained in the November 2004 IPF PPS final rule, implementation of the IPF PPS may result in certain changes in IPF practices especially with respect to coding for comorbid medical conditions. As a result, Medicare may make higher payments than assumed in our calculations. Accounting for these effects through an adjustment is commonly known as a behavioral offset.

Based on accepted actuarial practices and consistent with the assumptions made in other PPSs, we assumed in determining the behavioral offset that IPFs would regain 15 percent of potential ''losses'' and augment payment increases by 5 percent. We applied this actuarial assumption, which is based on our historical experience with new payment systems, to the estimated ''losses'' and ''gains'' among the IPFs. The behavioral offset for the IPF PPS was calculated to be 2.66 percent. As a result, we reduced the standardized Federal per diem base rate by 2.66 percent to account for behavioral changes. As indicated in the November 2004 IPF PPS final rule, we do not plan to change adjustment factors or projections, including the behavioral offset, until we analyze IPF PPS data. At that time, we will re-assess the accuracy of the behavioral offset along with the other factors impacting budget neutrality.

If we find that an adjustment is warranted, the percent difference may be applied prospectively to the established PPS rates to ensure the rates accurately reflect the payment level intended by the statute. In conducting this analysis, we will be interested in the extent to which improved documentation and coding of patients' principal and other diagnoses, which may not reflect real increases in underlying resource demands, has occurred under the PPS.

B. Update of the Federal Per Diem Base Rate and Electroconvulsive Therapy Rate

1. Market Basket for IPFs Reimbursed Under the IPF PPS

As described in the November 2004 IPF PPS final rule, the average per diem cost was updated to the midpoint of the implementation year (69 FR 66931). This updated average per diem cost of $724.43 was reduced by 17.46 percent to account for standardization to projected TEFRA payments for the implementation period, by 2 percent to account for outlier payments, by 0.39 percent to account for stop-loss payments, and by 2.66 percent to account for the behavioral offset. The Federal per diem base rate in the implementation year was $575.95, the per diem base rate for RY 2007 was $595.09, and the per diem base rate for RY 2008 was $614.99.

Applying the market basket increase of 3.2 percent, the stop-loss adjustment of 0.39 percent, and the wage index budget neutrality factor of 1.0010 yields a Federal per diem base rate of $637.78 for RY 2009. Similarly, applying the market basket increase, stop-loss adjustment, and wage index budget neutrality factor to the RY 2008 ECT rate yields an ECT rate of $274.58 for RY 2009.

a. Market Basket Index for the IPF PPS

The market basket index that was used to develop the IPF PPS was the excluded hospital with capital market basket. The market basket was based on 1997 Medicare cost report data and included data for Medicare participating IPFs, inpatient rehabilitation facilities (IRFs), long-term care hospitals (LTCHs), cancer, and children's hospitals.

We are presently unable to create a separate market basket specifically for psychiatric hospitals due to the following two reasons: (1) There is a very small sample size for free-standing psychiatric facilities; and (2) there are limited expense data for some categories on the free-standing psychiatric cost reports (for example, approximately 4 percent of free-standing psychiatric facilities reported contract labor cost data for FY 2002). However, since all IRFs, LTCHs, and IPFs are now paid under a PPS, we are updating PPS payments made under the IRF PPS, the IPF PPS, and the LTCH PPS, using a market basket reflecting the operating and capital cost structures for IRFs, IPFs, and LTCHs (hereafter referred to as the rehabilitation, psychiatric, long-term care (RPL) market basket).

We have excluded cancer and children's hospitals from the RPL market basket because their payments are based entirely on reasonable costs subject to rate-of-increase limits established under the authority of section 1886(b) of the Act, which are implemented in regulations at § 413.40. They are not reimbursed under a PPS. Also, the FY 2002 cost structures for cancer and children's hospitals are noticeably different than the cost structures of the IRFs, IPFs, and LTCHs.

The services offered in IRFs, IPFs, and LTCHs are typically more labor-intensive than those offered in cancer and children's hospitals. Therefore, the compensation cost weights for IRFs, IPFs, and LTCHs are larger than those in cancer and children's hospitals. In addition, the depreciation cost weights for IRFs, IPFs, and LTCHs are noticeably smaller than those for cancer and children's hospitals.

A complete discussion of the RPL market basket appears in the May 2006 IPF PPS final rule (71 FR 27046 through 27054).

b. Overview of the RPL Market Basket

The RPL market basket is a fixed weight, Laspeyres-type price index. A market basket is described as a fixed-weight index because it answers the question of how much it would cost, at another time, to purchase the same mix of goods and services purchased to provide hospital services in a base period. The effects on total expenditures resulting from changes in the quantity or mix of goods and services (intensity) purchased subsequent to the base period are not measured. In this manner, the market basket measures only pure price change. Only when the index is rebased would the quantity and intensity effects be captured in the cost weights. Therefore, we rebase the market basket periodically so that cost weights reflect changes in the mix of goods and services that hospitals purchase (hospital inputs) to furnish patient care between base periods.

The terms rebasing and revising, while often used interchangeably, actually denote different activities. Rebasing means moving the base year for the structure of costs of an input price index (for example, shifting the base year cost structure from FY 1997 to FY 2002). Revising means changing data sources, methodology, or price proxies used in the input price index. In 2006, we rebased and revised the market basket used to update the IPF PPS. Table 2 below sets forth the completed FY 2002-based RPL market basket including the cost categories, weights, and price proxies.

TABLE 2.—FY 2002-BASED RPL MARKET BASKET COST CATEGORIES, WEIGHTS, AND PROXIES

Expense categories	FY 2002-based RPL market basket cost weight	FY 2002-based RPL market basket price proxies
TOTAL	100.000	
Compensation	65.877	
Wages and Salaries *	52.895	ECI-Wages and Salaries, Civilian Hospital Workers.
Employee Benefits *	12.982	ECI-Benefits, Civilian Hospital Workers.
Professional Fees, Non-Medical 1A*	2.892	ECI-Compensation for Professional & Related occupations.
Utilities	0.656	
Electricity	0.351	PPI-Commercial Electric Power.
Fuel Oil, Coal, etc.	0.108	PPI-Commercial Natural Gas.
Water and Sewage	0.197	CPI–U—Water & Sewage Maintenance.
Professional Liability Insurance	1.161	CMS Professional Liability Premium Index.
All Other Products and Services	19.265	
All Other Products	13.323	
Pharmaceuticals	5.103	PPI Prescription Drugs.
Food: Direct Purchases	0.873	PPI Processed Foods & Feeds.
Food: Contract Service	0.620	CPI–U Food Away From Home.
Chemicals	1.100	PPI Industrial Chemicals.
Medical Instruments	1.014	PPI Medical Instruments & Equipment.
Photographic Supplies	0.096	PPI Photographic Supplies.
Rubber and Plastics	1.052	PPI Rubber & Plastic Products.
Paper Products	1.000	PPI Converted Paper & Paperboard Products.
Apparel	0.207	PPI Apparel.
Machinery and Equipment	0.297	PPI Machinery & Equipment.
Miscellaneous Products **	1.963	PPI Finished Goods less Food & Energy.
All Other Services	5.942	
Telephone	0.240	CPI–U Telephone Services.
Postage	0.682	CPI–U Postage.
All Other: Labor Intensive *	2.219	ECI-Compensation for Private Service Occupations.
All Other: Non-labor Intensive	2.800	CPI–U All Items.
Capital-Related Costs ***	10.149	
Depreciation	6.186	
Fixed Assets	4.250	Boeckh Institutional Construction 23-year useful life.
Movable Equipment	1.937	WPI Machinery & Equipment 11-year useful life.
Interest Costs	2.775	
Nonprofit	2.081	Average yield on domestic municipal bonds (Bond Buyer 20 bonds) vintage-weighted (23 years).
For Profit	0.694	Average yield on Moody's Aaa bond vintage-weighted (23 years).
Other Capital-Related Costs	1.187	CPI–U Residential Rent.

* Labor-related.
** Blood and blood-related products is included in miscellaneous products.
*** A portion of capital costs (0.46) are labor-related.
Note: Due to rounding, weights may not sum to total.

For RY 2009, we evaluated the price proxies using the criteria of reliability, timeliness, availability, and relevance. *Reliability* indicates that the index is based on valid statistical methods and has low sampling variability. *Timeliness* implies that the proxy is published regularly, preferably at least once a quarter. *Availability* means that the proxy is publicly available. Finally, *relevance* means that the proxy is applicable and representative of the cost category weight to which it is applied. The Consumer Price Indexes (CPIs), Producer Price Indexes (PPIs), and Employment Cost Indexes (ECIs) used as proxies in this market basket meet these criteria.

We note that the proxies are the same as those used for the FY 1997-based excluded hospital with capital market basket. Because these proxies meet our criteria of reliability, timeliness, availability, and relevance, we believe they continue to be the best measure of price changes for the cost categories. For further discussion on the FY 1997-based excluded hospital with capital market basket, see the August 1, 2002 IPPS final rule (67 FR at 50042).

The RY 2009 (that is, beginning July 1, 2008) update for the IPF PPS using the FY 2002-based RPL market basket and Global Insight's 1st quarter 2008 forecast for the market basket components is 3.2 percent. This includes increases in both the operating section and the capital section for the 12-month RY period (that is, July 1, 2008 through June 30, 2009). Global Insight, Inc. is a nationally recognized economic and financial forecasting firm that contracts with CMS to forecast the components of the market baskets.

2. Labor-Related Share

Due to the variations in costs and geographic wage levels, we believe that payment rates under the IPF PPS should continue to be adjusted by a geographic wage index. This wage index applies to the labor-related portion of the Federal per diem base rate, hereafter referred to as the labor-related share.

The labor-related share is determined by identifying the national average proportion of operating costs that are related to, influenced by, or vary with the local labor market. Using our current definition of labor-related, the labor-related share is the sum of the relative importance of wages and salaries, fringe benefits, professional fees, labor-intensive services, and a portion of the capital share from an appropriate market basket. We used the FY 2002-based RPL market basket cost weights

relative importance to determine the labor-related share for the IPF PPS.

The labor-related share for RY 2009 is the sum of the RY 2009 relative importance of each labor-related cost category, and reflects the different rates of price change for these cost categories between the base year (FY 2002) and RY 2009. The sum of the relative importance for the RY 2009 operating costs (wages and salaries, employee benefits, professional fees, and labor-intensive services) is 71.681, as shown in Table 3 below. The portion of capital that is influenced by the local labor market is estimated to be 46 percent, which is the same percentage used in the FY 1997-based IRF and IPF payment systems.

Since the relative importance for capital is 8.586 percent of the FY 2002-based RPL market basket in RY 2009, we are taking 46 percent of 8.586 percent to determine the labor-related share of capital for RY 2009. The result is 3.950 percent, which we added to 71.681 percent for the operating cost amount to determine the total labor-related share for RY 2009. Thus, the labor-related share that we are using for IPF PPS in RY 2009 is 75.631 percent. Table 3 below shows the RY 2009 labor-related share using the FY 2002-based RPL market basket. We note that this labor-related share is determined by using the same methodology as employed in calculating all previous IPF labor-related shares.

A complete discussion of the IPF labor-related share methodology appears in the November 2004 IPF PPS final rule (69 FR 66952 through 66954).

TABLE 3.—TOTAL LABOR-RELATED SHARE—RELATIVE IMPORTANCE FOR RY 2009

Cost category	FY 2002-based RPL Market Basket Relative Importance (Percent) RY 2008*	FY 2002-based RPL Market Basket Relative Importance (Percent) RY 2009**
Wages and salaries	52.588	52.645
Employee benefits	14.127	14.004
Professional fees	2.907	2.895
All other labor-intensive services	2.145	2.137
SUBTOTAL	71.767	71.681
Labor-related share of capital costs (0.46)	4.021	3.950
TOTAL	75.788	75.631

*Based on 2007 1st Quarter forecast.
**Based on 2008 1st Quarter forecast.

3. IPFs Paid Based on a Blend of the Reasonable Cost-Based Payments

As stated in the FY 2006 IPPS final rule (70 FR 47399), for IPFs that are transitioning to the fully Federal prospective payment rate, we will continue using the rebased and revised FY 2002-based excluded hospital market basket to update the reasonable cost-based portion of their payments.

For RY 2009, all IPFs will have fully transitioned to PPS payment and therefore, be paid based on 100 percent IPF PPS. The reasonable cost-based payment which is subject to TEFRA limits will no longer be applied.

IV. Update of the IPF PPS Adjustment Factors

A. Overview of the IPF PPS Adjustment Factors

The IPF PPS payment adjustments were derived from a regression analysis of 100 percent of the FY 2002 MedPAR data file, which contained 483,038 cases. We used the same results of this regression analysis to implement the November 2004 and May 2006 IPF PPS final rules. While we have since used more recent claims data to set the fixed dollar loss threshold amount, we use the same results of this regression analysis to update the IPF PPS for RY 2008 as well as RY 2009.

As previously stated, we do not plan to update the regression analysis until we analyze IPF PPS data. We plan to monitor claims and payment data independently from cost report data to assess issues, or whether changes in case-mix or payment shifts have occurred between free standing governmental, non-profit and private psychiatric hospitals, and psychiatric units of general hospitals, and other issues of importance to psychiatric facilities.

A complete discussion of the data file used for the regression analysis appears in the November 2004 IPF PPS final rule (69 FR 66935 through 66936).

B. Patient-Level Adjustments

In the May 2006 IPF PPS final rule (71 FR 27040) for RY 2007 and in the May 2007 IPF PPS notice (72 FR 25602) for RY 2008, we provided payment adjustments for the following patient-level characteristics: DRG assignment of the patient's principal diagnosis; selected comorbidities; patient age; and the variable per diem adjustments. As previously stated in the November 2004 IPF PPS final rule, we do not intend to update the adjustment factors derived from the regression analysis until we analyze IPF PPS data that include as much information as possible regarding the patient-level characteristics of the population that each IPF serves.

1. Adjustment for MS–DRG Assignment

The IPF PPS includes payment adjustments for the psychiatric DRG assigned to the claim based on each patient's principal diagnosis. In the May 4, 2007 IPF PPS update notice (72 FR 25602), we explained that the IPF PPS includes 15 diagnosis-related group (DRG) adjustment factors. The adjustment factors were expressed relative to the most frequently reported psychiatric DRG in FY 2002, that is, DRG 430 (psychoses). The coefficient values and adjustment factors were derived from the regression analysis.

In accordance with § 412.27(a), payment under the IPF PPS is conditioned on IPFs admitting ''only patients whose admission to the unit is required for active treatment, of an intensity that can be provided appropriately only in an inpatient hospital setting, of a psychiatric principal diagnosis that is listed in the Fourth Edition, Text Revision of the American Psychiatric Association's Diagnostic and Statistical Manual, (DSM–IV–TR) or in Chapter Five (''Mental Disorders'') of the

International Classification of Diseases, Ninth Revision, Clinical Modification [(ICD–9–CM)].'' IPF claims with a principal diagnosis included in Chapter Five of the ICD–9–CM or the DSM–IV–TR will be paid the Federal per diem base rate under the IPF PPS, and all other applicable adjustments, including any applicable DRG adjustment. Psychiatric principal diagnoses that do not group to one of the 15 designated DRGs still receive the Federal per diem base rate and all other applicable adjustments, but the payment would not include a DRG adjustment.

The Standards for Electronic Transaction final rule published in the **Federal Register** on August 17, 2000 (65 FR 50312) adopted the ICD–9–CM as the designated code set for reporting diseases, injuries, impairments, other health related problems, their manifestations, and causes of injury, disease, impairment, or other health related problems. Therefore, we use the ICD–9–CM as the designated code set for the IPF PPS.

We believe that it is important to maintain the same diagnostic coding and DRG classification for IPFs that are used under the IPPS for providing the same psychiatric care. Therefore, when the IPF PPS was implemented for cost reporting periods beginning on or after January 1, 2005, we adopted the same diagnostic code set and DRG patient classification system (that is, the CMS DRGs) that was utilized at the time under the hospital inpatient prospective payment system (IPPS). Since the inception of the IPF PPS, the DRGs used as the patient classification system under the IPF PPS have corresponded exactly with the CMS DRGs applicable under the IPPS for acute care hospitals.

Every year, changes to the ICD–9–CM coding system are addressed in the IPPS proposed and final rules. The changes to the codes are effective October 1 of each year and must be used by acute care hospitals under the IPPS to report diagnostic and procedure information. The IPF PPS has always incorporated those ICD–9–CM coding changes made in the annual IPPS update. The IPF PPS announces the changes in a change request, at the same time the coding changes to IPPS and LTCH PPS are announced. Those ICD–9–CM coding changes are also published in the next IPF PPS RY update, in either the proposed and final rules, or in an update notice.

As part of CMS' effort to better recognize resource use and the severity of illness among patients, CMS adopted the new Medicare Severity diagnosis related groups (MS–DRGs) for the IPPS in the FY 2008 IPPS final rule with comment period (72 FR 47130). By better accounting for patients' severity of illness in Medicare payment rates, the MS–DRGs encourage hospitals to improve their coding and documentation of patient diagnoses. The MS–DRGs, which are based on the CMS DRGs, represent a significant increase in the number of DRGs (from 538 to 745, an increase of 207). For a full description of the development and implementation of the MS–DRGs, see the FY 2008 IPPS final rule with comment period (72 FR 47141 through 47175). Also see Transmittal 1374 (change request 5748), dated November 7, 2007, for the ICD–9–CM coding changes.

All of the ICD–9–CM coding changes are reflected in the FY 2008 GROUPER, Version 25.0, effective for IPPS discharges occurring on or after October 1, 2007 through September 30, 2008. The GROUPER Version 25.0 software package assigns each case to a DRG on the basis of the diagnosis and procedure codes and demographic information (that is age, sex, and discharge status). The Medicare Code Editor (MCE) 24.0 uses the new ICD–9–CM codes to validate coding for IPPS discharges on or after October 1, 2007. For additional information on the GROUPER Version 25.0 and MCE 24.0, see Transmittal 1374, dated November 7, 2007. The IPF PPS has always used the same GROUPER and Code Editor as the IPPS. Therefore, the ICD–9–CM changes, which were reflected in the GROUPER Version 25.0 and MCE 24.0 on October 1, 2007, also became effective for the IPF PPS for discharges occurring on or after October 1, 2007.

The impact of the new MS–DRGs on the IPF PPS is negligible. Mapping the current DRGs to the MS–DRGs, there are now 17 MS–DRGs, instead of the original 15, for which the IPF PPS provides an adjustment. In addition, although the code set is updated, the same associated adjustment factors apply now that have been in place since implementation of the IPF PPS, with one exception that is unrelated to the update to the codes. When DRGs 521 and 522 were consolidated into MS–DRG 895, we carried over the adjustment factor of 1.02 from DRG 521 to the newly consolidated MS–DRG. This was done to reflect the higher claims volume under DRG 521, with more than eight times the number of claims than billed under DRG 522. The updated codes, which were effective October 1, 2007, must be used to report diagnostic or procedure information on IPF PPS claims. These updates are reflected in Table 4.

The official version of the ICD–9–CM is available on CD–ROM from the U.S. Government Printing Office. The FY 2008 version can be ordered by contacting the Superintendent of Documents, U.S. Government Printing Office, Department 50, Washington, DC 20402–9329, telephone number (202) 512–1800. Questions concerning the ICD–9–CM should be directed to Patricia E. Brooks, Co-Chairperson, ICD–9–CM Coordination and Maintenance Committee, CMS, Center for Medicare Management, Hospital and Ambulatory Policy Group, Division of Acute Care, Mailstop C4–08–06, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Further information concerning the official version of the ICD–9–CM can be found in the IPPS final rule with comment period, ''Changes to Hospital Inpatient Prospective Payment System and Fiscal Year 2008 Rates'' in the August 22, 2007 **Federal Register** (72 FR 47130) and at *http://www.cms.hhs.gov/QuarterlyProviderUpdates/downloads/cms1533fc.pdf.*

Table 4 below lists the FY 2008 new ICD–9–CM diagnosis codes that group to one of the 17 MS–DRGs for which the IPF PPS provides an adjustment. This table is only a listing of FY 2008 changes and does not reflect all of the currently valid and applicable ICD–9–CM codes classified in the MS–DRGs. When coded as a principal code or diagnosis, these codes receive the correlating MS–DRG adjustment.

TABLE 4.—FY 2008 NEW DIAGNOSIS CODES

Diagnosis code	Description	MS–DRG
315.34	Speech and language developmental delay due to hearing loss.	886
331.5	Idiopathic normal pressure hydrocephalus (INPH).	056, 057

Since we do not plan to update the regression analysis until we analyze IPF PPS data, the MS–DRG adjustment factors, shown in Table 5 below, will continue to be paid for RY 2009. Table 5 reflects the changes that were made to the DRGs under the IPF PPS in a crosswalk of DRGs prior to October 1, 2007 to the new MS–DRGs, which were effective October 1, 2007.

TABLE 5.—FY 2008 CROSSWALK OF CURRENT DRGS TO NEW MS–DRGS APPLICABLE FOR THE PRINCIPAL DIAGNOSIS ADJUSTMENT

(v24) DRG prior to 10/01/07	(v25) MS–DRG after 10/01/07	MS–DRG descriptions	Adjustment factor
	056	Degenerative nervous system disorders w MCC	
12	057	Degenerative nervous system disorders w/o MCC	1.05
	080	Nontraumatic stupor & coma w MCC	
023	081	Nontraumatic stupor & coma w/o MCC	1.07
424	876	O.R. procedure w principal diagnoses of mental illness	1.22
425	880	Acute adjustment reaction & psychosocial dysfunction	1.05
426	881	Depressive neuroses	0.99
427	882	Neuroses except depressive	1.02
428	883	Disorders of personality & impulse control	1.02
429	884	Organic disturbances & mental retardation	1.03
430	885	Psychoses	1.00
431	886	Behavioral & developmental disorders	0.99
432	887	Other mental disorder diagnoses	0.92
433	894	Alcohol/drug abuse or dependence, left AMA	0.97
521	895	Alcohol/drug abuse or dependence w rehabilitation therapy	1.02
	896	Alcohol/drug abuse or dependence w/o rehabilitation therapy w MCC	
523	897	Alcohol/drug abuse or dependence w/o rehabilitation therapy w/o MCC	0.88

2. Payment for Comorbid Conditions

The intent of the comorbidity adjustment is to recognize the increased costs associated with comorbid conditions by providing additional payments for certain concurrent medical or psychiatric conditions that are expensive to treat. In the May 2007 IPF PPS update notice (72 FR 25602), we explained that the IPF PPS includes 17 comorbidity categories and identified the new, revised and deleted ICD–9–CM diagnosis codes that generate a comborbid condition payment adjustment under the IPF PPS for RY 2008 (72 FR 25609–13).

Comorbidities are specific patient conditions that are secondary to the patient's principal diagnosis, and that require treatment during the stay. Diagnoses that relate to an earlier episode of care and have no bearing on the current hospital stay are excluded and should not be reported on IPF claims. Comorbid conditions must exist at the time of admission or develop subsequently, and affect the treatment received, affect the length of stay (LOS) or affect both treatment and LOS.

For each claim, an IPF may receive only one comorbidity adjustment per comorbidity category, but it may receive an adjustment for more than one comorbidity category. Billing instructions require that IPFs must enter the full ICD–9–CM codes for up to 8 additional diagnoses if they co-exist at the time of admission or develop subsequently.

The comorbidity adjustments were determined based on the regression analysis using the diagnoses reported by hospitals in FY 2002. The principal diagnoses were used to establish the DRG adjustment and were not accounted for in establishing the comorbidity category adjustments, except where ICD–9–CM ''code first'' instructions apply. As we explained in the May 2007 IPF PPS notice (72 FR 25602), the code first rule applies when a condition has both an underlying etiology and a manifestation due to the underlying etiology. For these conditions, the ICD–9–CM has a coding convention that requires the underlying conditions to be sequenced first followed by the manifestation. Whenever a combination exists, there is a ''use additional code'' note at the etiology code and a ''code first'' note at the manifestation code.

As discussed in the DRG section, it is our policy to maintain the same diagnostic coding set for IPFs that is used under the IPPS for providing the same psychiatric care. Although the ICD–9–CM code set has been updated, the same adjustment factors have been in place since the implementation of the IPF PPS. Table 6 below lists the FY 2008 new ICD diagnosis codes that impact the comorbidity adjustments under the IPF PPS. Table 6 is not a list of all currently valid ICD codes applicable for the IPF PPS comorbidity adjustments.

TABLE 6.—FY 2008 NEW ICD CODES APPLICABLE FOR THE COMORBIDITY ADJUSTMENTS DIAGNOSIS

Diagnosis code	Description	Comorbidity category
040.41	Infant botulism	Infectious Diseases.
040.42	Wound botulism	Infectious Diseases.
058.10	Roseola infantum, unspecified	Infectious Diseases.
058.11	Roseola infantum due to human herpesvirus 6	Infectious Diseases.
058.12	Roseola infantum due to human herpesvirus 7	Infectious Diseases.
058.21	Human herpesvirus 6 encephalitis	Infectious Diseases.
058.29	Other human herpesvirus encephalitis	Infectious Diseases.
058.81	Human herpesvirus 6 infection	Infectious Diseases.
058.82	Human herpesvirus 7 infection	Infectious Diseases.
058.89	Other human herpesvirus infection	Infectious Diseases.
200.30	Marginal zone lymphoma, unspecified site, extranodal and solid organ sites.	Oncology Treatment.
200.31	Marginal zone lymphoma, lymph nodes of head, face, and neck.	Oncology Treatment.
200.32	Marginal zone lymphoma, intrathoracic lymph nodes	Oncology Treatment.

TABLE 6.—FY 2008 NEW ICD CODES APPLICABLE FOR THE COMORBIDITY ADJUSTMENTS DIAGNOSIS—Continued

Diagnosis code	Description	Comorbidity category
200.33	Marginal zone lymphoma, intraabdominal lymph nodes	Oncology Treatment.
200.34	Marginal zone lymphoma, lymph nodes of axilla and upper limb.	Oncology Treatment.
200.35	Marginal zone lymphoma, lymph nodes of inguinal region and lower limb.	Oncology Treatment.
200.36	Marginal zone lymphoma, intrapelvic lymph nodes	Oncology Treatment.
200.37	Marginal zone lymphoma, spleen	Oncology Treatment.
200.38	Marginal zone lymphoma, lymph nodes of multiple sites	Oncology Treatment.
200.40	Mantle cell lymphoma, unspecified site, extranodal and solid organ sites.	Oncology Treatment.
200.41	Mantle cell lymphoma, lymph nodes of head, face, and neck	Oncology Treatment.
200.42	Mantle cell lymphoma, intrathoracic lymph nodes	Oncology Treatment.
200.43	Mantle cell lymphoma, intra-abdominal lymph nodes	Oncology Treatment.
200.44	Mantle cell lymphoma, lymph nodes of axilla and upper limb	Oncology Treatment.
200.45	Mantle cell lymphoma, lymph nodes of inguinal region and lower limb.	Oncology Treatment.
200.46	Mantle cell lymphoma, intrapelvic lymph nodes	Oncology Treatment.
200.47	Mantle cell lymphoma, spleen	Oncology Treatment.
200.48	Mantle cell lymphoma, lymph nodes of multiple sites	Oncology Treatment.
200.50	Primary central nervous system lymphoma, unspecified site, extranodal and solid organ sites.	Oncology Treatment.
200.51	Primary central nervous system lymphoma, lymph nodes of head, face, and neck.	Oncology Treatment.
200.52	Primary central nervous system lymphoma, intrathoracic lymph nodes.	Oncology Treatment.
200.53	Primary central nervous system lymphoma, intra-abdominal lymph nodes.	Oncology Treatment.
200.54	Primary central nervous system lymphoma, lymph nodes of axilla and upper limb.	Oncology Treatment.
200.55	Primary central nervous system lymphoma, lymph nodes of inguinal region and lower limb.	Oncology Treatment.
200.56	Primary central nervous system lymphoma, intrapelvic lymph nodes.	Oncology Treatment.
200.57	Primary central nervous system lymphoma, spleen	Oncology Treatment.
200.58	Primary central nervous system lymphoma, lymph nodes of multiple sites.	Oncology Treatment.
200.60	Anaplastic large cell lymphoma, unspecified site, extranodal and solid organ sites.	Oncology Treatment.
200.61	Anaplastic large cell lymphoma, lymph nodes of head, face, and neck.	Oncology Treatment.
200.62	Anaplastic large cell lymphoma, intrathoracic lymph nodes	Oncology Treatment.
200.63	Anaplastic large cell lymphoma, intra-abdominal lymph nodes	Oncology Treatment.
200.64	Anaplastic large cell lymphoma, lymph nodes of axilla and upper limb.	Oncology Treatment.
200.65	Anaplastic large cell lymphoma, lymph nodes of inguinal region and lower limb.	Oncology Treatment.
200.66	Anaplastic large cell lymphoma, intrapelvic lymph nodes	Oncology Treatment.
200.67	Anaplastic large cell lymphoma, spleen	Oncology Treatment.
200.68	Anaplastic large cell lymphoma, lymph nodes of multiple sites	Oncology Treatment.
200.70	Large cell lymphoma, unspecified site, extranodal and solid organ sites.	Oncology Treatment.
200.71	Large cell lymphoma, lymph nodes of head, face, and neck	Oncology Treatment.
200.72	Large cell lymphoma, intrathoracic lymph nodes	Oncology Treatment.
200.73	Large cell lymphoma, intra-abdominal lymph nodes	Oncology Treatment.
200.74	Large cell lymphoma, lymph nodes of axilla and upper limb	Oncology Treatment.
200.75	Large cell lymphoma, lymph nodes of inguinal region and lower limb.	Oncology Treatment.
200.76	Large cell lymphoma, intrapelvic lymph nodes	Oncology Treatment.
200.77	Large cell lymphoma, spleen	Oncology Treatment.
200.78	Large cell lymphoma, lymph nodes of multiple sites	Oncology Treatment.
202.70	Peripheral T cell lymphoma, unspecified site, extranodal and solid organ sites.	Oncology Treatment.
202.71	Peripheral T cell lymphoma, lymph nodes of head, face, and neck.	Oncology Treatment.
202.72	Peripheral T cell lymphoma, intrathoracic lymph nodes	Oncology Treatment.
202.73	Peripheral T cell lymphoma, intra-abdominal lymph nodes	Oncology Treatment.
202.74	Peripheral T cell lymphoma, lymph nodes of axilla and upper limb.	Oncology Treatment.
202.75	Peripheral T cell lymphoma, lymph nodes of inguinal region and lower limb.	Oncology Treatment.
202.76	Peripheral T cell lymphoma, intrapelvic lymph nodes	Oncology Treatment.
202.77	Peripheral T cell lymphoma, spleen	Oncology Treatment.

TABLE 6.—FY 2008 NEW ICD CODES APPLICABLE FOR THE COMORBIDITY ADJUSTMENTS DIAGNOSIS—Continued

Diagnosis code	Description	Comorbidity category
202.78	Peripheral T cell lymphoma, lymph nodes of multiple sites	Oncology Treatment.
233.30	Carcinoma in situ, unspecified female genital organ	Oncology Treatment.
233.31	Carcinoma in situ, vagina	Oncology Treatment.
233.32	Carcinoma in situ, vulva	Oncology Treatment.
233.39	Carcinoma in situ, other female genital organ	Oncology Treatment.

Table 7 lists the invalid ICD–9–CM codes no longer applicable for the comorbidity adjustment. .

TABLE 7.—FY 2008 INVALID ICD CODES NO LONGER APPLICABLE FOR THE COMORBIDITY ADJUSTMENT

Diagnosis code	Description	Comorbidity category.
233.3	Carcinoma in situ, other and unspecified female genital organs.	Oncology Treatment.

The seventeen comorbidity categories for which we are providing an adjustment, their respective codes, including the new FY 2008 ICD codes, and their respective adjustment factors, are listed below in Table 8. .

TABLE 8.—RY 2009 DIAGNOSIS CODES AND ADJUSTMENT FACTORS FOR COMORBIDITY CATEGORIES

Description of comorbidity	ICD–9CM code	Adjustment factor
Developmental Disabilities	317, 3180, 3181, 3182, and 319	1.04
Coagulation Factor Deficits	2860 through 2864	1.13
Tracheostomy	51900—through 51909 and V440	1.06
Renal Failure, Acute	5845 through 5849, 63630, 63631, 63632, 63730, 63731, 63732, 6383, 6393, 66932, 66934, 9585.	1.11
Renal Failure, Chronic	40301, 40311, 40391, 40402, 40412, 40413, 40492, 40493, 5853, 5854, 5855, 5856, 5859, 586, V451, V560, V561, and V562.	1.11
Oncology Treatment	1400 through 2399 with a radiation therapy code 92.21–92.29 or chemotherapy code 99.25.	1.07
Uncontrolled Diabetes-Mellitus with or without complications.	25002, 25003, 25012, 25013, 25022, 25023, 25032, 25033, 25042, 25043, 25052, 25053, 25062, 25063, 25072, 25073, 25082, 25083, 25092, and 25093.	1.05
Severe Protein Calorie Malnutrition	260 through 262	1.13
Eating and Conduct Disorders	3071, 30750, 31203, 31233, and 31234	1.12
Infectious Disease	01000 through 04110, 042, 04500 through 05319, 05440 through 05449, 0550 through 0770, 0782 through 07889, and 07950 through 07959.	1.07
Drug and/or Alcohol Induced Mental Disorders.	2910, 2920, 29212, 2922, 30300, and 30400	1.03
Cardiac Conditions	3910, 3911, 3912, 40201, 40403, 4160, 4210, 4211, and 4219	1.11
Gangrene	44024 and 7854	1.10
Chronic Obstructive Pulmonary Disease	49121, 4941, 5100, 51883, 51884, V4611 and V4612, V4613 and V4614	1.12
Artificial Openings-Digestive and Urinary	56960 through 56969, 9975, and V441 through V446	1.08
Severe Musculoskeletal and Connective Tissue Diseases.	6960, 7100, 73000 through 73009, 73010 through 73019, and 73020 through 73029.	1.09
Poisoning	96500 through 96509, 9654, 9670 through 9699, 9770, 9800 through 9809, 9830 through 9839, 986, 9890 through 9897.	1.11

3. Patient Age Adjustments

As explained in the November 2004 IPF PPS final rule, we analyzed the impact of age on per diem cost by examining the age variable (that is, the range of ages) for payment adjustments.

In general, we found that the cost per day increases with increasing age. The older age groups are more costly than the under 45 age group, the differences in per diem cost increase for each successive age group, and the differences are statistically significant.

For RY 2009, we are continuing to use the patient age adjustments currently in effect and shown in Table 9 below.

TABLE 9.—AGE GROUPINGS AND ADJUSTMENT FACTORS

Age	Adjustment factor
Under 45	1.00
45 and under 50	1.01
50 and under 55	1.02
55 and under 60	1.04

TABLE 9.—AGE GROUPINGS AND ADJUSTMENT FACTORS—Continued

Age	Adjustment factor
60 and under 65	1.07
65 and under 70	1.10
70 and under 75	1.13
75 and under 80	1.15
80 and over	1.17

4. Variable Per Diem Adjustments

We explained in the November 2004 IPF PPS final rule that a regression analysis indicated that per diem cost declines as the LOS increases (69 FR 66946). The variable per diem adjustments to the Federal per diem base rate account for ancillary and administrative costs that occur disproportionately in the first days after admission to an IPF.

We used a regression analysis to estimate the average differences in per diem cost among stays of different lengths. As a result of this analysis, we established variable per diem adjustments that begin on day 1 and decline gradually until day 21 of a patient's stay. For day 22 and thereafter, the variable per diem adjustment remains the same each day for the remainder of the stay. However, the adjustment applied to day 1 depends upon whether the IPF has a qualifying ED. If an IPF has a qualifying ED, it receives a 1.31 adjustment factor for day 1 of each patient stay. If an IPF does not have a qualifying ED, it receives a 1.19 adjustment factor for day 1 of the stay. The ED adjustment is explained in more detail in section IV.C.5 of this notice.

For RY 2009, we are continuing to use the variable per diem adjustment factors currently in effect as shown in Table 10 below.

A complete discussion of the variable per diem adjustments appears in the November 2004 IPF PPS final rule (69 FR 66946).

TABLE 10.—VARIABLE PER DIEM ADJUSTMENTS

Day-of-stay	Adjustment factor
Day 1—IPF Without a Qualified ED	1.19
Day 1—IPF With a Qualified ED	1.31
Day 2	1.12
Day 3	1.08
Day 4	1.05
Day 5	1.04
Day 6	1.02
Day 7	1.01
Day 8	1.01
Day 9	1.00
Day 10	1.00
Day 11	0.99
Day 12	0.99
Day 13	0.99
Day 14	0.99
Day 15	0.98
Day 16	0.97
Day 17	0.97
Day 18	0.96
Day 19	0.95
Day 20	0.95
Day 21	0.95
After Day 21	0.92

C. Facility-Level Adjustments

The IPF PPS includes facility-level adjustments for the wage index, IPFs located in rural areas, teaching IPFs, cost of living adjustments for IPFs located in Alaska and Hawaii, and IPFs with a qualifying ED.

1. Wage Index Adjustment

As discussed in the May 2006 IPF PPS final rule, and in the May 2007 notice, in providing an adjustment for area wage levels, the labor-related portion of an IPF's Federal prospective payment is adjusted using an appropriate wage index. An IPF's area wage index value is determined based on the actual location of the IPF in an urban or rural area as defined in § 412.64(b)(1)(ii)(A) through (C).

Since the inception of the IPF PPS, we have used hospital wage data in developing a wage index to be applied to IPFs. We are continuing that practice for RY 2009. We apply the wage index adjustment to the labor-related portion of the Federal rate, which is 75.631 percent. This percentage reflects the labor-related relative importance of the RPL market basket for RY 2009. The IPF PPS uses the pre-floor, pre-reclassified hospital wage index. Changes to the wage index are made in a budget neutral manner, so that updates do not increase expenditures.

For RY 2009, we are applying the most recent hospital wage index using the most recent hospital wage data, and applying an adjustment in accordance with our budget neutrality policy. This policy requires us to estimate the total amount of IPF PPS payments in RY 2008 and divide that amount by the total estimated IPF PPS payments in RY 2009. The estimated payments are based on FY 2006 IPF claims, inflated to the appropriate RY. This quotient is the wage index budget neutrality factor, and it is applied in the update of the Federal per diem base rate for RY 2009. The wage index budget neutrality factor for RY 2009 is 1.0010.

The wage index applicable for RY 2009 appears in Table 1 and Table 2 in Addendum B of this notice. As explained in the May 2006 IPF PPS final rule for RY 2007 (71 FR 27061), and in the IPF PPS May 2007 notice for RY 2008 (72 FR 25602), the IPF PPS applies the hospital wage index without a hold-harmless policy, and without an out-commuting adjustment or out-migration adjustment because we feel these policies apply only to the IPPS.

In the May 2006 IPF PPS final rule for RY 2007 (71 FR 27061), we adopted the changes discussed in the Office of Management and Budget (OMB) Bulletin No. 03–04 (June 6, 2003), which announced revised definitions for Metropolitan Statistical Areas (MSAs), and the creation of Micropolitan Statistical Areas and Combined Statistical Areas. In adopting the OMB Core-Based Statistical Area (CBSA) geographic designations, since the IPF PPS was already in a transition period from TEFRA payments to PPS payments, we did not provide a separate transition for the wage index.

As was the case in RY 2008, for RY 2009, we will be using the full CBSA-based wage index values as presented in Tables 1 and 2 in Addendum B of this notice.

Finally, we continue to use the same methodology discussed in the IPF PPS proposed rule for RY 2007 (71 FR 3633), and finalized in the May 2006 IPF PPS final rule for RY 2007 (71 FR 27061) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the RY 2009 IPF PPS wage index. For RY 2009, those areas consist of rural Massachusetts, rural Puerto Rico and urban CBSA (25980) Hinesville-Fort Stewart, GA.

A complete discussion of the CBSA labor market definitions appears in the May 2006 IPF PPS final rule (71 FR 27061 through 27067).

a. Clarification of New England Deemed Counties

We are also taking this opportunity to address the change in the treatment of ''New England deemed counties'' (that is, those counties in New England listed in § 412.64(b)(1)(ii)(B) that were deemed to be parts of urban areas under section 601(g) of the Social Security Amendments of 1983) that was made in the FY 2008 IPPS final rule with comment period. These counties include the following: Litchfield County, Connecticut; York County, Maine; Sagadahoc County, Maine; Merrimack County, New Hampshire; and Newport County, Rhode Island. Of these five ''New England deemed counties,'' three (York County, Sagadahoc County, and Newport County) are also included in metropolitan statistical areas defined by OMB and are considered urban under both the current IPPS and IPF PPS labor market area definitions in § 412.64(b)(1)(ii)(A). The remaining two, Litchfield County and Merrimack County, are geographically located in areas that are considered rural under the current IPPS (and IPF PPS) labor market area definitions (however, they have been previously deemed urban under the IPPS in certain circumstances as discussed below).

In the FY 2008 IPPS final rule with comment period (72 FR 47337 through 47338), § 412.64(b)(1)(ii)(B) was revised such that the two ''New England deemed counties'' that are still considered rural under the OMB definitions (Litchfield County, CT and Merrimack County, NH), are no longer considered urban effective for discharges occurring on or after October 1, 2007, and therefore, are considered rural in accordance with § 412.64(b)(1)(ii)(C). However, for purposes of payment under the IPPS, acute-care hospitals located within those areas are treated as being reclassified to their deemed urban area effective for discharges occurring on or after October 1, 2007 (see 72 FR 47337 through 47338). We note that the IPF PPS does not provide for such geographic reclassification (71 FR 27061 through 27067). Also in the FY 2008 IPPS final rule with comment period (72 FR 47338), we explained that we limited this policy change for the ''New England deemed counties'' only to IPPS hospitals, and any change to non-IPPS provider wage indices would be addressed in the respective payment system rules.

Accordingly, as stated above, we are taking the opportunity to clarify the treatment of ''New England deemed counties'' under the IPF PPS in this notice. As discussed above, under existing § 412.402 and § 412.424(d)(1)(i), an IPF's wage index is determined based on the location of the IPF in an urban or rural area as defined in § 412.64(b)(1)(ii)(A) through (C). Under existing § 412.402, an urban area under the IPF PPS is currently defined at § 412.64(b)(1)(ii)(A) and (B), and a rural area is defined at § 412.64(b)(1)(ii)(C) as any area outside of an urban area.

Historical changes to the labor market area/geographic classifications and annual updates to the wage index values under the IPF PPS are made effective July 1 each year. When we established the most recent IPF PPS payment rate update, effective for IPF discharges occurring on or after July 1, 2007 through June 30, 2008, we considered the ''New England deemed counties'' (including Litchfield County, CT and Merrimack County, NH) as urban for RY 2008 (in accordance with the definitions of urban and rural stated in the RY 2008 IPF PPS notice (72 FR 25602) and as evidenced by the inclusion of Litchfield County as one of the constituent counties of urban CBSA 25540 (Hartford-West Hartford-East Hartford, CT), and the inclusion of Merrimack County as one of the constituent counties of urban CBSA 31700 (Manchester-Nashua, NH)). (See 72 FR 25643 and 25651, respectively).

As noted above, existing § 412.402 indicates that the terms ''rural'' and ''urban'' are defined according to the definitions of those terms in § 412.64(b)(1)(ii)(A) through (C). Effective for discharges on or after July 1, 2008, § 412.64(b)(1)(ii)(B) is no longer applicable under the IPF PPS. Therefore, as Litchfield County, CT and Merrimack County, NH would be considered rural areas in accordance with our regulations at § 412.402, these two counties will be ''rural'' under the IPF PPS effective with the next update of the IPF PPS payment rates, which will be July 1, 2008 (under the IPF PPS effective for discharges on or after July 1, 2008, Litchfield County, CT and Merrimack County, NH are not urban under § 412.64(b)(1)(ii)(A) through (B), as revised under the RY 2008 IPPS final rule with comment period, and therefore are rural under § 412.64(b)(1)(ii)(C)). Litchfield County, CT and Merrimack County, NH will be considered ''rural'' effective for IPF PPS discharges occurring on or after July 1, 2008, and will no longer be considered as being part of urban CBSA 25540 (Hartford-West Hartford-East Hartford, CT) and urban CBSA 31700 (Manchester-Nashua, NH), respectively. We do not need to make any changes to our regulations to effectuate this change. We note that this policy is consistent with our policy of not taking into account IPPS geographic reclassifications in determining payments under the IPF PPS.

Four IPFs (two in Litchfield County, CT, and two in Merrimack County, NH) greatly benefit from treating the counties in which they are located as rural. These IPFs will begin to receive the rural facility adjustment and see an approximate 17 percent increase in payments. Five IPFs in NH that are currently treated as rural will experience an approximate 3 percent decrease in payments because the rural NH wage index value decreases when this change is made. One IPF in CT that is currently treated as rural will experience an approximate 4 percent decrease in payments because the rural CT wage index value is lower when this change is made.

The area wage index values for CBSAs 31700 and 25540 increase with the change. No other IPFs in CT or NH are affected by treating Litchfield and Merrimack Counties as rural.

b. Multi-Campus—Wage Index Data Collection

Historically, under the IPF PPS, we have established IPF PPS wage index values calculated from acute care IPPS hospital wage data without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. As we discussed in the May 2006 IPF PPS final rule (71 FR 27040), hospitals that are excluded from the IPPS are not required to provide wage-related information on the Medicare cost report (which is needed in order to make geographic reclassifications). Thus, the wage adjustment established under the IPF PPS is based on an IPF's actual location without regard to the urban or rural designation of any related or affiliated provider.

In the RY 2008 IPF PPS notice (72 FR 25602), we established IPF PPS wage index values for the RY 2008 calculated from the same data (collected from cost reports submitted by hospitals for cost reporting periods beginning during FY 2003) used to compute the FY 2007 acute care hospital inpatient wage index data without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act because that was the best available data at that time. The IPF PPS wage index values applicable for discharges occurring on or after July 1, 2007 through June 30, 2008 are shown in Table 1 (for urban areas) and Table 2 (for rural areas) in the Addendum to the RY 2008 IPF PPS final rule (72 FR 25627 through 25673).

For RY 2009, the same data (collected from cost reports submitted by hospitals for cost reporting periods beginning during FY 2004) used to compute the FY 2008 acute care hospital inpatient wage index data without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act was used to determine the applicable wage index values under the IPF PPS because these data (FY 2004) are the most recent complete data. (For information on the data used to compute the FY 2008 IPPS wage index, refer to the FY 2008 IPPS final rule with comment period (72 FR 47308 through 47309, 47315)). We are continuing to use IPPS wage data as a proxy to determine the IPF wage index values for RY 2009 because both IPFs and acute-care hospitals are required to meet the same certification criteria set forth in section 1861(e) of the Act to participate as a hospital in the Medicare program and they both compete in the same labor markets, and therefore, experience similar wage-related costs. We note that the IPPS wage data used to determine the RY 2009 IPF wage index values reflects our policy that was adopted under the IPPS beginning in FY 2008 that apportions the wage data for multi-campus hospitals located in different

labor market areas (CBSAs) to each CBSA where the campuses are located (see the FY 2008 IPPS final rule with comment period (72 FR 47317 through 47320)). The RY 2009 IPF PPS wage index values presented in this notice were computed consistent with our pre-reclassified IPPS wage index policy (that is, our historical policy of not taking into account IPPS geographic reclassifications in determining payments under the IPF PPS).

For the RY 2009 IPF PPS, the wage index was computed from IPPS wage data (submitted by hospitals for cost reporting periods beginning in FY 2004 (just like the FY 2008 IPPS wage index)), which allocated salaries and hours to the campuses of two multi-campus hospitals with campuses that are located in different labor areas, one in Massachusetts and another in Illinois. Thus, the RY 2009 IPF PPS wage index values for the following CBSAs are affected by this policy: Boston-Quincy, MA (CBSA 14484), Providence-New Bedford-Falls River, RI–MA (CBSA 39300), Chicago-Naperville-Joliet, IL (CBSA 16974) and Lake County-Kenosha County, IL–WI (CBSA 29404) (refer to Table 1 in the Addendum of this notice).

The table below describes the change in wage index value and the number of IPFs affected by the multi-campus hospital policy change:

TABLE 11.—IPFS AFFECTED BY THE MULTI-CAMPUS HOSPITAL POLICY CHANGE

CBSA	No. of IPFs	Wage index value change
14484 (Boston-Quincy, MA)	17	0.0153
16974 (Chicago-Naperville-Joliet, IL)	47	−0.002
29404 (Lake County-Kenosha County, IL–WI)	2	0.0288
39300 (Providence-New Bedford-Falls River, RI–MA)	12	−0.0111

c. OMB Bulletins

The Office of Management and Budget (OMB) publishes bulletins regarding CBSA changes, including changes to CBSA numbers and titles. In the May 2006 IPF PPS final rule for FY 2006 (71 FR 27040), we adopted the changes discussed in the OMB Bulletin No. 03–04 (June 6, 2003), available online at *http://www.whitehouse.gov/omb/bulletins/b03-04.html*. Those changes were strictly nomenclature changes and did not represent substantive changes to the CBSA-based designations. In this notice, we incorporate the CBSA nomenclature changes published in the most recent OMB bulletin that applies to the hospital wage data used to determine the current IPF PPS wage index, and we expect to do the same for all such OMB CBSA nomenclature changes in future IPF PPS rules and notices, as necessary. The OMB bulletins may be accessed online at *http://www.whitehouse.gov/omb/bulletins/index.html.*

2. Adjustment for Rural Location

In the November 2004 IPF PPS final rule, we provided a 17 percent payment adjustment for IPFs located in a rural area. This adjustment was based on the regression analysis, which indicated that the per diem cost of rural facilities was 17 percent higher than that of urban facilities after accounting for the influence of the other variables included in the regression. For RY 2009, we are applying a 17 percent payment adjustment for IPFs located in a rural area as defined at § 412.64(b)(1)(ii)(C). A complete discussion of the adjustment for rural locations appears in the November 2004 IPF PPS final rule (69 FR 66954).

3. Teaching Adjustment

In the November 2004 IPF PPS final rule, we implemented regulations at § 412.424(d)(1)(iii) to establish a facility-level adjustment for IPFs that are, or are part of, teaching institutions. The teaching adjustment accounts for the higher indirect operating costs experienced by facilities that participate in graduate medical education (GME) programs. Payments are made based on the number of full-time equivalent interns and residents training in the IPF.

Medicare makes direct GME payments (for direct costs such as resident and teaching physician salaries, and other direct teaching costs) to all teaching hospitals including those paid under the IPPS, and those that were once paid under the TEFRA rate-of-increase limits but are now paid under other PPSs. These direct GME payments are made separately from payments for hospital operating costs and are not part of the PPSs. The direct GME payments do not address the estimated higher indirect operating costs teaching hospitals may face.

For teaching hospitals paid under the TEFRA rate of increase limits, Medicare did not make separate medical education payments because payments to these hospitals were based on the hospitals' reasonable costs. Since payments under TEFRA were based on hospitals' reasonable costs, the higher indirect costs that might be associated with teaching programs would automatically have been factored into the TEFRA payments.

The results of the regression analysis of FY 2002 IPF data established the basis for the payment adjustments included in the November 2004 IPF PPS final rule. The results showed that the indirect teaching cost variable is significant in explaining the higher costs of IPFs that have teaching programs. We calculated the teaching adjustment based on the IPF's ''teaching variable,'' which is one plus the ratio of the number of full-time equivalent (FTE) residents training in the IPF (subject to limitations described below) to the IPF's average daily census (ADC).

In the regression analysis, the logarithm of the teaching variable had a coefficient value of 0.5150. We converted this cost effect to a teaching payment adjustment by treating the regression coefficient as an exponent and raising the teaching variable to a power equal to the coefficient value. We note that the coefficient value of 0.5150 was based on the regression analysis holding all other components of the payment system constant.

As with other adjustment factors derived through the regression analysis, we do not plan to rerun the regression analysis until we analyze IPF PPS data. Therefore, for RY 2009, we are retaining the coefficient value of 0.5150 for the teaching adjustment to the Federal per diem base rate.

A complete discussion of how the teaching adjustment was calculated appears in the November 2004 IPF PPS final rule (69 FR 66954 through 66957) and the May 2006 IPF PPS final rule (71 FR 27067 through 27070).

4. Cost of Living Adjustment for IPFs Located in Alaska and Hawaii

The IPF PPS includes a payment adjustment for IPFs located in Alaska and Hawaii based upon the county in which the IPF is located. As we explained in the November 2004 IPF PPS final rule, the FY 2002 data

demonstrated that IPFs in Alaska and Hawaii had per diem costs that were disproportionately higher than other IPFs. Other Medicare PPSs (for example, the IPPS and LTCH PPS) have adopted a cost of living adjustment (COLA) to account for the cost differential of care furnished in Alaska and Hawaii.

We analyzed the effect of applying a COLA to payments for IPFs located in Alaska and Hawaii. The results of our analysis demonstrated that a COLA for IPFs located in Alaska and Hawaii would improve payment equity for these facilities. As a result of this analysis, we provided a COLA in the November 2004 IPF PPS final rule.

In general, the COLA accounts for the higher costs in the IPF and eliminates the projected loss that IPFs in Alaska and Hawaii would experience absent the COLA. A COLA factor for IPFs located in Alaska and Hawaii is made by multiplying the non-labor share of the Federal per diem base rate by the applicable COLA factor based on the COLA area in which the IPF is located.

As previously stated, we will update the COLA factors according to updates established by the U.S. Office of Personnel Management (OPM), which issued a final rule to change COLA rates effective September 1, 2006.

The COLA factors are published on the OPM Web site at *http://www.opm.gov/oca/cola/rates.asp*.

We note that the COLA areas for Alaska are not defined by county as are the COLA areas for Hawaii. In 5 CFR 591.207, the OPM established the following COLA areas:

(a) City of Anchorage, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse;

(b) City of Fairbanks, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse;

(c) City of Juneau, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse;

(d) Rest of the State of Alaska.

In the November 2004 and May 2006 IPF PPS final rules, we showed only one COLA for Alaska because all four areas were the same amount (1.25). Effective September 1, 2006, the OPM updated the COLA amounts and there are now two different amounts for the Alaska COLA areas (1.24 and 1.25).

For RY 2009, IPFs located in Alaska and Hawaii will receive the updated COLA factors based on the COLA area in which the IPF is located and as shown in Table 12 below.

TABLE 12.— COLA FACTORS FOR ALASKA AND HAWAII IPFS

	Location	COLA
Alaska	Anchorage	1.24
	Fairbanks	1.24
	Juneau	1.24
	Rest of Alaska	1.25
Hawaii	Honolulu County	1.25
	Hawaii County	1.17
	Kauai County	1.25
	Maui County	1.25
	Kalawao County	1.25

5. Adjustment for IPFs With a Qualifying Emergency Department (ED)

Currently, the IPF PPS includes a facility-level adjustment for IPFs with qualifying EDs. We provide an adjustment to the standardized Federal per diem base rate to account for the costs associated with maintaining a full-service ED. The adjustment is intended to account for ED costs allocated to the hospital's distinct part psychiatric unit for preadmission services otherwise payable under the Medicare Outpatient Prospective Payment System (OPPS) furnished to a beneficiary during the day immediately preceding the date of admission to the IPF (see § 413.40(c)) and the overhead cost of maintaining the ED. This payment is a facility-level adjustment that applies to all IPF admissions (with the one exception as described below), regardless of whether a particular patient receives preadmission services in the hospital's ED.

The ED adjustment is incorporated into the variable per diem adjustment for the first day of each stay for IPFs with a qualifying ED. That is, IPFs with a qualifying ED receive an adjustment factor of 1.31 as the variable per diem adjustment for day 1 of each stay. If an IPF does not have a qualifying ED, it receives an adjustment factor of 1.19 as the variable per diem adjustment for day 1 of each patient stay.

The ED adjustment is made on every qualifying claim except as described below. As specified in § 412.424(d)(1)(v)(B), the ED adjustment is not made where a patient is discharged from an acute care hospital or CAH and admitted to the same hospital's or CAH's psychiatric unit. An ED adjustment is not made in this case because the costs associated with ED services are reflected in the DRG payment to the acute care hospital or through the reasonable cost payment made to the CAH. If we provided the ED adjustment in these cases, the hospital would be paid twice for the overhead costs of the ED (69 FR 66960).

Therefore, when patients are discharged from an acute care hospital or CAH and admitted to the same hospital's or CAH's psychiatric unit, the IPF receives the 1.19 adjustment factor as the variable per diem adjustment for the first day of the patient's stay in the IPF.

For RY 2009, we are retaining the 1.31 adjustment factor for IPFs with qualifying EDs. A complete discussion of the steps involved in the calculation of the ED adjustment factor appears in the November 2004 IPF PPS final rule (69 FR 66959 through 66960) and the May 2006 IPF PPS final rule (71 FR 27070 through 27072).

D. Other Payment Adjustments and Policies

For RY 2009, the IPF PPS includes the following payment adjustments: An outlier adjustment to promote access to IPF care for those patients who require expensive care and to limit the financial risk of IPFs treating unusually costly patients. In this section, we also explain the reason for ending the stop-loss provision that was applicable during the transition period.

1. Outlier Payments

In the November 2004 IPF PPS final rule, we implemented regulations at § 412.424(d)(3)(i) to provide a per-case payment for IPF stays that are extraordinarily costly. Providing additional payments to IPFs for extremely costly cases strongly improves the accuracy of the IPF PPS in determining resource costs at the patient and facility level. These additional

payments reduce the financial losses that would otherwise be incurred in treating patients who require more costly care and, therefore, reduce the incentives for IPFs to under-serve these patients.

We make outlier payments for discharges in which an IPF's estimated total cost for a case exceeds a fixed dollar loss threshold amount (multiplied by the IPF's facility-level adjustments) plus the Federal per diem payment amount for the case.

In instances when the case qualifies for an outlier payment, we pay 80 percent of the difference between the estimated cost for the case and the adjusted threshold amount for days 1 through 9 of the stay (consistent with the median LOS for IPFs in FY 2002), and 60 percent of the difference for day 10 and thereafter. We established the 80 percent and 60 percent loss sharing ratios because we were concerned that a single ratio established at 80 percent (like other Medicare PPSs) might provide an incentive under the IPF per diem payment system to increase LOS in order to receive additional payments. After establishing the loss sharing ratios, we determined the current fixed dollar loss threshold amount of $6,488 through payment simulations designed to compute a dollar loss beyond which payments are estimated to meet the 2 percent outlier spending target.

a. Update to the Outlier Fixed Dollar Loss Threshold Amount

In accordance with the update methodology described in § 412.428(d), we are updating the fixed dollar loss threshold amount used under the IPF PPS outlier policy. Based on the regression analysis and payment simulations used to develop the IPF PPS, we established a 2 percent outlier policy which strikes an appropriate balance between protecting IPFs from extraordinarily costly cases while ensuring the adequacy of the Federal per diem base rate for all other cases that are not outlier cases.

We believe it is necessary to update the fixed dollar loss threshold amount because analysis of the latest available data (that is, FY 2006 IPF claims) and rate increases indicates adjusting the fixed dollar loss amount is necessary in order to maintain an outlier percentage that equals 2 percent of total estimated IPF PPS payments.

In the May 2006 IPF PPS Final Rule (71 FR 27072), we describe the process by which we calculate the outlier fixed dollar loss threshold amount. We continue to use this process for RY 2009. We begin by simulating aggregate payments with and without an outlier policy, and applying an iterative process to a fixed dollar loss amount that will result in outlier payments being equal to 2 percent of total estimated payments under the simulation. Based on this process, for RY 2009, the IPF PPS will use $6,113 as the fixed dollar loss threshold amount in the outlier calculation in order to maintain the 2 percent outlier policy.

b. Statistical Accuracy of Cost-to-Charge Ratios

As previously stated, under the IPF PPS, an outlier payment is made if an IPF's cost for a stay exceeds a fixed dollar loss threshold amount. In order to establish an IPF's cost for a particular case, we multiply the IPF's reported charges on the discharge bill by its overall cost to charge ratio (CCR). This approach to determining an IPF's cost is consistent with the approach used under the IPPS and other PPSs. In FY 2004, we implemented changes to the IPPS outlier policy used to determine CCRs for acute care hospitals because we became aware that payment vulnerabilities resulted in inappropriate outlier payments. Under the IPPS, we established a statistical measure of accuracy for CCRs in order to ensure that aberrant CCR data did not result in inappropriate outlier payments.

As we indicated in the November 2004 IPF PPS final rule, because we believe that the IPF outlier policy is susceptible to the same payment vulnerabilities as the IPPS, we adopted an approach to ensure the statistical accuracy of CCRs under the IPF PPS (69 FR 66961). Therefore, we adopted the following procedure in the November 2004 IPF PPS final rule:

- We calculated two national ceilings, one for IPFs located in rural areas and one for IPFs located in urban areas. We computed the ceilings by first calculating the national average and the standard deviation of the CCR for both urban and rural IPFs.

To determine the rural and urban ceilings, we multiplied each of the standard deviations by 3 and added the result to the appropriate national CCR average (either rural or urban). The upper threshold CCR for IPFs in RY 2009 is 1.8041 for rural IPFs, and 1.6724 for urban IPFs, based on CBSA-based geographic designations. If an IPF's CCR is above the applicable ceiling, the ratio is considered statistically inaccurate and we assign the appropriate national (either rural or urban) median CCR to the IPF.

We are applying the national CCRs to the following situations:

++ New IPFs that have not yet submitted their first Medicare cost report.

++ IPFs whose CCR is in excess of 3 standard deviations above the corresponding national geometric mean (that is, above the ceiling).

++ Other IPFs for whom the Medicare contractor obtains inaccurate or incomplete data with which to calculate a CCR.

For new IPFs, we are using these national CCRs until the facility's actual CCR can be computed using the first tentatively settled or final settled cost report, which will then be used for the subsequent cost report period.

We are not making any changes to the procedures for ensuring the statistical accuracy of CCRs in RY 2009. However, we are updating the national urban and rural CCRs (ceilings and medians) for IPFs for RY 2009 based on the CCRs entered in the latest available IPF PPS Provider Specific File.

The national CCRs for RY 2009 are 0.686 for rural IPFs and 0.5370 for urban IPFs and will be used in each of the three situations listed above. These calculations are based on the IPF's location (either urban or rural) using the CBSA-based geographic designations.

A complete discussion regarding the national median CCRs appears in the November 2004 IPF PPS final rule (69 FR 66961 through 66964).

2. Stop-Loss Provision

In the November 2004 IPF PPS final rule, we implemented a stop-loss policy that reduces financial risk to IPFs expected to experience substantial reductions in Medicare payments during the period of transition to the IPF PPS. This stop-loss policy guarantees that each facility receives total IPF PPS payments that are no less than 70 percent of its TEFRA payments had the IPF PPS not been implemented.

This policy is applied to the IPF PPS portion of Medicare payments during the 3-year transition. During the first year, for transitioning IPFs, three-quarters of the payment was based on TEFRA and one-quarter on the IPF PPS payment amount. In the second year, one-half of the payment was based on TEFRA and one-half on the IPF PPS payment amount. In the third year, one-quarter of the payment was based on TEFRA and three-quarters on the IPF PPS. For cost report periods beginning on or after January 1, 2008, payments are based 100 percent on the IPF PPS.

The combined effects of the transition and the stop-loss policies ensure that the total estimated IPF PPS payments were no less than 92.5 percent in the first year, 85 percent in the second year,

and 77.5 percent in the third year. Under the 70 percent policy, in the third year, 25 percent of an IPF's payment is TEFRA payments, and 75 percent is IPF PPS payments, which are guaranteed to be at least 70 percent of the TEFRA payments. The resulting 77.5 percent of TEFRA payments is the sum of 25 percent and 75 percent times 70 percent (which equals 52.5 percent).

In the implementation year, the 70 percent of TEFRA payment stop-loss policy required a reduction in the standardized Federal per diem and ECT base rates of 0.39 percent in order to make the stop-loss payments budget neutral.

For the RY 2009 (that is for discharges occurring on or after July 1, 2008 through June 30, 2009), we are not making any changes to the stop-loss policy for IPFs continuing to transition. However, beginning January 1, 2009, the stop-loss provision will have ended for all IPFs because it was implemented to be effective for the duration of the transition period, and the transition period will be completed beginning January 1, 2009. As indicated in ''Section III. A.2.6 of this notice for RY 2009, we are increasing the Federal per diem base rate and ECT rate by 0.39 percent because these rates were reduced by 0.39 percent in the implementation year to ensure stop-loss payments were budget neutral.

V. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect. We can waive this procedure, however, if we find good cause that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest and we incorporate a statement of finding and its reasons in the notice.

We find it is unnecessary to undertake notice and comment rulemaking for the update in this notice because the update does not make any substantive changes in policy, but merely reflects the application of previously established methodologies. Therefore, under 5 U.S.C 553(b)(3)(B), for good cause, we waive notice and comment procedures.

VI. Collection of Information Requirement

This document does not impose any information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

VII. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 (as amended) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). For purposes of Title 5, United States Code, section 804(2), we estimate that this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of the rulemaking on the 1,669 IPFs.

The updates to the IPF labor-related share and wage indices are made in a budget neutral manner and thus have no effect on estimated costs to the Medicare program. Therefore, the estimated increased cost to the Medicare program is due to the updated IPF payment rates, which results in a $140 million increase in payments, and the transition from 75 percent PPS/25 percent TEFRA payments to 100 percent PPS payments, which results in a $20 million decrease in payments. The sunset of the stop-loss provision has a minimal impact on IPF payments in RY 2009. The distribution of these impacts is summarized in Table 13. The effect of the updates described in this notice result in an overall $120 million increase in payments from RY 2008 to RY 2009.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that the great majority of IPFs are small entities as that term is used in the RFA (include small businesses, nonprofit organizations, and small governmental jurisdictions). The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business (having revenues of less than $6.5 million to $31.5 million in any 1 year) (For details, see the Small Business Administration's Interim final rule that set forth size standards at 70 FR 72577, December 6, 2005.) Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IPFs or the proportion of IPFs' revenue that is derived from Medicare payments. Therefore, we assume that all IPFs are considered small entities. As shown in Table 13, we estimate that the net revenue impact of this notice on all IPFs is to increase payments by about 2.5 percent. Thus, we anticipate that this notice will not have a significant impact on a substantial number of small entities. Medicare contractors are not considered to be small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. With the exception of hospitals located in certain New England counties, for purposes of section 1102(b) of the Act, we previously defined a small rural hospital as a hospital with fewer than 100 beds that is located outside of a Metropolitan Statistical Area (MSA) or New England County Metropolitan Area (NECMA). However, under the new labor market definitions, we no longer employ NECMAs to define urban areas in New England. For purposes of this analysis, we now define a small rural hospital as a hospital with fewer than 100 beds that is located outside of an MSA. Therefore, the Secretary certifies that this notice has a significant impact on the operations of a substantial number of small rural hospitals.

We have determined that this notice will have a significant and positive impact on substantial number of hospitals classified as located in rural areas. Since the impact on rural hospitals is positive, we did not consider alternatives to reduce burden on these IPFs.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess

anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2008, that threshold is approximately $130 million. This notice will not impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, of $130 million Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this notice under the criteria set forth in Executive Order 13132 and have determined that the notice will not have any substantial impact on the rights, roles, and responsibilities of State, local, or tribal governments.

B. Anticipated Effects

We discuss below the historical background of the IPF PPS and the impact of this notice on the Federal Medicare budget and on IPFs.

1. Budgetary Impact

As discussed in the November 2004 and May 2006 IPF PPS final rules, we applied a budget neutrality factor to the Federal per diem and ECT base rates to ensure that total estimated payments under the IPF PPS in the implementation period would equal the amount that would have been paid if the IPF PPS had not been implemented. The budget neutrality factor includes the following components: Outlier adjustment, stop-loss adjustment, and the behavioral offset. In accordance with § 412.424(c)(3)(ii), we will evaluate the accuracy of the budget neutrality adjustment within the first 5 years after implementation of the payment system. We may make a one-time prospective adjustment to the Federal per diem and ECT base rates to account for differences between the historical data on cost-based TEFRA payments (the basis of the budget neutrality adjustment) and estimates of TEFRA payments based on actual data from the first year of the IPF PPS. As part of that process, we will re-assess the accuracy of all of the factors impacting budget neutrality.

In addition, as discussed in section IV.C.1. of this notice, we are using the wage index and labor market share in a budget neutral manner by applying a wage index budget neutrality factor to the Federal per diem and ECT base rates. Thus, the budgetary impact to the Medicare program by the update of the IPF PPS will be due to the market basket updates (see section III.B. of this notice) and the planned update of the payment blend discussed below.

2. Impacts on Providers

To understand the impact of the changes to the IPF PPS discussed in this notice on providers, it is necessary to compare estimated payments under the IPF PPS rates and factors for RY 2009 to estimated payments under the IPF PPS rates and factors for RY 2008. The estimated payments for RY 2008 are a blend of: 25 percent of the facility-specific TEFRA payment and 75 percent of the IPF PPS payment with stop-loss payment. The estimated payments for the RY 2009 IPF PPS will be 100 percent of the IPF PPS payment and the stop-loss payment will no longer be applied. We determined the percent change of estimated RY 2009 IPF PPS payments to estimated RY 2008 IPF PPS payments for each category of IPFs. In addition, for each category of IPFs, we have included the estimated percent change in payments resulting from the wage index changes for the RY 2009 IPF PPS, the market basket update to IPF PPS payments, and the transition blend for the RY 2009 IPF PPS payment and the facility-specific TEFRA payment.

To illustrate the impacts of the final RY 2009 changes in this update notice, our analysis begins with a RY 2008 baseline simulation model based on FY 2006 IPF payments inflated to the midpoint of RY 2008 using Global Insight's most recent forecast of the market basket update (see section III.B. of this notice); the estimated outlier payments in RY 2008; the estimated stop-loss payments in RY 2008; the CBSA designations for IPFs based on OMB's MSA definitions after June 2003; the FY 2007 pre-floor, pre-reclassified hospital wage index; the RY 2008 labor-market share; and the RY 2008 percentage amount of the rural adjustment. During the simulation, the outlier payment is maintained at the target of 2 percent of total PPS payments.

Each of the following changes is added incrementally to this baseline model in order for us to isolate the effects of each change:

- The FY 2008 pre-floor, pre-reclassified hospital wage index and RY 2009 final labor-related share.
- A market basket update of 3.2 percent resulting in an update to the IPF PPS base rates.
- The transition to 100 percent IPF PPS payments.
- The removal of the stop-loss provision.
- Our final comparison illustrates the percent change in payments from RY 2008 (that is, July 1, 2007 to June 30, 2008) to RY 2009 (that is, July 1, 2008 to June 30, 2009).

TABLE 13.—PROJECTED IMPACTS

Facility by type	Number of facilities	CBSA wage index and labor share (percent)	Market basket (percent)	Transition blend (percent)	Stop-loss (percent)	Total (percent)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
All Facilities	1,669	0.0	3.2	−0.5	−0.1	2.5
Urban	1,301	0.0	3.2	−0.5	0.0	2.6
Rural	368	0.0	3.2	−0.6	−0.3	2.1
Urban unit	931	0.0	3.2	−2.6	−0.1	0.4
Rural unit	308	0.0	3.2	−2.4	−0.5	0.1
Freestanding IPF By Type of Ownership:						
Urban Psychiatric Hospitals:						
Government	141	0.1	3.2	6.7	0.3	10.5
Non-Profit	83	0.0	3.2	0.2	−0.1	3.3
For-Profit	145	−0.1	3.2	5.6	0.1	9.0
Rural Psychiatric Hospitals:						
Government	40	−0.1	3.2	8.3	0.4	12.1
Non-Profit	7	0.2	3.2	0.9	0.4	4.5
For-Profit	14	−0.4	3.2	5.5	0.4	8.4

TABLE 13.—PROJECTED IMPACTS

Facility by type	Number of facilities	CBSA wage index and labor share (percent)	Market basket (percent)	Transition blend (percent)	Stop-loss (percent)	Total (percent)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
By Teaching Status:						
Non-teaching	1,424	0.0	3.2	−0.4	−0.1	2.6
Less than 10% interns and residents to beds	137	0.0	3.2	−0.4	0.3	3.1
10% to 30% interns and residents to beds	73	0.0	3.2	−2.0	−0.1	1.0
More than 30% interns and residents to beds	35	0.0	3.2	−1.6	−0.5	1.1
By Region:						
New England	121	0.4	3.2	−2.4	0.0	1.2
Mid-Atlantic	284	−0.1	3.2	1.9	0.2	5.2
South Atlantic	226	0.0	3.2	−0.5	0.1	2.8
East North Central	292	−0.2	3.2	−2.3	−0.3	0.3
East South Central	164	−0.4	3.2	−0.2	0.0	2.5
West North Central	141	0.1	3.2	−1.7	−0.2	1.4
West South Central	228	−0.1	3.2	−1.1	−0.5	1.3
Mountain	74	−0.3	3.2	−1.7	−0.7	0.5
Pacific	132	0.5	3.2	0.4	0.0	4.2
By Bed Size:						
Psychiatric Hospitals:						
Less than 12 beds	24	−0.1	3.2	−1.9	0.0	1.1
12 to 25 beds	62	−0.1	3.2	1.2	0.1	4.2
25 to 50 beds	94	−0.2	3.2	2.4	−0.5	4.9
50 to 75 beds	77	0.0	3.2	5.1	0.2	8.6
More than 75 beds	174	0.1	3.2	6.5	0.4	10.4
Psychiatric Units:						
Less than 12 beds	489	0.0	3.2	−4.6	−0.7	−2.4
12 to 25 beds	430	0.1	3.2	−2.9	−0.3	0.0
25 to 50 beds	217	0.0	3.2	−2.0	0.2	1.3
50 to 75 beds	55	−0.1	3.2	−1.8	0.3	1.4
More than 75 beds	47	0.0	3.2	0.7	0.3	4.2

3. Results

Table 1 above displays the results of our analysis. The table groups IPFs into the categories listed below based on characteristics provided in the Provider of Services (POS) file, the IPF provider specific file, and cost report data from HCRIS:

- Facility Type
- Location
- Teaching Status Adjustment
- Census Region
- Size

The top row of the table shows the overall impact on the 1,669 IPFs included in the analysis.

In column 3, we present the effects of the budget-neutral update to the labor-related share and the wage index adjustment under the CBSA geographic area definitions announced by OMB in June 2003. This is a comparison of the simulated RY 2009 payments under the FY 2008 hospital wage index under CBSA classification and associated labor-related share to the simulated RY 2008 payments under the FY 2007 hospital wage index under CBSA classifications and associated labor-related share. There is no projected change in aggregate payments to IPFs, as indicated in the first row of column 3. There would, however, be small distributional effects among different categories of IPFs. For example, rural for-profit IPFs and IPFs located in the East South Central region will experience a 0.4 percent decrease in payments. IPFs located in the Pacific region will receive the largest increase of 0.5 percent.

In column 4, we present the effects of the market basket update to the IPF PPS payments by applying the TEFRA and PPS updates to payments under the revised budget neutrality factor and labor-related share and wage index under CBSA classification. In the aggregate this update is projected to be a 3.2 percent increase in overall payments to IPFs.

In column 5, we present the effects of the payment change in transition blend percentages to the final year of the transition (TEFRA Rate Percentage = 0 percent, IPF PPS Federal Rate Percentage = 100 percent) from the third year of the transition (TEFRA Rate Percentage = 25 percent, IPF PPS Federal Rate Percentage = 75 percent) of the IPF PPS under the revised budget neutrality factor, labor-related share and wage index under CBSA classification, and TEFRA and PPS updates to RY 2008. The overall aggregate effect, across all hospital groups, is projected to be a 0.5 percent decrease in payments to IPFs. There are distributional effects of these changes among different categories of IPFs. Government psychiatric hospitals will receive the largest increase, with rural government hospitals receiving an 8.3 percent increase and urban government hospitals receiving a 6.7 percent increase. In addition, psychiatric hospitals with more than 75 beds will receive a 6.5 percent increase. Alternatively, psychiatric units with fewer than 12 beds will receive the largest decrease of 4.6 percent.

In column 6, we present the effects of the removal of the stop-loss provision. Stop-loss payments are no longer applicable when payments are 100 percent IPF PPS payments. However, all IPFs will receive an increase in the rates of 0.39 percent. The overall aggregate effect, across all hospital groups, is projected to be a 0.1 percent decrease in payments to IPFs. While stop-loss payments were intended to be budget neutral, we slightly underestimated the percentage by which we needed to decrease the Federal per diem base rate in the implementation year. Therefore,

the aggregate impact of removing the stop-loss provision is a 0.1 percent decrease in payments instead of 0.0 percent. There are distributional effects of these changes among different categories of IPFs. Rural freestanding psychiatric hospitals will receive the largest increases, with rural government hospitals, rural non-profit hospitals, and rural for-profit hospitals each receiving a 0.4 percent increase. Alternatively, psychiatric units with fewer than 12 beds and IPFs located in the Mountain region will receive the largest decrease of 0.7 percent.

Column 7 compares our estimates of the changes reflected in this notice for RY 2009, to our estimates of payments for RY 2008 (without these changes). This column reflects all RY 2009 changes relative to RY 2008 (as shown in columns 3 through 6). The average increase for all IPFs is approximately 2.5 percent. This increase includes the effects of the market basket update resulting in a 3.2 percent increase in total RY 2009 payments, a 0.5 percent decrease in RY 2009 payments for the transition blend, and a 0.1 percent decrease in RY 2009 payments for the removal of the stop-loss provision.

Overall, the largest payment increase is projected to be among government IPFs. Rural government psychiatric hospitals will receive a 12.1 percent increase and urban government psychiatric hospitals will receive a 10.5 percent increase. In addition, psychiatric hospitals with more than 75 beds will receive a 10.4 percent increase. Psychiatric units with fewer than 12 beds will receive a 2.4 percent decrease.

4. Effect on the Medicare Program

Based on actuarial projections resulting from our experience with other PPSs, we estimate that Medicare spending (total Medicare program payments) for IPF services over the next 5 years would be as follows:

TABLE 14.—ESTIMATED PAYMENTS

Rate year	Dollars in millions
July 1, 2008 to June 30, 2009	$4,584

TABLE 14.—ESTIMATED PAYMENTS—Continued

Rate year	Dollars in millions
July 1, 2009 to June 30, 2010	4,799
July 1, 2010 to June 30, 2011	5,055
July 1, 2011 to June 30, 2012	5,373
July 1, 2012 to June 30, 2013	5,722

These estimates are based on the current estimate of increases in the RPL market basket as follows:

- 3.2 percent for RY 2009;
- 2.9 percent for RY 2010;
- 3.0 percent for RY 2011;
- 3.2 percent for RY 2012; and
- 3.2 percent for RY 2013.

We estimate that there would be a change in fee-for-service Medicare beneficiary enrollment as follows:

- −0.3 percent in RY 2009;
- 0.2 percent in RY 2010;
- 0.5 percent in RY 2011;
- 1.5 percent in RY 2012; and
- 2.5 percent in RY 2013.

5. Effect on Beneficiaries

Under the IPF PPS, IPFs will receive payment based on the average resources consumed by patients for each day. We do not expect changes in the quality of care or access to services for Medicare beneficiaries under the RY 2009 IPF PPS. In fact, we believe that access to IPF services will be enhanced due to the patient and facility level adjustment factors, all of which are intended to adequately reimburse IPFs for expensive cases. Finally, the outlier policy is intended to assist IPFs that experience high-cost cases.

C. Alternatives Considered

The statute does not specify an update strategy for the IPF PPS and is broadly written to give the Secretary discretion in establishing an update methodology. Therefore, we are updating the IPF PPS similar to the update approach used in other hospital PPSs and as published in the November 15, 2004, final rule. We note that this notice does not initiate any policy changes with regard to the IPF PPS; rather, it simply provides an update to the rates for RY 2009. Therefore, no other options were considered.

D. Accounting Statement

As required by OMB Circular A–4 (available at: *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf)*, in Table 15 below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this notice. This table provides our best estimate of the increase in Medicare payments under the IPF PPS as a result of the changes presented in this notice based on the data for 1,669 IPFs in our database. All expenditures are classified as transfers to Medicare providers (that is, IPFs).

TABLE 15.—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE 2008 IPF PPS RY TO THE 2009 IPF PPS RY

[in Millions]

Category	Transfers
Annualized Monetized Transfers.	$120.
From Whom To Whom?	Federal Government To IPFs Medicare Providers.

E. Conclusion

This notice does not initiate any policy changes with regard to the IPF PPS; rather, it simply provides an update to the rates for RY 2009 using established methodologies. In accordance with the provisions of Executive Order 12866, this rule was previously reviewed by OMB.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: March 14, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: April 4, 2008.

Michael O. Leavitt,

Secretary.

Addendum A--Rate and Adjustment Factors

Per Diem Rate:

Federal Per Diem Base Rate	$637.78
Labor Share (0.75631)	$482.36
Non-Labor Share (0.24369)	$155.42

Fixed Dollar Loss Threshold Amount:

$6,113

Wage Index Budget Neutrality Factor:

1.0010

Facility Adjustments:

Rural Adjustment Factor	1.17
Teaching Adjustment Factor	0.5150
Wage Index	Pre-Reclassified Hospital Wage Index (FY2008)

Cost of Living Adjustments (COLAs):

Alaska	
Anchorage	1.24
Fairbanks	1.24
Juneau	1.24
Rest of Alaska	1.25
Hawaii	
Honolulu County	1.25
Hawaii County	1.17
Kauai County	1.25
Maui County	1.25
Kalawao County	1.25

Patient Adjustments:

ECT – Per Treatment	$274.58

Variable Per Diem Adjustments:

	Adjustment Factor
Day 1 -- Facility Without a Qualifying Emergency Department	1.19
Day 1 -- Facility With a Qualifying Emergency Department	1.31
Day 2	1.12
Day 3	1.08
Day 4	1.05
Day 5	1.04
Day 6	1.02
Day 7	1.01
Day 8	1.01
Day 9	1.00
Day 10	1.00
Day 11	0.99
Day 12	0.99
Day 13	0.99
Day 14	0.99
Day 15	0.98
Day 16	0.97
Day 17	0.97
Day 18	0.96
Day 19	0.95
Day 20	0.95
Day 21	0.95
After Day 21	0.92

Age Adjustments:

Age (in years)	Adjustment Factor
Under 45	1.00
45 and under 50	1.01
50 and under 55	1.02
55 and under 60	1.04
60 and under 65	1.07
65 and under 70	1.10
70 and under 75	1.13
75 and under 80	1.15
80 and over	1.17

DRG Adjustments:

(v24) DRG Prior to 10/01/07	(v25) MS-DRG After 10/01/07	MS-DRG Descriptions	Adjustment Factor
	056	Degenerative nervous system disorders w MCC	
12	057	Degenerative nervous system disorders w/o MCC	1.05
	080	Nontraumatic stupor & coma w MCC	
023	081	Nontraumatic stupor & coma w/o MCC	1.07
424	876	O.R. procedure w principal diagnoses of mental illness	1.22
425	880	Acute adjustment reaction & psychosocial dysfunction	1.05
426	881	Depressive neuroses	0.99
427	882	Neuroses except depressive	1.02
428	883	Disorders of personality & impulse control	1.02
429	884	Organic disturbances & mental retardation	1.03
430	885	Psychoses	1.00
431	886	Behavioral & developmental disorders	0.99
432	887	Other mental disorder diagnoses	0.92
433	894	Alcohol/drug abuse or dependence, left AMA	0.97
521-522	895	Alcohol/drug abuse or dependence w rehabilitation therapy	1.02
	896	Alcohol/drug abuse or dependence w/o rehabilitation therapy w MCC	
523	897	Alcohol/drug abuse or dependence w/o rehabilitation therapy w/o MCC	0.88

Comorbidity Adjustments:

Comorbidity	Adjustment Factor
Developmental Disabilities	1.04
Coagulation Factor Deficit	1.13
Tracheostomy	1.06
Eating and Conduct Disorders	1.12
Infectious Diseases	1.07
Renal Failure, Acute	1.11
Renal Failure, Chronic	1.11
Oncology Treatment	1.07
Uncontrolled Diabetes Mellitus	1.05
Severe Protein Malnutrition	1.13
Drug/Alcohol Induced Mental Disorders	1.03
Cardiac Conditions	1.11
Gangrene	1.10
Chronic Obstructive Pulmonary Disease	1.12
Artificial Openings – Digestive & Urinary	1.08
Severe Musculoskeletal & Connective Tissue Diseases	1.09
Poisoning	1.11

Addendum B – RY 2009 CBSA Wage Index Tables

In this addendum, we provide Tables 1 and 2 which indicate the CBSA-based wage index values for urban and rural providers.

Table 1-- RY 2009 Wage Index for Urban Areas Based On CBSA Labor Market Areas

CBSA Code	Urban Area (Constituent Counties)	Wage Index
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.7957
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3448
10420	Akron, OH Portage County, OH Summit County, OH	0.8794
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.8514
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8588
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9554
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.7979
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	0.9865
11020	Altoona, PA Blair County, PA	0.8618
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.9116
11180	Ames, IA Story County, IA	1.0046
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.1913
11300	Anderson, IN Madison County, IN	0.8827
11340	Anderson, SC Anderson County, SC	0.9086
11460	Ann Arbor, MI Washtenaw County, MI	1.0539
11500	Anniston-Oxford, AL Calhoun County, AL	0.7926
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9598
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9185
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	1.0517

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Atlanta-Sandy Springs-Marietta, GA	
	Barrow County, GA	
	Bartow County, GA	
	Butts County, GA	
	Carroll County, GA	
	Cherokee County, GA	
	Clayton County, GA	
	Cobb County, GA	
	Coweta County, GA	
	Dawson County, GA	
	DeKalb County, GA	
	Douglas County, GA	
	Fayette County, GA	
	Forsyth County, GA	
	Fulton County, GA	
	Gwinnett County, GA	
	Haralson County, GA	
	Heard County, GA	
	Henry County, GA	
	Jasper County, GA	
	Lamar County, GA	
	Meriwether County, GA	
	Newton County, GA	
	Paulding County, GA	
	Pickens County, GA	
	Pike County, GA	
	Rockdale County, GA	
	Spalding County, GA	
12060	Walton County, GA	0.9828
	Atlantic City, NJ	
12100	Atlantic County, NJ	1.2198
	Auburn-Opelika, AL	
12220	Lee County, AL	0.8090
	Augusta-Richmond County, GA-SC	
	Burke County, GA	
	Columbia County, GA	
	McDuffie County, GA	
	Richmond County, GA	
	Aiken County, SC	
12260	Edgefield County, SC	0.9645
	Austin-Round Rock, TX	
	Bastrop County, TX	
	Caldwell County, TX	
	Hays County, TX	
	Travis County, TX	
12420	Williamson County, TX	0.9544
	Bakersfield, CA	
12540	Kern County, CA	1.1051
	Baltimore-Towson, MD	
	Anne Arundel County, MD	
	Baltimore County, MD	
	Carroll County, MD	
	Harford County, MD	
	Howard County, MD	
	Queen Anne's County, MD	
12580	Baltimore City, MD	1.0134
	Bangor, ME	
12620	Penobscot County, ME	0.9978
	Barnstable Town, MA	
12700	Barnstable County, MA	1.2603
	Baton Rouge, LA	
	Ascension Parish, LA	
	East Baton Rouge Parish, LA	
	East Feliciana Parish, LA	
	Iberville Parish, LA	
	Livingston Parish, LA	
	Pointe Coupee Parish, LA	
	St. Helena Parish, LA	
	West Baton Rouge Parish, LA	
12940	West Feliciana Parish, LA	0.8034
	Battle Creek, MI	
12980	Calhoun County, MI	1.0179
	Bay City, MI	
13020	Bay County, MI	0.8897
	Beaumont-Port Arthur, TX	
	Hardin County, TX	
	Jefferson County, TX	
13140	Orange County, TX	0.8531
	Bellingham, WA	
13380	Whatcom County, WA	1.1474
	Bend, OR	
13460	Deschutes County, OR	1.0942
	Bethesda-Gaithersburg-Frederick, MD	
	Frederick County, MD	
13644	Montgomery County, MD	1.0511

CBSA Code	Urban Area (Constituent Counties)	Wage Index
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8666
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.8949
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8898
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.7225
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8192
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.8915
14060	Bloomington-Normal, IL McLean County, IL	0.9325
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9465
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.1792
14500	Boulder, CO Boulder County, CO	1.0426
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8159
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.0904
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2735
15180	Brownsville-Harlingen, TX Cameron County, TX	0.8914
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9475
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9568
15500	Burlington, NC Alamance County, NC	0.8747
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	0.9660
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1215
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0411
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.8935
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9396
16180	Carson City, NV Carson City, NV	1.0003
16220	Casper, WY Natrona County, WY	0.9385
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.8852
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	0.9392

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Charleston, WV	
	Boone County, WV	
	Clay County, WV	
	Kanawha County, WV	
	Lincoln County, WV	
16620	Putnam County, WV	0.8289
	Charleston-North Charleston, SC	
	Berkeley County, SC	
	Charleston County, SC	
16700	Dorchester County, SC	0.9124
	Charlotte-Gastonia-Concord, NC-SC	
	Anson County, NC	
	Cabarrus County, NC	
	Gaston County, NC	
	Mecklenburg County, NC	
	Union County, NC	
16740	York County, SC	0.9520
	Charlottesville, VA	
	Albemarle County, VA	
	Fluvanna County, VA	
	Greene County, VA	
	Nelson County, VA	
16820	Charlottesville City, VA	0.9277
	Chattanooga, TN-GA	
	Catoosa County, GA	
	Dade County, GA	
	Walker County, GA	
	Hamilton County, TN	
	Marion County, TN	
16860	Sequatchie County, TN	0.8994
	Cheyenne, WY	
16940	Laramie County, WY	0.9308
	Chicago-Naperville-Joliet, IL	
	Cook County, IL	
	DeKalb County, IL	
	DuPage County, IL	
	Grundy County, IL	
	Kane County, IL	
	Kendall County, IL	
	McHenry County, IL	
16974	Will County, IL	1.0715
	Chico, CA	
17020	Butte County, CA	1.1290

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Cincinnati-Middletown, OH-KY-IN	
	Dearborn County, IN	
	Franklin County, IN	
	Ohio County, IN	
	Boone County, KY	
	Bracken County, KY	
	Campbell County, KY	
	Gallatin County, KY	
	Grant County, KY	
	Kenton County, KY	
	Pendleton County, KY	
	Brown County, OH	
	Butler County, OH	
	Clermont County, OH	
	Hamilton County, OH	
17140	Warren County, OH	0.9784
	Clarksville, TN-KY	
	Christian County, KY	
	Trigg County, KY	
	Montgomery County, TN	
17300	Stewart County, TN	0.8251
	Cleveland, TN	
	Bradley County, TN	
17420	Polk County, TN	0.8052
	Cleveland-Elyria-Mentor, OH	
	Cuyahoga County, OH	
	Geauga County, OH	
	Lake County, OH	
	Lorain County, OH	
17460	Medina County, OH	0.9339
	Coeur d'Alene, ID	
17660	Kootenai County, ID	0.9532
	College Station-Bryan, TX	
	Brazos County, TX	
	Burleson County, TX	
17780	Robertson County, TX	0.9358
	Colorado Springs, CO	
	El Paso County, CO	
17820	Teller County, CO	0.9719
	Columbia, MO	
	Boone County, MO	
17860	Howard County, MO	0.8658

CBSA Code	Urban Area (Constituent Counties)	Wage Index
17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.8800
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.8729
18020	Columbus, IN Bartholomew County, IN	0.9537
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	1.0085
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8588
18700	Corvallis, OR Benton County, OR	1.0959
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.8294
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	0.9915
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8760
19180	Danville, IL Vermilion County, IL	0.8957
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8240
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8830
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9190
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.7885
19500	Decatur, IL Macon County, IL	0.8074
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.9031
19740	Denver-Aurora, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.0718
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9226
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	0.9999

CBSA Code	Urban Area (Constituent Counties)	Wage Index
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.7270
20100	Dover, DE Kent County, DE	1.0099
20220	Dubuque, IA Dubuque County, IA	0.9058
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	0.9975
20500	Durham, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	0.9816
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9475
20764	Edison, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1181
20940	El Centro, CA Imperial County, CA	0.8914
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8711
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9611
21300	Elmira, NY Chemung County, NY	0.8264
21340	El Paso, TX El Paso County, TX	0.8989
21500	Erie, PA Erie County, PA	0.8495
21660	Eugene-Springfield, OR Lane County, OR	1.0932
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8662
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1050
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.4375
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8042
22140	Farmington, NM San Juan County, NM	0.9587
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9368
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8742
22380	Flagstaff, AZ Coconino County, AZ	1.1687
22420	Flint, MI Genesee County, MI	1.1220
22500	Florence, SC Darlington County, SC Florence County, SC	0.8249
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.7680
22540	Fond du Lac, WI Fond du Lac County, WI	0.9667
22660	Fort Collins-Loveland, CO Larimer County, CO	0.9897
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	1.0229

CBSA Code	Urban Area (Constituent Counties)	Wage Index
22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.7933
23020	Fort Walton Beach-Crestview-Destin, FL Okaloosa County, FL	0.8743
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9284
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9693
23420	Fresno, CA Fresno County, CA	1.0993
23460	Gadsden, AL Etowah County, AL	0.8159
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.9196
23580	Gainesville, GA Hall County, GA	0.9216
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9224
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8256
24140	Goldsboro, NC Wayne County, NC	0.9288
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.7881
24300	Grand Junction, CO Mesa County, CO	0.9864
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9315
24500	Great Falls, MT Cascade County, MT	0.8675
24540	Greeley, CO Weld County, CO	0.9658
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9727
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.9010
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9402
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9860
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3064
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.8773
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.9013
25260	Hanford-Corcoran, CA Kings County, CA	1.0499
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9280
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.8867

CBSA Code	Urban Area (Constituent Counties)	Wage Index
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.0959
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.7366
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.9028
25980	Hinesville-Fort Stewart, GA[1] Liberty County, GA Long County, GA	0.9251
26100	Holland-Grand Haven, MI Ottawa County, MI	0.9006
26180	Honolulu, HI Honolulu County, HI	1.1556
26300	Hot Springs, AR Garland County, AR	0.9109
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.7892
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	0.9939
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.9041
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9146
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9264
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	0.9844
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9568
27060	Ithaca, NY Tompkins County, NY	0.9630
27100	Jackson, MI Jackson County, MI	0.9329
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8011
27180	Jackson, TN Chester County, TN Madison County, TN	0.8676
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.9021
27340	Jacksonville, NC Onslow County, NC	0.8079
27500	Janesville, WI Rock County, WI	0.9702
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8478

CBSA Code	Urban Area (Constituent Counties)	Wage Index
27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.7677
27780	Johnstown, PA Cambria County, PA	0.7543
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.7790
27900	Joplin, MO Jasper County, MO Newton County, MO	0.8951
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0433
28100	Kankakee-Bradley, IL Kankakee County, IL	1.0238
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	0.9504
28420	Kennewick-Richland-Pasco, WA Benton County, WA Franklin County, WA	1.0075
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.8249
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.7658
28740	Kingston, NY Ulster County, NY	0.9556
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.8036
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9591
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	0.9685
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.8869
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8247
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.7777
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.0603
29420	Lake Havasu City-Kingman, AZ Mohave County, AZ	0.9333
29460	Lakeland, FL Polk County, FL	0.8661
29540	Lancaster, PA Lancaster County, PA	0.9252
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	1.0119
29700	Laredo, TX Webb County, TX	0.8093

CBSA Code	Urban Area (Constituent Counties)	Wage Index
29740	Las Cruces, NM Dona Ana County, NM	0.8676
29820	Las Vegas-Paradise, NV Clark County, NV	1.1799
29940	Lawrence, KS Douglas County, KS	0.8227
30020	Lawton, OK Comanche County, OK	0.8025
30140	Lebanon, PA Lebanon County, PA	0.8192
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9454
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.9193
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY Jessamine County, KY Scott County, KY Woodford County, KY	0.9191
30620	Lima, OH Allen County, OH	0.9424
30700	Lincoln, NE Lancaster County, NE Seward County, NE	1.0051
30780	Little Rock-North Little Rock-Conway, AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8863
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.9183
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8717
31020	Longview, WA Cowlitz County, WA	1.0827
31084	Los Angeles-Long Beach-Santa Ana, CA Los Angeles County, CA	1.1771
31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.9065
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.8680
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.8732
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9541
31460	Madera, CA Madera County, CA	0.8069
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.0935
31700	Manchester-Nashua, NH Hillsborough County, NH	1.0273
31900	Mansfield, OH Richland County, OH	0.9271
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.3711
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.9123

CBSA Code	Urban Area (Constituent Counties)	Wage Index
32780	Medford, OR Jackson County, OR	1.0318
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9250
32900	Merced, CA Merced County, CA	1.2120
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	1.0002
33140	Michigan City-La Porte, IN LaPorte County, IN	0.8914
33260	Midland, TX Midland County, TX	1.0017
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0214
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1093
33540	Missoula, MT Missoula County, MT	0.8953
33660	Mobile, AL Mobile County, AL	0.8033
33700	Modesto, CA Stanislaus County, CA	1.1962
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.7832
33780	Monroe, MI Monroe County, MI	0.9414
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8088
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8321
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.7388
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0529
34620	Muncie, IN Delaware County, IN	0.8214
34740	Muskegon-Norton Shores, MI Muskegon County, MI	0.9836
34820	Myrtle Beach-Conway-North Myrtle Beach, SC Horry County, SC	0.8634
34900	Napa, CA Napa County, CA	1.4476
34940	Naples-Marco Island, FL Collier County, FL	0.9487
34980	Nashville-Davidson—Murfreesboro-Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9689

CBSA Code	Urban Area (Constituent Counties)	Wage Index
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2640
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1862
35300	New Haven-Milford, CT New Haven County, CT	1.1871
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.8897
35644	New York-Wayne-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	1.3115
35660	Niles-Benton Harbor, MI Berrien County, MI	0.9141
35980	Norwich-New London, CT New London County, CT	1.1432
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.5685
36100	Ocala, FL Marion County, FL	0.8627
36140	Ocean City, NJ Cape May County, NJ	1.0988
36220	Odessa, TX Ector County, TX	1.0042
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9000
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.8815
36500	Olympia, WA Thurston County, WA	1.1512
36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE Washington County, NE	0.9561
36740	Orlando-Kissimmee, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.9226
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9551
36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8652
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.1852
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9325
37380	Palm Coast, FL Flagler County, FL	0.8945
37460	Panama City-Lynn Haven, FL Bay County, FL	0.8313

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Parkersburg-Marietta-Vienna, WV-OH	
	Washington County, OH	
	Pleasants County, WV	
	Wirt County, WV	
37620	Wood County, WV	0.8105
	Pascagoula, MS	
	George County, MS	
37700	Jackson County, MS	0.8647
	Peabody, MA	
37764	Essex County, MA	1.0650
	Pensacola-Ferry Pass-Brent, FL	
	Escambia County, FL	
37860	Santa Rosa County, FL	0.8281
	Peoria, IL	
	Marshall County, IL	
	Peoria County, IL	
	Stark County, IL	
	Tazewell County, IL	
37900	Woodford County, IL	0.9299
	Philadelphia, PA	
	Bucks County, PA	
	Chester County, PA	
	Delaware County, PA	
	Montgomery County, PA	
37964	Philadelphia County, PA	1.0925
	Phoenix-Mesa-Scottsdale, AZ	
	Maricopa County, AZ	
38060	Pinal County, AZ	1.0264
	Pine Bluff, AR	
	Cleveland County, AR	
	Jefferson County, AR	
38220	Lincoln County, AR	0.7839
	Pittsburgh, PA	
	Allegheny County, PA	
	Armstrong County, PA	
	Beaver County, PA	
	Butler County, PA	
	Fayette County, PA	
	Washington County, PA	
38300	Westmoreland County, PA	0.8525
	Pittsfield, MA	
38340	Berkshire County, MA	1.0091
	Pocatello, ID	
	Bannock County, ID	
38540	Power County, ID	0.9465
	Ponce, PR	
	Juana Díaz Municipio, PR	
	Ponce Municipio, PR	
38660	Villalba Municipio, PR	0.4450
	Portland-South Portland-Biddeford, ME	
	Cumberland County, ME	
	Sagadahoc County, ME	
38860	York County, ME	1.0042
	Portland-Vancouver-Beaverton, OR-WA	
	Clackamas County, OR	
	Columbia County, OR	
	Multnomah County, OR	
	Washington County, OR	
	Yamhill County, OR	
	Clark County, WA	
38900	Skamania County, WA	1.1498
	Port St. Lucie, FL	
	Martin County, FL	
38940	St. Lucie County, FL	1.0016
	Poughkeepsie-Newburgh-Middletown, NY	
	Dutchess County, NY	
39100	Orange County, NY	1.0982
	Prescott, AZ	
39140	Yavapai County, AZ	1.0020
	Providence-New Bedford-Fall River, RI-MA	
	Bristol County, MA	
	Bristol County, RI	
	Kent County, RI	
	Newport County, RI	
	Providence County, RI	
39300	Washington County, RI	1.0574
	Provo-Orem, UT	
	Juab County, UT	
39340	Utah County, UT	0.9557
	Pueblo, CO	
39380	Pueblo County, CO	0.8851
	Punta Gorda, FL	
39460	Charlotte County, FL	0.9254
	Racine, WI	
39540	Racine County, WI	0.9498
	Raleigh-Cary, NC	
	Franklin County, NC	
	Johnston County, NC	
39580	Wake County, NC	0.9839

CBSA Code	Urban Area (Constituent Counties)	Wage Index
39660	Rapid City, SD Meade County, SD Pennington County, SD	0.8811
39740	Reading, PA Berks County, PA	0.9356
39820	Redding, CA Shasta County, CA	1.3541
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0715
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9425
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1100
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.8691
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.0755
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.8858
40420	Rockford, IL Boone County, IL Winnebago County, IL	0.9814
40484	Rockingham County, NH Rockingham County, NH Strafford County, NH	1.0111
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.9001
40660	Rome, GA Floyd County, GA	0.9042
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.3505
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.8812
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.0549
41100	St. George, UT Washington County, UT	0.9358
41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	0.8762

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	St. Louis, MO-IL	
	Bond County, IL	
	Calhoun County, IL	
	Clinton County, IL	
	Jersey County, IL	
	Macoupin County, IL	
	Madison County, IL	
	Monroe County, IL	
	St. Clair County, IL	
	Crawford County, MO	
	Franklin County, MO	
	Jefferson County, MO	
	Lincoln County, MO	
	St. Charles County, MO	
	St. Louis County, MO	
	Warren County, MO	
	Washington County, MO	
41180	St. Louis City, MO	0.9024
	Salem, OR	
	Marion County, OR	
41420	Polk County, OR	1.0572
	Salinas, CA	
41500	Monterey County, CA	1.4775
	Salisbury, MD	
	Somerset County, MD	
41540	Wicomico County, MD	0.8994
	Salt Lake City, UT	
	Salt Lake County, UT	
	Summit County, UT	
41620	Tooele County, UT	0.9399
	San Angelo, TX	
	Irion County, TX	
41660	Tom Green County, TX	0.8579
	San Antonio, TX	
	Atascosa County, TX	
	Bandera County, TX	
	Bexar County, TX	
	Comal County, TX	
	Guadalupe County, TX	
	Kendall County, TX	
	Medina County, TX	
41700	Wilson County, TX	0.8834
	San Diego-Carlsbad-San Marcos, CA	
41740	San Diego County, CA	1.1492
	Sandusky, OH	
41780	Erie County, OH	0.8822
	San Francisco-San Mateo-Redwood City, CA	
	Marin County, CA	
	San Francisco County, CA	
41884	San Mateo County, CA	1.5195
	San Germán-Cabo Rojo, PR	
	Cabo Rojo Municipio, PR	
	Lajas Municipio, PR	
	Sabana Grande Municipio, PR	
41900	San Germán Municipio, PR	0.4729
	San Jose-Sunnyvale-Santa Clara, CA	
	San Benito County, CA	
41940	Santa Clara County, CA	1.5735

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	San Juan-Caguas-Guaynabo, PR	
	Aguas Buenas Municipio, PR	
	Aibonito Municipio, PR	
	Arecibo Municipio, PR	
	Barceloneta Municipio, PR	
	Barranquitas Municipio, PR	
	Bayamón Municipio, PR	
	Caguas Municipio, PR	
	Camuy Municipio, PR	
	Canóvanas Municipio, PR	
	Carolina Municipio, PR	
	Cataño Municipio, PR	
	Cayey Municipio, PR	
	Ciales Municipio, PR	
	Cidra Municipio, PR	
	Comerío Municipio, PR	
	Corozal Municipio, PR	
	Dorado Municipio, PR	
	Florida Municipio, PR	
	Guaynabo Municipio, PR	
	Gurabo Municipio, PR	
	Hatillo Municipio, PR	
	Humacao Municipio, PR	
	Juncos Municipio, PR	
	Las Piedras Municipio, PR	
	Loíza Municipio, PR	
	Manatí Municipio, PR	
	Maunabo Municipio, PR	
	Morovis Municipio, PR	
	Naguabo Municipio, PR	
	Naranjito Municipio, PR	
	Orocovis Municipio, PR	
	Quebradillas Municipio, PR	
	Río Grande Municipio, PR	
	San Juan Municipio, PR	
	San Lorenzo Municipio, PR	
	Toa Alta Municipio, PR	
	Toa Baja Municipio, PR	
	Trujillo Alto Municipio, PR	
	Vega Alta Municipio, PR	
	Vega Baja Municipio, PR	
41980	Yabucoa Municipio, PR	0.4528
	San Luis Obispo-Paso Robles, CA	
42020	San Luis Obispo County, CA	1.2488
	Santa Ana-Anaheim-Irvine, CA	
42044	Orange County, CA	1.1766
	Santa Barbara-Santa Maria-Goleta, CA	
42060	Santa Barbara County, CA	1.1714
	Santa Cruz-Watsonville, CA	
42100	Santa Cruz County, CA	1.6122
	Santa Fe, NM	
42140	Santa Fe County, NM	1.0734
	Santa Rosa-Petaluma, CA	
42220	Sonoma County, CA	1.4696
	Sarasota-Bradenton-Venice, FL	
	Manatee County, FL	
42260	Sarasota County, FL	0.9933
	Savannah, GA	
	Bryan County, GA	
	Chatham County, GA	
42340	Effingham County, GA	0.9131
	Scranton--Wilkes-Barre, PA	
	Lackawanna County, PA	
	Luzerne County, PA	
42540	Wyoming County, PA	0.8457
	Seattle-Bellevue-Everett, WA	
	King County, WA	
42644	Snohomish County, WA	1.1572
	Sebastian-Vero Beach, FL	
42680	Indian River County, FL	0.9412
	Sheboygan, WI	
43100	Sheboygan County, WI	0.8975
	Sherman-Denison, TX	
43300	Grayson County, TX	0.8320
	Shreveport-Bossier City, LA	
	Bossier Parish, LA	
	Caddo Parish, LA	
43340	De Soto Parish, LA	0.8476
	Sioux City, IA-NE-SD	
	Woodbury County, IA	
	Dakota County, NE	
	Dixon County, NE	
43580	Union County, SD	0.9251
	Sioux Falls, SD	
	Lincoln County, SD	
	McCook County, SD	
	Minnehaha County, SD	
43620	Turner County, SD	0.9563

CBSA Code	Urban Area (Constituent Counties)	Wage Index
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	0.9617
43900	Spartanburg, SC Spartanburg County, SC	0.9422
44060	Spokane, WA Spokane County, WA	1.0455
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.8944
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0366
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8695
44220	Springfield, OH Clark County, OH	0.8694
44300	State College, PA Centre County, PA	0.8768
44700	Stockton, CA San Joaquin County, CA	1.1855
44940	Sumter, SC Sumter County, SC	0.8599
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	0.9910
45104	Tacoma, WA Pierce County, WA	1.1055
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.9025
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.9020
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.8805
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.7770
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9431
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.8538
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0699
46060	Tucson, AZ Pima County, AZ	0.9245
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8340
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8303
46340	Tyler, TX Smith County, TX	0.9114
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8486
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.8098

CBSA Code	Urban Area (Constituent Counties)	Wage Index
46700	Vallejo-Fairfield, CA Solano County, CA	1.4666
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8302
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0133
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA	0.8818
47300	Visalia-Porterville, CA Tulare County, CA	1.0091
47380	Waco, TX McLennan County, TX	0.8518
47580	Warner Robins, GA Houston County, GA	0.9128
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	1.0001

CBSA Code	Urban Area (Constituent Counties)	Wage Index
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA Manassas City, VA Manassas Park City, VA Jefferson County, WV	1.0855
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8519
48140	Wausau, WI Marathon County, WI	0.9679
48260	Weirton-Steubenville, WV-OH Jefferson County, OH Brooke County, WV Hancock County, WV	0.7924
48300	Wenatchee, WA Chelan County, WA Douglas County, WA	1.1469
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	0.9728
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.6961
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.9062

CBSA Code	Urban Area (Constituent Counties)	Wage Index
48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.7920
48700	Williamsport, PA Lycoming County, PA	0.8043
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0824
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.9410
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	0.9913
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.9118
49340	Worcester, MA Worcester County, MA	1.1287
49420	Yakima, WA Yakima County, WA	1.0267
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3284
49620	York-Hanover, PA York County, PA	0.9359
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.9002
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.0756
49740	Yuma, AZ Yuma County, AZ	0.9488

[1] At this time, there are no hospitals located in this urban area on which to base a wage index.

Table 2-- FY 2008 WAGE INDEX BASED ON CBSA LABOR MARKET AREAS FOR RURAL AREAS

CBSA Code	Nonurban Area	Wage Index
1	Alabama	0.7533
2	Alaska	1.2109
3	Arizona	0.8479
4	Arkansas	0.7371
5	California	1.2023
6	Colorado	0.9704
7	Connecticut	1.1119
8	Delaware	0.9727
10	Florida	0.8465
11	Georgia	0.7659
12	Hawaii	1.0612
13	Idaho	0.7920
14	Illinois	0.8335
15	Indiana	0.8576
16	Iowa	0.8566
17	Kansas	0.7981
18	Kentucky	0.7793
19	Louisiana	0.7373
20	Maine	0.8476
21	Maryland	0.9034
22	Massachusetts[1]	1.1644
23	Michigan	0.8953
24	Minnesota	0.9079
25	Mississippi	0 7700
26	Missouri	0.7930
27	Montana	0.8379
28	Nebraska	0.8849
29	Nevada	0.9272
30	New Hampshire	1.0470
31	New Jersey[1]	------
32	New Mexico	0.8940
33	New York	0.8268
34	North Carolina	0.8603
35	North Dakota	0.7182
36	Ohio	0.8714
37	Oklahoma	0.7492

CBSA Code	Nonurban Area	Wage Index
35	North Dakota	0.7182
36	Ohio	0.8714
37	Oklahoma	0.7492
38	Oregon	0.9906
39	Pennsylvania	0.8385
40	Puerto Rico[1]	0.4047
41	Rhode Island[1]	-----
42	South Carolina	0.8656
43	South Dakota	0.8549
44	Tennessee	0.7723
45	Texas	0.7968
46	Utah	0.8116
47	Vermont	0.9919
48	Virgin Islands	0.6830
49	Virginia	0.7896
50	Washington	1.0259
51	West Virginia	0.7454
52	Wisconsin	0.9667
53	Wyoming	0.9287
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for RY 2009. The rural Massachusetts wage index is calculated as the average of all contiguous CBSAs. The Puerto Rico wage index is the same as RY 2008.

[FR Doc. 08–1213 Filed 5–1–08; 4:00 pm]
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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0272]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry: Notification of a Health Claim or Nutrient Content Claim Based on an Authoritative Statement of a Scientific Body

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the collection of information associated with the submission of notifications of health claims or nutrient content claims based on authoritative statements of scientific bodies of the U.S. Government.

DATES: Submit written or electronic comments on the collection of information by July 7, 2008.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of the Chief Information Officer (HFA–250), Food and Drug Administration,5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry: Notification of a Health Claim or Nutrient Content Claim Based on an Authoritative Statement of a Scientific Body (OMB Control Number 0910–0374)—Extension

Section 403(r)(2)(G) and (r)(3)(C) of the Federal Food, Drug and Cosmetic Act (the act) (21 U.S.C. 343(r)(2)(G) and (r)(3)(C)), as amended by the FDA

Modernization Act of 1997, provides that any person may market a food product whose label bears a nutrient content claim or a health claim that is based on an authoritative statement of a scientific body of the U.S. Government or the National Academy of Sciences (NAS). Under this section of the act, a person that intends to use such a claim must submit a notification of its intention to use the claim 120 days before it begins marketing the product bearing the claim. In the **Federal Register** of June 11, 1998 (63 FR 32102), FDA announced the availability of a guidance entitled ''Guidance for Industry: Notification of a Health Claim or Nutrient Content Claim Based on an Authoritative Statement of a Scientific Body.'' The guidance provides the agency's interpretation of terms central to the submission of a notification and the agency's views on the information that should be included in the notification. The agency believes that the guidance will enable persons to meet the criteria for notifications that are established in section 403(r)(2)(G) and (r)(3)(C) of the act. In addition to the information specifically required by the act to be in such notifications, the guidance states that the notifications should also contain information on analytical methodology for the nutrient that is the subject of a claim based on an authoritative statement. FDA intends to review the notifications the agency receives to ensure that they comply with the criteria established by the act.

FDA estimates the burden of this collection of information as follows:

TABLE 1.— ESTIMATED ANNUAL REPORTING BURDEN[1]

Section of the Act/Basis of Burden	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours Per Response	Total Hours
403(r)(2)(G) (nutrient content claims)	1	1	1	250	250
403(r)(2)(C) (health claims)	2	1	2	450	900
Guidance for notifications	3	1	3	1	3
Total					1,153

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates are based on FDA's experience with health claims, nutrient content claims, and other similar notification procedures that fall under the agency's jurisdiction. FDA estimates that it will receive one nutrient content claim notification and two health claim notifications per year.

Section 403(r)(2)(G) and 403(r)(3)(C) of the act requires that the notification include the exact words of the claim, a copy of the authoritative statement, a concise description of the basis upon which such person relied for determining that this is an authoritative statement as outlined in the act, and a balanced representation of the scientific literature relating to the relationship between a nutrient and a disease or health-related condition to which a health claim refers or to the nutrient level to which the nutrient content claim refers. This balanced representation of the scientific literature is expected to include a bibliography of the scientific literature on the topic of the claim and a brief, balanced account or analysis of how this literature either supports or fails to support the authoritative statement.

Since the claims are based on authoritative statements of a scientific body of the Federal government or NAS, FDA believes that the information that is required by the act to be submitted with a notification will be readily available to a respondent. However, the respondent will have to collect and assemble that information. Based on communications with firms that have submitted notifications, FDA estimates that it will take a respondent 250 hours to collect and assemble the information required by the statute for nutrient content claim notifications and 450 hours to collect and assemble the information required by the statute for health claim notifications.

Under the guidance, notifications should also contain information on analytical methodology for the nutrient that is the subject of a claim based on an authoritative statement. The guidance applies to both nutrient content claim and health claim notifications. FDA has determined that this information should be readily available to a respondent and, thus, the agency estimates that it will take a respondent 1 hour to incorporate the information into the notification.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: May 1, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–10180 Filed 5–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0269]

Agency Emergency Processing Under Office of Management and Budget Review; Implementation of Sections 222, 223, and 224 of the Food and Drug Administration Amendments Act of 2007

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for emergency processing under the Paperwork Reduction Act of 1995 (the PRA). The proposed collection of information concerns the requirement established by the Food and Drug Administration Amendments Act of 2007 (FDAAA), that device establishments must submit registration and listing information by electronic means using FDA Form 3673, unless the Secretary of Health and Human Services (the Secretary) grants them a waiver from the electronic submission requirement.

DATES: Fax written comments on the collection of information by June 6, 2008.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *baguilar@omb.eop.gov*. All comments should be identified with the OMB control number 0910–NEW and title ''Implementation of Sections 222, 223, and 224 of the Food and Drug Administration Amendments Act of 2007; (21 U.S.C. 360); Emergency Request.'' Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of the Chief Information Officer (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1472.

SUPPLEMENTARY INFORMATION: FDA is requesting emergency processing of this proposed collection of information under section 3507(j) of the PRA (44 U.S.C. 3507(j) and 5 CFR 1320.13)). Title II of FDAAA (Public Law 110–85), enacted September 27, 2007, amends section 510 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360) to require all domestic and foreign device establishments to submit registration and device listing information to FDA by electronic means, and specifies the timeframes when establishments are required to submit such information. These new registration and listing requirements were in effect on October 1, 2007. The proposed collection of information concerns the information that owners/operators of device establishments must submit electronically in order to register their establishments and list their devices using FDA Form No. 3673. In addition, owners/operators seeking a waiver from the electronic submission requirements will need to submit a written request for a waiver to FDA with a complete explanation as to why their registration and listing information cannot be submitted electronically. See sections 222, 223, and 224 of FDAAA. Thus, FDA is requesting emergency processing of this new collection of information for electronic registration and listing, and information relating to requests for waivers.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Implementation of Sections 222, 223, and 224 of the Food and Drug Administration Amendments Act of 2007; (21 U.S.C. 360); Emergency Request

Sections 222, 223, and 224 of FDAAA, which were in effect on October 1, 2007, require that device establishment registrations and listings under section 510 of the FD&C Act (including the submission of updated information) be submitted to the Secretary by electronic means, unless the Secretary grants a request for waiver of the requirement because the use of electronic means is not reasonable for the person requesting the waiver. FDA expects that 20,000 to 30,000 device establishments will need to register electronically between now and December 31, 2008. Section 224 of FDAAA requires that these establishments also must have an opportunity request waivers. Thus, emergency approval of this request is necessary to implement these provisions of the statute.

Section 222 of FDAAA amends section 510(b) of the FD&C Act to require domestic establishments to register annually during the period beginning October 1 and ending December 31 of each year. Section 222 of FDAAA also amends section 510(i)(1) of the FD&C Act to require foreign establishments to immediately register upon first engaging in one of the covered device activities described under the statute, and they must also register annually during the period beginning on October 1 and ending on December 31 of each year. In addition, section 223 of FDAAA amends section 510(j)(2) of the FD&C Act to require establishments to list their devices annually with FDA during the period beginning on October 1 and ending on December 31 of each year.

Under FDAAA, device establishment owners/operators are required to keep their registration and device listing information up-to-date using the agency's new electronic system. Owners/operators of new device establishments must use the electronic system to create new accounts, new registration records, and new device listings. Section 224 of FDAAA amends section 510(p) of the FD&C Act by allowing a person affected to request a waiver from the requirement to register electronically when the ''use of electronic means'' is not reasonable for the person.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Section of the 2007 Amendments	FDA Form No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
222[2]	3673	2,600	1	2,704	0.5	1,352
223[2]	3673	24,382	1	24,382	0.25	6,095
224[2]		29,370	1	29,370	0.75	22,028
224[3]		2,600	1	2,600	0.5	1,300
224 (waiver request)[2]		20	1	20	1	20
224 (waiver request)[3]		1	1	1	1	1

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

Section of the 2007 Amendments	FDA Form No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Total Hours						30,796

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] One time burden.
[3] Annual increase in burden.

The estimates in table 1 of this document are based on FDA's experience, data from the device registration and listing database, and our estimates of the time needed to complete the previously required forms. We estimate that the time needed to enter registration and listing information electronically using FDA Form 3673 will not differ significantly from the time needed to fill in the paper forms (FDA Forms 2891, 2891a, and 2892) that previously were used for this purpose because the information required is essentially identical.

In addition, under section 224 of FDAAA, device establishments owner/operators for whom registering and listing by electronic means is not reasonable may request a waiver from the Secretary. Because a device establishment's owner/operator required to register and list would only need to have access to a computer, Internet, and an e-mail address for registration and list by electronic means, the agency did not anticipate the receipt of a large number of requests for waiver. For the first few months of operation of the web-based system, i.e., October through December 2007, FDA received fewer than 10 requests for waivers from the requirement to submit registration and listing information electronically. As data for more than 16,000 establishments have been received electronically for the same period, these requests amount to less than 1 percent of the total number of establishments that have responded.

Based on information taken from our databases, FDA estimates that there are 29,370 owner/operators who collectively register a total of 33,490 device establishments. The number of respondents listed for section 224 of FDAAA in the burden table is 29,370, which corresponds to the number of owner/operators who annually register one or more establishments. In addition, FDA estimates that 4,988 owner/operators are initial importers who must register their establishments but who, under FDA's existing regulations, are not required to list their devices unless they initiate or develop the specifications for the devices or repackage or relabel the devices. The number of respondents included in the burden table for section 223 of FDAAA is 24,382, which corresponds to the number of owner/operators who list one or more devices annually (29,370 - 4,988 = 24,382).

To calculate the burden estimate for waiver requests under section 224 of FDAAA, we assume as stated previously that less than one tenth of one percent of the 33,490 total device establishments would request waivers from FDA. This means the total number of waiver requests would probably not exceed 20 requests (33,490 x 0.0006). We also estimate that the one-time burden on these establishments would be an hour of time for a mid-level manager to draft, approve, and mail a letter. In addition, FDA estimates the total number of establishments will increase by 2,600 new establishments each year. Of the 2,600 new registrants each year, we assume that less than one percent (i.e., 1) of these will also request waivers each year. The total, therefore, is 21 waiver requests, which could increase by only 1 additional request each year.

Dated: May 1, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–10194 Filed 5–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0228] (formerly Docket No. 00D–1401)

Guidance for Industry and Food and Drug Administration Staff; Administrative Procedures for CLIA Categorization; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Administrative Procedures for CLIA Categorization.'' The guidance describes FDA's current practices concerning the administrative aspects of categorizing commercially available in vitro diagnostic tests under the Clinical Laboratory Improvement Amendments of 1988 (CLIA). The guidance discusses what manufacturers should submit to help expedite CLIA categorization by FDA.

DATES: Submit written or electronic comments on this guidance at any time. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled ''Administrative Procedures for CLIA Categorization'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist the office in processing your request, or fax your request to 240–276–3151. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this 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*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Carol Benson, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 240–276–0491, ext. 117.

SUPPLEMENTARY INFORMATION:

I. Background

On February 28, 1992, the Department of Health and Human Services published the final laboratory standards regulations (57 FR 7002) implementing CLIA (42 U.S.C. 263a). The implementing regulations are codified at 42 CFR part 493. CLIA regulates laboratory testing and requires that clinical laboratories obtain a certificate

before accepting materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or the impairment of, or assessment of the health of human beings. The type of CLIA certificate a laboratory obtains depends upon the complexity of the tests it performs. CLIA regulations describe three levels of test complexity: Waived tests, moderate complexity tests, and high complexity tests.

On January 31, 2000, the responsibility for categorization of commercially marketed in vitro diagnostic (IVD) tests was transferred from the Centers for Disease Control and Prevention to FDA (64 FR 73561, December 30, 1999). This allows IVD test manufacturers to submit premarket (510(k)) notifications or applications and requests for complexity categorization under CLIA to one agency. This notice announces the availability of a guidance document that describes the general administrative procedures FDA uses to assign a device's complexity category under CLIA.

The draft of this guidance was issued August 14, 2000, and the comment period closed on November 13, 2000. FDA did not receive any comments concerning the ''Draft Guidance on Administrative Procedures for CLIA Categorization.'' In preparing the final guidance, however, FDA needed to obtain an approval for a new collection of information from the Office of Management and Budget (OMB). We obtained this approval (see section IV. Paperwork Reduction Act of 1995) and are now issuing the final guidance. Updates added to the guidance include a revised background section and procedures for CLIA categorization for 510(k) submissions submitted electronically. The guidance also notes that manufacturers who wish to request CLIA waiver for a device (other than those devices already waived under 42 CFR 493.15), should refer to the guidance entitled ''Guidance for Industry and FDA Staff: Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices,'' issued in January 2008.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on administrative procedures for CLIA categorization. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. To receive ''Administrative Procedures for CLIA Categorization,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 240–276–3151 to receive a hard copy. Please use the document number 1143 to identify the guidance you are requesting.

CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available at *http://www.regulations.gov*.

IV. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in this guidance were approved under OMB control number 0910–0607.

V. Comments

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

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: April 30, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–10178 Filed 5–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Office of Biotechnology Activities; Recombinant DNA Research; Notice of a Meeting of an NIH Blue Ribbon Panel

There will be a meeting of the NIH Blue Ribbon Panel to advise on the Risk Assessment of the National Emerging Infectious Diseases Laboratories (NEIDL) at Boston University Medical Center. The meeting will be held on Friday, May 16, 2008, at The Commonwealth of Massachusetts Bureau of State Office Buildings, State House, Gardner Auditorium, 24 Beacon Street, Boston, Massachusetts 02133, from approximately 9 a.m. to 12 p.m.

Discussions will include the charge to the Panel and the process and framework for deliberations. There will also be time allotted on the agenda for public comment. Sign up for public comment will begin at approximately 8 a.m. on May 16, 2008. In the event that time does not allow for all those interested to present oral comments, anyone may file written comments using the address below.

To file written comments or for further information concerning this meeting contact Ms. Laurie Lewallen, Advisory Committee Coordinator, Office of Biotechnology Activities, Office of the Director, National Institutes of Health, Mail Stop Code 7985, Bethesda, MD 20892–7985, 301–496–9838, *lewallla@od.nih.gov*

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed above in advance of the meeting. Any interested person may file written comments with the panel by forwarding the statement to the Contact Person listed on this notice. The statement should include the name,

address, telephone number and when applicable, the business or professional affiliation of the interested person.

An agenda and any additional information for the meeting will be posted on the agency's Web site: *http://www.nih.gov/about/director/acd/index.htm*.

Background information may be obtained by contacting NIH OBA by e-mail *oba@od.nih.gov*

Dated: April 29, 2008.

Amy P. Patterson,

Director, Office of Biotechnology Activities.

[FR Doc. E8–10011 Filed 5–6–08; 8:45 am]

BILLING CODE 4140–01–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.

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 Cancer Institute Initial Review Group; Subcommittee F—Manpower & Training; NCI–F Manpower and Training Grants.

Date: May 19, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Hilton Old Town Alexandria, 1767 King Street, Alexandria, VA 22314.

Contact Person: Lynn M. Amende, PhD, Scientific Review Administrator, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8105, Bethesda, MD 20892, 301–451–4759, *amendel@mail.nih.gov*.

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

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, 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: April 30, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–10013 Filed 5–6–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of 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 meeting of the National Cancer Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

A portion of 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 Cancer Advisory Board.

Open: June 17, 2008, 8:30 a.m. to 3:20 p.m.

Agenda: Program reports and presentations; Business of the Board.

Place: National Cancer Institute, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Name of Committee: National Cancer Advisory Board.

Closed: June 17, 2008, 3:20 p.m. to 5 p.m.

Agenda: Review of grant applications.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Name of Committee: National Cancer Advisory Board.

Open: June 18, 2008, 8:30 a.m. to 12 p.m.

Agenda: Program reports and presentations; Business of the Board.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page *http://deainfo.nci.nih.gov/advisory/ncab.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: April 30, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–10014 Filed 5–6–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Toxicology Program (NTP); Office of Liaison, Policy and Review; Meeting of the Scientific Advisory Committee on Alternative Toxicological Methods (SACATM)

AGENCY: National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH).

ACTION: *COM057*Meeting announcement and request for comment.

SUMMARY: Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of SACATM on June 18–19, 2008, at the

Radisson Hotel Research Triangle Park, 150 Park Drive, Research Triangle Park, NC 27709. The meeting is scheduled from 8:30 a.m. to 5:30 p.m. on June 18 and 8:30 a.m. until adjournment on June 19. The meeting is open to the public with attendance limited only by the space available. SACATM advises the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM), the NTP Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), and the Director of the NIEHS and NTP regarding statutorily mandated duties of ICCVAM and activities of NICEATM.

DATES: The SACATM meeting will be held on June 18 and 19, 2008. All individuals who plan to attend are encouraged to register online at the NTP Web site (*http://ntp.niehs.nih.gov/go/7441*) by June 10, 2008. In order to facilitate planning, persons wishing to make an oral presentation are asked to notify Dr. Lori White, NTP Executive Secretary, via online registration, phone, or email by June 10, 2008 (see **ADDRESSES** below). Written comments should also be received by June 10 to enable review by SACATM and NIEHS/NTP staff before the meeting.

ADDRESSES: The SACATM meeting will be held at the Radisson Hotel Research Triangle Park, 150 Park Drive, Research Triangle Park, NC 27709 [hotel: (919) 549–8631]. Public comments and other correspondence should be directed to Dr. Lori White (NTP Office of Liaison, Policy and Review, NIEHS, P.O. Box 12233, MD A3–01, Research Triangle Park, NC 27709; telephone: 919–541–9834 or e-mail: *whiteld@niehs.nih.gov*). Courier address: NIEHS, 111 T.W. Alexander Drive, Room A326, Research Triangle Park, NC 27709. Persons needing interpreting services in order to attend should contact 301–402–8180 (voice) or 301–435–1908 (TTY). Requests should be made at least 7 days in advance of the meeting.

SUPPLEMENTARY INFORMATION:

Preliminary Agenda Topics and Availability of Meeting Materials

Preliminary agenda topics include:

- NICEATM–ICCVAM Update;
- Overview of NICEATM–ICCVAM 5–Year Plan;
- NRC Report: Toxicity Testing in the 21st Century;
- Presentations from Federal Agencies on Research, Development, Translation, and Validation Activities Relevant to the NICEATM–ICCVAM Five-Year Plan;
- Report on the ICCVAM–NICEATM Independent Scientific Peer Review Meeting: Validation Status of New Versions and Applications of the Murine Local Lymph Node Assay (LLNA), a Test Method for Assessing the Contact Dermatitis Potential of Chemicals and Products;
- Report on the ICCVAM–NICEATM–ECVAM–JACVAM Scientific Workshop on Acute Chemical Safety Testing: Advancing In Vitro Approaches and Humane Endpoints for Systemic Toxicity Evaluations;
- Nominations to ICCVAM: NTP Rodent Bioassay for Carcinogenicity;
- Proposal for International Cooperation on Alternative Test Methods;
- Update from the Japanese Center for the Validation of Alternative Methods;
- Update from the European Center for the Evaluation of Alternative Methods,

A copy of the preliminary agenda, committee roster, and additional information, when available will be posted on the NTP Web site (*http://ntp.niehs.nih.gov/go/7441*) or available upon request (see **ADDRESSES** above). Following the SACATM meeting, summary minutes will be prepared and available on the NTP website or upon request.

Request for Comments

Both written and oral public input on the agenda topics is invited. Written comments received in response to this notice will be posted on the NTP Web site. Persons submitting written comments should include their name, affiliation (if applicable), and sponsoring organization (if any) with the document. Time is allotted during the meeting for presentation of oral comments and each organization is allowed one time slot per public comment period. At least 7 minutes will be allotted for each speaker, and if time permits, may be extended up to 10 minutes at the discretion of the chair. Registration for oral comments will also be available on-site, although time allowed for presentation by on-site registrants may be less than for pre-registered speakers and will be determined by the number of persons who register at the meeting.

Persons registering to make oral comments are asked to do so through the online registration form (*http://ntp.niehs.nih.gov/go/7441*) and to send a copy of their statement to Dr. White (see **ADDRESSES** above) by June 10 to enable review by SACATM, NICEATM–ICCVAM, and NIEHS/NTP staff prior to the meeting. Written statements can supplement and may expand the oral presentation. If registering on-site and reading from written text, please bring 40 copies of the statement for distribution and to supplement the record.

Background Information on ICCVAM, NICEATM, and SACATM

ICCVAM is an interagency committee composed of representatives from 15 Federal regulatory and research agencies that use, generate, or disseminate toxicological information. ICCVAM conducts technical evaluations of new, revised, and alternative methods with regulatory applicability and promotes the development, scientific validation, regulatory acceptance, implementation, and national and international harmonization of new, revised, and alternative toxicological test methods that more accurately assess the safety and hazards of chemicals and products and that refine, reduce, and replace animal use. The ICCVAM Authorization Act of 2000 [42 U.S.C. 285l–3] established ICCVAM as a permanent interagency committee of the NIEHS under NICEATM. NICEATM administers ICCVAM and provides scientific and operational support for ICCVAM-related activities. NICEATM and ICCVAM work collaboratively to evaluate new and improved test methods applicable to the needs of U.S. Federal agencies. Additional information about ICCVAM and NICEATM can be found on their Web site (*http://iccvam.niehs.nih.gov*).

SACATM was established in response to the ICCVAM Authorization Act [Section 285l–3(d)] and is composed of scientists from the public and private sectors. SACATM advises ICCVAM, NICEATM, and the Director of the NIEHS and NTP regarding statutorily mandated duties of ICCVAM and activities of NICEATM. SACATM provides advice on priorities and activities related to the development, validation, scientific review, regulatory acceptance, implementation, and national and international harmonization of new, revised, and alternative toxicological test methods. Additional information about SACATM, including the charter, roster, and records of past meetings, can be found at *http://ntp.niehs.nih.gov/go/167*.

Dated: April 28, 2008.

Samuel H. Wilson,

Acting Director, National Institute of Environmental Health Sciences and National Toxicology Program.

[FR Doc. E8–10010 Filed 5–6–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Science and Technology Directorate; Notice of Public Meeting of the Project 25 Compliance Assessment Program Governing Board

AGENCY: Science and Technology Directorate, DHS.

ACTION: Notice of Public Meeting.

SUMMARY: The Department of Homeland Security's (DHS) Office for Interoperability and Compatibility (OIC) will hold a public meeting of its Project 25 (P25) Compliance Assessment Program (CAP) Governing Board (GB). The P25 CAP GB is composed of public sector officials who represent the collective interest of organizations that procure P25 equipment. The purpose of the meeting is to review and approve proposed Compliance Assessment Bulletin(s).

The P25 CAP GB will receive public comments on the P25 CAP at this meeting. DHS OIC will post details of the meeting, including the agenda, ten business days in advance of the meeting at *http://www.safecomprogram.gov*.

The meeting is open to the public, but space is limited. All participants must bring proper identification to attend the meeting.

DATES: The meeting will take place on Wednesday, May 21, 2008, from 9 a.m. to 1 p.m. (EST).

ADDRESSES: The meeting will be held in the Auditorium of the General Services Administration Building, 301 7th Street, SW., Washington, DC 20407.

FOR FURTHER INFORMATION CONTACT: Luke Klein-Berndt, Department of Homeland Security, Science and Technology Directorate, Office for Interoperability and Compatibility, Washington Navy Yard, 245 Murray Lane, SW., Building #410, Washington, DC 20528. Telephone: (202) 254–5332. E-mail: *Luke.Klein-Berndt@dhs.gov*.

SUPPLEMENTARY INFORMATION: Emergency responders—emergency medical services, fire personnel, and law enforcement officers—need to seamlessly exchange communications across disciplines and jurisdictions to successfully respond to day-to-day incidents and large-scale emergencies. P25 focuses on developing standards that allow radios and other components to interoperate, regardless of manufacturer. In turn, these standards enable emergency responders to exchange critical communications with other disciplines and jurisdictions.

An initial goal of P25 is to specify formal standards for interfaces between the components of a land mobile radio (LMR) system. (LMR systems are commonly used by emergency responders in portable handheld and mobile vehicle-mounted devices.) Although formal standards are being developed, no process is currently in place to confirm that equipment advertised as P25-compliant meets all aspects of P25 standards.

To address discrepancies between P25 standards and industry equipment, Congress passed legislation calling for the creation of the P25 CAP. The P25 CAP is a partnership of the DHS Command, Control and Interoperability Division; the Department of Commerce's National Institute of Standards and Technology; industry; and the emergency response community.

The P25 CAP works to establish a process for ensuring that equipment complies with P25 standards and can interoperate across manufacturers. By providing manufacturers with a method to test their equipment for compliance with P25 standards, the P25 CAP helps emergency response officials make informed purchasing decisions. The program's initial focus is on the Common Air Interface, which allows for over-the-air compatibility between mobile and portable radios, and tower equipment.

For more information on the program, please review OIC's *Charter for the Project 25 Compliance Assessment Program*, which is available at *http://www.safecomprogram.gov*.

Dated: May 1, 2008.

Luke Klein-Berndt,

P25 CAP Program Manager.

[FR Doc. E8–10214 Filed 5–6–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2008–0331]

Public Workshop on Marine Technology and Standards

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: The United States Coast Guard (USCG) and the American Society of Mechanical Engineers (ASME) are sponsoring a two-day public workshop on marine technology and standards in Arlington, VA. This public workshop will provide a unique opportunity for classification societies, industry groups, standards development organizations, governments, and interested members of the public to come together for a professional exchange on topics ranging from technological impacts to the marine industry, corresponding coverage in related codes and standards, and existing government regulations.

DATES: This public workshop will be held 8 a.m. to 7:30 p.m. on Tuesday, June 3, 2008, and from 8 a.m. to 4:30 p.m. on Wednesday, June 4, 2008. This workshop is open to the public with advance registration required.

ADDRESSES: The two-day workshop will be held at the Sheraton National Hotel near the Pentagon. The hotel is located at 900 South Orme Street in Arlington, VA, approximately one mile from the Pentagon City Metro Station. The hotel's phone number is (703) 521–1900. Shuttle service to and from the hotel may be available by contacting the hotel directly at the phone number above.

FOR FURTHER INFORMATION CONTACT: For additional information about this workshop you may visit the USCG Web site at *http://www.uscg.mil/marine_event* or contact Mr. Wayne Lundy by telephone at (202) 372–1379 or by e-mail at *Wayne.M.Lundy@uscg.mil.*

SUPPLEMENTARY INFORMATION: The purpose of this workshop is to provide a technical exchange on areas of technology that impact the marine industry with corresponding coverage in related codes and standards and existing government regulations. To register for this workshop, please visit the ASME Web site: *http://www.asmeconferences.org/asmeuscg08*. Registration deadline is May 23, 2008. While the workshop is open to the public, space is limited due to room capacity restrictions, so we encourage you to register in advance for this event. There is no fee for registration.

Agenda of Meeting

The workshop comprises six panel sessions conducted over a two-day period on a variety of topics.

Day One—June 3, 2008

(1) Use of Compressed Natural Gas (CNG) and Liquefied Natural Gas (LNG) for ship propulsion;

(2) Emerging technologies such as bio-fuels, use of fuel cells for ship propulsion, development of high pressure composite hydrogen pressure vessels, and exhaust gas cleaning systems for ships;

(3) Importation of CNG;

Day Two—June 4, 2008

(4) Pressure vessels for human occupancy, including submersibles, diving bells, and acrylic windows;

(5) Pressure vessel and piping codes, including rewrite of ASME Section VIII–Division 2, API 570/ASME FFS–1 Fitness for Service, ASME B31.12—Code for Hydrogen Piping and Pipelines, and use of ASME Section VIII–Division 3; and

(6) Risk-based approaches and in-service examination of marine systems.

Procedural

This workshop is open to the public. Please note that the workshop may close early if all business is finished. Material presented at the workshop will be made available to the public on the USCG Web site at *http://www.uscg.mil/marine_even* for 30 days starting June 3. For additional information on material presented at this event, you may contact Mr. Wayne Lundy by telephone at (202) 372–1379 or by e-mail at *Wayne.M.Lundy@uscg.mil.* Summaries of comments made, materials presented, and lists of attendees will be available on the docket at the conclusion of the 2 day meeting. To view comments and materials, go to *http://www.regulations.gov* at any time, enter the docket number ''USCG 2008–0331'' in the Search box, and click on ''Go>>.''

Information on Services for Individuals with Disabilities

For information on facilities or services for individuals With disabilities or to request special assistance at the meeting, contact Mr. Wayne Lundy at (202) 372–1379 or by e-mail at *Wayne.M.Lundy@uscg.mil* as soon as possible.

Dated: April 25, 2008.

J. G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. E8–10239 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket Nos. TSA–2006–24191; USCG–2006–24196]

Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License

AGENCY: United States Coast Guard; DHS.

ACTION: Notice of compliance date, Captain of the Port Zones Boston, Northern New England, and Southeastern New England.

SUMMARY: This Notice informs owners and operators of facilities located within Captain of the Port Zones Boston, Northern New England, and Southeastern New England that they must implement access control procedures utilizing TWIC no later than October 15, 2008.

DATES: This Notice is effective May 7, 2008.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, are part of dockets TSA–2006–24191 and USCG–2006–24196, and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, 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. You may also find this docket on the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this Notice, call LCDR Jonathan Maiorine, telephone 1–877–687–2243. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–493–0402.

SUPPLEMENTARY INFORMATION:

I. Regulatory History

On May 22, 2006, the Department of Homeland Security (DHS) through the United States Coast Guard (Coast Guard) and the Transportation Security Administration (TSA) published a joint notice of proposed rulemaking entitled ''Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License'' in the **Federal Register** (71 FR 29396). This was followed by a 45-day comment period and four public meetings. The Coast Guard and TSA issued a joint final rule, under the same title, on January 25, 2007 (72 FR 3492) (hereinafter referred to as the original TWIC final rule). The preamble to that final rule contains a discussion of all the comments received on the NPRM, as well as a discussion of the provisions found in the original TWIC final rule, which became effective on March 26, 2007.

In a separate section of today's **Federal Register**, the Coast Guard and TSA issued a final rule to realign the compliance date for implementation of the Transportation Worker Identification Credential. The date by which mariners need to obtain a TWIC, and by which owners and operators of vessels, facilities, and outer continental shelf facilities, who have not otherwise been required to implement access control procedures utilizing TWIC, must implement those procedures, is now April 15, 2009 instead of September 25, 2008. This realignment provides 18 months from the date the initial enrollment centers became operational for regulated entities to come into compliances with the requirements of the TWIC final rule. Owners and operators of facilities that must comply with 33 CFR part 105 will still be subject to earlier, rolling compliance dates, as laid out in 33 CFR 105.115(e). As provided in that regulation, the Coast Guard will announce those dates at least 90 days in advance via notices published in the **Federal Register**. The final compliance date will not be later than April 15, 2009.

II. Notice of Facility Compliance Date—COTP Zones Boston, Northern New England, and Southeastern New England

Title 33 CFR 105.115(e) currently states that ''[f]acility owners and operators must be operating in accordance with the TWIC provisions in this part by the date set by the Coast Guard in a Notice to be published in the **Federal Register**.'' Through this Notice, the Coast Guard informs the owners and operators of facilities subject to 33 CFR 105.115(e) located within the following Captain of the Port Zones: Boston, Northern New England, and Southeastern New England that the deadline for their compliance with Coast Guard and TSA TWIC requirements is October 15, 2008.

We have determined that this date provides sufficient time for the estimated population required to obtain TWICs for these COTPs to enroll and for TSA to complete the necessary security threat assessments for those enrollment applications. We strongly encourage persons requiring unescorted access to facilities regulated by 33 CFR part 105 and located in one of these COTP Zones to enroll for their TWIC as soon as possible, if they haven't already. Information on enrollment procedures, as well as a link to the pre-enrollment web site (which will also enable an applicant to make an appointment for enrollment), may be found at *https://twicprogram.tsa.dhs.gov.*

Dated: May 2, 2008.

Brian M. Salerno,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Stewardship.

[FR Doc. E8–10244 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1740–DR]

Indiana; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Indiana (FEMA–1740–DR), dated January 30, 2008, and related determinations.

DATES: *Effective Date:* April 25, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Indiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of January 30, 2008.

Benton, Carroll, Cass, DeKalb, Elkhart, Jasper, Kosciusko, Marshall, Newton, Noble, Pulaski, Starke, and White Counties for Public Assistance (already designated for Individual Assistance).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidential Declared Disaster Assistance to Individuals and Households—Other Needs, 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–10144 Filed 5–6–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1749–DR]

Missouri; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Missouri (FEMA–1749–DR), dated March 19, 2008, and related determinations.

DATES: *Effective Date:* April 28, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Missouri is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of March 19, 2008.

Dade and Vernon Counties for Public Assistance (already designated for emergency protective measures [Category B], limited to direct Federal assistance, under the Public Assistance program.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidential Declared Disaster Assistance to Individuals and Households—Other Needs, 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–10145 Filed 5–6–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–865, Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–865, Sponsor's Notice of Change of Address; OMB Control Number 1615–0076.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on February 28, 2008, at 73 FR 10080, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 6, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0076. Written comments and suggestions from the public and

affected agencies should address one or more of the following four points:

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

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

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

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

Overview of This Information Collection

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

(2) *Title of the Form/Collection:* Sponsor's Notice of Change of Address.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–865. U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. This form will be used by every sponsor who has filed an Affidavit of Support under section 213A of the Immigration and Nationality Act to notify the USCIS of a change of address. The data will be used to locate a sponsor if there is a request for reimbursement.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 100,000 responses at .25 hours (15 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 25,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://www.regulations.gov/search/index.jsp.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: May 1, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–10067 Filed 5–6–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form G–1054, Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form G–1054, Request for Fee Waiver Denial Letter; OMB Control No. 1615–0089.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on February 28, 2008, at 73 FR 10798, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 6, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0089. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

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

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

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

Overview of This Information Collection

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

(2) *Title of the Form/Collection:* Request for Fee Waiver Denial Letter.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–1054; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. The regulations at 8 CFR 103.7(c) allows U.S. Citizenship and Immigration Services (USCIS) to waive fees for benefits under the Immigration and Nationality Act (Act). This form is used to maintain consistency in the adjudication of fee waiver requests, to collect accurate data on amounts of fee waivers, and to facilitate the public-use process.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 16,000 responses at 1.25 hours (75 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 20,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at *http://www.regulations.gov/search/index.jsp*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: May 1, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–10069 Filed 5–6–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

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

ACTION: 60-Day Notice of Information Collection Under Review: File No. OMB–4, Guidelines on Producing Master Exhibits for Asylum Applications; OMB Control No. 1615–0073.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until July 7, 2008.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail, please include the OMB Control Number 1615–0073 in the subject box.

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

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

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

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

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

Overview of This Information Collection

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

(2) *Title of the Form/Collection:* Guidelines on Producing Master Exhibits for Asylum Applications.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number (File No. OMB–4); U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Private Organizations and Businesses. Private voluntary organizations, law firms, or other groups submit master exhibits to USCIS to support asylum applications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 20 responses at 80 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,600 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: May 2, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–10079 Filed 5–6–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

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

ACTION: 60-Day Notice of Information Collection Under Review: Notice of Immigration Pilot Program, File No. OMB–5. OMB Control No. 1615–0061.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until July 7, 2008.

Written comments and suggestions regarding the item(s) contained in this notice, and especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., 3rd Floor, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by email please add the OMB Control Number 1615–0061 in the subject box.

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

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

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

(2) *Title of the Form/Collection:* Notice of Immigration Pilot Program.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No form number. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. The information collected will be used by USCIS to determine which regional centers should participate in the immigration pilot program.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 50 responses at 40 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 2,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: May 2, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–10080 Filed 5–6–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–777, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–777, Application for Issuance or Replacement of Northern Mariana Card; OMB Control No. 1615–0042.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on February 28, 2008, at 73 FR 10799, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 6, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0042. Written comments and suggestions from the public and affected agency's should address one or more of the following four points:

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

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

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

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

Overview of This Information Collection

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

(2) *Title of the Form/Collection:* Application for Issuance or Replacement of Northern Mariana Card.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–777. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. This information collection is used by applicants applying for a Northern Mariana identification card if they received United States citizenship pursuant to Public Law 94–241 (Covenant to Establish a Commonwealth of the Northern Mariana Islands).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 100 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 50 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://www.regulations.gov/search/index.jsp.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: May 1, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–10081 Filed 5–6–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–643, Extension of an Existing Information Collection; Comment Request

ACTION: *30-Day Notice of Information Collection Under Review:* Form I–643, Health and Human Services Statistical

Data for Refugee/Asylee Adjusting Status, OMB Control No. 1615–0070.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on February 28, 2008, at 73 FR 10799, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 6, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov*.

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0070 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

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

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

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

Overview of this information collection:

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

(2) *Title of the Form/Collection:* Health and Human Services Statistical Data for Refugee/Asylee Adjusting Status.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–643. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. The primary purpose of the information collected on this form is for use in the Office of Refugee Resettlement Report to Congress (8 U.S.C. 1523). The USCIS is required to report on the status of refugees at the time of adjustment to lawful permanent resident.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 195,000 responses at 55 minutes (.916 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 178,620 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://www.regulations.gov/search/index.jsp.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: May 1, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–10174 Filed 5–6–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5100–FA–20]

Announcement of Funding Awards for Healthy Homes and Lead Hazard Control Grant Programs for Fiscal Year 2007

AGENCY: Office of the Secretary, Office of Healthy Homes and Lead Hazard Control.

ACTION: Announcement of awards funded.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in competitions for funding under the Office of Healthy Homes and Lead Hazard Control Grant Program Notices of Funding Availability (NOFA). This announcement contains the name and address of the award recipients and the amounts awarded.

FOR FURTHER INFORMATION CONTACT: Jonnette G. Hawkins, Department of Housing and Urban Development, Office of Healthy Homes and Lead Hazard Control, Room 8236, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 402–7593. Hearing- and speech-impaired persons may access the number above via TTY by calling the toll free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The 2007 awards were announced September 13, 2007. These awards were the result of competitions announced in a **Federal Register** notice published on March 13, 2007 (72 FR 11539). The purpose of the competitions was to award funding for grants and cooperative agreements for the Office of Healthy Homes and Lead Hazard Control Grant Programs. Applications were scored and selected on the basis of selection criteria contained in these Notices.

A total of $156,990,259 was awarded. In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and the amount of these awards as follows:

A total of $86,640,622 was awarded to 34 grantees for the *Lead Based Paint and Hazard Control Program:* City of Tucson, 310 N. Commerce Park Loop, Tucson, AZ 85745, $3,000,000; City of Concord, 1950 Park Side Drive, Concord, CA 94521, $1,389,228; City of Bridgeport, 999 Broad Street,

Bridgeport, CT 06604, $3,000,000; State of Delaware, 417 Federal Street, Dover, DE 19901, $2,996,866; City of Davenport, 226 West Fourth Street, Davenport, IA 52801, $2,273,039; City of Waterloo, 620 Mulberry Street, Waterloo, IA 50703, $1,510,597; City of Chicago, 333 S. State Street, Room 200, Chicago, IL 60604, $3,000,000; City of Kankakee, 199 S. East Avenue, Suite #1, Kankakee, IL 60901, $3,000,000; State of Illinois, 525 West Jefferson Street, Springfield, IL 62761, $3,000,000; City of Lawrence, 200 Common Street, Lawrence, MA 01840, $3,000,000; City of Worcester, 44 Front Street, Worcester, MA 01608, $2,926,802; City of Portland, 389 Congress Street, Portland, ME 04101, $1,525,172; City of Muskegon, 933 Terrace, Muskegon, MI 49440, $2,079,492; Hennepin County, 417 North 5th Street, Suite 320, Minneapolis, MN 55401, $3,000,000; State of Minnesota, 625 Robert St. N., St. Paul, MN 55103–2441; $1,413,100; City of Greensboro, 300 West Washington Street, Room 315, P.O. Box 3136, Greensboro, NC 27402–3136, $3,000,000; City of Rocky Mountain, 331 S. Franklin Street, Rocky Mountain, NC 27802–1180, $2,765,585; City of Nashua, 229 Main Street, P.O. Box 2019, Nashua, NH 03061–2019, $3,000,000; City of New York, 100 Gold Street, New York, NY 10038, $3,000,000; City of Syracuse, 201 East Washington Street, Syracuse, NY 13202, $3,000,000; City of Cincinnati, 801 Plum Street, Cincinnati, OH 45219, $3,000,000; City of Newark, 40 West Main Street, Suite 407, Newark, OH 43055, $1,500,000; City of Springfield, 76 East High Street, Springfield, OH 45502, $3,000,000; Cuyahoga County, 5550 Venture Drive, Parma, OH 44130, $3,000,000; Mahoning County, 21 West Boardman Street, Youngstown, OH 44503; $3,000,000; City of Erie, 626 State Street, Erie, PA 17101, $3,000,000; City of Harrisburg, 10 North 2nd Street, Suite 206, Harrisburg, PA, 17101, $2,154,490; City of Burlington, 149 Church Street, City Hall, Burlington, VT 05401, $2,865,629; Vermont Housing & Conservation Board, 149 State Street, Montpelier, VT 05602, $3,000,000; City of Rochester, 30 Church Street, Rochester, NY 14614, $1,606,710; City of Dubuque, 1805 Central Avenue, Dubuque, IA 52001–3656, $2,982,769; Sheboygan County, 828 Center Avenue, Sheboygan, WI 53081, $1,880,441; City of Cambridge, 795 Massachusetts Avenue, Cambridge, MA 02139, $770,702; City of Houston, 8000 North Stadium Drive, 2nd Floor, Houston, TX 77054, $3,000,000.

A total of $58,675,147 was awarded to 18 grantees for the *Lead Hazard Reduction Demonstration Program:* Will County, 302 N. Chicago Street, Joilet, IL 60432, $1,500,000; Health and Hospital Corporation of Marion County, 3838 North Rural Street, Indianapolis, IN 46205, $2,920,290; City of Baltimore, 210 Guilford Avenue, 3rd Floor, Baltimore, MD 21202, $3,897,034; Charter County of Wayne, 33030 Van Born Road, Wayne, MI 48184, $3,000,000; Hennepin County, 417 N. 5th Street, Suite 320, Minneapolis, MN, 55401, $4,000,000; Kansas City, 2400 Troost Avenue, Suite 3100, Kansas City, MO 64108, $394,770; City of Omaha, 1819 Farnam Street, Omaha, NE 68183, $2,000,000; City of Newark, 920 Broad Street, Newark, NJ 07102, $4,000,000; County of Union, Administration Building, 10 Elizabethtown Plaza, Elizabeth, NJ, 07202–3451, $3,975,202; City of New York, 100 Gold Street, New York, NY 10038, $4,000,000; City of Syracuse, 201 East Washington Street, Syracuse, NY 13202, $4,000,000; City of Columbus, 50 W. Gay Street, 3rd Floor, Columbus, OH 43215, $4,000,000; City of Toledo, One Government Center, Suite 1800, Toledo, OH 43604, $3,860,036; Cuyahoga County, 5550 Venture Drive, Parma, OH 44130, $4,000,000; City of Houston, 8000 North Stadium Drive, Houston, TX 77054, $3,000,000; City of San Antonio, 1400 South Flores, San Antonio, TX 78204, $4,000,000; County of Harris, 1001 Preston, Suite 900, Houston, TX 77002, $2,127,810. In addition, due to an incorrect calculation, a grant to the City of Birmingham, 710 North 20th Street, Room 1000, Birmingham, AL 35203 for $4,000,000 will be awarded with FY 2008 funds.

A total of $1,187,519 was awarded to 3 grantees for the *Lead Outreach Grants Program:* Esperanza Community Housing Corporation, 2337 S. Figueroa Street, Los Angeles, CA 90007, $400,000; Housing Counseling Services, Inc., 2410 17th Street, NW., Suite 100, Bridgeport, CT 06604, $400,000; Children's Memorial Hospital, 2300 Children's Plaza, No. 205, Chicago, IL 60614, $387,519.

A total of $3,499,997 was awarded to 8 grantees for the *Lead Technical Studies Program:* Silver Lake Research Corporation, 911 South Primrose Avenue, Suite N, Monrovia, CA 91016, $471,116; Alliance for Healthy Homes, P.O. Box 75941, Washington, DC 20013, $413,354; National Center for Healthy Housing, 10320 Little Patuxent Parkway, Suite 500, Columbia, MD 21044, $708,977; Saint Louis University, 211 North Grand Blvd., St. Louis, MO 63103, $530,606; Research Triangle Institute, 3040 Cornwallis Road, Research Triangle Park, NC 27709, $347,572; Battelle Memorial Institute, 505 King Avenue, Columbus, OH 43201, $457,442; University of Cincinnati, P.O. Box 210222, 51 Goodman Drive, University Hall, Suite 530, Cincinnati, OH 45221–0222, $328,020; University of Cincinnati, P.O. Box 210222, 51 Goodman Drive, University Hall, Suite 530, Cincinnati, OH 45221–0222, $242,910.

A total of $4,986,974 was awarded to 5 grantees for the *Healthy Homes Demonstration Grant Program:* City of San Diego, 9601 Ridgehaven Court, Suite 310, San Diego, CA 92123, $999,913; Coalition to End Childhood Lead Poisoning, 2714 Hudson Street, Baltimore, MD 21202, $1,000,000; National Center for Healthy Housing, 10320 Little Patuxent Parkway, Suite 500, Columbia, MD 21044, $999,374; American Lung Association of the Upper Midwest, 490 Concordia, CA, St. Paul, MN 55103–2441, $999,769; The Children's Mercy Hospital, 2401 Gillham Road, Kansas City, MO 64108, $987,918.

A total of $2,000,000 was awarded to 3 grantees for the *Healthy Homes Technical Studies Grants Program:* Boston Medical Center Corporation, One Boston Medical Center Place, Boston, MA 02118–2393, $855,655; Case Western Reserve University, 10900 Euclid Avenue, Cleveland, OH 44106, $359,197; University of Cincinnati, P.O. Box 210222, 51 Goodman Drive, University Hall, Suite 530, Cincinnati, OH 45221–0222, $785,148.

Office of Healthy Homes.

Dated: April 21, 2008.

Jon L. Gant,

Director, Office of Healthy Homes and Lead Hazard Control.

[FR Doc. E8–10004 Filed 5–6–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5141–N–06]

Meeting of the Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of upcoming meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee (the Committee). The meeting is open to the public and the site is accessible to individuals with disabilities.

DATES: Meetings will be held on Tuesday, June 17, 2008, 8 a.m. to 5 p.m., Wednesday, June 18, 2008, 8 a.m. to 5 p.m., and Thursday, June 19, 2008, 8 a.m. to 11 a.m. eastern standard time.

ADDRESSES: These meetings will be held at the Holiday Inn Arlington at Ballston, 4610 North Fairfax Drive, Arlington, Virginia 22203, telephone (703) 243–9800.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Associate Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing, Office of Manufactured Housing Programs, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.2) and 41 CFR 102–3.150. The Manufactured Housing Consensus Committee was established under section 604(a)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000, 42 U.S.C. 5403(a)(3). The Consensus Committee is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured housing construction and safety standards, procedural and enforcement regulations, installation standards, installation regulations, and dispute resolution regulations.

Tentative Agenda

A. Welcome and Introductions;

B. Full Committee Meeting;

C. Quality Control;

D. Installation Program Final Rule;

E. Public Proposals for MHCSS Changes;

F. On-Site Rule;

G. Public Testimony;

H. Reports and Actions on Committee Work;

I. Adjourn.

Dated: April 29, 2008.

Brian D. Montgomery,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. E8–10008 Filed 5–6–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Proposed Low-Effect Safe Harbor Agreement for the Southwestern Willow Flycatcher for Landowners Restoring, Enhancing, or Managing Riparian Habitats in Washington, Iron, Garfield, Kane, Emery, Grand, Wayne, and San Juan Counties, Utah

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; receipt of application.

SUMMARY: This notice advises the public that the Color Country Resource Conservation and Development Council, Inc. (Applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an enhancement of survival permit (permit) for the Southwestern willow flycatcher (flycatcher) pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act). This permit application includes a Programmatic Safe Harbor Agreement (Agreement) between the Applicant and the Service. The Service requests information, views, and opinions from the public via this notice. Further, the Service is soliciting information regarding the adequacy of the Programmatic Agreement as measured against the Service's Safe Harbor Policy and the regulations that implement it.

DATES: Written comments on the permit application must be received on or before June 6, 2008.

ADDRESSES: Comments should be addressed to Laura Romin, U.S. Fish and Wildlife Service, 2369 West Orton Circle, Suite 50, West Valley City, Utah 84119. Written comments may be sent by facsimile to (801) 975–3331.

FOR FURTHER INFORMATION CONTACT: Laura Romin, Utah Field Office Assistant Field Supervisor (see **ADDRESSES**), telephone (801) 975–3330.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of the documents for review by contacting the individual named above. You also may make an appointment to view the documents at the above address during normal business hours.

Public Availability of Comments

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.

Background

Under a Safe Harbor Agreement, participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the Act. Safe Harbor Agreements, and the subsequent permits that are issued pursuant to section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*), encourage private and other non-Federal property owners to implement conservation efforts for listed species by assuring property owners that they will not be subjected to increased land use restrictions as a result of efforts to attract or increase the numbers or distribution of a listed species on their property. Application requirements and issuance criteria for permits through Safe Harbor Agreements are found in 50 CFR 17.22(c).

We have worked with the Applicant to develop this proposed Programmatic Agreement for the conservation of the flycatcher in Washington, Iron, Garfield, Kane, Emery, Garfield, Wayne, and San Juan Counties, Utah. Within the 25,661,861 hectares (63,411,840 acres) of land within the above-named counties, landowners will be able to enroll non-Federal properties on which habitat for flycatcher will be restored, enhanced, and managed pursuant to a written agreement between the Applicant and a property owner. We have made a preliminary determination that the Agreement qualifies as a low-effect plan.

This Agreement provides for the creation of a Program in which private landowners (Program Participants) enter into written cooperative agreements with the Applicant pursuant to the terms of the Agreement, to restore, enhance, and maintain riparian habitat in ways beneficial to the flycatcher. Such cooperative agreements will be for a term of at least 15 years. The proposed duration of the Agreement and permit is 50 years. The Agreement fully describes the proposed management activities to be undertaken by Program Participants and the conservation benefits expected to be gained for the flycatcher.

Upon approval of this Agreement, and consistent with the Service's Safe Harbor Policy published in the **Federal Register** on June 17, 1999 (64 FR 32717), the Service would issue a permit to the applicant authorizing take of flycatcher by Program Participants incidental to the implementation of the management

activities specified in the cooperative agreements, incidental to other lawful uses of the properties, including normal routine land management activities, and/or to return to pre-Agreement conditions. To benefit the flycatcher, Program Participants will agree to undertake site-specific management activities, which will be specified in their written cooperative agreements.

Management activities that could be included in the Cooperative Agreements will provide for the restoration, enhancement and management of native riparian habitats in the range of the flycatcher in Utah. The object of such activities is to enhance populations of flycatchers by increasing the amount and quality of suitable habitat on the enrolled properties. Take of flycatchers incidental to the aforementioned activities is unlikely; however, it is possible that in the course of such activities or other lawful activities on the enrolled property, a Program Participant could incidentally take flycatcher thereby necessitating take authority under the permit.

Pre-Agreement conditions (baseline), consisting of survey for flycatchers and documentation on the extent of habitat shall be determined for each enrolled property as provided in the Agreement. In order to receive the above assurances regarding incidental take of flycatchers, a Program Participant must maintain baseline on the enrolled property. The Agreement and requested permit would allow each Program Participant to return to baseline conditions after the end of the term of the cooperative agreement (minimum of 15 years) and prior to the expiration of the 50-year permit, if so desired by the Applicants.

Public Review and Comments

The Service has made a preliminary determination that the proposed Agreement and permit application are eligible for categorical exclusion under the National Environmental Policy Act of 1969 (NEPA). We explain the basis for this determination in an Environmental Action Statement, which also is available for public review.

Individuals wishing copies of the permit application, copies of our draft Environmental Action Statement, and/or copies of the Agreement, including a map of the proposed permit area and references, should contact the office and personnel listed in the **ADDRESSES** section above.

If you wish to comment on the permit application or the Agreement, you may submit your comments to the address listed in the **ADDRESSES** section of this document. Comments and materials received, including names and addresses of respondents, will be available for public review, by appointment, during normal business hours at the address in the **ADDRESSES** section above and will become part of the public record, pursuant to section 10(c) of the Act. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. Anonymous comments will not be considered. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, are available for public inspection in their entirety.

We will evaluate this permit application, associated documents, and comments submitted thereon to determine whether the permit application meets the requirements of section 10(a) of the Act and NEPA regulations at 40 CFR 1506.6. If we determine that the requirements are met, we will sign the proposed Agreement and issue a permit under section 10(a)(1)(A) of the Act to the Applicants for take of the flycatcher incidental to otherwise lawful activities in accordance with the terms of the Agreement. We will not make our final decision until after the end of the 30-day comment period and will fully consider all comments received during the comment period.

The Service provides this notice pursuant to section 10(c) of the Act and pursuant to implementing regulations for NEPA (40 CFR 1506.6).

Dated: March 6, 2008.

Larry Crist,

Field Supervisor, Utah Field Office, West Valley City, Utah.

[FR Doc. E8–10055 Filed 5–6–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of 41 Applications for Incidental Take Permits for Single Family and Duplex Residential Developments on the Fort Morgan Peninsula, Baldwin County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The applicants (Ms. Shirley Baird, Mr. Edward Boykin, Mr. Richard Dorsey, Mr. Richard Eastman, Mr. Terry Elkins, Mr. Medford Foster, Mr. Ted Giles, Mr. John Griffin, Harrison Building, Mr. Kenneth Howald, Mr. Gary Hudson, Mr. Jerry Hutcherson, Mr. Dean Jones, Mr. Bobby Junkins, K-Developers LLC, Mr. James Keeling, Mr. James Klimback, Mr. Marshall Newport, Ms. Mary Powers, Mr. Bradley Redwine, Mr. Edwin Spence, Mr. Jackie Stokley, Mr. Olin Tumlin, and Mr. James Walker) have applied to the Fish and Wildlife Service (Service) for incidental take permits (ITP) under section 10(a)(1)(B) of the Endangered Species Act of 1973 (16 U.S. C. 1531 *et seq.*) (Act), as amended for the take of Alabama beach mouse (*Peromyscus polionotus ammobates*) (ABM). The proposed take would be incidental to the otherwise lawful activity of constructing 37 single-family and 5 duplex residences on the Fort Morgan Peninsula in Baldwin County, Alabama.

The applicants have prepared Habitat Conservation Plans (HCPs) in accordance with section 10(a)(2)(A) of the Act, specifying, among other things, the impacts that are likely to result from the taking and the measures each applicant would undertake to minimize and mitigate such impacts. A detailed description of the proposed minimization and mitigation measures is provided in the applicants' HCPs and in our Environmental Assessment (EA). The proposed action would involve approval of the HCPs if the statutory issuance criteria are satisfied. The EA considers the environmental impacts of the proposed projects on the environment.

DATES: Written comments on the ITP applications, HCPs, and EA should be sent to the Service's Regional Office (see **ADDRESSES**) and should be received on or before June 6, 2008.

ADDRESSES: Persons wishing to review the applications, HCPs, and EA may obtain an electronic copy on compact disk by writing the Service's Southeast Regional Office, Atlanta, Georgia, at the address below. Documents will also be available for public inspection by appointment during normal business hours at the Service's Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), or the Daphne Ecological Services Field Office, 1208–B Main Street, Daphne, Alabama 36526. Written data or comments concerning the applications or HCPs should be submitted to the Regional

Office. Please reference Batch IV ITPs for 41 applications in requests for the documents discussed herein.

FOR FURTHER INFORMATION CONTACT: Mr. Aaron Valenta, Regional HCP Coordinator (see **ADDRESSES**), telephone: 404–679–4144, or Mr. Darren LeBlanc, Fish and Wildlife Service Biologist, Daphne Field Office (see **ADDRESSES**), telephone: 251–441–5859.

SUPPLEMENTARY INFORMATION: We announce applications for 41 ITPs, including the HCPs, and the availability of an EA. The EA is a combined assessment addressing the environmental impacts associated with these projects both individually and cumulatively. Copies of these documents may be obtained by making a request, in writing, to the Service's Regional Office (see **ADDRESSES**). This notice advises the public that we have opened the comment period on the ITP applications, the HCPs, and the EA. This notice is provided pursuant to section 10 of the Act and National Environmental Policy Act regulations at 40 CFR 1506.6.

We specifically request information, views, and opinions from the public on the Federal action, including the identification of any other aspects of the human environment not already identified in our EA. Further, we specifically solicit information regarding the adequacy of the HCPs as measured against our ITP issuance criteria found in 50 CFR parts 13.21 and 17.22.

If you wish to comment, you may submit comments by any one of several methods. Please reference Batch IV ITPs for 41 applications for residential development in such comments. You may mail comments to our Regional Office (see **ADDRESSES**). You may also comment via the Internet to *aaron_valenta@fws.gov*. Please include your name and return mailing address in your Internet message. If you do not receive a confirmation from us that we have received your Internet message, contact us directly at either telephone number listed (see **FOR FURTHER INFORMATION CONTACT**).

Finally, you may hand-deliver comments to either Service office listed (see **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

The ITPs would cover 41 discrete lots totaling 23.2 acres on the Fort Morgan Peninsula. Under the preferred alternative, project development would result in the overall loss of 4.25 acres of ABM habitat. Minimization and mitigation of impacts includes: reduced project impacts, maintenance of ABM habitat on-site, prohibition of cats, preservation of dune habitat, and elimination of debris.

We will evaluate the HCPs, applications, and any received comments to determine whether the applications meet the requirements of section 10(a) of the Act. If it is determined that those requirements are met, the ITPs will be issued for the incidental take of the ABM. We will also evaluate whether issuance of the section 10(a)(1)(B) ITPs comply with section 7 of the Endangered Species Act by conducting an intra-Service section 7 consultation. The results of this consultation, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITPs.

Dated: April 30, 2008.

Noreen E. Walsh,

Acting Regional Director.

[FR Doc. E8–10052 Filed 5–6–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Land Acquisitions; Federated Indians of Graton 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 254 acres of land into trust for the Federated Indians of Graton Rancheria of California on April 18, 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, Director, 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 Part 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 April 18, 2008, the Assistant Secretary—Indian Affairs decided to accept approximately 254 acres of land into trust for the Federated Indians of Graton Rancheria of California. The Graton Rancheria was restored to federal recognition pursuant to Title XIV of Public Law 106–568 (the Graton Rancheria Restoration Act), 25 U.S.C. 1300n-3, which mandates that, ''the Secretary shall accept into trust for the benefit of the Tribe any real property located in Marin or Sonoma County...''. The 254 acre parcel is located in Sonoma County, California.

The legal description of the property is as follows:

Tract One

Farms 102, 103, 104, 105, 106, 124, 125, 126 and 127, as shown upon the Map of Plan of Subdivision of Santa Rosa Farms No. 2, filed March 7, 1910 in the Office of the County Recorder of Sonoma County in Book 21 of Maps, Page 14, Sonoma County Records. Certificate of Compliance recorded January 28, 1998 as Document No.'s 1998 0008588 through 1998 0008596, Sonoma County Records. Being Assessors Parcel No. 045–073–001

Tract Two

Parcel One

Farms 130 and 131 as shown upon the Map of Plan of Subdivision of Santa Rosa Farms No. 2 filed March 7, 1910 in the Office of the County Recorder of Sonoma County in Book 21 of Maps, Page 14, Sonoma County Records. Certificate of Compliance recorded January 28, 1998 as Document No.'s 1998 0008597 and 1998 0008598, Sonoma County Records. Being a portion of Assessor's Parcel No. 045–074–009.

Parcel Two

Farm 129 of Santa Rosa Farms No. 2, according to Map thereof filed in the Office of the County Recorder of said County on March 7, 1910 in Book 21 Maps, Page 14, Sonoma County Records.

Being Assessor's Parcel No. 045–074–010.

Parcel Three

Farm No. 128 as same is shown upon that certain Map Entitled ''Plan of Subdivision of Santa Rosa Farms No. 2, Sonoma Co., Cal., Etc.'', filed March 7, 1910 in Book 21 of Maps at Page 14.

Saving and Excepting Therefrom, the following:

Commencing at the Southeasterly corner of said Farm No. 128; thence Northerly along the Eastern line thereon, 155 feet and 7 inches to a point, for the actual point of commencement of the tract to be herein described; thence from said point of commencement, South 89° West, 289 feet and 6 inches to a point; thence Northerly, parallel with the Eastern line of said Farm No. 128, a distance of 155 feet and 10 inches to a point; thence North 89° East, 289 feet and 6 inches to the Eastern line of said Farm No. 128; thence Southerly along said Eastern line, 155 feet and 10 inches to the point of commencement.

Also Saving and Excepting Therefrom, the following:

Beginning at a point on the center line of Labath Avenue, which point is the Southeast corner of Lot 128 as shown upon the Map entitled ''Plan Of Subdivision of Santa Rosa Farms No. 2, Sonoma Co., Cal., Etc.'', filed March 7, 1910 in Book 21 of Maps, Page 14, Sonoma County Records; thence North 1° West along the Easterly line of Lot 128, a distance of 155 feet, 7 inches to a point; thence South 89° West, 289.5 feet; thence North 1° West, 77 feet, 10 inches; thence South 89° West, 283.66 feet to the Westerly line of said Lot 128; thence along said line, South 1° East, 233.5 feet to the Southwest corner of said Lot 128; thence along the Southerly line of said Lot, North 89° East, 573.16 feet to the point of beginning.

Being Assessor's Parcel No. 045–073–002.

Tract Three

A Portion of Farm No. 128 as shown upon the Map entitled ''Plan of Subdivision of Santa Rosa Farms No. 2, Sonoma County, California'', filed in the Office of the County Recorder of Sonoma County, California, on March 7, 1910 in Book 21 of Maps, page 14, more particularly described as follows:

Commencing at the Southeasterly corner of said Farm No. 128; thence Northerly along the Easterly line thereof, 155 feet, 7 inches to a point for the true point of beginning of the tract to be herein described; thence South 89° West 289 feet, 6 inches to a point; thence Northerly parallel with the Easterly line of said Farm No. 128, a distance of 155 feet, 10 inches to a point; thence North 89° East, 289 feet, 6 inches to the Easterly line of said Farm No. 128; thence Southerly along said Easterly line, 155 feet, 10 inches to the point of beginning.

Being Assessor's Parcel No. 045–073–003.

Tract Four

Beginning at a point on the center line of Labath Avenue which point is the Southeast corner Lot 128 as shown upon the Map entitled Plan of Subdivision of Santa Rosa Farms No. 2, Sonoma County, California, etc., filed March 7, 1910 in Book 21 of Maps, page 14, Sonoma County Records; thence North 1° West along the Easterly line of Lot 128, a distance of 155 feet 7 inches to a point; thence South 89° West, 289.5 feet; thence North 1° West, 77 feet 10 inches; thence 89° West, 283.66 feet to the Westerly line of said Lot 128; thence along said line South 1° East, 233.5 feet to the Southwest corner of said Lot 128; thence along the Southerly line of said Lot, North 89° East, 573.16 feet to the point of beginning.

Being Assessor's Parcel No. 045–073–004.

Tract Five

A tract of land, being a portion of the Rancho Llano de Santa Rosa, and commencing on the boundary line of said Rancho on the line between Section 21 and 22, in Township 6 North, Range 8 West, Mount Diablo Base & Meridian, at a point in the center of the County Road known as the Santa Rosa and Stony Point Road, from which point the post for the railing of the bridge, across the Laguna and standing on the Southeast corner of the same, is North 31° West, 13 links distant; thence from said point of beginning, North 89° 30′ East, 11.92 chains, South 39° 05′ East, 2.61 chains, South 53° East, 1.36 chains, South 64° East, 1.23 chains, South 77° 15′ East, 2.62 chains, South 88° 05′ East, 3.94 chains, North 4° 15′ East, 1.43 chains, South 88° East, 2.03 chains, South 56° East, 2.44 chains, North 87° 15′ East, 22.62 chains to the Northwest boundary line of the Cotati Rancho; thence along said line, North 29° 15′ East, 39.44 chains; thence leaving said line, West 67.92 chains to the center of the aforesaid Road and Section line; thence South, 32.18 chains to the point of beginning. Magnetic Variation 17° East.

Excepting therefrom those portions of land described in the Deeds from Manuel T. Pimentel, *et al*, to the Sonoma County Flood Control and Water Conservation District, recorded August 16, 1961 in Book 1840 of Official Records, page 280, Serial No. G–60050, Sonoma County Records, and recorded September 24, 1963 in Book 1989 of Official Records, page 575, Serial No. H–56600, Sonoma County Records.

Also excepting therefrom that portion of land described in the Deed from Mary C. Pimentel, *et al*, to the Sonoma County Flood Control and Water Conservation District, recorded February 11, 1966 in Book 2187 of Official Records, page 957, Serial No. J–83549, Sonoma County Records.

Also excepting therefrom that portion of land described in the Deed to the City of Rohnert Park, recorded January 11, 1989, as Document No. 89002750 of Official Records of Sonoma County.

Also excepting therefrom that portion of land described in the Deed to the County of Sonoma, recorded May 17, 1996 as Document No. 1996 0044116 of Official Records of Sonoma County.

An easement for cattle and agricultural equipment crossing, as described in the Deed from the Sonoma County Flood Control and Water Conservation District to Manuel L. Pimentel and Mary C. Pimentel, recorded August 15, 1961 in Book 1840 of Official Records, page 284, Serial No. G–60051, Sonoma County Records.

An easement for cattle and agricultural equipment crossing, as described in the Deed from the Sonoma County Flood Control and Water Conservation District to Manuel L. Pimentel and Mary C. Pimentel, recorded August 15, 1961 in Book 1840 of Official Records, page 288, Serial No. G–60052, Sonoma County Records.

Being Assessor's Parcel Nos. 046–021–020 & 021,046–021–039 & 040.

Tract Six

All that certain real property situated in the City of Rohnert Park, County of Sonoma, State of California, described as follows: Lot 6, as shown on the map of ''Rohnert Business Park Subdivision'', filed August 12, 1985 in the office of the County Recorder in Book 375 of Maps, at pages 10 and 11, Sonoma County Records.

Being Assessor's Parcel No. 143–040–068.

Dated: April 18, 2008.

Carl J. Artman,

Assistant Secretary—Indian Affairs.

[FR Doc. E8–10064 Filed 5–6–08; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–060–08–1430–EQ; UTU–81536]

Notice of Realty Action; Re-Issuance; Noncompetitive Lease of Public Land; Grand County, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action; Re-issuance.

SUMMARY: This notice announces the re-issuance of the Notice of Realty Action published in the **Federal Register** on March 14, 2006 and cancelled by notice published on July 21, 2006.

DATES: Interested parties may submit comments to the BLM Acting Moab Field Manager, at the address below. Comments must be received by not later than June 23, 2008. Only written comments will be accepted.

ADDRESSES: Address all written comments concerning this notice to the BLM Acting Moab Field Manager, 82 East Dogwood Avenue, Moab, Utah 84532. Please send e-mail comments to the following address: *momail@ut.blm.gov*.

FOR FURTHER INFORMATION CONTACT: Mary von Koch, Realty Specialist, Moab Field Office, 435–259–2128.

SUPPLEMENTARY INFORMATION: The decision to cancel the Notice of Realty Action was based on the comments received during the 45-day comment period. Since July of 2006, all the impediments that led to the cancellation of the Notice of Realty Action have been removed. BLM has determined that the following 2,808.67 acres of isolated public lands in Grand County, Utah, are suitable for lease pursuant to Section 302 of the Federal Land Policy and Management Act of 1976 (FLPMA) (90 Stat. 2762; 43 U.S.C. 1732) using noncompetitive (direct) lease procedures.

Salt Lake Meridian

T. 20 S., R. 16 E.,
Sec. 25, S½;
Sec. 26, SW¼SW¼, E½SW¼, and SE¼;
Sec. 27, SE¼SE¼;
Sec. 28, E½SE¼;
Sec. 34, W½NW¼.

T. 21 S., R. 16 E.,
Sec. 1, lots 1, 4, 5, 8, 9, 11, 12, 13, and 16.

T. 21 S., R. 17 E.,
Sec. 4, lots 11, 12, 13, 14, N½SW¼, SW¼SW¼, and NW¼SE¼;
Sec. 5, E½SE¼;
Sec. 6, lots 2, 3, 4, 5, 7, and 10;
Sec. 7, lot 4, SE¼SW¼, and SE¼;
Sec. 8, NW¼SW¼, SE¼SW¼, and SE¼;
Sec. 9, N½N½, S½NE¼, SW¼NW¼, and S½

Green River Farms, a domestic corporation, has proposed to file with BLM an application to lease the above public lands, located near Green River, Utah. The lands would be used, occupied and developed as a commercial agricultural farm in conjunction with adjoining private lands owned by Green River Farms and lands leased to Green River Farms by the State of Utah School and Institutional Trust Lands Administration.

After review, the BLM has determined that the proposed use of the above described parcels is in conformance with the Grand Resource Area Resource Management Plan, and that the above described land is available for that use. Therefore, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1732(b)) and the implementing regulations at 43 CFR part 2920, the BLM will accept for processing an application to be filed by Green River Farms, or its duly qualified designee, for a non-competitive lease of the above described lands, to be used, occupied, and developed as stated above. A non-competitive lease may be employed in this case because all of the subject tracts of public land are adjacent to lands of the same proposed farming project. A detailed description of the negotiated, non-competitive process was provided in the original notice.

On or before June 23, 2008, interested parties may submit comments to the BLM at the address stated above with respect to:

(1) The decision of the BLM regarding the availability of the lands described herein and

(2) The decision of the BLM to accept for processing an application from Green River Farms for a non-competitive lease.

Facsimiles, telephone calls, and electronic mails are unacceptable means of notification. Comments including names and street addresses of respondents will be available for public review at the BLM Moab Field Office during regular business hours, except holidays. Individual respondents may request confidentiality. 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.

Any adverse comments will be reviewed by the BLM Utah State Director, who may sustain, vacate or modify this realty action. In the absence of any objections, or adverse comments, the proposed realty action will become the final determination of the Department of the Interior.

Authority: 43 CFR 2920.4.

Dated: April 30, 2008.

Selma Sierra,

State Director.

[FR Doc. E8–10051 Filed 5–6–08; 8:45 am]

BILLING CODE 4310–DQ–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–565 Consolidated Enforcement Proceeding]

In the Matter of Certain Ink Cartridges and Components Thereof; Notice of Institution of Formal Enforcement Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has instituted a formal enforcement proceeding relating to exclusion orders and cease and desist orders issued at the conclusion of the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Michael Haldenstein, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3041. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov/*. Hearing-impaired persons are advised that information on

the matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on March 23, 2006, based on a complaint filed by Epson Portland, Inc. of Oregon; Epson America, Inc. of California; and Seiko Epson Corporation of Japan (collectively ''Epson''). 71 FR 14720 (March 23, 2006). The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930 (''section 337'') in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ink cartridges and components thereof by reason of infringement of claim 7 of U.S. Patent No. 5,615,957; claims 18, 81, 93, 149, 164 and 165 of U.S. Patent No. 5,622,439; claims 83 and 84 of U.S. Patent No. 5,158,377; claims 19 and 20 of U.S. Patent No. 5,221,148; claims 29, 31, 34 and 38 of U.S. Patent No. 5,156,472; claim 1 of U.S. Patent No. 5,488,401; claims 1–3 and 9 of U.S. Patent No. 6,502,917; claims 1, 31 and 34 of U.S. Patent No. 6,550,902; claims 1, 10 and 14 of U.S. Patent No. 6,955,422; claim 1 of U.S. Patent No. 7,008,053; and claims 21, 45, 53 and 54 of U.S. Patent No. 7,011,397. The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The complainants requested that the Commission issue a general exclusion order and cease and desist orders. The Commission named as respondents 24 companies located in China, Germany, Hong Kong, Korea, and the United States. Several respondents were terminated from the investigation on the basis of settlement agreements or consent orders or were found in default.

On March 30, 2007, the presiding ALJ (Judge Luckern) issued a final ID in the investigation finding a violation of section 337 with respect to certain respondents. He found the asserted claims valid and infringement by certain respondents' products. He recommended issuance of a general exclusion order and cease and desist orders directed to certain respondents and bond in the amount of $13.60 per cartridge during the Presidential review period.

On October, 19, 2007, after review, the Commission made its final determination in the investigation, finding a violation of section 337. The Commission issued a general exclusion order, limited exclusion order, and cease and desist orders directed to several domestic respondents. The Commission also determined that the public interest factors enumerated in 19 U.S.C. 1337(d), (f), and (g) did not preclude issuance of the aforementioned remedial orders, and that the bond during the Presidential review period would be $13.60 per cartridge for covered ink cartridges.

On February 8, 2008, complainant Epson filed two complaints seeking enforcement proceedings under Commission Rule 210.75. One complaint alleges that Ninestar Technology Co., Ltd.; Ninestar Technology Company, Ltd.; and Town Sky Inc. have violated the general exclusion order and that Ninestar Technology Company, Ltd. and Town Sky Inc. have violated the cease and desist orders directed to them. Epson's second complaint alleges that Mipo International Ltd. and Mipo America, Ltd. have violated the general and limited exclusion orders and that Mipo America, Ltd. has violated the cease and desist order directed to it.

Having examined the complaints seeking a formal enforcement proceeding, and having found that the complaints comply with the requirements for institution of a formal enforcement proceeding contained in Commission rule 210.75, the Commission has determined to institute a consolidated formal enforcement proceeding to determine whether the five respondents are in violation of the Commission's exclusion orders and cease and desist orders issued in the investigation, and what, if any, enforcement measures are appropriate. The following entities are named as parties to the formal enforcement proceeding: (1) Complainant Epson, (2) respondents (Ninestar Technology Co., Ltd.; Ninestar Technology Company, Ltd.; Town Sky Inc.; Mipo America Ltd., and Mipo International, Ltd.) and (3) a Commission investigative attorney to be designated by the Director, Office of Unfair Import Investigations.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.75 of the Commission's Rules of Practice and Procedure (19 CFR 210.75).

Issued: May 1, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–9984 Filed 5–6–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0010]

Agency Information Collection Activities

ACTION: 30-day notice of information collection under review.

Proposed collection; comments requested:

U.S. Official Order Forms for Schedule I and II Controlled Substances (Accountable Forms), Order Form Requisition—DEA Form 222 and 222a

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 73, Number 42, page 11443 on March 3, 2008, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until June 6, 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:* U.S. Official Order Forms for Schedule I and II Controlled Substances (Accountable Forms), Order Form Requisition (DEA Form 222 and 222a).

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: DEA Form 222 and 222a.

Component: Office of Diversion Control, Drug Enforcement Administration, 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, State, local or tribal government.

Abstract: DEA–222 is used to transfer or purchase Schedule I and II controlled substances and data are needed to provide an audit of transfer and purchase. DEA–222a Requisition Form is used to obtain the DEA–222 Order Form. Persons may also digitally sign and transmit orders for controlled substances electronically, using a digital certificate. Orders for Schedule I and II controlled substances are archived and transmitted to DEA.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that 96,280 registrants submit forms annually for this collection, taking an estimated 13.34 hours annually.

(6) *An estimate of the total public burden (in hours) associated with the collection:* DEA estimates that there will be 1,283,935 annual burden hours associated with the collection.

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: May 2, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E8–10082 Filed 5–6–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0021]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: Records and Reports of Registrants.

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 73, Number 42, pages 11443–11444 on March 3, 2008, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until June 6, 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:* Records and Reports of Registrants.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: None.

Office of Diversion Control, Drug Enforcement Administration, United States 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: This information is needed to maintain a closed system of distribution by requiring the individual practitioner to keep records of the dispensing and administration of controlled substances.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that 103,000 respondents, with 103,000 responses annually to this collection. DEA estimates that it takes 30 minutes per year for each practitioner to maintain the necessary records.

(6) *An estimate of the total public burden (in hours) associated with the collection:* This information collection creates an annual burden of 51,500 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: May 2, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E8–10084 Filed 5–6–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Advisory Board Meeting

Time and Date: 8 a.m. to 4:30 p.m. on Monday, June 9, 2008. 8 a.m. to 11:30 p.m. on Tuesday, June 10, 2008.

Place: National Institute of Corrections, 500 First Street NW., 7th fl, Washington, DC 20534, Phone (202) 307–3106.

Status: Open.

Matters To Be Considered: NIC executive Director's report; FY 09 Program Plan; Chairman McFarland will discuss the hearings of the PREA Review Panel; Review PREA Commission draft standards with Richard Hoffman, executive Director, PREA Commission; Reports from Office of Justice Programs, U.S. Parole Commission, American Correctional Association and Federal Judicial center.

Contact Person for More Information: Thomas Beauclair, Deputy Director, 202–307–3106, ext. 44254.

Morris L. Thigpen,

Director.

[FR Doc. E8–9986 Filed 5–6–08; 8:45 am]

BILLING CODE 4410–36–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

May 1, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (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 each 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 Website 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: OMB Desk Officer for the Bureau of Labor Statistics (BLS), 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: Bureau of Labor Statistics.

Type of Review: Extension without change of a previously approved collection.

Title: Report on Current Employment Statistics.

OMB Control Number: 1220–0011.

Affected Public: Business or other for-profits; not-for-profit institutions; State, Local, and Tribal Governments; and Federal Government.

Estimated Number of Respondents: 264,700.

Total Estimated Annual Burden Hours: 529,940.

Total Estimated Annual Costs Burden: $0.

Description: The Current Employment Statistics program provides current monthly statistics on employment, hours, and earnings, by industry. The statistics are fundamental inputs in economic decision processes at all levels of government, private enterprise, and organized labor. For additional information, see related notice published at 73 FR 7608 on February 8, 2008.

Agency: Bureau of Labor Statistics.

Type of Review: Extension without change of a previously approved collection.

Title: Quarterly Census of Employment and Wages (QCEW).

OMB Control Number: 1220–0012.

Affected Public: State, Local, and Tribal Governments.

Estimated Number of Respondents: 53.

Total Estimated Annual Burden Hours: 1,042,080.

Total Estimated Annual Costs Burden: $0.

Description: QCEW data, which are provided to BLS by State Workforce Agencies, are used by BLS as a sampling frame for its establishment surveys; for publishing of accurate current estimates of employment for the U.S., States, and metropolitan areas; and publishing quarterly census totals of local establishment counts, employment, and wages. The Bureau of Economic Analysis uses the data to produce accurate personal income data for the U.S., States, and local areas. Finally, the data is critical to the Employment Training Administration to administer unemployment insurance programs. For additional information, see related notice published at 73 FR 6215 on February 2, 2008.

Agency: Bureau of Labor Statistics.

Type of Review: Extension without change of a previously approved collection.

Title: Consumer Price Index Commodities and Services Survey.

OMB Control Number: 1220–0039.

Affected Public: Business or other for-profits; not-for-profit institutions; and State, Local, or Tribal Governments.

Estimated Number of Respondents: 53,600.

Total Estimated Annual Burden Hours: 123,850.

Total Estimated Annual Costs Burden: $0.

Description: The Consumer Price Index (CPI) is a measure of the average change over time in the prices paid by consumers for a market basket of consumer goods and services. Each month, BLS data collectors called economic assistants, visit or call thousands of retail stores, service establishments, rental units, and doctors' offices, all over the United States to obtain information on the prices of the thousands of items used to track and measure price changes in the CPI. The collection of price data is essential for the timely and accurate calculation of the commodities and services component of the CPI. The CPI is then widely used as a measure of inflation, indicator of the effectiveness of government economic policy, deflator for other economic series, and as a means of adjusting dollar values. For additional information, see related

notice published at 73 FR 3755 on January 22, 2008.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. E8–10038 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,718]

Fraser Timber Limited, Ashland, ME, Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated April 10, 2008, a company official requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on March 14, 2008. The Notice of determination was published in the **Federal Register** on March 26, 2008 (73 FR 16064).

The initial investigation resulted in a negative determination based on the finding that imports of lumber and woodchips did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding aggregate imports of lumber and the impact of Canadian imports on lumber industry in the United States.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 28th day of April 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–10031 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,947]

Norcal Pottery Products, Macrame Department, Richmond Distribution Center, Richmond, California; Notice of Affirmative Determination Regarding Application for Reconsideration

By applications dated April 15, 2008, petitioners requested administrative reconsideration of the Department of Labor's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, applicable to workers and former workers of the subject firm. The denial notice was signed on March 21, 2008 and published in the **Federal Register** on April 24, 2008 (73 FR 22169).

The initial investigation resulted in a negative determination based on the finding that criteria I.A and II.A have not been met. The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by Section 222 of the Trade Act of 1974.

In the request for reconsideration, the petitioner provided additional information regarding employment and layoffs at the subject firm.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed in Washington, DC, this 30th day of April, 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–10035 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,920]

Lanxess Sybron Chemicals, Inc., a Subsidiary of Lanxess Corporation, Including On-Site Contract Workers from Aerotek, Birmingham, NJ; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on March 18, 2008, applicable to workers of Lanxess Sybron Chemicals, Inc., a subsidiary of Lanxess Corporation, Birmingham, New Jersey. The notice was published in the **Federal Register** on April 24, 2008 (73 FR 22169).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of ion exchange resins for a variety of industrial applications.

New information shows that employees of AeroTek were working on-site at the Birmingham, New Jersey location of Lanxess Sybron Chemicals, Inc., a subsidiary of Lanxess Corporation. The Department has determined that the AeroTek workers were sufficiently under the control of the subject firm to be considered contract/leased workers.

Based on these findings, the Department is amending this certification to include temporary workers of AeroTek working on-site at the Birmingham, New Jersey location of the subject firm.

The intent of the Department's certification is to include all workers employed at Lanxess Sybron Chemicals, Inc., a subsidiary of Lanxess Corporation, Birmingham, New Jersey who were adversely affected by increased imports.

The amended notice applicable to TA–W–62,920 is hereby issued as follows:

''All workers of Lanxess Sybron Chemicals, Incorporated, a subsidiary of Lanxess Corporation, including on-site contract workers from AeroTek, Birmingham, New Jersey, who became totally or partially separated from employment on or after February 27, 2007, through March 18, 2010,

are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC this 28th day of April 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–10033 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,629; TA–W–62,629A]

Giant Merchandising, Inc., Including On-Site Leased Workers From Priority Temporary Services, Partners In Diversity and Apple One Commerce, CA; Including An Employee in Support of Giant Merchandising, Inc., Commerce, CA Operating Out of Rochester, MN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on January 28, 2008, applicable to workers of Giant Merchandising, Inc., including on-site leased workers from Priority Temporary Services, Partners In Diversity and Apple One, Commerce, California. The notice was published in the **Federal Register** on February 13, 2008 (73 FR 8369).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm.

New information shows that a worker separation (Mr. Halton Hamer) has occurred involving an employee in support of and under the control of the Commerce, California facility of Giant Merchandising, Inc. operating out of Rochester, Minnesota.

Based on these findings, the Department is amending this certification to include an employee in support of the Commerce, California facility operating out of Rochester, Minnesota.

The intent of the Department's certification is to include all workers of Giant Merchandising, Inc., Commerce, California who were adversely affected by a shift in production of screen printed apparel to Mexico.

The amended notice applicable to TA–W–62,629 is hereby issued as follows:

''All workers of Giant Merchandising, Inc., including on-site leased workers from Priority Temporary Services, Partners In Diversity, and Apple One, Commerce, California (TA–W–62,629), including an employee in support of Giant Merchandising, Inc., Commerce, California operating out of Rochester, Minnesota (TA–W–62,629A), who became totally or partially separated from employment on or after December 10, 2006, through January 28, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 28th day of April 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–10029 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,659]

Richloom Home Fashions, Division of Richloom Fabrics Corporation, Clinton, SC; Notice of Negative Determination on Reconsideration

On March 27, 2008, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The notice was published in the **Federal Register** on April 24, 2008 (73 FR 22166).

The initial investigation resulted in a negative determination based on the finding that worker group does not produce an article within the meaning of section 222 for the Trade Act of 1974.

In the request for reconsideration the petitioner stated that workers of the Sample Department of the subject firm produce samples of window treatments and bed coverings and requested that the Department conduct further investigation of the Sample Department.

On reconsideration, the Department contacted a company official and requested additional information regarding the production of samples of window treatments and bed coverings. The investigation revealed that workers of the Sample Department, Richloom Home Fashions in Clinton, South Carolina manufacture samples of window treatments and bed coverings. However, the investigation also revealed that only one worker was separated from the Sample Department in 2007 and there was no threat of future separations.

The subject company did not separate or threaten to separate a significant number or proportion of workers, as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers in a firm or appropriate subdivision means at least three workers in a workforce of fewer than 50 workers, five percent of the workers in a workforce of over 50 workers, or at least 50 workers. As employment levels at the subject facility did not decline during the relevant time period and there was no threat of separations during the relevant period, criterion (1) has not been met.

Conclusion

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Richloom Home Fashions, division of Richloom Fabrics Corporation, Clinton, South Carolina.

Signed at Washington, DC this 28th day of April, 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–10030 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,927]

Chase Home Finance LLC, A Division of JP Morgan Chase & Co., Lexington, Kentucky; Notice of Negative Determination Regarding Application for Reconsideration

By application dated April 17, 2008, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on March 17, 2008 and published in the **Federal Register** on April 24, 2008 (73 FR 22170).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The negative TAA determination issued by the Department for workers of Chase Home Finance LLC, a Division of JP Morgan Chase & Co., Lexington, Kentucky was based on the finding that the worker group does not produce an article within the meaning of Section 222 of the Trade Act of 1974.

The petitioner states that employment at the subject firm was negatively impacted by a shift of job functions to the Philippines. The petitioner also states that regardless of whether the workers of the subject firm produce a product or provide services, they should be certified eligible for Trade Adjustment Assistance.

The investigation revealed that the workers of Chase Home Finance LLC, a Division of JP Morgan Chase & Co., Lexington, Kentucky provide loan services for home mortgages and home equity lines of credit. These functions, as described above, are not considered production of an article within the meaning of Section 222 of the Trade Act of 1974.

The allegation of a shift to another country might be relevant if it was determined that workers of the subject firm produced an article. Since the investigation determined that workers of Chase Home Finance LLC, a Division of JP Morgan Chase & Co., Lexington, Kentucky do not produce an article, there cannot be imports nor a shift in production of an ''article'' abroad within the meaning of the Trade Act of 1974 in this instance.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 30th day of April 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–10034 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,771]

Parlex U.S.A., Laminated Cable Division, Including On-Site Leased Workers of Technical Needs, Marathon, Atwork Personnel Methuen, MA; Notice of Revised Determination on Reconsideration

On April 1, 2008, the Department issued an Affirmative Determination Regarding Application on Reconsideration applicable to workers and former workers of the subject firm. The notice was published in the **Federal Register** on April 11, 2008 (73 FR 19896).

The previous investigation was initiated on January 30, 2008, resulted in a negative determination issued on February 14, 2008, was based on the finding that, during the relevant period, the number of workers separated from the subject did not constitute a significant number or proportion of the subject worker group (at least 5 percent) and there was no threat of future separations. The denial notice was published in the **Federal Register** on February 29, 2008 (73 FR 11153).

To support the request for reconsideration, the petitioner supplied additional information regarding employment at the subject firm and indicated that at the time the petition was filed, there was a threat of worker separations at the subject firm.

Upon further contact with the subject firm's company official, it was revealed that the subject firm separated a significant number of workers during March 2008 and there is a threat of future separations. The investigation also revealed that the subject firm was in the process of shifting production of laminated cable to China. It is likely that the company will increase imports of laminated cable.

In accordance with section 246 the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor herein presents the results of its investigation regarding certification of eligibility to apply for alternative trade adjustment assistance (ATAA) for older workers.

In order for the Department to issue a certification of eligibility to apply for ATAA, the group eligibility requirements of section 246 of the Trade Act must be met. The Department has determined in this case that the requirements of Section 246 have been met.

A significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful review of the facts obtained in the investigation, I determine that there was a shift in production from the workers' firm or subdivision to China of articles that are like or directly competitive with those produced by the subject firm or subdivision, and there has been or is likely to be an increase in imports of like or directly competitive articles. In accordance with the provisions of the Act, I make the following certification:

All workers of Parlex U.S.A., Laminated Cable Division, including on-site leased workers of Technical Needs, Marathon, Atwork Personnel, Methuen, Massachusetts, who became totally or partially separated from employment on or after January 29, 2007, through two years from the date of this certification, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed in Washington, DC this 28th day of April 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–10032 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,222]

Brockway Mould, Inc., Brockport, PA; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 21, 2008 in response to a worker petition filed by a company official on behalf of workers of Brockway Mould, Inc., Brockport, Pennsylvania.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 29th day of April, 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–10028 Filed 5–6–08; 8:45 am]

BILLING CODE 4510–FN–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 08–05]

Notice of Quarterly Report (January 1, 2008–March 31, 2008)

AGENCY: Millennium Challenge Corporation.

SUMMARY: The Millennium Challenge Corporation (MCC) is reporting for the quarter January 1, 2008 through March 31, 2008 with respect to both assistance provided under Section 605 of the Millennium Challenge Act of 2003 (Pub. L. 108-199, Division D (the Act)), and transfers or allocations of funds to other federal agencies pursuant to Section 619(b) of the Act. The following report shall be made available to the public by means of publication in the **Federal Register** and on the Internet Web site of the MCC (*http://www.mcc.gov*) in accordance with Section 612(b) of the Act.

ASSISTANCE PROVIDED UNDER SECTION 605

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Madagascar Year: 2008 Quarter 2 Total obligation: $109,773,000 Entity to which the assistance is provided: MCA Madagascar Total quarterly disbursement: $6,378,369				
Land Tenure Project	$37,802,712	Increase Land Titling and Security.	$9,489,400	Legislative proposal reflecting the National Land Tenure Program submitted to Parliament and passed. Number of land disputes reported and resolved in the target zones and sites of implementation. Percentage of land documents inventoried, restored, and/or digitized. Average time and cost required to carry out property transactions. Percent of reported land conflicts resolved on titled land in zone 3, 4, 5 during the title regularization operations. Percentage of land in the zones that is demarcated and ready for titling.
Finance Project	35,688,288	Increase Competition in the Financial Sector.	4,456,685	The number of savings accounts and outstanding value of accounts from primary banks. Maximum check clearing delay. Volume of funds in payment system and number of transactions. Increased public awareness of new financial instruments as measured by surveys within intervention zones and large towns. The amount of government debt issued with maturities in excess of 52 weeks. The number of new individual investors buying government debt securities. The number of bank branches of the Central Bank of Madagascar capable of accepting auction tenders. Percentage of all loans included in the central database.
Agricultural Business Investment Project.	17,683,000	Improve Agricultural Projection Technologies and Market Capacity in Rural Areas.	7,217,240	Number of rural producers receiving or soliciting information from Agricultural Business Centers about the opportunities. Intervention zones identified and description of beneficiaries within each zone submitted. Number of visitors receiving information from National Coordinating Center with respect to business opportunities. Change in farm income due to improved production and marketing practices. Change in enterprise income due to improved production and marketing practices. Number of farmers and businesses employing technical assistance received.
Program Administration* and Control, Monitoring and Evaluation.	18,399,000	.....	8,544,664	
Pending subsequent reports**.		.....	−599,355	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Honduras Year: 2008 Quarter 2 Total obligation: $215,000,000 Entity to which the assistance is provided: MCA Honduras Total quarterly disbursement: $4,111,178				
Rural Development Project	$70,687,000	Increase the productivity and business skills of farmers who operate small- and medium-size farms and their employees.	$13,888,166	Increase in farm income resulting from Rural Development Project. Funds lent by MCA-Honduras to financial institutions. Increase in employment income resulting from Rural Development Project. Number of Program farmers harvesting high-value horticulture crops. Number of hectares harvesting high-value horticulture crops.
Transportation Project	127,208,000	Reduce transportation costs between targeted production centers and national, regional and global markets.	2,978,662	Freight shipment cost from Tegucigalpa to Puerto Cortes. Price of basic food basket. Number of days per year road is passable.
Program Administration * and Control, Monitoring and Evaluation.	17,105,000	.....	2,961,084	
Pending subsequent reports**.	.....	.....	−791,608	
Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Cape Verde Year: 2008 Quarter 2 Total obligation: $110,078,488 Entity to which the assistance is provided: MCA Cape Verde Total quarterly disbursement: $3,657,327				
Watershed and Agricultural Support.	$10,848,630	Increase agricultural production in three targeted watershed areas on three islands.	$2,042,500	Increase in horticultural productivity. Increase in annual income. Value-added for farms and agribusiness.
Infrastructure Improvement	78,760,208	Increase integration of the internal market and reduce transportation costs.	8,252,439	Volume of goods shipped between Praia and other islands. Mobility Ratio: Percentage of beneficiary population who take at least 5 trips per month. Savings on transport costs from improvements.
Private Sector Development.	7,200,000	Spur private sector development on all islands through increased investment in the priority sectors and through financial sector reform.	113,890	Value added in priority sectors above current trends. Volume of private investment in priority sectors above current trends.
Program Administration * and Control, Monitoring and Evaluation.	13,269,650	.....	4,428,462	
Pending subsequent reports **.	.....	.....	2,206,857	
Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Nicaragua Year: 2008 Quarter 2 Total obligation: $175,000,000 Entity to which the assistance is provided: MCA Nicaragua Total Quarterly Disbursement: $ 5,476,511				
Property Regularization Project.	$26,400,000	Increase Investment by strengthening property rights.	$2,927,021	Value of investment on land. Value of urban land. Value of rural land. Number of days to conduct a land transaction. Total cost to conduct a land transaction.
Transportation Project	92,800,000	Reduce transportation costs between Leon and Chinandega and national, regional and global markets.	5,747,905	Price of a basket of goods. Travel Time.
Rural Business Development Project.	33,500,000	Increase the value added of farms and enterprises in the region.	8,258,440	Annual percentage increase in value-added of clients of business office. Number of jobs created. Number of program farm plots harvesting higher-value crops or reforesting under improvement of Water Supply Activities.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Program Administration,* Due Diligence, Monitoring and Evaluation.	22,300,000	.....	6,629,264	
Pending subsequent reports **.	.....	.....	−3,731,791	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Georgia Year: 2008 Quarter 2 Total obligation: $295,300,000 Entity to which the assistance is provided: MCA Georgia Total quarterly disbursement: $7,227,528				
Regional Infrastructure Rehabilitation.	$211,700,000	Key Regional Infrastructure Rehabilitated.	$19,756,033	Reduction in Akhalkalaki-Ninotsminda-Teleti journey time. Reduction in vehicle operating costs. Increase in internal regional traffic volumes. Decreased technical losses in gas through the main North-South pipeline Reduction in the production of greenhouse gas emissions measured in tons of CO2 equivalent. Increased collection rate of the Georgian Gas Company (GOGC). Number of household beneficiaries served by Regional Infrastructure Development projects. Actual operations and maintenance expenditures.
Regional Enterprise Development.	47,500,000	Enterprises in Regions Developed.	6,185,514	Increase in annual revenue in portfolio companies. Increase in number of portfolio company employees and number of local suppliers. Increase in portfolio companies' wages and payments to local suppliers. Jobs created. Increase in aggregate incremental net revenue to project assisted firms. Direct household net income. Direct household net income for market information initiative beneficiaries. Number of beneficiaries.
Program Administration *, Due Diligence, Monitoring and Evaluation.	36,100,000	.....	8,552,935	
Pending subsequent reports **.	.....	.....	$11,389,101	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Vanuatu Year: 2008 Quarter 2 Total obligation: $65,690,000 Entity to which the assistance is provided: MCA Vanuatu Total quarterly disbursement: $0				
Transportation Infrastructure Project.	$60,615,232	Facilitate transportation to increase tourism and business development.	$152,297	Number of Tourists. Number of days per year road is closed. Number of S-W Bay, Malekula flights cancelled per year due to flooding. Vessel wait time at wharf.
Program Administration,* Due Diligence, Monitoring and Evaluation.	5,074,768	.....	1,786,418	
Pending subsequent reports **.	.....	.....	67,893	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Armenia Year: 2008 Quarter 2 Total obligation: $235,650,000 Entity to which the assistance is provided: MCA Armenia Total quarterly disbursement: $3,963,775				
Irrigated Agriculture Project (Agriculture and Water).	$145,680,000	Increase agricultural productivity. Improve Quality of Irrigation.	$7,414,586	Increase in hectares covered by high value added horticultural and fruit crops. Percentage of respondents satisfied with irrigation services. Share of Water User Association water charges as percentage of Water User Association annual operations and maintenance costs.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
				Number of farmers using improved on-farm water management practices. Annual increase in irrigated land in Project area. State budget expenditures on maintenance of irrigation system. Value of loans provided under the project.
Rural Road Rehabilitation Project.	67,100,000	Better access to economic and social infrastructure.	2,453,964	Government budgetary allocations for routine maintenance of the entire road network. Average daily traffic in Project area. Kilometers of Package 1 road sections rehabilitated. Kilometers of Package 2 road sections rehabilitated. Kilometers of Package 3 road sections rehabilitated.
Program Administration,* Due Diligence, Monitoring and Evaluation.	22,870,000	.....	5,562,777	
Pending subsequent reports **.	.....	.....	−207,073	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Benin Year: 2008 Quarter 2 Total obligation: $307,298,040 Entity to which the assistance is provided: MCA Benin Total quarterly disbursement: $6,911,600				
Access to Financial Services.	$19,650,000	Expand Access to Financial Services.	$2,375,946	Operational self-sufficiency of participating microfinance institutions. Number of microfinance institutions supervised by the microfinance cellule. Total incremental increase in value of new credit extended and savings received by financial institutions participating in the project. Share value of all loans outstanding that have one or more installments of principal over 30 days past due. Total number of loans guaranteed by land titles per year.
Access to Justice	34,270,000	Improved Ability of Justice System to Enforce Contracts and Reconcile Claims.	1,297,304	Number of cases processed at the arbitration center. Percentage of all cases in the ''Tribunal de Premiere Instance'' courts per year. Percentage of all cases resolved in court of appeals per year. Average distance to reach TPI. Number of enterprises registered through the registration center. Average number of days required to register an enterprise.
Access to Land	36,020,000	Strengthen property rights and increase investment in rural and urban land.	8,277,185	Total value of additional investments in target rural land parcels. Total value of additional investments in target urban land parcels.
Access to Markets	169,447,000	Improve Access to Markets through Improvements to the Port of Cotonou.	5,070,264	Total metric tons of exports and imports passing through Port of Cotonou per year.
Program Administration,* Due Diligence, Monitoring and Evaluation.	47,911,040	.....	11,569,831	
Pending subsequent reports **.	.....	.....	−4,206,496	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Ghana Year: 2008 Quarter 2 Total obligation: $547,009,000 Entity to which the assistance is provided: MCA Ghana Total quarterly disbursement: $2,066,682				
Agriculture Project	$240,984,050	Enhance profitability of cultivation, services to agriculture and product handling in support of the expansion of commercial agriculture among groups of smallholder farms.	$5,399,639	Number of hectares irrigated. Number of days to conduct a land transaction. Number of land disputes in the pilot registration districts. Registration of land rights in the pilot registration districts. Metric tons of products passing through post-harvest treatment. Portfolio-at-risk of agriculture loan fund. Value of loans disbursed to clients from agricultural loan fund. Number of additional loans. Vehicle operating costs on minor, medium and major rehabilitated roads.
Rural Development	101,288,000	Strengthen the rural institutions that provide services complementary to, and supportive of, agricultural and agriculture business development.	482,804	Time/quality per procurement. Score card of citizen satisfaction with services. Gross enrollment rates. Gender parity in school enrollment. Distance to collect water. Time to collect water. Distance to sanitation facility. Travel time to sanitation facility. Incidence of guinea worm, diarrhea or bilharzias. Average number of days lost due to guinea worm, diarrhea or bilharzias. Percentage of households, schools, and agricultural processing plants in target districts with electricity. Number of inter-bank transactions. Value of deposit accounts in rural banks.
Transportation	141,104,000	Reduce the transportation costs affecting agriculture commerce at sub-regional levels.	87,040	Volume capacity ratio. Vehicles per hour at peak hour. Travel time at peak hour. International roughness index. Annual average daily vehicle and passenger traffic.
Program Administration,* Due Diligence, Monitoring and Evaluation.	61,632,950	.....	7,660,087	
Pending subsequent reports**.	.....	.....	1,877,851	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: El Salvador Year: 2008 Quarter 2 Total obligation: $460,939,996 Entity to which the assistance is provided: MCA El Salvador Total quarterly disbursement: $847,312				
Human Development Project.	$91,674,603	Increase human and physical capital of residents of the Northern Zone to take advantage of employment and business opportunities.	$0	Number of students enrolled in the Chalatenango Center functioning as a MEGATEC institute. Graduation rate of students enrolled in the Chalatenango Center functioning as a MEGATEC institute. Number of students enrolled in participating middle technical schools. Graduation rate of students enrolled in participating middle technical schools. Number of students enrolled in non-formal training activities. Graduation rate of students enrolled in non-formal training activities. Number of households with access to water in the Northern Zone. Number of households with access to basic sanitation in the Northern Zone. Number of households with electricity in the Northern Zone.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
				Number of individuals that benefit annually from the strategic infrastructure projects.
Productive Development Project.	84,196,330	Increase production and employment in the Northern Zone.	0	Investment in productive chains by selected beneficiaries.
Connectivity Project	234,963,039	Reduce travel cost and time within the Northern Zone, with the rest of the country, and within the region.	0	Weighted average of the International Roughness Index for the rehabilitation of the Transnational Highway. Weighted average of the International Roughness Index for the rehabilitation of the network of connecting roads.
Program Administration * and Control, Monitoring and Evaluation.	50,106,024	.....	0	
Pending Subsequent Report **.	.....	.....	4,882,131	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Mali Year: 2008 Quarter 1 Total obligation: $460,684,411 Entity to which the assistance is provided: MCA Mali Total quarterly disbursement: $3,520,714				
Bamako Sénou Airport Improvement Project.	$89,631,177	Establish an independent and secure link to the regional and global economy.	$1,377, 281	Number of weekly flight arrivals and departures. Average time for passengers to complete departures and arrivals procedures.
Industrial Park Project	94,353,559	Develop a platform for industrial activity to be located within the Airport domain.	2,080,155	Occupancy level. Average number of days required for operator to connect to Industrial Park water and electricity services.
Alatona Irrigation Project ..	234,884,675	Increase the agricultural production and productivity in the Alatona zone of the ON..	0	Weighted average of the International Roughness Index for the rehabilitation of the Niono-Goma Coura road. Annual average daily count of vehicles on the Niono-Goma Coura road. Total amount of land irrigated by the Project in the Alatona zone. Average water volume delivered at the farm level in the Alatona zone. Crop water requirements as a percentage share of water supply at the canal headworks in the Alatona zone. Number of 5 and 10 hectare farm plots allocated in the Alatona zone. Total market garden parcels allocated in the Alatona zone. Number of titles registered in the land registration office granted to households in the Alatona zone. Number of students enrolled in schools established by the Project. Graduation rate of students enrolled in schools established by the Project. Number of farms adopting at least one new extension technique as a percentage of all farms receiving technical assistance under the Project. Total amount of credit extended in loan portfolios by participating microfinance institutions and banks in the Alatona zone. Number of active clients of microfinance institutions and banks in the Alatona zone.
Program Administration * and Control, Monitoring and Evaluation.	41,815,000	.....	3,603,110	
Pending Subsequent Report **.	.....	.....	0	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Mozambique (CIF ONLY) [1] Year: 2008 Quarter 2 Total obligation: $25,346,200 Entity to which the assistance is provided: MCA Mozambique Total quarterly disbursement: $0				
Water and Sanitation Project.	N/A	Increase access to reliable and quality water and sanitation facilities.	N/A	Value of productive days gained due to less diarrhea, cholera and/or malaria. School attendance days gained due to less diarrhea, cholera and/or malaria. Number (Percent) of businesses with access to improved water source. Reduction in time for rural/urban households to access improved water sources. Number (Percent) of urban households with access to improved water sources. Number (Percent) of rural households with access to improved water sources. Number (Percent) of urban households with access to improved sanitation facilities.
Road Rehabilitation Project	N/A	Increase access to productive resources and markets.	N/A	Increase in agricultural production among communities affected by road rehabilitation works. Increase in the number of new businesses within 5 km of rehabilitated roads. Reduction in vehicle operating costs as a result of rehabilitated roads. Time savings due to a reduction in time to travel a fixed length of rehabilitated road. Weighted average of the International Roughness Index for the rehabilitation roads. Average annual daily traffic volume on rehabilitated roads disaggregated by vehicle type.
Land Tenure Services Project.	N/A	Establish efficient, secure land access for households and investors.	N/A	Increase (Percent) in value of new investments on land. Number of new businesses. Reduction (Percent) in time to right to land usage. More efficient, free and secure land transfers/transactions. Increase (Percentage) in parcel-holder land value. Reduction (Percent) in costs to right to land usage.
Farmer Income Support Project.	N/A	Improve coconut productivity and diversification into cash crop.	N/A	Reduction (Percentage) in loss of coconut production and coconut products' sales. Increased income (Percentage) from sales from intercropping activities to small farm plot holders. Increased number (Percentage) of live coconut trees. Increased productive capacity (Percentage) of coconut trees.
Program Administration * and Control, Monitoring and Evaluation.	N/A	.....	N/A	
Pending Subsequent Report **.	.....	.....	N/A	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Lesotho (CIF ONLY) Year: 2008 Quarter 2 Total obligation: $15,668,416 Entity to which the assistance is provided: MCA Lesotho Total quarterly disbursement: $369,321				
Water Project	$4,913,000	Improve the water supply for industrial and domestic needs, and enhance rural livelihoods through improved watershed management.	N/A	Increased urban access to potable water supply. Increase in volume of water delivered after treatment at Metolong site. Decrease in percentage of urban water that is not accounted for (non-revenue losses plus physical losses). Number of people covered per year in rural areas with MCC funded rural water supply. Number of new VIP latrines provided to households.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Health Project	4,436,000	Increase access to life-extending ART and essential health services by providing a sustainable delivery platform.	N/A	Increase in the percentage of health facilities providing full package of standard services for level of center (MoHSW 2007 standard). Increase in TB treatment success rate. Increase in the percentage of health facilities staffed with standard number and type of qualified staff (MoHSW 2007 standard). Increase in the number of patients treated in health centers in Lesotho. Increase in immunization rate (measles). Number of people receiving ARV treatment (number). Increase in annual enrolment at National Health Training College. Increase in average referred tests performed at the central laboratory per quarter during the past year. Increase in average number of blood units collected per quarter during the past year.
Private Sector Development Project.	710,000	Stimulate investment by improving access to credit, reducing transaction costs and increasing the participation of women in the economy.	30,000	Increase in the percentage of the adult population listed by a private credit bureau with current information on repayment history, unpaid debts or credit outstanding. Increase in the number of payments associated with salaries and pensions made through EFT per year. Land used as collateral (number of mortgage bonds registered). Land transaction costs (percent of property value). Land transaction times (median number of days necessary to complete a procedure). Increase in the number of pending civil cases in the High Court. Gender equality index (percent change in index of knowledge, attitudes, and practices for supporting gender equality in economic rights).
Program Administration * and Control, Monitoring and Evaluation.	5,609,416	.....	N/A	
Pending Subsequent Report **.	.....	.....	N/A	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Morocco (CIF ONLY) Year: 2008 Quarter 2 Total obligation: $32,400,000 Entity to which the assistance is provided: MCA Lesotho Total quarterly disbursement: $107,746				
Fruit Tree Productivity	$6,959,765	TBD	N/A	TBD.
Small Scale Fisheries	7,005,874	TBD	N/A	TBD.
Artisan and Fez Medina	6,142,437	TBD	N/A	TBD.
Financial Services	$500,000	TBD	N/A	TBD.
Program Administration * and Control, Monitoring and Evaluation.	11,271,924	TBD.	107,746	TBD
Pending Subsequent Report **.	N/A	TBD	N/A	TBD.

* Program administration funds are used to pay items such as salaries, rent, and the cost of office equipment.

** These amounts represent disbursements made that will be allocated to individual projects in the subsequent quarter(s) and reported as such in subsequent quarterly report(s)

[1] Beginning in fiscal year 2007, CIF (i.e., Compact Implementation Funding) is assistance made available to a country, upon signature of a compact, under the authority of Section 609(g) of the Act. It is additional to compact program assistance provided under Section 605 of the Act upon entry into force of the compact and is included in the overall total of compact funding. As of this report, only CIF funds have been obligated for Mozambique, Lesotho and Morocco.

619(b) Transfer or allocation of funds

U.S. agency to which funds were transferred or allocated	Amount	Description of program or project
USAID	$62,757,548	Threshold Program.

Dated: May 2, 2008.

Matthew McLean,

Vice President, Congressional and Public Affairs, Millennium Challenge Corporation.

[FR Doc. E8–10076 Filed 5–6–08; 8:45 am]

BILLING CODE 9210–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–043)]

NASA Advisory Council; Science Committee; Earth Science Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: The National Aeronautics and Space Administration (NASA) announces a meeting of the Earth Science Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, May 28, 2008, 8 a.m. to 4:30 p.m. and Thursday, May 29, 2008, 8 a.m. to 3 p.m. Eastern Daylight Time.

ADDRESSES: NASA Headquarters, Room 6H45 and Room 5H45 consecutively, 300 E Street, SW., Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

- Earth Science Division Update
- Implications of the fiscal year 2009 Budget for Implementing the Decadal Survey
- Role and Sequencing of Venture-Class Missions as Part of Earth Science Division's Portfolio

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide the following information no less than 6 working days prior to the meeting: Full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: April 30, 3008.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E8–10017 Filed 5–6–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–042)]

Aerospace Safety Advisory Panel; Meeting

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announce a forthcoming meeting of the Aerospace Safety Advisory Panel.

DATES: Thursday, May 22, 2008, 1 p.m. to 3 p.m. Eastern Daylight Time.

ADDRESSES: NASA Headquarters, 300 E Street, SW., Washington, DC 20546, Room 9H40.

FOR FURTHER INFORMATION CONTACT: Ms. Kathy Dakon, Aerospace Safety Advisory Panel Executive Director, National Aeronautics and Space Administration, Washington, DC 20546, (202) 358–0732.

SUPPLEMENTARY INFORMATION: The Aerospace Safety Advisory Panel will hold its 2nd Quarterly Meeting for 2008. This discussion is pursuant to carrying out its statutory duties for which the Panel reviews, identifies, evaluates, and advises on those program activities, systems, procedures, and management activities that can contribute to program risk. Priority is given to those programs that involve the safety of human flight. The agenda will include updates on Technical Authority, Technical Standards, Fall Protection Standards, Drug and Alcohol Testing Standards, and Exploration Human vs. Robotic Review Process.

The meeting will be open to the public up to the seating capacity of the room. Seating will be on a first-come basis. Please contact Ms. Susan Burch on (202) 358–0550 at least 48 hours in advance to reserve a seat. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Attendees will be required to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. All attendees will need to provide the following information to receive an access badge: full name; gender; date/place of birth; citizenship; employer/affiliation information (name of institution, address, county, phone), and title/position. Foreign Nationals will need to provide the following additional information: visa/green card information (number, type, expiration date. To expedite admittance, attendees can provide their identifying information in advance by contacting Ms. Susan Burch via e-mail at *susan.burch@nasa.gov* or by telephone at (202) 358–0550. Persons with disabilities who require assistance should indicate this.

Photographs will only be permitted during the first 10 minutes of the meeting. During the first 30 minutes of the meeting, members of the public may make a 5-minute verbal presentation to the Panel on the subject of safety in NASA. To do so, please contact Ms. Susan Burch on (202) 358–0550 at least 48 hours in advance. Any member of the public is permitted to file a written statement with the Panel at the time of the meeting. Verbal presentations and written comments should be limited to the subject of safety in NASA.

Dated: April 30, 2008.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E8–10016 Filed 5–6–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for International Science and Engineering; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science

Foundation announces the following meeting:

Name: Advisory Committee for International Science and Engineering (25104).

Date/Time: June 9, 2008; 8 a.m. to 6 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Room 375, Arlington, VA.

Type of Meeting: Open.

Contact Person: Eduardo Feller, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230 (703) 292–8710.

If you are attending the meeting and need access to the NSF, please contact the individual listed above so you name may be added to the building access list.

Purpose of Meeting: To provide advice concerning issues related to the international science and engineering programs and initiatives of the NSF.

Agenda: Update on Program and Staff Activities. Discussion of Proposed International Policies and Practices and Draft Strategic Plan. NSB Report on International Science and Engineering Partnerships. Update on Developing Countries Initiatives. Committee of Visitors Report. Partnerships for International Research and Education.

Dated: May 2, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–10036 Filed 5–6–08; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 4201 Wilson, Blvd., Arlington, Virginia 22230.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will no longer be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF Web site: *http://www.nsf.gov/events/advisory.jsp.* This information may also be requested by telephoning 703/292–8182.

Dated: May 2, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–10037 Filed 5–6–08; 8:45 am]

BILLING CODE 7555–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; 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–2; OMB Control No. 3235–0201; SEC File No. 270–189.

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 a request for approval of extension of the existing collection of information provided for in the following rule: Rule 17a–2 (17 CFR 240.17a–2).

Rule 17a–2 requires underwriters to maintain information regarding stabilizing activities conducted in accordance with Rule 104. The collections of information under Regulation M and Rule 17a–2 are necessary for covered persons to obtain certain benefits or to comply with certain requirements. The collections of information are necessary to provide the Commission with information regarding syndicate covering transactions and penalty bids. The Commission may review this information during periodic examinations or with respect to investigations. Except for the information required to be kept under Rule 104(i) (17 CFR 242.104(i)) and Rule 17a–2(c), none of the information required to be collected or disclosed for PRA purposes will be kept confidential. The recordkeeping requirement of Rule 17a–2 requires the information be maintained in a separate file, or in a separately retrievable format, for a period of three years, the first two years in an easily accessible place, consistent with the requirements of Exchange Act Rule 17a–4(f) (17 CFR 240.17a–4(f)).

There are approximately 795 respondents per year that require an aggregate total of 3975 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes approximately 5 hours to complete. Thus, the total compliance burden per year is 3975 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.

Comments should be directed to (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 by sending an e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: April 30, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10041 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–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 17a–6; SEC File No. 270–506; OMB Control No. 3235–0564.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501) the Securities and

Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Section 17(a) of the Investment Company Act of 1940 (15 U.S.C. 80a) (the ''Act'') generally prohibits affiliated persons of a registered investment company (''fund'') from borrowing money or other property from, or selling or buying securities or other property to or from the fund, or any company that the fund controls. Rule 17a–6 (17 CFR 270.17a–6) permits a fund and a ''portfolio affiliate'' (a company that is an affiliated person of the fund because the fund controls the company, or holds 5 percent or more of the company's outstanding voting securities) to engage in principal transactions that would otherwise be prohibited under section 17(a) of the Act under certain conditions. A fund may not rely on the exemption in the rule to enter into a principal transaction with a portfolio affiliate if certain prohibited participants (*e.g.*, directors, officers, employees, or investment advisers of the fund) have a financial interest in a party to the transaction. Rule 17a–6 specifies certain interests that are not ''financial interests,'' including any interest that the fund's board of directors (including a majority of the directors who are not interested persons of the fund) finds to be not material. A board making this finding is required to record the basis for the finding in its meeting minutes. This recordkeeping requirement is a collection of information under the rule.

The rule is designed to permit transactions between funds and their portfolio affiliates in circumstances in which it is unlikely that the affiliate would be in a position to take advantage of the fund. In determining whether a financial interest is ''material,'' the board of the fund should consider whether the nature and extent of the interest in the transaction is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement. The information collection requirements in rule 17a–6 are intended to ensure that Commission staff can review, in the course of its compliance and examination functions, the basis for a board of directors' finding that the financial interest of an otherwise prohibited participant in a party to a transaction with a portfolio affiliate is not material.

Based on analysis of past filings, Commission staff estimates that 148 funds are affiliated persons of 668 issuers as a result of the fund's ownership or control of the issuer's voting securities, and that there are approximately 1,000 such affiliate relationships. Based on staff discussions with a limited number of fund representatives, we estimate that funds currently do not rely on the exemption from the term ''financial interest'' with respect to any interest that the fund's board of directors (including a majority of the directors who are not interested persons of the fund) finds to be not material. Accordingly, we estimate that annually there will be no principal transactions under rule 17a–6 that will result in a collection of information.

The Commission requests authorization to maintain an inventory of one burden hour to ease future renewals of rule 17a–6's collection of information analysis should funds rely on this exemption to the term ''financial interest'' as defined in rule 17a–6.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Complying with this collection of information requirement is necessary to obtain the benefit of relying on rule 17a–6. 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.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: April 30, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10042 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–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 206(4)–6; SEC File No. 270–513; OMB Control No. 3235–0571.

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 a request for extension of the previously approved collection of information discussed below.

The title for the collection of information is ''Rule 206(4)–6'' under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) (''Advisers Act'') and the collection has been approved under OMB Control No. 3235–0571. The Commission adopted rule 206(4)–6 (17 CFR 275.206(4)–6), the proxy voting rule, to address an investment adviser's fiduciary obligation to clients who have given the adviser authority to vote their securities. Under the rule, an investment adviser that exercises voting authority over client securities is required to: (i) Adopt and implement policies and procedures that are reasonably designed to ensure that the adviser votes securities in the best interest of clients, including procedures to address any material conflict that may arise between the interest of the adviser and the client; (ii) disclose to clients how they may obtain information on how the adviser has voted with respect to their securities; and (iii) describe to clients the advisers proxy voting policies and procedures and, on request, furnish a copy of the policies and procedures to the requesting client. The rule is designed to assure that advisers that vote proxies for their clients vote those proxies in their clients' best interest and provide clients with information about how their proxies were voted.

Rule 206(4)–6 contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act. 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. The collection is mandatory and responses to the disclosure requirement are not kept confidential.

The respondents are investment advisers registered with the Commission that vote proxies with respect to clients' securities. Advisory clients of these investment advisers use the information required by the rule to assess investment advisers' proxy voting policies and procedures and to monitor the advisers' performance of its proxy voting activities. The information required by Rule 206(4)–6 also is used by the Commission staff in its examination and oversight program. Without the information collected under the rules, advisory clients would not have information they need to assess the adviser's services and monitor the adviser's handling of their accounts, and the Commission would be less efficient and effective in its programs.

The estimated number of investment advisers subject to the collection of information requirements under the rule is 9,166. It is estimated that each of these advisers is required to spend on average 10 hours annually documenting its proxy voting procedures under the requirements of the proposed rule, for a total burden of 91,660 hours. We further estimate that on average, approximately 101 clients of each adviser, would request copies of the underlying policies and procedures. We estimate that it would take these advisers 0.1 hours per client to deliver copies of the policies and procedures, for a total burden of approximately 92,577 hours. Accordingly, we estimate that rule 206(4)–6 results in an annual aggregate burden of collection for SEC-registered investment advisers by a total of 184,237 hours.

Records related to an adviser's proxy voting policies and procedures and proxy voting history are separately required under the Advisers Act recordkeeping rule 204–2 (17 CFR 275.204–2). The standard retention period required for books and records under rule 204–2 is five years, in an easily accessible place, the first two years in an appropriate office of the investment adviser. OMB has previously approved the collection with this retention period.

General 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 e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312, or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: April 30, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10043 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; 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 102; OMB Control No. 3235–0467; SEC File No. 270–409.

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 a request for approval of extension of the existing collection of information provided for in the following rule: Rule 102 of Regulation M (17 CFR 242.102).

Rule 102 prohibits distribution participants, issuers, and selling security holders from purchasing activities at specified times during a distribution of securities. Persons otherwise covered by these rules may seek to use several applicable exceptions such as an exclusion for actively traded reference securities and the maintenance of policies regarding information barriers between their affiliates.

There are approximately 945 respondents per year that require an aggregate total of 1845 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes approximately 1.95 hours to complete. Thus, the total compliance burden per year is 1845 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.

Comments should be directed to (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 by sending an e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: April 30, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10044 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–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 17a–10; SEC File No. 270–507; OMB Control No. 3235–0563.

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 (''OMB'') a request for extension of the previously approved collection of information discussed below.

Section 17(a) of the Investment Company Act of 1940 (15 U.S.C. 80a) (the ''Act''), prohibits affiliated persons of a registered investment company (''fund'') from borrowing money or other property from, or selling or buying securities or other property to or from the fund, or any company that the fund controls. Section 2(a)(3) of the Act (15 U.S.C. 80a–2(a)(3)(E) defines ''affiliated person'' of a fund to include its investment advisers. Rule 17a–10 (17 CFR 270.17a–10) permits (i) a subadviser of a fund to enter into transactions with funds the subadviser does not advise but which are affiliated persons of a fund that it does advise (e.g., other funds in the fund complex), and (ii) a subadviser (and its affiliated persons) to enter into transactions and arrangements with funds the subadviser does advise, but only with respect to discrete portions of the subadvised fund for which the subadviser does not provide investment advice.

To qualify for the exemptions in rule 17a–10, the subadvisory relationship must be the sole reason why section

17(a) prohibits the transaction; and the advisory contracts of the subadviser entering into the transaction, and any subadviser that is advising the purchasing portion of the fund, must prohibit the subadvisers from consulting with each other concerning securities transactions of the fund, and limit their responsibility to providing advice with respect to discrete portions of the fund's portfolio.[1]

The Commission staff estimates that 3583 portfolios of approximately 649 fund complexes use the services of one or more subadvisers. Based on discussions with industry representatives, the staff estimates that it requires approximately 6 hours to draft and execute revised subadvisory contracts allowing funds and subadvisers to rely on the exemptions in rule 17a–10.[2] The staff assumes that all existing funds amended their advisory contracts following the adoption of rule 17a–10 in 2003 that conditioned certain exemptions upon these contractual alterations, and therefore there is no continuing burden for those funds.[3]

Based on an analysis of fund filings, the staff estimates that approximately 600 fund portfolios enter into new subadvisory agreements each year.[4] Based on discussions with industry representatives, the staff estimates that it will require approximately 3 attorney hours [5] to draft and execute additional clauses in new subadvisory contracts in order for funds and subadvisers to be able to rely on the exemptions in rule 17a–10. Because these additional clauses are identical to the clauses that a fund would need to insert in their subadvisory contracts to rely on rules 10f–3, 12d3–1, and 17e–1, and because we believe that funds that use one such rule generally use all of these rules, we apportion this 3 hour time burden equally among all four rules. Therefore, we estimate that the burden allocated to rule 17a–10 for this contract change would be 0.75 hours.[6] Assuming that all 600 funds that enter into new subadvisory contracts each year make the modification to their contract required by the rule, we estimate that the rule's contract modification requirement will result in 450 burden hours annually, with an associated cost of approximately $131,400.[7]

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Complying with this collection of information requirement is necessary to obtain the benefit of relying on rule 17a–10. Responses will not be kept confidential. 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.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: April 30, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10045 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

[1] See 17 CFR 270.17a–10(a)(2).

[2] Rules 12d3–1, 10f–3, 17a–10, and 17e–1 require virtually identical modifications to fund advisory contracts. The Commission staff assumes that funds would rely equally on the exemptions in these rules, and therefore the burden hours associated with the required contract modifications should be apportioned equally among the four rules.

[3] We assume that funds formed after 2002 that intended to rely on rule 17a–10 would have included the required provision as a standard element in their initial subadvisory contracts.

[4] The use of subadvisers has grown rapidly over the last several years, with approximately 600 portfolios that use subadvisers registering between December 2005 and December 2006. Based on information in Commission filings, we estimate that 31 percent of funds are advised by subadvisers.

[5] The Commission staff's estimates concerning the wage rates for attorney time are based on salary information for the securities industry compiled by the Securities Industry Association. The $292 per hour figure for an attorney is from the SIA Report on Management & Professional Earnings in the Securities Industry 2006, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[6] This estimate is based on the following calculation (3 hours ÷ 4 rules = .75 hours).

[7] These estimates are based on the following calculations: (0.75 hours × 600 portfolios = 450 burden hours); ($292 per hour × 450 hours = $131,400 total cost).

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 482; SEC File No. 270–508; OMB Control No. 3235–0565.

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 a request for extension of the previously approved collection of information discussed below.

Like most issuers of securities, when an investment company [1] (''fund'') offers its shares to the public, its promotional efforts become subject to the advertising restrictions of the Securities Act of 1933, (15 U.S.C. 77) as amended (the ''Securities Act''). In recognition of the particular problems faced by funds that continually offer securities and wish to advertise their securities, the Commission has previously adopted advertising safe harbor rules. The most important of these is Rule 482 (17 CFR 230.482) under the Securities Act, which, under certain circumstances, permits funds to advertise investment performance data, as well as other information. Rule 482 advertisements are deemed to be ''prospectuses'' under section 10(b) of the Securities Act.[2]

Rule 482 contains certain requirements regarding the disclosure that funds are required to provide in qualifying advertisements. These requirements are intended to encourage the provision to investors of information that is balanced and informative, particularly in the area of investment performance. For example, a fund is required to include disclosure advising investors to consider the fund's investment objectives, risks, charges and expenses, and other information described in the fund's prospectus or accompanying profile (if applicable), and highlighting the availability of the fund's prospectus. In addition, rule 482 advertisements that include performance data of open-end funds or insurance company separate accounts offering variable annuity contracts are required to include certain standardized performance information, information about any sales loads or other nonrecurring fees, and a legend warning that past performance does not guarantee future results. Such funds including performance information in rule 482 advertisements are also

[1] ''Investment company'' refers to both investment companies registered under the Investment Company Act of 1940, as amended, and business development companies.

[2] 15 U.S.C. 77j(b).

required to make available to investors month-end performance figures via Web site disclosure or by a toll-free telephone number, and to disclose the availability of the month-end performance data in the advertisement. The rule also sets forth requirements regarding the prominence of certain disclosures, requirements regarding advertisements that make tax representations, requirements regarding advertisements used prior to the effectiveness of the fund's registration statement, requirements regarding the timeliness of performance data, and certain required disclosures by money market funds.

Rule 482 advertisements must be filed with the Commission or, in the alternative, with Financial Industry Regulatory Authority (''FINRA'').[3] This information collection differs from many other federal information collections that are primarily for the use and benefit of the collecting agency.

As discussed above, rule 482 contains requirements that are intended to encourage the provision to investors of information that is balanced and informative, particularly in the area of investment performance. The Commission is concerned that in the absence of such provisions fund investors may be misled by deceptive rule 482 performance advertisements and may rely on less-than-adequate information when determining in which funds they should invest their money. As a result, the Commission believes it is beneficial for funds to provide investors with balanced information in fund advertisements in order to allow investors to make better-informed decisions.

The Commission estimates that 89,077 responses are filed annually pursuant to rule 482 by 4,106 investment companies offering 37,265 portfolios. Respondents consist of all the investment companies that take advantage of the safe harbor offered by the rule for their advertisements. The burden associated with rule 482 is presently estimated to be 5.16 hours per response. The hourly burden is therefore approximately 459,637 hours (89,077 responses × 5.16 hours per response).

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Cost burden is the cost of services purchased to comply with rule 482, such as for the services of computer programmers, outside counsel, financial printers, and advertising agencies. The Commission attributes no cost burden to rule 482.

The provision of information under rule 482 is necessary to obtain the benefits of the safe harbor offered by the rule. The information provided is not kept confidential.

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.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: April 30, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10046 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–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 27d–2; SEC File No. 270–500; OMB Control No. 3235–0566.

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 (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of the collections of information under the Investment Company Act of 1940 (15 U.S.C. 80a) (''Act'') summarized below.

Rule 27d–2 (17 CFR 270.27d–2) is entitled ''Insurance Company Undertaking in Lieu of Segregated Trust Account.'' Rule 27d–1 (17 CFR 270.27d–1)[1] under the Act requires the depositor or principal underwriter for an issuer of periodic payment plans to deposit funds into a segregated trust account to provide assurance of its ability to fulfill its refund obligations under sections 27(d) and 27(f).[2] Rule 27d–2 provides an exemption from rule 27d–1 under the Act for depositors or principal underwriters for the issuers of periodic payments plans. In order to comply with the rule: (i) The depositor or principal underwriter must secure from an insurance company a written guarantee of the refund requirements; (ii) the insurance company must satisfy certain financial criteria; and (iii) the depositor or principal underwriter must file as an exhibit to the issuer's registration statement, a copy of the written undertaking, an annual statement that the insurance company has met the requisite financial criteria on a monthly basis, and an annual audited balance sheet.

Rules 27d–1 and 27d–2, which were explicitly authorized by statute, provide assurance that depositors and principal underwriters of issuers have access to sufficient cash to meet the demands of certificate holders who reconsider their decisions to invest in a periodic payment plan. The information collection requirements in rules 27d–1 and 27d–2 enable the Commission to monitor compliance with reserve rules.

Rules 27d–1 and 27d–2, which were explicitly authorized by statute, provide assurance that depositors and principal underwriters of issuers have access to sufficient cash to meet the demands of certificate holders who reconsider their decisions to invest in a periodic payment plan. The information collection requirements in rules 27d–1 and 27d–2 enable the Commission to monitor compliance with reserve rules.

[3] See Rule 24b–3 under the Investment Company Act (17 CFR 270.24b–3), which provides that any sales material, including rule 482 advertisements, shall be deemed filed with the Commission for purposes of Section 24(b) of the Investment Company Act upon filing with FINRA.

[1] The information collection requirements for rule 27d–1 and Form N–27D–1 are covered in a separate **Federal Register** notice under OMB Control No. 3235–0560.

[2] The rule sets forth minimum reserve amounts and guidelines for the management and disbursement of the assets in the account. Rule 27d–1(j) directs depositors and principal underwriters annually to make an accounting of their segregated trust accounts on Form N–27D–1, which is filed with the Commission. The form requires depositors and principal underwriters to report deposits to a segregated trust account, including those made pursuant to paragraphs (c) and (e) of the rule. Withdrawals pursuant to paragraph (f) of the rule also must be reported. In addition, the form solicits information regarding the minimum amount required to be maintained under paragraphs (d) and (e) of rule 27d–1.

Only one registered investment company has issued a new periodic payment plan certificate within the past 18 months, and the principal underwriter or depositor for this sole issuer relies on the exemption in rule 27d–2. The respondent makes approximately three responses per year.[3] The insurance company provides the written undertaking, annual statement, and certified balance sheet at no cost to the respondent. The staff estimates that the respondent spends approximately one hour per year filing the required documents from the insurance company on EDGAR. Thus, we estimate that the annual burden is approximately 1 hour.

The staff believes that rule 27d–2 does not impose any cost burdens other than those arising from the hour burdens discussed above.

The estimates of average burden hours and costs are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.[4]

Complying with the collection of information requirements of rule 27d–2 is mandatory for depositors or principal underwriters of issuers of periodic payment plans who rely on the rule for an exemption from complying with rule 27d–1 and filing Form N–27D–1 (17 CFR 274.127d–1). The information provided pursuant to rule 27d–2 is public and, therefore, will not be kept confidential.

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.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: April 30, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10047 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

[3] The three responses are: (i) Obtaining and filing the written undertaking or an amendment to the undertaking, (ii) filing the insurance company's annual statement that the financial conditions were satisfied, and (iii) filing the insurance company's certified balance sheet.

[4] These estimates are based on telephone interviews between the Commission staff and representatives of depositors or principal underwriters of periodic payment plan issuers.

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; 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 103; OMB Control No. 3235–0466; SEC File No. 270–410.

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 a request for approval of extension of the existing collection of information provided for in the following rule: Rule 103 of Regulation M (17 CFR 242.103).

Rule 103 permits passive market-making in Nasdaq securities during a distribution. A distribution participant that seeks use of this exception would be required to disclose to third parties its intention to engage in passive market making.

There are approximately 214 respondents per year that require an aggregate total of 214 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes approximately 1 hour to complete. Thus, the total compliance burden per year is 214 burden hours. The total compliance cost for the respondents is approximately $12,037.50, resulting in a cost of compliance for the respondent per response of approximately $56.25 (i.e., $12,037.50/214 responses).

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.

Comments should be directed to (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 by sending an e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: April 30, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10040 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28259; 812–13476]

Fidelity Rutland Square Trust, et al.; Notice of Application

April 30, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act.

SUMMARY OF THE APPLICATION: Applicants request an order to permit certain registered open-end management investment companies to acquire shares of other registered open-end management investment companies and unit investment trusts that are within and outside the same group of investment companies. The order would supersede a prior order (the ''Prior Order'').[1]

APPLICANTS: Fidelity Management & Research Company (''FMR''), Fidelity Management Trust Company (''FMTC''), Pyramis Global Advisors Trust Company (''PGATC''), Strategic Advisers, Inc. (''SAI'') (collectively, the ''Adviser''); Fidelity Distributors Corporation (''FDC'') and National Financial Services LLC (''NFS'') (collectively, the ''Distributor''); and Fidelity Rutland Square Trust (the ''Trust'').

FILING DATES: The application was filed on January 16, 2008, and amended on April 29, 2008.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be

[1] *Fidelity Rutland Square Trust, et al.*, Investment Company Act Release Nos. 28008 (Sept. 28, 2007) (notice) and 28023 (Oct. 24, 2007) (order).

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 May 27, 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, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, 82 Devonshire Street, Boston, MA 02109.

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, at (202) 551–6879, or Michael W. Mundt, Assistant Director, at (202) 551–6821 (Office of Investment Company Regulation, Division of Investment Management).

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 20549–1520 (telephone (202) 551–5850).

Applicants' Representations

1. The Trust is a statutory trust organized under the laws of the state of Delaware and is registered under the Act as an open-end management investment company. The Trust currently offers seven series that intend to rely on the relief requested by the application: PAS Core Income Fund of Funds, PAS Income Opportunities Fund of Funds, PAS International Fund of Funds, PAS International Fidelity Fund of Funds, PAS Small Cap Fund of Funds, PAS U.S. Opportunity Fund of Funds, and PAS U.S. Opportunity Fidelity Fund of Funds (''PAS Funds,'' and each a ''Fund of Funds'').[2] Each PAS Fund operates as a fund of funds and has its own distinct investment objectives, policies and restrictions.

2. SAI currently serves as the investment adviser to each PAS Fund. FMR and SAI are investment advisers registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). Each of FMTC and PGATC is a ''bank'' within the meaning of section 202(a)(2) of the Advisers Act and, accordingly, is exempt from registration under the Advisers Act. Any Adviser to a Fund will be registered under the Advisers Act. Each of FMR, FMTC, PGATC, and SAI is a direct or indirect subsidiary of FMR LLC, a Delaware limited liability company. FDC and NFS are broker-dealers registered under the Securities Exchange Act of 1934 (''Exchange Act''). Each of FDC and NFS is a direct or indirect subsidiary of FMR LLC. FDC is currently the distributor of the PAS Funds.

3. Applicants request relief to permit: (a) A Fund of Funds to acquire shares of registered open-end management investment companies that are not part of the same ''group of investment companies'' (as defined in section 12(d)(1)(G)(ii) of the Act) as the Fund of Funds (the ''Non-Affiliated Investment Companies'') and unit investment trusts (''UITs'') that are not part of the same group of investment companies as the Fund of Funds (''Non-Affiliated Trusts,'' and together with the Non-Affiliated Investment Companies, the ''Non-Affiliated Underlying Funds''); (b) the Non-Affiliated Underlying Funds, their principal underwriter and brokers and dealers registered under the Exchange Act (''Brokers'') to sell such shares to the Fund of Funds; (c) a Fund of Funds to acquire shares of certain other registered open-end management investment companies advised by the Adviser or series thereof and that are part of the same ''group of investment companies'' (as defined in section 12(d)(1)(G)(ii) of the Act) as the Fund of Funds (''Affiliated Underlying Funds,'' and together with the Non-Affiliated Underlying Funds, the ''Underlying Funds''); and (d) the Affiliated Underlying Funds, their principal underwriter and Brokers to sell such shares to the Fund of Funds.[3] Certain of the Non-Affiliated Underlying Funds may be registered under the Act as either UITs or open-end management investment companies and have received exemptive relief to permit their shares to be listed and traded on a national securities exchange at negotiated prices (''ETFs''). Each Fund of Funds also may invest in stocks, bonds, money market instruments and other securities and financial instruments that are consistent with its investment objective.

Applicants' Legal Analysis

A. Section 12(d)(1)

1. 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 and any broker or dealer from selling the shares of the investment company 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.

2. 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. Applicants seek an exemption under section 12(d)(1)(J) of the Act to permit the Funds of Funds to acquire shares of the Underlying Funds and to permit the Underlying Funds, their principal underwriter and Brokers to sell shares to the Funds of Funds beyond the limits set forth in sections 12(d)(1)(A) and (B) of the Act.

3. Applicants state that the proposed arrangement will not give rise to the policy concerns underlying sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants state that the proposed arrangement will not result in undue influence by a Fund of Funds or its

[2] Applicants request that the order extend to each registered open-end management investment company or series thereof that is part of the same group of investment companies, as defined in section 12(d)(1)(G)(ii) of the Act as the Trust (each included in the term ''Fund of Funds'') and advised by the Adviser or any investment adviser controlling, controlled by, or under common control with the Adviser (each included in the term ''Adviser''). Each existing registered open-end management investment company that currently intends to rely on the order is named as an applicant. Any other existing or future registered open-end management investment company that subsequently relies on the order will do so only in accordance with the terms and conditions of the application.

[3] With regard to purchases of shares of Non-Affiliated Underlying Funds, the requested order would apply to purchases made by a Fund of Funds only to the extent that the Fund of Funds could not rely on the provisions of section 12(d)(1)(F) of the Act.

affiliated persons over the Non-Affiliated Underlying Funds. The concern about undue influence does not arise in connection with a Fund of Funds' investment in the Affiliated Underlying Funds, since they are part of the same group of investment companies. To limit the control that a Fund of Funds may have over a Non-Affiliated Underlying Fund, applicants propose a condition prohibiting: (a) The Adviser, any person controlling, controlled by or under common control with the Adviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or section 3(c)(7) of the Act advised or sponsored by the Adviser or any person controlling, controlled by or under common control with the Adviser (collectively, the ''Group''); and (b) any investment adviser to a Fund of Funds within the meaning of section 2(a)(20)(B) of the Act (''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 (collectively, the ''Subadviser Group'') from controlling (individually or in the aggregate) a Non-Affiliated Underlying Fund within the meaning of section 2(a)(9) of the Act.

5. Applicants further state that condition 2 below precludes a Fund of Funds and its Adviser, Subadviser, promoter, principal underwriter and any person controlling, controlled by or under common control with any of these entities (each, a ''Fund Affiliate'') from causing any existing or potential investment by the Fund of Funds in a Non-Affiliated Underlying Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund Affiliate and the Non-Affiliated Underlying Fund or its investment adviser(s), sponsor, promoter, principal underwriter and any person controlling, controlled by or under common control with any of these entities (each, a ''Non-Affiliated Fund Affiliate''). No Fund of Funds or Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Non-Affiliated Investment Company or sponsor to a Non-Affiliated Trust) will cause a Non-Affiliated Underlying Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an officer, director, member of an advisory board, Adviser, Subadviser, or employee of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, Adviser, Subadviser, or employee is an affiliated person (each, an ''Underwriting Affiliate,'' except any person whose relationship to the Non-Affiliated Underlying Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate). An offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate is an ''Affiliated Underwriting.''

6. Applicants also propose a condition that once an investment by a Fund of Funds in the securities of a Non-Affiliated Investment Company exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of directors or trustees of the Non-Affiliated Investment Company, including a majority of the independent directors or trustees, will determine that any consideration paid by the Non-Affiliated Investment Company to the Fund of Funds or a Fund Affiliate Service Provider [4] 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 Non-Affiliated Investment Company; (b) is within the range of consideration that the Non-Affiliated Investment Company 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.

7. To further assure that a Non-Affiliated Investment Company understands the implications of an investment by a Fund of Funds under the requested order, prior to a Fund of Funds' investment in a Non-Affiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and Non-Affiliated Investment Company will execute an agreement stating, without limitation, that their boards of directors or trustees and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (''Participation Agreement''). Applicants note that a Non-Affiliated Underlying Fund will retain the right to reject any direct investment from a Fund of Funds.[5]

8. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. With respect to investment advisory fees, applicants state that, prior to approving any investment advisory contract under section 15 of the Act, the board of trustees of the Fund of Funds (the ''Board''), including a majority of the trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the Act (the ''Independent Trustees''), will find that the investment advisory fees charged under the Fund of Fund's investment advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to any Underlying Fund's advisory contract(s). Applicants further state that the Adviser or Distributor will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Non-Affiliated Investment Company under rule 12b–1 under the Act) received from a Non-Affiliated Underlying Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by the Non-Affiliated Investment Company, in connection with the investment by the Fund of Funds in the Non-Affiliated Underlying Fund. Applicants also state that any sales charges and/or service fees, as defined in Rule 2830 of the Conduct Rules of the NASD (''NASD Conduct Rule 2830''), charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds set forth in NASD Conduct Rule 2830.

9. Applicants state that the proposed arrangement will not create an overly complex fund structure. Applicants note that an Underlying Fund will be prohibited from acquiring securities of any investment company or company

[4] A ''Fund Affiliate Service Provider'' is the Adviser, any Subadviser, promoter or principal underwriter of the Fund of Funds, and any person controlling, controlled by or under common control with any of these entities, provided that (i) such person would reasonably be expected to be in a position to provide services of a securities-related nature (that is, investment advisory, brokerage, distribution, transfer agency, administration, participant recordkeeping or shareholder services) to a Non-Affiliated Underlying Fund, or (ii) if such person is not described by clause (i), to the actual knowledge of the Adviser, any Subadviser, promoter or principal underwriter of the Fund of Funds, such person currently has or is reasonably expected to begin having a material business relationship with a Non-Affiliated Underlying Fund.

[5] To the extent a Fund of Funds purchases shares of a Non-Affiliated Underlying Fund that is an ETF in the secondary market, the Non-Affiliated Underlying Fund would still retain its ability to reject initial purchases of shares made in reliance on the requested order by declining to enter into a Participation Agreement prior to any investment by a Fund of Funds in excess of the limits of section 12(d)(1)(A)(i) of the Act.

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), except in certain circumstances identified in condition 12 below. Applicants also represent that a Fund of Funds' prospectus and sales literature will contain concise, ''plain English'' disclosure designed to inform investors about the unique characteristics of the proposed arrangement, including its expense structure and the additional expenses of investing in Underlying Funds.

B. Section 17(a)

10. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3) of the Act defines an ''affiliated person'' of another person to include: (a) 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; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

11. Applicants state that if a Fund of Funds and an Affiliated Underlying Fund were deemed to be under common control, they would be affiliated persons of each another. Applicants also state that a Fund of Funds and an Underlying Fund might be deemed to be affiliated persons of one another if a Fund of Funds acquires 5% or more of an Underlying Fund's outstanding voting securities. In light of these possible affiliations, section 17(a) could prevent an Underlying Fund from selling shares to and redeeming shares from a Fund of Funds.[6]

12. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that: (a) The terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if 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.

13. Applicants submit that the proposed transactions satisfy the standards for relief under sections 17(b) and 6(c) of the Act as the terms are fair and reasonable and do not involve overreaching.[7] Applicants note that the terms upon which an Underlying Fund will sell its shares to or purchase its shares from a Fund of Funds will be based on the net asset value of each Underlying Fund. Applicants state that the proposed arrangement will be consistent with the policies of each Fund of Funds and Underlying Fund, and with the general purposes of the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The members of the Group will not control (individually or in the aggregate) a Non-Affiliated Underlying Fund within the meaning of section 2(a)(9) of the Act. The members of the Subadviser Group will not control (individually or in the aggregate) a Non-Affiliated Underlying 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 Non-Affiliated Underlying Fund, the Group or the Subadviser Group, each in the aggregate, becomes a holder of more than 25% of the outstanding voting securities of a Non-Affiliated Underlying Fund, it will vote its shares of the Non-Affiliated Underlying Fund in the same proportion as the vote of all other holders of the Non-Affiliated Underlying Fund's shares. This condition will not apply to the Subadviser Group with respect to a Non-Affiliated Underlying 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 (in the case of a Non-Affiliated Investment Company) or as the sponsor (in the case of a Non-Affiliated Trust).

2. No Fund of Funds or Fund Affiliate will cause any existing or potential investment by the Fund of Funds in a Non-Affiliated Underlying Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund Affiliate and the Non-Affiliated Underlying Fund or a Non-Affiliated Fund Affiliate.

3. The Board of the Fund of Funds, including a majority of the Independent Trustees, will adopt procedures reasonably designed to assure that the Adviser and any Subadviser are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or a Fund Affiliate from a Non-Affiliated Underlying Fund or a Non-Affiliated Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of a Non-Affiliated Investment Company exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of directors or trustees of the Non-Affiliated Investment Company, including a majority of the independent directors or trustees, will determine that any consideration paid by the Non-Affiliated Investment Company to the Fund of Funds or a Fund Affiliate Service Provider 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 Non-Affiliated Investment Company; (b) is within the range of consideration that the Non-Affiliated Investment Company 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 Non-Affiliated Investment Company and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Non-Affiliated Investment Company or

[6] Applicants note that a Fund of Funds investing in Non-Affiliated Underlying Funds that are ETFs generally would purchase and sell shares of the ETFs through secondary market transactions at market prices rather than through principal transactions with the Non-Affiliated Underlying Fund. Applicants would not rely on the requested relief from section 17(a) for such secondary market transactions. To the extent that a Fund of Funds purchases or redeems shares from a Non-Affiliated Underlying Fund that is an ETF and an affiliated person of the Fund of Funds in exchange for a basket of specified securities as described in the application for the exemptive order upon which the ETF relies, applicants also request relief from section 17(a) for those transactions. A Fund of Funds would not purchase or redeem shares directly from an Affiliated Underlying Fund operating as an ETF.

[7] Applicants acknowledge that receipt of compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of shares of an Underlying Fund or (b) an affiliated person of an Underlying Fund, or an affiliated person of such person, for the sale by the Underlying Fund of its shares to a Fund of Funds may be prohibited by section 17(e)(1) of the Act. The Participation Agreement also will include this acknowledgement.

sponsor to a Non-Affiliated Trust) will cause a Non-Affiliated Underlying Fund to purchase a security in any Affiliated Underwriting.

6. The board of directors or trustees of a Non-Affiliated Investment Company, including a majority of the independent directors or trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Non-Affiliated Investment Company in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Non-Affiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The board of directors or trustees of the Non-Affiliated Investment Company will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Non-Affiliated Investment Company. The board of directors or trustees of the Non-Affiliated Investment Company will consider, among other things: (a) Whether the purchases were consistent with the investment objectives and policies of the Non-Affiliated Investment Company; (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 Non-Affiliated Investment Company in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The board of directors or trustees of a Non-Affiliated Investment Company 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.

7. Each Non-Affiliated Investment Company 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 of not less than six years from the end of the fiscal year in which any purchase from an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of a Non-Affiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth the (a) Party from whom the securities were acquired, (b) identity of the underwriting syndicate's members, (c) terms of the purchase, and (d) information or materials upon which the determinations of the board of directors or trustees of the Non-Affiliated Investment Company were made.

8. Before investing in a Non-Affiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Non-Affiliated Investment Company will execute a Participation Agreement stating, without limitation, that their boards of directors or trustees and their investment advisers 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 Non-Affiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i), the Fund of Funds will notify the Non-Affiliated Investment Company of the investment. At such time, the Fund of Funds will also transmit to the Non-Affiliated Investment Company a list of the names of each Fund Affiliate Service Provider and Underwriting Affiliate. The Fund of Funds will notify the Non-Affiliated Investment Company of any changes to the list of names as soon as reasonably practicable after a change occurs. The Non-Affiliated Investment Company and the Fund of Funds will maintain and preserve a copy of the order, the Participation 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.

9. Before approving any advisory contract under section 15 of the Act, the Board of the Fund of Funds, including a majority of the Independent Trustees, will find that the advisory fees charged under the advisory contract will be based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. These findings and the basis upon which they are made will be recorded fully in the minute books of the appropriate Fund of Funds.

10. The Adviser or Distributor will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Non-Affiliated Investment Company under rule 12b-1 under the Act) received from a Non-Affiliated Underlying Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by the Non-Affiliated Investment Company, in connection with the investment by the Fund of Funds in the Non-Affiliated Underlying Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received from a Non-Affiliated Underlying 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 Non-Affiliated Investment Company, in connection with the investment by the Fund of Funds in the Non-Affiliated Underlying 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 Fund of Funds.

11. Any sales charges and/or service fees (as defined in NASD Conduct Rule 2830) charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds set forth in NASD Conduct Rule 2830.

12. No Underlying Fund will acquire securities of any investment company or 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, except to the extent that such Underlying Fund: (a) Receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (b) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to (i) acquire securities of one or more affiliated investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–9996 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–28260; 812–13496]

The RBB Fund, Inc. and Abundance Technologies, Inc.; Notice of Application

April 30, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application to amend a prior order under section 12(d)(1)(J) of the Investment Company Act of 1940 (''Act'') granting an exemption from sections 12(d)(1)(A) and (B) of the Act and under sections 6(c) and 17(b) of the Act granting an exemption from section 17(a) of the Act.

SUMMARY OF APPLICATION: Applicants request an order (''Amended Order'') that would amend a prior order that permits certain series of a registered open-end management investment company advised by Abundance Technologies, Inc. (the ''Funds of Funds'') to acquire shares of other registered open-end management investment companies and unit investment trusts (''UITs'') (collectively, the ''Underlying Funds'') that are outside the same group of investment companies as the Funds of Funds (''Prior Order'').[1] The Amended Order would amend a condition of the Prior Order to permit Funds of Funds to invest in Underlying Funds that serve as feeder funds in a master-feeder structure in reliance on section 12(d)(1)(E) of the Act.

APPLICANTS: The RBB Fund, Inc. (the ''Company'') and Abundance Technologies, Inc. (the ''Adviser'').

FILING DATES: The application was filed on February 7, 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 application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on May 27, 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, The RBB Fund, Inc., 103 Bellevue Parkway, Wilmington, DE 19809 and Abundance Technologies, Inc., 3700 Park 42 Drive, Suite 105A, Cincinnati, OH 42141.

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, at (202) 551–6811, or Janet M. Grossnickle, 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 Public Reference Desk, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1520 (telephone (202) 551–5850).

Applicants' Representations

1. On April 3, 2007, the Commission issued the Prior Order to the Company, a registered open-end management investment company, and the Adviser, a registered investment adviser, under section 12(d)(1)(J) of the Act granting an exemption from sections 12(d)(1)(A) and (B) of the Act and under sections 6(c) and 17(b) of the Act granting an exemption from section 17(a) of the Act. The Prior Order permits the Funds of Funds to acquire shares of Underlying Funds that are not part of the same ''group of investment companies'' as defined in section 12(d)(1)(G)(ii) of the Act as the Funds of Funds (the ''Underlying Funds'') and the Underlying Funds to sell such shares to the Funds of Funds.[2]

2. Condition 12 in the Prior Order provides that an Underlying Fund will not acquire securities of any investment company or 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, subject to certain exceptions relating to reorganizations of portfolio companies, cash management and interfund lending. Applicants seek to modify condition 12 to permit the Funds of Funds to acquire shares of Underlying Funds that operate as feeder funds in a master-feeder structure in reliance on section 12(d)(1)(E) of the Act and are in the same ''group of investment companies'' as their corresponding master funds. Applicants argue that a master-feeder arrangement would not result in an overly complex structure because it is entirely transparent. Applicants submit that an investment in an Underlying Fund that operates as a feeder fund would be no different than investing in one that does not use a master-feeder arrangement.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the conditions in the Prior Order except that Condition 12 of the Prior Order will be modified to read as follows:

12. No Underlying Fund will acquire securities of any other investment company or 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, except to the extent that such Underlying Fund: (a) Acquires such securities in compliance with section 12(d)(1)(E) of the Act; (b) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (c) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to: (i) Acquire securities of one or more investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10015 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

[1] *The RBB Fund, Inc. and Abundance Technologies, Inc.,* Investment Company Act Release Nos. 27749 (Mar. 8, 2007) (notice) and 27775 (Apr. 3, 2007) (order).

[2] All Funds of Funds that currently intend to rely on the Amended Order are named as applicants. Any other investment company that relies on the Amended Order in the future will comply with the terms and conditions of the Amended Order.

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–8916; 34–57766/May 2, 2008]

Order Making Fiscal Year 2009 Annual Adjustments to the Fee Rates Applicable Under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b), and 31(c) of the Securities Exchange Act of 1934

I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 (''Securities Act'') requires the Commission to collect fees from issuers on the registration of securities.[1] Section 13(e) of the Securities Exchange Act of 1934 (''Exchange Act'') requires the Commission to collect fees on specified repurchases of securities.[2] Section 14(g) of the Exchange Act requires the Commission to collect fees on proxy solicitations and statements in corporate control transactions.[3] Finally, Sections 31(b) and (c) of the Exchange Act require national securities exchanges and national securities associations, respectively, to pay fees to the Commission on transactions in specified securities.[4]

The Investor and Capital Markets Fee Relief Act (''Fee Relief Act'')[5] amended Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act to require the Commission to make annual adjustments to the fee rates applicable under these sections for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates under these sections for fiscal year 2012 and beyond.[6]

II. Fiscal Year 2009 Annual Adjustment to the Fee Rates Applicable Under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act

Section 6(b)(5) of the Securities Act requires the Commission to make an annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act in each of the fiscal years 2003 through 2011.[7] In those same fiscal years, Sections 13(e)(5) and 14(g)(5) of the Exchange Act require the Commission to adjust the fee rates under Sections 13(e) and 14(g) to a rate that is equal to the rate that is applicable under Section 6(b). In other words, the annual adjustment to the fee rate under Section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under Sections 13(e) and 14(g) of the Exchange Act.

Section 6(b)(5) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2009. Specifically, the Commission must adjust the fee rate under Section 6(b) to a ''rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2009], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target offsetting collection amount for [fiscal year 2009].'' That is, the adjusted rate is determined by dividing the ''target offsetting collection amount'' for fiscal year 2009 by the ''baseline estimate of the aggregate maximum offering prices'' for fiscal year 2009.

Section 6(b)(11)(A) specifies that the ''target offsetting collection amount'' for fiscal year 2009 is $284,000,000.[8] Section 6(b)(11)(B) defines the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2009 as ''the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2009] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget * * *.''

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2009, the Commission is using the same methodology it developed in consultation with the Congressional Budget Office (''CBO'') and Office of Management and Budget (''OMB'') to project aggregate offering price for purposes of the fiscal year 2008 annual adjustment. Using this methodology, the Commission determines the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2009 to be $5,091,289,629,574.[9] Based on this estimate, the Commission calculates the fee rate for fiscal 2009 to be $55.80 per million. This adjusted fee rate applies to Section 6(b) of the Securities Act, as well as to Sections 13(e) and 14(g) of the Exchange Act.

III. Fiscal Year 2009 Annual Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Exchange Act

Section 31(b) of the Exchange Act requires each national securities exchange to pay the Commission a fee at a rate, as adjusted by our order pursuant to Section 31(j)(2),[10] which currently is $5.60 per million of the aggregate dollar amount of sales of specified securities transacted on the exchange. Similarly, Section 31(c) requires each national securities association to pay the Commission a fee at the same adjusted rate on the aggregate dollar amount of sales of specified securities transacted by or through any member of the association otherwise than on an exchange. Section 31(j)(1) requires the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011.[11]

Section 31(j)(1) specifies the method for determining the annual adjustment

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[1] 15 U.S.C. 77f(b).

[2] 15 U.S.C. 78m(e).

[3] 15 U.S.C. 78n(g).

[4] 15 U.S.C. 78ee(b) and (c). In addition, Section 31(d) of the Exchange Act requires the Commission to collect assessments from national securities exchanges and national securities associations for round turn transactions on security futures. 15 U.S.C. 78ee(d).

[5] Pub. L. 107–123, 115 Stat. 2390 (2002).

[6] *See* 15 U.S.C. 77f(b)(5), 77f(b)(6), 78m(e)(5), 78m(e)(6), 78n(g)(5), 78n(g)(6), 78ee(j)(1), and 78ee(j)(3). Section 31(j)(2) of the Exchange Act, 15 U.S.C. 78ee(j)(2), also requires the Commission, in specified circumstances, to make a mid-year adjustment to the fee rates under Sections 31(b) and (c) of the Exchange Act in fiscal years 2002 through 2011.

[7] The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the ''target offsetting collection amount'' specified in Section 6(b)(11)(A) for that fiscal year.

[8] Congress determined the target offsetting collection amounts by applying reduced fee rates to the CBO's January 2001 projections of the aggregate maximum offering prices for fiscal years 2002 through 2011. In any fiscal year through fiscal year 2011, the annual adjustment mechanism will result in additional fee rate reductions if the CBO's January 2001 projection of the aggregate maximum offering prices for the fiscal year proves to be too low, and fee rate increases if the CBO's January 2001 projection of the aggregate maximum offering prices for the fiscal year proves to be too high.

[9] Appendix A explains how we determined the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2009 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2009 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2009.

[10] Order Making Fiscal 2008 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934, Rel. No. 34–57407 (February 29, 2008), 73 FR 12228 (March 6, 2008).

[11] The annual adjustments, as well as the mid-year adjustments required in specified circumstances under Section 31(j)(2) in fiscal years 2002 through 2011, are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section 31 equal to the ''target offsetting collection amount'' specified in Section 31(*j*)(1) for that fiscal year.

for fiscal year 2009. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a ''uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for [fiscal year 2009], is reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under [Section 31(d)]) that are equal to the target offsetting collection amount for [fiscal year 2009].''

Section 31(l)(1) specifies that the ''target offsetting collection amount'' for fiscal year 2009 is $1,023,000,000.[12] Section 31(l)(2) defines the ''baseline estimate of the aggregate dollar amount of sales'' as ''the baseline estimate of the aggregate dollar amount of sales of securities * * * to be transacted on each national securities exchange and by or through any member of each national securities association (otherwise than on a national securities exchange) during [fiscal year 2009] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget * * *.''

To make the baseline estimate of the aggregate dollar amount of sales for fiscal year 2009, the Commission is using the same methodology it developed in consultation with the CBO and OMB to project dollar volume for purposes of prior fee adjustments.[13] Using this methodology, the Commission calculates the baseline estimate of the aggregate dollar amount of sales for fiscal year 2009 to be $113,703,210,464,919. Based on this estimate, and an estimated collection of $18,755 in assessments on security futures transactions under Section 31(d) in fiscal year 2009, the uniform adjusted rate for fiscal year 2009 is $9.30 per million.[14]

[12] Congress determined the target offsetting collection amounts by applying reduced fee rates to the CBO's January 2001 projections of dollar volume for fiscal years 2002 through 2011. In any fiscal year through fiscal year 2011, the annual and, in specified circumstances, mid-year adjustment mechanisms will result in additional fee rate reductions if the CBO's January 2001 projection of dollar volume for the fiscal year proves to be too low, and fee rate increases if the CBO's January 2001 projection of dollar volume for the fiscal year proves to be too high.

[13] Appendix B explains how we determined the ''baseline estimate of the aggregate dollar amount of sales'' for fiscal year 2009 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2009 annual adjustment based on that estimate. The appendix also includes the data used by the Commission in making its ''baseline estimate of the aggregate dollar amount of sales'' for fiscal year 2009.

[14] The calculation of the adjusted fee rate assumes that the current fee rate of $5.60 per million will apply through October 31, 2008, due to the operation of the effective date provision contained in Section 31(j)(4)(A) of the Exchange Act.

IV. Effective Dates of the Annual Adjustments

Section 6(b)(8)(A) of the Securities Act provides that the fiscal year 2009 annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act shall take effect on the later of October 1, 2008, or five days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted.[15] Sections 13(e)(8)(A) and 14(g)(8)(A) of the Exchange Act provide for the same effective date for the annual adjustments to the fee rates applicable under Sections 13(e) and 14(g) of the Exchange Act.[16]

Section 31(j)(4)(A) of the Exchange Act provides that the fiscal year 2009 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2008, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted.

V. Conclusion

Accordingly, pursuant to Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act,[17]

It is hereby ordered that the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act shall be $55.80 per million effective on the later of October 1, 2008, or five days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted; and

It is further ordered that the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall be $9.30 per million effective on the later of October 1, 2008, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted.

By the Commission.

Nancy M. Morris,

Secretary.

Appendix A

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the ''aggregate maximum offering prices,'' which measures the aggregate dollar amount of securities registered with the Commission over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2009, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an ARIMA model was used to forecast the value of the aggregate maximum offering prices for months subsequent to March 2008, the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Maximum Offering Prices for Fiscal Year 2009

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (March 1998–March 2008). Next, calculate the percentage change in the AMOP from month to month.

Model the monthly percentage change in AMOP as a first order moving average process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more ''typical'' value of AMOP.

Use the estimated moving average model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from March 1998 to March 2008.

2. Divide each month's AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).

3. For each month t, the natural logarithm of AAMOP is reported in column E.

4. Calculate the change in log(AAMOP) from the previous month as $\Delta_t = \log(\text{AAMOP}_t) - \log(\text{AAMOP}_{t-1})$. This approximates the percentage change.

5. Estimate the first order moving average model $\Delta_t = \alpha + \beta e_{t-1} + e_t$, where

[15] 15 U.S.C. 77f(b)(8)(A).

[16] 15 U.S.C. 78m(e)(8)(A) and 78n(g)(8)(A).

[17] 15 U.S.C. 77f(b), 78m(e), 78n(g), and 78ee(j).

e_t denotes the forecast error for month t. The forecast error is simply the difference between the one-month ahead forecast and the actual realization of Δ_t. The forecast error is expressed as $e_t = \Delta_t - \alpha - \beta e_{t-1}$. The model can be estimated using standard commercially available software such as SAS or Eviews. Using least squares, the estimated parameter values are $\alpha = 0.00154$ and $\beta = -0.87424$.

6. For the month of April 2008 forecast $\Delta_{t=4/08} = \alpha + \beta e_{t\,=\,3/08}$. For all subsequent months, forecast $\Delta_t = \alpha$.

7. Calculate forecasts of log(AAMOP). For example, the forecast of log(AAMOP) for June 2008 is given by $FLAAMOP_{t\,=\,6/08} = \log(AAMOP_{t\,=\,3/08}) + \Delta_{t=4/08} + \Delta_{t\,=\,5/08} + \Delta_{t\,=\,6/08}$.

8. Under the assumption that e_t is normally distributed, the n-step ahead forecast of AAMOP is given by $\exp(FLAAMOP_t + \sigma_n^2/2)$, where σ_n denotes the standard error of the n-step ahead forecast.

9. For June 2008, this gives a forecast AAMOP of $19.7 Billion (Column I), and a forecast AMOP of $414.1 Billion (Column J).

10. Iterate this process through September 2009 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2009 of $5,091,289,629,574.

B. Using the Forecasts From A to Calculate the New Fee Rate

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/1/08 and 9/30/09 to be $5,091,289,629,574.

2. The rate necessary to collect the target $284,000,000 in fee revenues set by Congress is then calculated as: $284,000,000 ÷ $5,091,289,629,574 = 0.00005578.

3. Round the result to the seventh decimal point, yielding a rate of .0000558 (or $55.80 per million).

Table A. Estimation of baseline of aggregate maximum offering prices .

Fee rate calculation.

a. Baseline estimate of the aggregate maximum offering prices, 10/1/08 to 9/30/08 ($Millions)	5,091,290
b. Implied fee rate ($284 Million / a)	$55.80

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Maximum Offering Prices, in $Millions	(D) Average Daily Aggregate Max. Offering Prices (AAMOP) in $Millions	(E) log(AAMOP)	(F) Change in AAMOP	(G) Forecast log(AAMOP)	(H) Standard Error	(I) Forecast AAMOP, in $Millions	(J) Forecast Aggregate Maximum Offering Prices, in $Millions
Mar-98	22	378,185	17,190	23.568					
Apr-98	21	242,310	11,539	23.169	-0.399				
May-98	20	298,454	14,923	23.426	0.257				
Jun-98	22	328,994	14,954	23.428	0.002				
Jul-98	22	272,957	12,407	23.242	-0.187				
Aug-98	21	392,104	18,672	23.650	0.409				
Sep-98	21	325,144	15,483	23.463	-0.187				
Oct-98	22	139,786	6,354	22.572	-0.891				
Nov-98	20	269,065	13,453	23.322	0.750				
Dec-98	22	248,596	11,300	23.148	-0.174				
Jan-99	19	253,448	13,339	23.314	0.166				
Feb-99	19	217,433	11,444	23.161	-0.153				
Mar-99	23	415,145	18,050	23.616	0.456				
Apr-99	21	431,280	20,537	23.746	0.129				
May-99	20	229,082	11,454	23.162	-0.584				
Jun-99	22	367,943	16,725	23.540	0.379				
Jul-99	21	332,623	15,839	23.486	-0.054				
Aug-99	22	240,157	10,916	23.114	-0.372				
Sep-99	21	236,011	11,239	23.143	0.029				
Oct-99	21	216,883	10,328	23.058	-0.085				
Nov-99	21	372,582	17,742	23.599	0.541				
Dec-99	22	319,846	14,538	23.400	-0.199				
Jan-00	20	282,165	14,108	23.370	-0.030				
Feb-00	20	665,367	33,268	24.228	0.858				
Mar-00	23	550,107	23,918	23.898	-0.330				
Apr-00	19	244,510	12,869	23.278	-0.620				
May-00	22	269,774	12,262	23.230	-0.048				

Jun-00	22	406,409	18,473	23.640	0.410						
Jul-00	20	230,894	11,545	23.169	-0.470						
Aug-00	23	257,797	11,209	23.140	-0.030						
Sep-00	20	332,120	16,606	23.533	0.393						
Oct-00	22	362,493	16,477	23.525	-0.008						
Nov-00	21	317,653	15,126	23.440	-0.086						
Dec-00	20	246,006	12,300	23.233	-0.207						
Jan-01	21	462,726	22,035	23.816	0.583						
Feb-01	19	388,304	20,437	23.741	-0.075						
Mar-01	22	523,443	23,793	23.893	0.152						
Apr-01	20	289,212	14,461	23.395	-0.498						
May-01	22	274,298	12,468	23.246	-0.148						
Jun-01	21	348,268	16,584	23.532	0.285						
Jul-01	21	264,590	12,600	23.257	-0.275						
Aug-01	23	245,591	10,678	23.091	-0.165						
Sep-01	15	178,524	11,902	23.200	0.108						
Oct-01	23	260,719	11,336	23.151	-0.049						
Nov-01	21	286,199	13,629	23.335	0.184						
Dec-01	20	395,230	19,762	23.707	0.372						
Jan-02	21	401,290	19,109	23.673	-0.034						
Feb-02	19	476,837	25,097	23.946	0.273						
Mar-02	20	380,160	19,008	23.668	-0.278						
Apr-02	22	282,947	12,861	23.277	-0.391						
May-02	22	215,645	9,802	23.006	-0.272						
Jun-02	20	277,757	13,888	23.354	0.348						
Jul-02	22	208,638	9,484	22.973	-0.381						
Aug-02	22	265,750	12,080	23.215	0.242						
Sep-02	20	109,565	5,478	22.424	-0.791						
Oct-02	23	179,374	7,799	22.777	0.353						
Nov-02	20	243,590	12,179	23.223	0.446						
Dec-02	21	212,838	10,135	23.039	-0.184						
Jan-03	21	201,839	9,611	22.986	-0.053						
Feb-03	19	144,642	7,613	22.753	-0.233						
Mar-03	21	444,331	21,159	23.775	1.022						

Apr-03	21	142,373	6,780	22.637	-1.138							
May-03	21	328,792	15,657	23.474	0.837							
Jun-03	21	281,580	13,409	23.319	-0.155							
Jul-03	22	304,383	13,836	23.351	0.031							
Aug-03	21	328,351	15,636	23.473	0.122							
Sep-03	21	459,563	21,884	23.809	0.336							
Oct-03	23	285,039	12,393	23.240	-0.569							
Nov-03	19	257,779	13,567	23.331	0.091							
Dec-03	22	244,998	11,136	23.133	-0.197							
Jan-04	20	369,784	18,489	23.640	0.507							
Feb-04	19	221,517	11,659	23.179	-0.461							
Mar-04	23	448,543	19,502	23.694	0.514							
Apr-04	21	260,029	12,382	23.240	-0.454							
May-04	20	227,239	11,362	23.154	-0.086							
Jun-04	21	370,668	17,651	23.594	0.441							
Jul-04	21	305,519	14,549	23.401	-0.193							
Aug-04	22	179,688	8,168	22.823	-0.577							
Sep-04	21	357,007	17,000	23.556	0.733							
Oct-04	21	254,489	12,119	23.218	-0.338							
Nov-04	21	363,406	17,305	23.574	0.356							
Dec-04	22	570,918	25,951	23.979	0.405							
Jan-05	20	375,484	18,774	23.656	-0.324							
Feb-05	19	338,922	17,838	23.605	-0.051							
Mar-05	22	590,862	26,857	24.014	0.409							
Apr-05	21	282,018	13,429	23.321	-0.693							
May-05	21	323,652	15,412	23.458	0.138							
Jun-05	22	517,022	23,501	23.880	0.422							
Jul-05	20	457,487	22,874	23.853	-0.027							
Aug-05	23	605,534	26,328	23.994	0.141							
Sep-05	21	312,281	14,871	23.423	-0.571							
Oct-05	21	258,956	12,331	23.235	-0.187							
Nov-05	21	192,736	9,178	22.940	-0.295							
Dec-05	21	308,134	14,673	23.409	0.469							
Jan-06	20	526,550	26,328	23.994	0.585							

Feb-06	19	301,446	15,866	23.487	-0.506							
Mar-06	23	1,211,344	52,667	24.687	1.200							
Apr-06	19	407,345	21,439	23.788	-0.899							
May-06	22	260,121	11,824	23.193	-0.595							
Jun-06	22	375,296	17,059	23.560	0.367							
Jul-06	20	232,654	11,633	23.177	-0.383							
Aug-06	23	310,050	13,480	23.325	0.147							
Sep-06	20	236,782	11,839	23.195	-0.130							
Oct-06	22	213,342	9,697	22.995	-0.200							
Nov-06	21	292,456	13,926	23.357	0.362							
Dec-06	20	349,512	17,476	23.584	0.227							
Jan-07	20	372,740	18,637	23.648	0.064							
Feb-07	19	278,753	14,671	23.409	-0.239							
Mar-07	22	862,786	39,218	24.392	0.983							
Apr-07	20	562,103	28,105	24.059	-0.333							
May-07	22	470,843	21,402	23.787	-0.272							
Jun-07	21	586,822	27,944	24.053	0.267							
Jul-07	21	326,612	15,553	23.468	-0.586							
Aug-07	23	369,172	16,051	23.499	0.032							
Sep-07	19	241,059	12,687	23.264	-0.235							
Oct-07	23	239,652	10,420	23.067	-0.197							
Nov-07	21	458,654	21,841	23.807	0.740							
Dec-07	20	410,200	20,510	23.744	-0.063							
Jan-08	21	354,433	16,878	23.549	-0.195							
Feb-08	20	263,410	13,171	23.301	-0.248							
Mar-08	20	596,923	29,846	24.119	0.818							
Apr-08	22					23.635	0.359	19,616	431,562			
May-08	21					23.637	0.362	19,667	413,000			
Jun-08	21					23.638	0.365	19,717	414,058			
Jul-08	22					23.640	0.367	19,768	434,886			
Aug-08	21					23.641	0.370	19,818	416,181			
Sep-08	21					23.643	0.373	19,869	417,247			
Oct-08	23					23.644	0.376	19,920	458,155			
Nov-08	19					23.646	0.378	19,971	379,445			

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Appendix B

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to investors based on the value of their transactions. This appendix provides the formula for determining such fees, which the Commission adjusts annually, and may

adjust semi-annually.[18] In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected dollar transaction volume on the securities exchanges and certain over-the-counter markets over the course of the year. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected dollar transaction volume.

For 2009, the Commission has estimated dollar transaction volume by projecting forward the trend established in the previous decade. More specifically, dollar transaction volume was forecasted for months subsequent to March 2008, the last month for which the Commission has data on transaction volume.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Dollar Amount of Sales for Fiscal Year 2009

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (March 1998–March 2008). The monthly aggregate dollar amount of sales (exchange plus certain over-the-counter markets) is presented in column C of Table B.

Next, calculate the change in the natural logarithm of ADS from month to month. The average monthly percentage growth of ADS over the entire sample is 0.015 and the standard deviation is 0.126. Assuming the monthly percentage change in ADS follows a random walk, calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 2.3%.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for March 2008 ($338,395,058,873) to forecast ADS for April 2008 ($346,177,695,873= $338,395,058,873 × 1.023).[19] Multiply by the number of trading days in April 2008 (22) to obtain a forecast of the total dollar volume for the month ($7,615,909,309,196). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column G of Table B. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).

2. For each month t, calculate the change in ADS from the previous month as $\Delta_t = \log (ADS_t/ADS_{t-1})$, where log (x) denotes the natural logarithm of x.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, \ldots, \Delta_{120}\}$. These are given by $\mu = 0.015$ and $\sigma = 0.126$, respectively.

4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t.

5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t/ADS_{t-1} is given by $\exp (\mu + \sigma^2/2)$, or on average $ADS_t = 1.023 \times ADS_{t-1}$.

6. For April 2008, this gives a forecast ADS of 1.023 × $338,395,058,873 = $346,177,695,873. Multiply this figure by the 22 trading days in April 2008 to obtain a total dollar volume forecast of $7,615,909,309,196.

7. For May 2008, multiply the April 2008 ADS forecast by 1.023 to obtain a forecast ADS of $354,139,323,188. Multiply this figure by the 21 trading days in May 2008 to obtain a total dollar volume forecast of $7,436,925,786,952.

8. Repeat this procedure for subsequent months.

B. Using the Forecasts from A to Calculate the New Fee Rate

1. Use Table B to estimate fees collected for the period 10/1/08 through 10/31/08. The projected aggregate dollar amount of sales for this period is $9,125,934,321,266. Projected fee collections at the current fee rate of 0.0000056 are $51,105,232.

2. Estimate the amount of assessments on securities futures products collected during 10/1/08 and 9/30/09 to be $18,755 by projecting a 2.3% monthly increase from a base of $1,173 in March 2008.

3. Subtract the amounts $51,105,232 and $18,755 from the target offsetting collection amount set by Congress of $1,023,000,000 leaving $971,876,013 to be collected on dollar volume for the period 11/1/08 through 9/30/09.

4. Use Table B to estimate dollar volume for the period 11/1/08 through 9/30/09. The estimate is $104,577,276,143,653. Finally, compute the fee rate required to produce the additional $971,876,013 in revenue. This rate is $971,876,013 divided by $104,577,276,143,653 or 0.0000092934.

5. Round the result to the seventh decimal point, yielding a rate of .0000093 (or $9.30 per million).

[18] Congress requires that the Commission make a mid-year adjustment to the fee rate if four months into the fiscal year it determines that its forecasts of aggregate dollar volume are reasonably likely to be off by 10% or more.

[19] The value 1.023 has been rounded. All computations are done with the unrounded value.

Table B. Estimation of baseline of the aggregate dollar amount of sales.

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/08 to 10/31/08 ($Millions)	9,125,934
b. Baseline estimate of the aggregate dollar amount of sales, 11/1/08 to 9/30/09 ($Millions)	104,577,276
c. Estimated collections in assessments on securities futures products in FY 2009 ($Millions)	0.019
d. Implied fee rate (($1023,000,000 - 0.0000056*a - c) /b)	$9.3

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Mar-98	22	1,259,994,685,467	57,272,485,703	-		
Apr-98	21	1,298,494,359,253	61,833,064,726	0.077		
May-98	20	1,110,221,658,995	55,511,082,950	-0.108		
Jun-98	22	1,243,779,791,913	56,535,445,087	0.018		
Jul-98	22	1,399,011,433,748	63,591,428,807	0.118		
Aug-98	21	1,307,501,463,442	62,261,974,450	-0.021		
Sep-98	21	1,352,428,235,083	64,401,344,528	0.034		
Oct-98	22	1,460,835,397,598	66,401,608,982	0.031		
Nov-98	20	1,298,403,768,065	64,920,188,403	-0.023		
Dec-98	22	1,442,697,787,306	65,577,172,150	0.010		
Jan-99	19	1,884,555,055,910	99,187,108,206	0.414		
Feb-99	19	1,656,058,202,765	87,160,958,040	-0.129		
Mar-99	23	1,908,967,664,074	82,998,594,090	-0.049		
Apr-99	21	2,177,601,770,622	103,695,322,411	0.223		
May-99	20	1,784,400,906,987	89,220,045,349	-0.150		
Jun-99	22	1,697,339,227,503	77,151,783,068	-0.145		
Jul-99	21	1,767,035,098,986	84,144,528,523	0.087		
Aug-99	22	1,692,907,150,726	76,950,325,033	-0.089		
Sep-99	21	1,730,505,881,178	82,405,041,961	0.068		
Oct-99	21	2,017,474,765,542	96,070,226,931	0.153		
Nov-99	21	2,348,374,009,334	111,827,333,778	0.152		
Dec-99	22	2,686,788,531,991	122,126,751,454	0.088		
Jan-00	20	3,057,831,397,113	152,891,569,856	0.225		
Feb-00	20	2,973,119,888,063	148,655,994,403	-0.028		
Mar-00	23	4,135,152,366,234	179,789,233,315	0.190		
Apr-00	19	3,174,694,525,687	167,089,185,562	-0.073		
May-00	22	2,649,273,207,318	120,421,509,424	-0.328		
Jun-00	22	2,883,513,997,781	131,068,818,081	0.085		
Jul-00	20	2,804,753,395,361	140,237,669,768	0.068		
Aug-00	23	2,720,788,395,832	118,295,147,645	-0.170		
Sep-00	20	2,930,188,809,012	146,509,440,451	0.214		
Oct-00	22	3,485,926,307,727	158,451,195,806	0.078		
Nov-00	21	2,795,778,876,887	133,132,327,471	-0.174		
Dec-00	20	2,809,917,349,851	140,495,867,493	0.054		
Jan-01	21	3,143,501,125,244	149,690,529,774	0.063		
Feb-01	19	2,372,420,523,286	124,864,238,068	-0.181		
Mar-01	22	2,554,419,085,113	116,109,958,414	-0.073		
Apr-01	20	2,324,349,507,745	116,217,475,387	0.001		
May-01	22	2,353,179,388,303	106,962,699,468	-0.083		
Jun-01	21	2,111,922,113,236	100,567,719,678	-0.062		
Jul-01	21	2,004,384,034,554	95,446,858,788	-0.052		
Aug-01	23	1,803,565,337,795	78,415,884,252	-0.197		
Sep-01	15	1,573,484,946,383	104,898,996,426	0.291		
Oct-01	23	2,147,238,873,044	93,358,211,871	-0.117		
Nov-01	21	1,939,427,217,518	92,353,677,025	-0.011		
Dec-01	20	1,921,098,738,113	96,054,936,906	0.039		
Jan-02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb-02	19	1,928,830,595,585	101,517,399,768	-0.008		
Mar-02	20	2,002,216,374,514	100,110,818,726	-0.014		
Apr-02	22	2,062,101,866,506	93,731,903,023	-0.066		
May-02	22	1,985,859,756,557	90,266,352,571	-0.038		

Jun-02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul-02	22	2,349,564,490,189	106,798,385,918	0.126		
Aug-02	22	1,793,429,904,079	81,519,541,095	-0.270		
Sep-02	20	1,518,944,367,204	75,947,218,360	-0.071		
Oct-02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov-02	20	1,780,816,458,122	89,040,822,906	-0.038		
Dec-02	21	1,561,092,215,646	74,337,724,555	-0.180		
Jan-03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb-03	19	1,411,722,405,357	74,301,179,229	-0.100		
Mar-03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr-03	21	1,759,751,025,279	83,797,667,870	0.035		
May-03	21	1,871,390,985,678	89,113,856,461	0.062		
Jun-03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul-03	22	2,100,812,973,956	95,491,498,816	-0.057		
Aug-03	21	1,766,527,686,224	84,120,366,011	-0.127		
Sep-03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov-03	19	1,903,726,129,859	100,196,112,098	-0.012		
Dec-03	22	2,066,530,151,383	93,933,188,699	-0.065		
Jan-04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb-04	19	2,177,765,594,701	114,619,241,826	-0.042		
Mar-04	23	2,613,808,754,550	113,643,858,893	-0.009		
Apr-04	21	2,418,663,760,191	115,174,464,771	0.013		
May-04	20	2,259,243,404,459	112,962,170,223	-0.019		
Jun-04	21	2,112,826,072,876	100,610,765,375	-0 116		
Jul-04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug-04	22	2,033,343,354,640	92,424,697,938	-0.130		
Sep-04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct-04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov-04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,839,174,160	129,091,958,708	0.060		
Feb-05	19	2,532,202,396,053	133,273,810,319	0.032		
Mar-05	22	3,030,474,095,010	137,748,822,500	0.033		
Apr-05	21	2,906,386,858,222	138,399,374,201	0.005		
May-05	21	2,697,406,551,792	128,447,931,038	-0.075		
Jun-05	22	2,825,792,932,509	128,445,133,296	0.000		
Jul-05	20	2,603,995,025,602	130,199,751,280	0.014		
Aug-05	23	2,846,109,434,770	123,743,888,468	-0.051		
Sep-05	21	3,009,608,583,531	143,314,694,454	0.147		
Oct-05	21	3,279,930,784,463	156,187,180,213	0.086		
Nov-05	21	3,163,288,362,669	150,632,779,175	-0.036		
Dec-05	21	3,090,218,506,716	147,153,262,225	-0.023		
Jan-06	20	3,573,306,111,973	178,665,305,599	0.194		
Feb-06	19	3,313,973,129,190	174,419,638,378	-0.024		
Mar-06	23	3,807,374,752,084	165,538,032,699	-0.052		
Apr-06	19	3,257,448,631,999	171,444,664,842	0.035		
May-06	22	4,206,452,683,345	191,202,394,697	0.109		
Jun-06	22	3,993,966,132,543	181,543,915,116	-0.052		
Jul-06	20	3,339,657,248,277	166,982,862,414	-0.084		
Aug-06	23	3,410,343,285,403	148,275,795,018	-0.119		
Sep-06	20	3,407,481,301,776	170,374,065,089	0.139		
Oct-06	22	3,980,061,341,623	180,911,879,165	0.060		
Nov-06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec-06	20	3,715,146,848,695	185,757,342,435	-0.008		
Jan-07	20	4,264,337,570,190	213,216,878,510	0.138		
Feb-07	19	3,947,307,855,865	207,753,045,046	-0.026		

Mar-07	22	5,245,976,330,691	238,453,469,577	0.138		
Apr-07	20	4,274,660,745,896	213,733,037,295	-0.109		
May-07	22	5,173,409,122,483	235,154,960,113	0.096		
Jun-07	21	5,589,955,070,604	266,188,336,695	0.124		
Jul-07	21	5,941,510,339,617	282,929,063,791	0.061		
Aug-07	23	7,715,893,065,459	335,473,611,542	0.170		
Sep-07	19	4,806,887,798,516	252,994,094,659	-0.282		
Oct-07	23	6,501,037,858,934	282,653,819,954	0.111		
Nov-07	21	7,175,404,886,442	341,685,946,973	0.190		
Dec-07	20	5,499,256,804,407	274,962,840,220	-0.217		
Jan-08	21	7,996,757,181,265	380,797,961,013	0.326		
Feb-08	20	6,139,476,764,099	306,973,838,205	-0.216		
Mar-08	20	6,767,901,177,467	338,395,058,873	0.097		
Apr-08	22				346,177,695,873	7,615,909,309,196
May-08	21				354,139,323,188	7,436,925,786,952
Jun-08	21				362,284,057,360	7,607,965,204,556
Jul-08	22				370,616,109,602	8,153,554,411,244
Aug-08	21				379,139,787,982	7,961,935,547,615
Sep-08	21				387,859,499,645	8,145,049,492,554
Oct-08	23				396,779,753,099	9,125,934,321,266
Nov-08	19				405,905,160,536	7,712,198,050,182
Dec-08	22				415,240,440,227	9,135,289,684,986
Jan-09	20				424,790,418,954	8,495,808,379,080
Feb-09	19				434,560,034,511	8,256,640,655,702
Mar-09	22				444,554,338,252	9,780,195,441,544
Apr-09	21				454,778,497,708	9,550,348,451,868
May-09	20				465,237,799,255	9,304,755,985,096
Jun-09	22				475,937,650,848	10,470,628,318,662
Jul-09	22				486,883,584,820	10,711,438,866,042
Aug-09	21				498,081,260,738	10,459,706,475,501
Sep-09	21				509,536,468,333	10,700,265,834,990

[FR Doc. E8–10068 Filed 5–6–08; 8:45 am]
BILLING CODE 8010–01–C

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57738; File No. SR–Amex–2007–129]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 1 Relating to an Exchange Member's Conduct in Doing Business With the Public

April 29, 2008.

I. Introduction

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], as amended, and Rule 19b–4 thereunder,[2] on November 29, 2007, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change relating to the Exchange's rules governing doing business with the public. On March 19, 2008, the Commission issued a release noticing the proposed rule change, which was published for comment in the **Federal Register** on March 25, 2008.[3] The comment period expired on April 15, 2008. The Commission did not receive any comment letters in response to the proposed rule change. On April 17,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57527 (Mar. 19, 2008), 73 FR 15810 (Mar. 25, 2008).

2008, the Exchange filed Amendment No. 1 to make a technical edit to the proposed rule change.[4] This order provides notice of the proposed rule change, as modified by Amendment No. 1, and approves the proposed rule change as amended on an accelerated basis.

II. Description of Amex Proposal

Amex proposes to amend certain Amex Rules that govern an Exchange member's conduct in doing business with the public. Specifically, the proposed rule change would require member organizations (also referred to as ''member firms'' or ''firms'') to integrate the responsibility for supervision of their public customer options business into their overall supervisory and compliance programs. In addition, the proposal would require member firms to strengthen their supervisory procedures and internal controls as related to their public customer options business.

A. Integration of Options Supervision

The purpose of the proposed rule change is to create a supervisory structure for options that is similar to that required by New York Stock Exchange, LLC (''NYSE) Rule 342 and National Association of Securities Dealers, Inc. (''NASD'') Rule 3010.[5] The proposed rule change would also conform Amex rules to those of the Chicago Board of Options Exchange (''CBOE'') by eliminating the requirement that a member firm, qualified to do a public customer business in options, designate a single person to act as a Senior Registered Options Principal (''SROP'') for the member organization and that each such member organization designate a specific individual as a Compliance Registered Options Principal (''CROP'').[6] The Exchange proposes to eliminate the SROP and CROP supervisory categories, allowing member firms to supervise their options activities through their overall supervisory and compliance programs that monitor all other securities products.

The SROP concept was first introduced during the early years of development of the listed options market. Previously under Amex rules, member firms were required to designate one or more persons qualified as Registered Options Principals (''ROPs'') to have supervisory responsibilities with respect to the firms' options business. As the number of ROPs at larger firms began to increase, the Amex imposed an additional requirement that member firms designate one of their ROPs as the SROP. This was intended to eliminate confusion as to where the compliance and supervisory responsibilities lay by centralizing in a single supervisory officer overall responsibility for the supervision of a firms options activities.[7] Subsequently, following the recommendation of the Special Study of the Options Market,[8] the Amex and the other options exchanges required firms to designate a CROP to be responsible for each firm's overall compliance program with respect to its options activities. The CROP could be the same person designated as a SROP, but while the CROP generally was not permitted to have sales functions in the firm, whereas the SROP was not so restricted.

Since the SROP and CROP requirements were first imposed, the supervisory function with respect to options activities of most securities firms has been integrated into their supervisory function for securities activities overall. This not only reflects the maturity of the options market, but also recognizes the ways in which the uses of options themselves have become more integrated with other securities in the implementation of particular strategies. By permitting supervision of a firm's options activities to be handled in the same manner as the supervision of its securities and futures activities, the proposed rule change would ensure that supervisory responsibility over each segment of a firm's business is assigned to the best qualified persons in the firm, thereby enhancing the overall quality of supervision and compliance.

The proposed rule change would allow firms the flexibility to assign such supervisory and compliance responsibilities, which formerly resided with the SROP and/or CROP, to more than one individual. For example, the proposed rule change would permit a member firm to designate certain ROPs to be responsible for a variety of supervisory compliance functions such as approving acceptance of discretionary accounts,[9] approving communications to customers,[10] and allowing exceptions to a member firm's suitability standards for trading uncovered short options.[11] A firm would be likely to do this in instances where the firm believes it advantageous to do so to enhance its supervisory or compliance structure. Typically, a firm may also wish to divide these functions on the basis of geographic region or functional considerations. Amex Rule 920 would be amended to clarify the qualification requirements of individuals designated as ROPs and also to specify the registration requirements of individuals who accept orders from non-broker-dealer customers.

With respect to discretionary accounts, the proposal would require acceptance of such accounts to be assigned to individuals who are qualified ROPs.[12] Further, the proposal would require that the individual who reviews the acceptance of a discretionary account (who is an individual other than the ROP who accepted the account as required by Amex Rule 924(a)) to be Series 4 qualified because such a review is not a routine sales supervisory function and requires more in-depth knowledge of options than that covered by the Series 9/10 examination.[13] The proposed rule change would eliminate the requirement that discretionary options orders be approved on the day of entry by a ROP (with one exception as discussed below) because such requirement is not consistent with the use of supervisory tools in computerized format or exception reports generated after the close of trading day. No similar requirement exists for supervision of other securities accounts that are handled on a discretionary basis.[14] Discretionary orders would be required to be reviewed in accordance with a firm's written supervisory procedures. Amex believes that the proposed rule change would ensure that supervisory responsibilities are assigned to specific qualified individuals, thereby enhancing the quality of supervision.

The proposed rule change would revise Amex Rule 924 by adding as Commentary .01, a requirement that any firm that does not utilize computerized surveillance tools for the frequent and

[4] Amendment No. 1 corrects an internal cross-reference and does not contain any substantive modifications to the rule text.

[5] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (Aug. 1, 2007). The FINRA rule book currently consists of both NASD rules and certain NYSE rules that FINRA has incorporated.

[6] *See* Securities Exchange Act Release No. 56492 (Sept. 21, 2007), 72 FR 54952 (Sept. 27, 2007) (SR–CBOE–2007–106).

[7] *Report of the Special Study of the Options Market,* p. 316 note 11 (Dec. 22, 1978).

[8] *Id.* at 335.

[9] *See* proposed Amex Rule 924(a) and Commentary .05 to Rule 920.

[10] *See* proposed Amex Rule 991(b).

[11] *See* proposed Amex Rule 921(g)(3).

[12] *See* proposed Amex Rule 924(a) and Commentary .04 to Rule 920.

[13] *See* supra note 9.

[14] *See, e.g.,* NYSE Rule 408.

appropriate review of discretionary account activity must establish and implement procedures to require ROP-qualified individuals (''Qualified Individuals'') who have been designated to review discretionary accounts to approve and initial each discretionary order on the day entered. The Exchange believes that any firm that does not utilize computerized surveillance tools to monitor discretionary account activity should continue to be required to perform the daily manual review of discretionary orders.

Under the proposed rule change, firms would continue to be required to designate Qualified Individuals to provide frequent appropriate supervisory review of options discretionary accounts.[15] Qualified Individuals would review the accounts to determine whether the ROP accepting the account had a reasonable basis for believing that the customer was able to understand and bear the risks of the proposed strategies or transactions. This requirement would provide an additional level of supervisory audit over options discretionary accounts that does not exist for other securities discretionary accounts.

In addition, the proposed change to Amex Rule 922 would require that each member organization provide for the preparation and submission of a written annual report to one or more of its control persons or, if the firm has no control person, to the audit committee of its board of directors or its equivalent group (collectively referred to as, ''Control Person''). The firm would be required to submit the report to the Exchange and to its Control Person by April 1st of each year. The firm would be required to detail in the report its supervision and compliance effort, including its options compliance program, during the preceding year and the adequacy of its ongoing compliance processes and procedures.[16]

Proposed Amex Rule 922(g) would further provide that a member organization that specifically includes its options compliance program in a report that complies with substantially similar NYSE and NASD rules will be deemed to have satisfied the requirements of Amex Rules 922(g) and 922(h).

Where appropriate, the proposed rule changes would delete references to SROP and CROP in Amex Rules 421, 920, 921, 922, 924 and 991.

Although the proposed rule change would eliminate entirely the positions and titles of SROP and CROP, firms would still be required to designate a single general partner or executive officer to assume overall authority and responsibility for internal supervision, control of the organization and compliance with securities laws and regulations.[17] A firm would also be required to designate specific qualified individuals as having supervisory or compliance responsibilities over each aspect of the firm's options activities and to set forth the names and titles of these individuals in its written supervisory procedures.[18]

The Exchange is a party to an options sales practice compliance plan, amended on March 26, 2007, entered into pursuant to Section 17(d) of the Act and Rule 17d–2, promulgated thereunder.[19] For Exchange members that are also FINRA members, the amended plan allocates responsibility for examination and enforcement of members' compliance with options sales practice rules primarily to FINRA (the ''Options 17d–2 Plan''). For non-FINRA members, the Options 17d–2 Plan provides that the exchange which is the Designated Examining Authority (''DEA'') pursuant to Rule 17d–1 under the Act, shall perform the regulatory responsibilities designated to it in the Options 17d–2 Plan. Under these provisions the Amex currently has responsibility for examination and enforcement of options sales practice rules as to three members (one of which is a dual member of the Philadelphia Stock Exchange and Amex and two Amex only members). FINRA will be primarily responsible for options sales practice examination and enforcement as to other dual members. In connection with the approval of these proposed changes, the Exchange intends to closely review written supervisory and compliance procedures of firms, for which it is the DEA, in the course of its routine examinations of member firms to ensure that supervisory and compliance responsibilities are adequately defined.

The Exchange believes the proposed rule changes will increase accountability and eliminate impractical and unrealistic supervisory standards applicable solely to listed options. The Exchange believes that the proposed rule changes are appropriate and will not materially alter the supervisory operations of firms.

B. Supervisory Procedures and Internal Controls

The Exchange also proposes to amend certain rules to strengthen member firms' supervisory procedures and internal controls relating to their public customer options business. The proposed rule changes discussed below are modeled after NYSE and NASD rules approved by the Commission in 2004.[20] The Exchange believes this proposal is appropriate and consistent with the proposal discussed above to integrate the responsibility for supervision of a member firm's public customer options business into its overall supervisory and compliance program.

The proposed revisions to Amex Rule 922(a)(3) would require member firms to develop and implement written policies and procedures reasonably designed to supervise sales managers and other supervisory personnel who service customer options accounts.[21] This would encompass branch office managers, sales managers, regional/district sales managers, or any person performing a similar supervisory function. Such policies and procedures are expected to encompass all options sales-related activities. Proposed Amex Rule 922(a)(3)(i) would require that supervisory reviews of producing sales managers be conducted by a qualified ROP who is either senior to, or otherwise ''independent of'', the producing manager under review.[22] This provision is intended to ensure that all options sales activity of a producing manager is monitored for compliance with applicable regulatory requirements by persons who do not have a personal interest in such activity.

Proposed Amex Rule 922(a)(3)(ii) would provide an exception for firms so limited in size and resources that there is no qualified person senior to, or otherwise independent of, the producing manager to conduct the review. In this situation, the review would be conducted by a qualified ROP to the extent practicable. Under proposed Amex Rule 922(a)(3)(iii), a member relying on the limited size and resources exception must document the factors used to determine that compliance with each of the ''senior'' or ''otherwise independent'' standards of proposed Amex Rule 922(a)(3)(i) is not

[15] *See* proposed Amex Rule 924(a).

[16] *See* proposed Amex Rules 922(g) and 922(h), which are modeled after NYSE Rules 342.30 and 354, respectively.

[17] *See* proposed Amex Rule 922(a).

[18] *See* proposed Amex Rule 922(a).

[19] Securities Exchange Act Release No. 55532 (Mar. 26, 2007), 72 FR 15729 (Apr. 2, 2007).

[20] *See* Securities Exchange Act Release Nos. 49882 (June 17, 2004), 69 FR 35108 (June 23, 2004) (SR–NYSE–2002–36) (approval order), 49883 (June 17, 2004), 69 FR 35092 (June 23, 2004) (SR–NASD–2002–162) (approval order).

[21] Proposed Amex Rule 922(a)(3) is modeled after NYSE Rule 342.19.

[22] An ''otherwise independent'' person is defined in proposed Amex Rule 922(a)(3)(i).

possible, and that the required supervisory systems and procedures in place with respect to any producing manager comply with the provisions of proposed Amex Rule 922(a)(3)(i) to the extent practicable.[23]

Proposed Amex Rule 922(c)(i) would require member organizations to develop and maintain adequate controls over each of their business activities. The proposed rule would require such controls to include the establishment of procedures to independently verify and test the supervisory systems and procedures for those business activities. A firm would be required to include in the annual report prepared pursuant to proposed Amex Rule 922(g), a review of the firm's efforts in this regard, including a summary of the tests conducted and significant exceptions identified. The Exchange believes proposed Amex Rule 922(c)(i) would enhance the overall quality of each member organization's supervision and compliance function.[24]

Paragraph (d) of proposed Amex Rule 922 would establish requirements for branch office inspections similar to the requirements of NYSE Rule 342.24. Specifically Amex Rule 922(d) would require a member organization to inspect, at least annually, each supervisory branch office and inspect each non-supervisory branch office at least once every three years.[25] The proposed rule would further require persons who conduct a firm's annual branch office inspection to be independent of the direct supervision or control of the branch office (*i.e.*, not the branch office manager, or any person who directly or indirectly reports to such manager, or any person to whom such manager directly reports). The Exchange believes that requiring branch office inspections to be conducted by someone who has no significant financial interest in the success of a branch office should lead to more objective and vigorous inspections.

Under proposed Amex Rule 922(e), any firm seeking an exemption, pursuant to Rule 922(d)(1)(ii), from the annual branch office inspection requirement would be required to submit to the Exchange written policies and procedures for systematic risk-based surveillance of its branch offices, as defined in Rule 922(e). Proposed Amex Rule 922(f) would require the annual branch office inspection programs to include, at a minimum, testing and verification of specified internal controls.[26] Proposed Amex Rule 922(d)(3) would provide that a firm that complies with the requirements of NASD or the NYSE that are substantially similar to the requirements of Rules 922(d), (e) and (f) will be deemed to have met such requirements. The Exchange also proposes to amend Commentary .04 of Amex Rule 922 to define ''branch office'' in a way that is substantially similar to the definition of branch office in NYSE Rule 342.10.

Proposed Amex Rule 922(g)(4) would require a firm to designate a Chief Compliance Officer (CCO). Proposed Rule 922(g)(5) would require each firm's Chief Executive Officer (CEO), or equivalent, to certify annually that the member organization has in place processes to (1) Establish and maintain policies and procedures reasonably designed to achieve compliance with applicable Exchange rules and federal securities laws and regulations, (2) modify such policies and procedures as business, regulatory, and legislative changes and events dictate, and (3) test the effectiveness of such policies and procedures on a regular basis, the timing of which is reasonably designed to ensure continuing compliance with Exchange rules and federal securities laws and regulations.

Proposed Amex Rule 922(g)(5) would also require the CEO to attest (1) that he or she has conducted one or more meetings with the CCO in the preceding 12 months to discuss the compliance processes in proposed Rule 922(g)(5)(i), (2) that he or she has consulted with the CCO and other officers to the extent necessary to attest to the statements in the certification, and (3) that the compliance processes are evidenced in a report, reviewed by the CEO, CCO and such other officers as the member firm deems necessary to make the certification, that is provided to the member firm's board of directors and audit committee (if such committee exists).[27]

Under proposed Amex Rule 922(b)(2), a member, upon a customer's written instructions, may hold mail for a customer who will not be at his or her usual address for no longer than two months if the customer is on vacation or traveling, or three months if the customer is going abroad. This provision would help ensure that members that hold mail for customers who are away from their usual addresses do so only pursuant to the customer's written instructions and for a specified, relatively short period of time.[28]

Proposed Amex Rule 922(b)(3) would require that before a customer options order is executed, the account name or designation to be placed upon the memorandum for each transaction. Only a Qualified Individual would be permitted to approve any changes in account names or designations. The ROP would be required to document the essential facts relied upon in approving the changes and maintain the record in an easily accessible place. A member would be required to preserve any documentation which provides for an account designation change for a period of not less than three years, with the documentation preserved for the first two years in an easily accessible place, as the term ''easily accessible place'' is used in Rule 17a–4 of the Act.[29] The Exchange believes the proposed rule would help to protect account name and designation information from possible fraudulent activity.[30]

Amex Rule 924(d) allows firms to exercise time and price discretion on orders for the purchase or sale of a definite number of options contracts in a specified security. The Exchange proposes to amend Amex Rule 924(d) to limit the duration of this discretionary authority to the day it is granted, absent written authorization to the contrary. The proposed rule would require any exercise of time and price discretion to be reflected on the customer order ticket. The proposed one-day limitation would not apply to time and price discretion exercised for orders effected with or for an institutional account (as defined in Rule 924(d)) pursuant to valid Good-Till-Cancelled instructions issued on a ''not held'' basis. The Exchange believes that investors will receive greater protection by clarifying the time such discretionary orders remain pending.[31]

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[23] Proposed Amex Rule 922(a)(3)(iv) would provide that a member organization that complies with the NYSE or NASD rules that are substantially similar to the requirements in Rules 922(a)(3)(i), (a)(3)(ii) and (a)(3)(iii) will be deemed to have met such requirements.

[24] Proposed Amex Rule 922(c)(i) is modeled after NYSE Rule 342.23. Paragraph (c)(ii) of proposed Amex Rule 922 would provide that a member organization that complies with NYSE or NASD rules that are substantially similar to the requirements in paragraph (c)(i) of proposed Amex Rule 922 will be deemed to have met such requirements.

[25] Proposed Amex Rules 922(d)(1)(i) and (ii) would provide members with two exceptions from the annual supervisory branch office inspection requirement.

[26] Proposed Rules 922(e) and (f) are modeled after NYSE Rules 342.25 and 342.26, respectively.

[27] Proposed Amex Rule 922(g)(5) is modeled after NASD Rule 3013 and NYSE Rule 342.30(e).

[28] Proposed Amex Rule 922(b)(2) is modeled after NASD Rule 3110(i).

[29] 17 CFR 240.17a–4.

[30] Proposed Amex Rule 922(b)(3) is modeled after NASD 3110(j).

[31] Proposed Amex Rule 924(d) is modeled after NASD Rule 2510(d)(1).

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder.[32] In particular, the Commission finds the proposed rule change, as amended, would integrate the supervision and compliance functions relating to member organizations' public customer options activities into the overall supervisory structure of a member organization, thereby eliminating any uncertainty over where supervisory responsibility lies. In addition, the proposed rule change would foster the strengthening of members' and member organizations' internal controls and supervisory systems. As such, the Commission finds the proposal to be consistent with the objectives of Section 6(b)(5) of the Act,[33] in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, and in general, to protect investors and the public interest.

The Commission also finds good cause for approving Amendment No.1 to the proposed rule change prior to the 30th day after its publication in the **Federal Register.** Amendment No. 1 corrects an internal cross-reference and does not contain any substantive modifications to the rule text. The Commission finds that it is in the public interest to approve the proposed rule change as soon as possible to expedite its implementation. Accordingly, the Commission believes good cause exists, consistent with Sections 6(b)(5) and 19(b) of the Act to approve Amendment No. 1 to the proposed rule change on an accelerated basis.

IV. Solicitation of Comments Concerning Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 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–Amex–2007–129 on the subject line.

Paper comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Amex–2007–129. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2007–129 and should be submitted on or before May 28, 2008.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[34] that the proposed rule change (SR–Amex–2007–129), as amended by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10019 Filed 5–6–08; 8:45 am]

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[32] In approving this rule change, as amended, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78s(b)(2).

[35] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57760; File No. SR–BSE–2008–02]

Self-Regulatory Organizations; Boston Stock Exchange, Incorporated; Notice of Filing of Proposed Rule Change Amending the Certificate of Incorporation of Boston Stock Exchange, Incorporated

May 1, 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 April 23, 2008, the Boston Stock Exchange, Incorporated (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by BSE. 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 BSE proposes to amend its Certificate of Incorporation in order to make distributions to Exchange membership [3] owners under certain circumstances. Specifically, the amended Certificate of Incorporation will permit the Exchange to distribute the net proceeds from the Exchange's intended sale of its equity interests in the Boston Options Exchange Group LLC (''BOX'') to the Bourse de Montréal (''MX'') by means of a pro rata redemption of a portion of each Exchange membership. The text of the proposed rule change is available on the Exchange's Web site (*http://www.bostonstock.com*), at the principal offices of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, BSE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. BSE has prepared

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As that term is defined in Article I, Section 3(h), and Article IX of the BSE Constitution.

summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On October 2, 2007, the Exchange announced that it had entered into an agreement to be acquired by The Nasdaq Stock Market, Inc., (n/k/a The NASDAQ OMX Group, Inc.) (''NASDAQ OMX'') in a transaction that is subject to approval by the Exchange's members and by the Commission. The Exchange is being sold in its entirety to NASDAQ OMX, including all of its subsidiaries, with the exception of BOX. The sale will be structured as a merger of the Exchange with and into a wholly- owned subsidiary of NASDAQ OMX. The Exchange will be the surviving corporation and will become a wholly-owned subsidiary of NASDAQ OMX. Proposed rule changes, filed pursuant to Section 19 of the Act, relating to NASDAQ OMX's planned acquisition of the Exchange must be approved by the Commission in order for the transaction to close and are the subject of a separate filing.[4] The sale of the Exchange's equity interest in BOX to a third party is a condition precedent to completing the sale of the Exchange to NASDAQ OMX.

Currently, BOX is owned by the Exchange, MX, and several other investors. On December 21, 2007, the Exchange announced that it had reached an agreement with MX to sell the Exchange's remaining equity interest in BOX to MX. Upon closing of this transaction, which is also subject to approval by the Commission, the Exchange will no longer have an equity interest in BOX, and MX will have increased its ownership interest in BOX from 31.4% to 53.24%.[5] Exchange membership owners [6] will be compensated for their equity interest in BOX as would be provided in Article Fourth of the Restated Certificate of Incorporation of Boston Stock Exchange, Incorporated (''Restated Certificate'').

After completing the sale of all of its equity interests in BOX, the Exchange will continue to act as the self-regulatory organization for the BOX facility, and the Exchange's wholly-owned subsidiary Boston Options Exchange Regulation, LLC (''BOXR'') will provide the regulatory framework for the BOX facility. BOXR, together with BOX, will continue to have regulatory responsibility for the activities of the BOX facility.

In order for the Exchange to distribute the net proceeds from the BOX sale to the Exchange's membership owners, the Exchange's Certificate of Incorporation must be amended in order to remove the existing provision that prevents the Exchange from making distributions to Exchange membership owners, and to add a provision that allows the Exchange to redeem a portion of each membership for a pro rata share of the net proceeds of the BOX sale.[7] The Exchange has been advised that the use of the redemption as a means to distribute proceeds from the sale of its equity interest in BOX may provide beneficial tax treatment. Therefore, the Restated Certificate would permit the Exchange to make distributions to membership owners, and also would permit the use of such pro rata redemption. The Restated Certificate also would delete obsolete text regarding the incorporators of the Exchange.

If approved by the Commission, the Restated Certificate would be effective immediately prior to the closing of the BOX distribution upon the filing of the Restated Certificate with the Secretary of State of the State of Delaware. It is anticipated that the Restated Certificate would be amended again upon the closing of NASDAQ OMX's planned acquisition of the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements under section 6(b)(5) of the Act,[8] that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest in that, if approved, the proposed rule change will provide a means for the Exchange to distribute the proceeds from the sale of the Exchange's equity interest in BOX to all of the Exchange's owners of memberships.

B. Self-Regulatory Organization's Statement on Burden on Competition

BSE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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–BSE–2008–02 on the subject line.

Paper comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090. All submissions should refer to File Number SR–BSE–2008–02. 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

[4] *See* Securities Exchange Act Release No. 57757 (May 1, 2008) (SR–BSE–2008–23).

[5] *See* Securities Exchange Act Release No. 57714 (April 25, 2008) (SR–BSE–2008–25).

[6] All holders of outstanding BSE memberships, including lessors but not lessees, and excluding electronic access members (''*EAMs*''), will be entitled to receive their pro rata share of the equity interest in BOX based on the outstanding number of such BSE memberships.

[7] *See* Restated Certificate, Article Fourth.

[8] 15 U.S.C. 78f(b)(5).

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, 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–BSE–2008–02 and should be submitted on or before May 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10072 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57747; File No. SR–CBOE–2008–49]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Off-Floor LMMs

April 30, 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 April 24, 2008, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') 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 Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 CBOE rules relating to Lead Market-Makers (''LMMs''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Last year, CBOE amended its rules to provide Designated Primary Market-Makers (''DPMs'') with the flexibility to operate remotely away from CBOE's trading floor as a so-called ''Off-Floor DPM.''[5] CBOE is now proposing to provide LMMs with the same flexibility to operate remotely away from CBOE's trading floor. Specifically, CBOE proposes to amend Rule 8.15A, *Lead Market-Makers in Hybrid Classes,* to provide the following:

- An LMM generally will operate on CBOE's trading floor (''On-Floor LMM''). However, an LMM can request that the Exchange authorize the LMM to function remotely away from CBOE's trading floor (''Off-Floor LMM'') on a class-by-class basis.
- An LMM can request that the Exchange authorize it to operate as an Off-Floor LMM in one or more Hybrid classes. The Exchange will consider the factors specified in Rule 8.15A(a)(i)(A),[6] as well as the factors applicable to Off-Floor DPMs specified in paragraph (g) of Rule 8.83, *Approval to Act as a DPM,*[7] in determining whether to permit an LMM to operate as an Off-Floor LMM. If an LMM is approved to operate as an Off-Floor LMM in one or more Hybrid classes, the Off-Floor LMM can have an LMM designee trade in open outcry in the option classes allocated to the Off-Floor LMM, but the Off-Floor LMM shall not receive a participation entitlement under Rule 8.15B, *Participation Entitlement of LMMs,* with respect to orders represented in open outcry.[8]
- An LMM that is approved to operate as an Off-Floor LMM in one or more Hybrid classes can request that the Exchange authorize it to operate as an On-Floor LMM in those option classes. In making a determination pursuant to this paragraph, the Exchange should evaluate whether the change is in the best interests of the Exchange, and may

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 55531 (March 26, 2007), 72 FR 15736 (April 2, 2007) (SR–CBOE–2006–94). *See also* Securities Exchange Act Release No. 57568 (March 26, 2008), 73 FR 18016 (April 2, 2008) (SR–CBOE–2008–32) (immediately effective rule change expanding the Off-Floor DPM program, which had originally been limited to equity option classes to include all option classes traded on the Hybrid Trading System and Hybrid 2.0 Platform (collectively ''Hybrid'')).

[6] CBOE Rule 8.15A(a)(i) provides that the factors to be considered in selecting LMMs include: Adequacy of capital; experience in trading index options or options on ETFs; presence in the trading crowd; adherence to CBOE Rules; and ability to meet the obligations specified in the Rule. An individual may be appointed as an LMM for one expiration month at a time. When individual members are associated with one or more other members, only one member may receive an LMM appointment.

[7] CBOE Rule 8.83(g) provides that the factors to be considered in determining whether to permit a DPM to operate as an Off-Floor DPM include, but are not limited to, any one or more of the following: (i) *Adequacy* of capital; (ii) operational capacity; (iii) trading experience of and observance of generally accepted standards of conduct by the applicant, its associated persons, and the DPM Designees who will represent the applicant in its capacity as a DPM; (iv) number and experience of support personnel of the applicant who will be performing functions related to the applicant's DPM business; (v) regulatory history of and history of adherence to CBOE Rules by the applicant, its associated persons, and the DPM Designees who will represent the applicant in its capacity as a DPM; (vi) willingness and ability of the applicant to promote the Exchange as a marketplace; (vii) performance evaluations conducted pursuant to CBOE Rule 8.60, *Evaluation of Trading Crowd Performance;* and (viii) in the event that one or more shareholders, directors, officers, partners, managers, members, DPM Designees, or other principals of an applicant is or has previously been a shareholder, director, officer, partner, manager, member, DPM Designee, or other principal in another DPM, adherence by such DPM to the requirements set forth in Section C of Chapter VIII of the CBOE Rules respecting DPM responsibilities and obligations during the time period in which such person(s) held such position(s) with the DPM.

[8] In addition to the changes to CBOE Rule 8.15A, CBOE is proposing related updates to paragraph (b) of CBOE Rule 8.15B, *Participation Entitlement of LMMs,* and subparagraphs (d)(v) and (vii) of CBOE Rule 6.74, *Crossing Orders.*

consider any information that it believes will be of assistance to it. Factors to be considered may include, but are not limited to, performance, operational capacity of the Exchange or LMM, efficiency, number and experience of personnel of the LMM who will be performing functions related to the trading of the applicable securities, number of securities involved, number of Market-Makers affected, and trading volume of the securities.[9]

• In addition, CBOE is proposing to include a requirement that, as part of a pilot program until March 14, 2009, an Off-Floor LMM not allow more than one Market-Maker affiliated with the Off-Floor LMM to trade on CBOE's trading floor in any specific option class allocated to the Off-Floor LMM and provided such Market-Maker is trading on a separate membership (absent the pilot program, an Off-Floor LMM may not allow any Market-Makers affiliated with the Off-Floor LMM to trade on CBOE's trading floor in any class allocated to the Off-Floor LMM) and provided the Off-Floor LMM does not have an LMM designee trading in open outcry in the option classes allocated to the Off-Floor LMM.[10]

Lastly, CBOE is proposing to update the LMM obligations listed in Rule 8.15A to include a requirement that, subject to paragraph (d) of Rule 54.7, *General Prohibitions* (under the CBOE Stock Exchange Rules), LMMs in Hybrid classes (whether On-Floor or Off-Floor) maintain information barriers that are reasonably designed to prevent the misuse of material, non-public information with any affiliates that may conduct a brokerage business in option classes allocated to the LMM or act as specialist or Market-Maker in any security underlying options allocated to the LMM, and otherwise comply with the requirements of Rule 4.18, *Prevention of the Misuse of Material, Non-Public Information*.[11]

By permitting an LMM to function as an Off-Floor LMM, CBOE believes that the rule change provides more flexibility to a member organization that may wish to function remotely, and provides more flexibility to CBOE when allocating option classes to the best applicant. It also removes a potential operational dilemma for a Market-Maker that functions as a DPM in some classes and an LMM in others, but that would like to function remotely away from the trading floor as a DPM/LMM in all of its option classes. Accordingly, CBOE believes that the proposed rule change is designed to promote just and equitable principles of trade.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[12] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) Act[13] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of 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 neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission,[14] the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[15] and Rule 19b–4(f)(6) thereunder.[16] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–49 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal

[9] These proposed On-/Off-Floor LMM provisions are substantially similar to the corresponding provisions for On-/Off-Floor DPMs in paragraphs (g) and .01 to CBOE Rule 8.83.

[10] This provision is substantially similar to an existing provision in CBOE's rules respecting Off-Floor DPM obligations. *See* paragraph (a)(v) of CBOE Rule 8.85, *DPM Obligations*. CBOE is proposing a related cross-reference update to paragraph (c)(vii)(1) of CBOE Rule 8.3.

[11] This language is substantially similar to existing language in CBOE's rules respecting e-DPM obligations. *See* paragraph (x) of CBOE Rule 8.93, *e-DPM Obligations*. In addition, the Exchange is proposing to modify CBOE Rule 8.15A to make clear that the rule applies to Hybrid Trading System and Hybrid 2.0 Platform option classes.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] CBOE fulfilled this requirement.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6).

office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE–2008–49 and should be submitted on or before May 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10023 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57752; File No. SR–CBOE–2008–51]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Lowering the Appointment Cost of SPX Options

May 1, 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 April 30, 2008, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 CBOE rules to lower the appointment cost for options on the Standard & Poor's 500 (SPX). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule change is to amend CBOE Rule 8.3 to lower the appointment cost for SPX options. Presently, SPX has an appointment cost of 1.0. CBOE proposes to reduce the appointment cost to .95 effective May 1, 2008. Members then could utilize the excess membership capacity of .05 to hold an appointment and quote electronically in an appropriate number of Hybrid 2.0 option classes, which promotes competition and efficiency.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) Act[6] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of 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 neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission,[7] the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Under Rule 19b–4(f)(6) of the Act,[10] the proposal does not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay, so that the proposal may take effect on May 1, 2008. Lowering the appointment cost on SPX options will allow Market-Makers who have an appointment in SPX additional options classes in which they could act as Market-Makers. Thus, the Exchange believes that waiving the 30-day operative period will promote competition and efficiency without undue delay. The Commission agrees and, consistent with the protection of investors and the public interest, has determined to waive the 30-day

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] CBOE fulfilled this requirement.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] *Id.*

operative delay so that the proposal may take effect on May 1, 2008.[11]

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–CBOE–2008–51 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–51. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–51 and should be submitted on or before May 28, 2008.

[11] For purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10039 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57758; File No. SR–CBOE–2008–44]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Equity Linked Term Notes

May 1, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 15, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared substantially by the Exchange. On April 30, 2008, the Exchange submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and is granting accelerated approval to the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend CBOE Rule 31.5(I), which provides the requirements for the listing and trading of Equity Linked Term Notes (''ELTNs'') on the Exchange. The text of the proposed rule change is available at the principal office of the Exchange, the Commission's Public Reference Room, and *http://www.cboe.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, CBOE included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item III below. CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 19b–4(e)[3] under the Act provides that the listing and trading of a new derivative securities product by a self-regulatory organization shall not be deemed a proposed rule change, pursuant to paragraph (c)(1) of Rule 19b–4,[4] if the Commission has approved, pursuant to section 19(b) of the Act,[5] the self-regulatory organization's trading rules, procedures, and listing standards for the product class that would include the new derivative securities product, and the self-regulatory organization has a surveillance program for the product class. The Exchange proposes to amend CBOE Rule 31.5(I), which sets forth CBOE's listing standards for ELTNs, to clarify that the listing and trading of ELTNs on CBOE, including the trading of ELTNs on CBOE pursuant to unlisted trading privileges, is subject to Rule 19b–4(e) under the Act.

2. Statutory Basis

Because this proposal clarifies that the listing and trading of ELTNs on the Exchange is subject to Rule 19b–4(e) under the Act,[6] the Exchange believes that the proposal is consistent with the Act and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes that the proposal is consistent with the Section 6(b)(5)[8] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(e).

[4] 17 CFR 240.19b–4(c)(1).

[5] 15 U.S.C. 78s(b).

[6] 17 CFR 240.19b–4(e).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. 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–CBOE–2008–44 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–44. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 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–CBOE–2008–44 and should be submitted on or before May 28, 2008.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[9] In particular, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[10] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds good cause for approving this proposal before the 30th day after the publication of notice thereof in the **Federal Register**. The proposal seeks to clarify that the Exchange's listing and trading of ELTNs is subject to Rule 19b–4(e) under the Act. Therefore, the Commission does not believe that the Exchange's proposal raises any novel regulatory issues. The Commission believes that accelerating approval of this proposal would ensure that the Exchange's rules clearly reflect the standards for listing and trading of ELTNs and conform the rules to those of other Exchanges without undue delay.[11]

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[12] that the proposed rule change, as amended (SR–CBOE–2008–44), be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10071 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

[9] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(5).

[11] *See e.g.,* International Securities Exchange Rule 2130 and NYSE Arca Rule 5.2(j)(2).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57750, File No. SR–MSRB–2007–08]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of Proposed Rule Change as Modified by Amendment No. 1 Thereto Relating to Rule G–8, Books and Records, Rule G–9, Preservation of Records, and Rule G–34, CUSIP Numbers and New Issue Requirements, To Improve Transaction Reporting of New Issues

May 1, 2008.

On November 27, 2007, the Municipal Securities Rulemaking Board (''MSRB''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change consisting of an amendment of its Rule G–8, Books and Records, Rule G–9, Preservation of Records, and Rule G–34, CUSIP Numbers and New Issue Requirements. The proposed rule change was published for comment in the **Federal Register** on January 17, 2008.[3] The Commission received two comment letters about the proposed rule change.[4] The MSRB also forwarded to the Commission a comment letter about the proposed rule change received by the MSRB.[5] On April 22, 2008, the MSRB filed Amendment No. 1 to the proposed rule change.[6] This order approves the proposed rule change as modified by Amendment No. 1.

The proposed rule change is designed to improve transaction reporting of new issues and would accelerate the timing for CUSIP number assignment and, with the exception of new issues of short-term instruments with less than nine months in effective maturity, require

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57131 (January 11, 2008), 73 FR 3295 (January 17, 2008) (''Commission's Notice'').

[4] *See* letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), dated March 28, 2008, and letter from Mary Lee Corrigan, Executive Vice President & Chief Financial Officer and Janis C. Brennan, Vice President & Operations Manager, Griffin, Kubik, Stephens & Thompson, Inc. (''GKST''), dated April 3, 2008.

[5] *See* letter from Michael Decker and Michael Nicholas, Co-Chief Executive Officers, Regional Bond Dealers Association (''RBDA''), dated April 1, 2008.

[6] In Amendment No. 1, the MSRB responded to the three comment letters and, in response to the comment letters, postponed the effective date of the proposed rule change from June 30, 2008 to September 30, 2008. This is a technical amendment and is not subject to notice and comment.

underwriters to: (i) Submit certain information about a new issue of municipal securities to Depository Trust and Clearing Corporation's New Issue Information Dissemination System (''NIIDS'') within set timeframes; and (ii) set and disseminate a ''Time of First Execution'' that allows time for market participants to access necessary information in preparation for trade reporting prior to beginning trade executions in the issue. A full description of the proposal is contained in the Commission's Notice.

SIFMA stated in its comment letter that it fully supports increased price transparency in the municipal marketplace and strongly supports the development of the Depository Trust and Clearing Corporation's New Issue Information Dissemination System. However, SIFMA recommended that the proposal not be effective on June 30, 2008 because firms have not had sufficient time to review and test the system and because current unexpected market issues and issuance volume related to auction-rate securities have significantly increased the time demands on the operations staff at the various firms. GKST also supported increased price transparency and the proposal but believed that if the Depository Trust and Clearing Corporation cannot fix the problems that have already been identified, the cost of complying with the proposed directive will be a severe burden to all firms but relatively more so to smaller firms. The RBDA also supported the development and implementation of the New Issue Information Dissemination System as a way to enhance the overall level of transparency in the municipal market, but did not believe the June 30 deadline offered the market enough time to fully test and implement the system. All three commentators suggested postponing the originally-proposed June 30, 2008 implementation date.

In Amendment No. 1, the MSRB postponed the effective date of the proposed rule change from June 30, 2008 to September 30, 2008. The MSRB believes that the new effective date will address commentators concerns and will allow for the additional time necessary for implementation of NIIDS.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB [7] and, in particular, the requirements of Section 15B(b)(2)(C) of the Act [8] and the rules and regulations thereunder. Section 15B(b)(2)(C) of the Act requires, among other things, that the MSRB's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.[9] In particular, the Commission finds that the proposed rule change is consistent with the Act because it will allow the municipal securities industry to produce more accurate trade reporting and transparency. The proposal will be effective on September 30, 2008, as requested by the MSRB.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–MSRB–2007–08), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10024 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

[7] In approving this proposed rule change, the commission notes that it has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78o–4(b)(2)(C).

[9] *Id.*

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57746; File No. SR–NYSE–2008–34]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Exchange Rule 36 (Communication Between Exchange and Exchange Members' Offices)

April 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 29, 2008, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange seeks to extend its current portable phone pilot (the ''Pilot'') operating pursuant to Exchange Rule 36 from its scheduled April 30, 2008 expiration date to no later than the approval of SR–NYSE–2008–20 [5] or June 30, 2008, the earlier thereof.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange seeks to extend the Pilot operating pursuant to Exchange Rule 36 from the Pilot's scheduled April 30, 2008 expiration date to no later than the approval of SR–NYSE–2008–20 or June 30, 2008, the earlier thereof.

Pursuant to the Pilot, Floor brokers and Registered Competitive Market Makers (''RCMMs'') are permitted to use an Exchange authorized and provided portable telephone on the Exchange Floor provided certain conditions are met. Such usage has been permitted on a pilot basis. The current Pilot expires on April 30, 2008. Through the rule filing SR–NYSE–2008–20, the Exchange seeks to have the amendment to Exchange Rule 36 made permanent.

[5] *See* Securities Exchange Act Release No. 57611 (April 3, 2008), 73 FR 19274 (April 9, 2008). The comment period expires on April 30, 2008.

Exchange filing SR–NYSE–2008–20 was noticed for comment in the **Federal Register** by the Commission on April 9, 2008. The comment period ends on April 30, 2008. In order to avoid a lapse of the operation of the Pilot pending the approval of SR–NYSE–2008–20 by the Commission, the Exchange proposes in the instant filing to extend the operation of the Pilot either for an additional two months until June 30, 2008, or until the approval of SR–NYSE–2008–20, whichever occurs first.

Background

The Commission originally approved the Pilot to be implemented for a six-month period [6] beginning no later than June 23, 2003.[7] Since the inception of the Pilot, the Exchange has extended the Pilot nine times, with the current Pilot expiring on April 30, 2008.[8]

Exchange Rule 36 governs the establishment of telephone or electronic communications between the Exchange's Trading Floor and any other location. Prior to the Pilot, Exchange Rule 36 prohibited the use of portable telephone communication between the Trading Floor and any off-Floor location.

During the operation of the Pilot, Floor brokers and RCMMs may use Exchange authorized and issued portable telephones on the Floor. Floor brokers are permitted to engage in direct voice communication from the point of sale to an off-Floor location, such as a member firm's trading desk or the office of one of the broker's customers. Such communications permit the broker to accept orders consistent with Exchange rules governing the entry of orders on the NYSE Floor, provide status and oral execution reports as to orders previously received, as well as ''market look'' observations as have historically been routinely transmitted from a broker's booth location.

Both incoming and outgoing calls are allowed, provided the requirements of all other Exchange rules have been met. A Floor broker is not permitted to represent and execute any order received as a result of such voice communication unless the order is first properly recorded by the member and entered into the Exchange's Front End Systemic Capture (''FESC'') electronic database (Exchange Rule 123(e)).[9] In addition, Exchange rules require that any Floor broker receiving orders from the public over portable phones must be properly qualified to engage in such direct access business under Exchange Rules 342 and 345, among others.[10]

The Pilot also allows RCMMs to use an Exchange authorized portable phone solely to call and receive calls from their booths on the Floor, to communicate with their or their member organizations' off-Floor office, and to communicate with the off-Floor office of their clearing member organization to enter off-Floor orders and to discuss matters related to the clearance and settlement of transactions, provided the off-Floor office uses a wired telephone line for these discussions. RCMMs, who trade for their own accounts on the Floor subject to the requirements of NYSE Rule 107A, are currently not allowed to use a portable phone to conduct any agency business.[11] For both RCMMs and Floor brokers, use of a portable telephone on the Exchange Floor other than one authorized and issued by the Exchange is prohibited.

Specialists are subject to separate restrictions in Exchange Rule 36 on their ability to engage in voice communications from the specialist post to an off-Floor location.[12] The Pilot does not apply to specialists, who would continue to be prohibited from speaking from the post to upstairs trading desks or customers.[13]

The Exchange believes that the Pilot is operating successfully in that there is a reasonable degree of usage of portable phones. During the period of January 31, 2008 through April 29, 2008, there have been no significant regulatory concerns identified with their usage.[14] Moreover, there have been no administrative or technical problems, other than routine telephone maintenance issues, that have resulted from the operation of the Pilot over the past few months.

Conclusion

The Exchange proposes to extend the operation of the current Pilot for an additional two months to June 30, 2008 or until the approval of SR–NYSE–2008–20. The Exchange believes that the approval of the Pilot's continuation for the earlier of an additional two months or until the approval of SR–NYSE–2008–20 will enable the Exchange to continue to provide more direct, efficient access to its trading crowds and customers, increase the speed of order transmittal and trade execution, and provide an enhanced level of service to customers in an increasingly competitive environment. Therefore the Exchange believes it is appropriate to extend the Pilot to expire no later than the approval of the pending filing to

[6] *See* Securities Exchange Act Release No. 47671 (April 11, 2003), 68 FR 19048 (April 17, 2003) (SR–NYSE–2002–11).

[7] *See* Securities Exchange Act Release No. 47992 (June 5, 2003), 68 FR 35047 (June 11, 2003) (SR–NYSE–2003–19) (delaying the implementation date for portable phones from on or about May 1, 2003, to no later than June 23, 2003).

[8] *See* Securities Exchange Act Release Nos. 48919 (December 12, 2003), 68 FR 70853 (December 19, 2003) (SR–NYSE–2003–38) (extending the Pilot for an additional six months ending on June 16, 2004); 49954 (July 1, 2004), 69 FR 41323 (July 8, 2004) (SR–NYSE–2004–30) (extending the Pilot for an additional five months ending on November 30, 2004); 50777 (December 1, 2004), 69 FR 71090 (December 8, 2004) (SR–NYSE–2004–67) (extending the Pilot for an additional four months ending March 31, 2005); 51464 (March 31, 2005), 70 FR 17746 (April 7, 2005) (SR–NYSE–2005–20) (extending the Pilot for additional four months ending July 31, 2005); 52188 (August 1, 2005), 70 FR 46252 (August 9, 2005) (SR–NYSE–2005–53) (extending the Pilot for an additional six months ending January 31, 2006); 53277 (February 13, 2006), 71 FR 8877 (February 21, 2006) (SR–NYSE–2006–03) (extending the Pilot for an additional six months ending July 31, 2006); 54276 (August 4, 2006), 71 FR 45885 (August 10, 2006) (SR–NYSE–2006–55) (extending the Pilot for an additional six months ending January 31, 2007); 55218 (January 31, 2007), 72 FR 6025 (February 8, 2007) (SR–NYSE–2007–05) (extending the Pilot for an additional twelve months ending January 31, 2008); and 57249 (January 31, 2008), 73 FR 7024 (February 6, 2008) (SR–NYSE–2008–10) (extending the Pilot for an additional three months ending April 30, 2008). Also, the Exchange has incorporated RCMMs into the Pilot and subsequently amended the Pilot to allow RCMMs to use an Exchange authorized and provided portable telephone on the Exchange Floor to call to and receive calls from their upstairs offices, the upstairs offices of their clearing firm, and their booth locations on the NYSE Floor. *See* Securities Exchange Act Release Nos. 53213 (February 2, 2006), 71 FR 7103 (February 10, 2006) (SR–NYSE–2005–80) and 54215 (July 26, 2006), 71 FR 43551 (August 1, 2006) (SR–NYSE–2006–51).

[9] *See* Securities Exchange Act Release No. 43689 (December 7, 2000), 65 FR 79145 (December 18, 2000) (SR–NYSE–98–25). *See also* Securities Exchange Act Release No. 44943 (October 16, 2001), 66 FR 53820 (October 24, 2001) (SR–NYSE–2001–39) (discussing certain exceptions to FESC, such as orders to offset an error, or a bona fide arbitrage, which may be entered within 60 seconds after a trade is executed).

[10] For more information regarding Exchange requirements for conducting a public business on the Exchange Floor, *see* Information Memos 01–41 (November 21, 2001), 01–18 (July 11, 2001) (available at *http://www.nyse.com/regulation/*) and 91–25 (July 8, 1991).

[11] Allowing RCMMs acting as Floor brokers to use portable phones would involve further discussions with the Commission and would be the subject of a separate filing with the Commission.

[12] *See* Securities Exchange Act Release No. 46560 (September 26, 2002), 67 FR 62088 (October 3, 2002) (SR–NYSE–00–31) (discussing restrictions on specialists' communications from the post).

[13] Exchange Rule 36.30 provides that, with the approval of the Exchange, a specialist unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the specialist unit or the unit's clearing firm. Such telephone connection shall not be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities, but may be used to enter options or futures hedging orders through the unit's off-Floor office or the unit's clearing firm, or through a member (on the Floor) of an options or futures exchange.

[14] The Exchange has received records of incoming and outgoing telephone calls from January 31, 2008, through March 31, 2008, for Floor brokers and RCMMs and will continue to receive records of such telephone calls on a monthly basis.

make the amendment to Exchange Rule 36 permanent or to June 30, 2008.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with, and furthers the objectives of, Section 6(b)(5) of the Act,[15] in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[16] and Rule 19b–4(f)(6) thereunder.[17] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

The Exchange requests that the Commission waive the five-day pre-filing period and 30-day operative period under Rule 19b–4(f)(6)(iii).[18] The Commission has waived the five-day pre-filing requirement for this proposed rule change. Additionally, the Exchange believes that the continuation of the Pilot is in the public interest as it will avoid inconvenience and interruption to the public. The Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and make this proposed rule change immediately effective upon filing.[19] The Commission believes that the waiver of the 30-day operative delay will allow the Exchange to continue, without interruption, the existing operation of its Pilot until the earlier of the approval of SR–NYSE–2008–20 or June 30, 2008.

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–NYSE–2008–34 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–34. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–34 and should be submitted on or before May 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–9995 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57751; File No. SR–NYSEArca–2008–29]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend the Eligibility Criteria for Components of an Index Underlying Investment Company Units

May 1, 2008.

I. Introduction

On March 13, 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''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposal to amend Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3) to modify the eligibility criteria for components of an index underlying Investment Company Units (''Units'').[3] On March 24, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the **Federal Register** on April 1, 2008.[4] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Units are securities that represent an interest in a registered investment company that could be organized as a unit investment trust, an open-end management investment company, or a similar entity, that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities or securities in another registered investment company that holds securities. *See* NYSE Arca Equities 5.2(j)(3).

[4] *See* Securities Exchange Act Release No. 57561 (March 26, 2008), 73 FR 17390.

Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

II. Description of the Proposal

Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3) provides that NYSE Arca Equities may approve a series of Units for listing and trading (including trading pursuant to unlisted trading privileges) pursuant to Rule 19b–4(e) under the Act,[5] if such series satisfies the criteria set forth in Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3). The Exchange proposes to exclude Units and certain other securities defined in Section 2 of NYSE Arca Equities Rule 8 (collectively, ''Derivative Securities Products'')[6] when applying the quantitative listing requirements of Commentaries .01(a)(A) and (B) to NYSE Arca Equities Rule 5.2(j)(3) relating to the listing of Units based on a U.S. index or portfolio or an international or global index or portfolio, respectively.

With respect to Commentary .01(a)(A) to NYSE Arca Equities Rule 5.2(j)(3), the Exchange proposes to exclude Derivative Securities Products, as components, when applying the following existing component eligibility requirements: (1) Component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum market value of at least $75 million (Commentary .01(a)(A)(1)); (2) component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum monthly trading volume during each of the last six months of at least 250,000 shares (Commentary .01(a)(A)(2)); and (3) the most heavily weighted component stock must not exceed 30% of the weight of the index or portfolio, and the five most heavily weighted component stocks must not exceed 65% of the weight of the index or portfolio (Commentary .01(a)(A)(3)). Component stocks, in the aggregate, excluding Derivative Securities Products, would still be required to meet the criteria of these provisions. Thus, for example, when determining compliance with Commentaries .01(a)(A)(1) and (2) to NYSE Arca Equities Rule 5.2(j)(3), component stocks that, in the aggregate, account for at least 90% of the remaining index weight, after excluding any Derivative Securities Products, would be required to have a minimum market value of at least $75 million and minimum monthly trading volume of 250,000 shares during each of the last six months, respectively. In addition, with respect to Commentary .01(a)(A)(3) to NYSE Arca Equities Rule 5.2(j)(3), when determining the component weight for the most heavily weighted stock and the five most heavily weighted component stocks for an underlying index that includes a Derivative Securities Product, the weight of such Derivative Securities Product included in the underlying index or portfolio would not be considered.

In addition, the Exchange proposes to modify the requirement in Commentary .01(a)(A)(4) to NYSE Arca Equities Rule 5.2(j)(3), which requires that the underlying index or portfolio include a minimum of 13 component stocks. Specifically, the Exchange proposes that there shall be no minimum number of component stocks if: (1) One or more series of Units or Portfolio Depositary Receipts (as defined in NYSE Arca Equities Rule 8.100) constitute, at least in part, components underlying a series of Units; or (2) one or more series of Derivative Securities Products account for 100% of the weight of the index or portfolio. Thus, for example, if the index or portfolio underlying a series of Units includes one or more series of Units or Portfolio Depositary Receipts, or if it consists entirely of other Derivative Securities Products, then there would not be required to be any minimum number of component stocks (*i.e.*, one or more components comprising the underlying index or portfolio would be acceptable). However, if the index or portfolio consists of Derivative Securities Products, other than Units or Portfolio Depositary Receipts, and other securities that are not Derivative Securities Products (*e.g.*, common stocks), then there would have to be at least 13 components in the underlying index or portfolio.

Consistent with current Commentary .01(a)(A)(5) to NYSE Arca Equities Rule 5.2(j)(3), all securities in the index or portfolio (including Derivative Securities Products) must nevertheless be U.S. Component Stocks[7] that are listed on a national securities exchange and NMS Stocks, as defined in Rule 600 under the Act.[8]

With respect to Commentary .01(a)(B) to NYSE Arca Equities Rule 5.2(j)(3), the Exchange proposes to exclude Derivative Securities Products, as components, when applying the following existing component eligibility requirements: (1) Component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum market value of at least $100 million (Commentary .01(a)(B)(1)); (2) component stocks that, in the aggregate, account for at least 90% of the weight of the index or portfolio each must have a minimum worldwide monthly trading volume during each of the last six months of at least 250,000 shares (Commentary .01(a)(B)(2)); and (3) the most heavily weighted component stock must not exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks must not exceed 60% of the weight of the index or portfolio (Commentary .01(a)(B)(3)). Thus, for example, when determining compliance with Commentaries .01(a)(B)(1) and (2) to NYSE Arca Equities Rule 5.2(j)(3), component stocks that, in the aggregate, account for at least 90% of the remaining index weight, after excluding any Derivative Securities Products, would be required to have a minimum market value of at least $100 million and minimum worldwide monthly trading volume of 250,000 shares during each of the last six months, respectively. In addition, with respect to Commentary .01(a)(B)(3) to NYSE Arca Equities Rule 5.2(j)(3), when determining the component weight for the most heavily weighted stock and the five most heavily weighted component stocks for an underlying index that includes a Derivative Securities Product, the weight of such Derivative Securities Product included in the underlying index or portfolio would not be considered.

In addition, the Exchange proposes to modify the requirement in Commentary .01(a)(B)(4) to NYSE Arca Equities

[5] Rule 19b–4(e) under the Act provides that the listing and trading of a new derivative securities product by a self-regulatory organization (''SRO'') shall not be deemed a proposed rule change, pursuant to Rule 19b–4(c)(1) under the Act (17 CFR 240.19b–4(c)(1)), if the Commission has approved, pursuant to Section 19(b) of the Act, the SRO's trading rules, procedures, and listing standards for the product class that would include the new derivatives securities product, and the SRO has a surveillance program for the product class. *See* 17 CFR 240.19b–4(e).

[6] The following securities are included in Section 2 of NYSE Arca Equities Rule 8: Portfolio Depositary Receipts (Rule 8.100); Trust Issued Receipts (Rule 8.200); Commodity-Based Trust Shares (Rule 8.201); Currency Trust Shares (Rule 8.202); Commodity Index Trust Shares (Rule 8.203); Partnership Units (Rule 8.300); Paired Trust Shares (Rule 8.400); and Managed Fund Shares (Rule 8.600). *See* Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25) (approving, among other things, the adoption of listing standards for Managed Fund Shares).

[7] ''U.S. Component Stock'' means an equity security that is registered under Section 12(b) or Section 12(g) of the Act or an American Depositary Receipt, the underlying equity security of which is registered under Section 12(b) or Section 12(g) of the Act. *See* NYSE Arca Equities Rule 5.2(j)(3).

[8] *See* 17 CFR 242.600(b)(47).

5.2(j)(3), which requires that the underlying index or portfolio include a minimum of 20 component stocks. Specifically, the Exchange proposes that there shall be no minimum number of component stocks if: (1) One or more series of Units or Portfolio Depositary Receipts (as defined in NYSE Arca Equities Rule 8.100) constitute, at least in part, components underlying a series of Units, or (2) one or more series of Derivative Securities Products account for 100% of the weight of the index or portfolio. Thus, for example, if the index or portfolio underlying a series of Units includes one or more series of Units or Portfolio Depositary Receipts, or if it consists entirely of other Derivative Securities Products, then there would not be required to be any minimum number of component stocks (*i.e.*, one or more components comprising the underlying index or portfolio would be acceptable). However, if the index or portfolio consists of Derivative Securities Products, other than Units or Portfolio Depositary Receipts, and other securities that are not Derivative Securities Products (*e.g.*, common stocks), then there would have to be at least 20 components in the underlying index or portfolio.

Consistent with current Commentary .01(a)(B)(5) to NYSE Arca Equities Rule 5.2(j)(3), each component that is a U.S. Component Stock (including Derivative Securities Products) would be required to be listed on a national securities exchange and be an NMS Stock, as defined in Rule 600 under the Act,[9] and each component that is a Non-U.S. Component Stock [10] (including Derivative Securities Products) would be required to be listed and traded on an exchange that has last-sale reporting.

III. Commission's Findings and Order Granting Approval of the Proposed Rule Change

After careful review and based on the Exchange's representations, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[11] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act [12] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Under Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3), one or more series of Derivative Securities Products may be included as a component comprising the index or portfolio underlying a series of Units.[13] The Commission notes that, based on the trading characteristics of Derivative Securities Products, it may be difficult for component Derivative Securities Products to satisfy certain quantitative index criteria, such as the minimum market value and trading volume limitations. However, because Derivative Securities Products are themselves subject to specific initial and continued listing requirements, the Commission believes that it would be reasonable to exclude Derivative Securities Products, as components, from certain index component eligibility criteria for Units. For example, the index component eligibility standards for Units and Portfolio Depositary Receipts require, among others, that there be a minimum of 13 component stocks in an underlying U.S. index or portfolio and a minimum of 20 component stocks in an international or global index or portfolio. If one or more series of Units or Portfolio Depositary Receipts constitutes, at least in part, a component of a U.S. or international index or portfolio underlying a series of Units, the Commission believes that not requiring a minimum number of components underlying such overlying Unit would be reasonable because each component Unit or Portfolio Depositary Receipt already requires a minimum of 13 or 20 component stocks, as the case may be. In addition, if one or more series of component Derivative Securities Products accounts for 100% of the weight of the index or portfolio underlying a series of Units, then a minimum number of components underlying such Units would not be required. The Commission notes that, if a series of Units is based on the performance of an underlying index or portfolio composed, in part, of a: (1) Unit or Portfolio Depositary Receipt and another non-Derivative Securities Product (*e.g.*, common stock), or (2) Derivative Securities Product other than a Unit or Portfolio Depositary Receipt, then the minimum number of component stock requirement will continue to apply.

In addition, because component Derivative Securities Products may comprise 100% of the weight of any index underlying a series of Units, the Commission believes that providing for an exception to the concentration limits contained in Commentaries .01(a)(A)(3) and .01(a)(B)(3) to NYSE Arca Equities Rule 5.2(j)(3) with respect to component Derivative Securities Products is reasonable.[14] The Commission further notes that component Derivative Securities Products that are U.S. Component Stocks comprising, at least in part, an index or portfolio underlying a series of Units must meet the definition of NMS Stock [15] and already have been listed and trading on a national securities exchange pursuant to a proposed rule change approved by the Commission pursuant to Section 19(b)(2) of the Act [16] or submitted by a national securities exchange pursuant to Section 19(b)(3)(A) of the Act,[17] or would have been listed by a national securities exchange pursuant to the requirements of Rule 19b–4(e) under the Act.[18] Component Derivative Securities Products that are Non-U.S. Component Stocks comprising, at least in part, an international or global index or portfolio underlying a series of Units must

[9] *See Id.*

[10] ''Non U.S. Component Stock'' means an equity security that is not registered under Section 12(b) or Section 12(g) of the Act and that is issued by an entity that (a) is not organized, domiciled, or incorporated in the United States, and (b) is an operating company (including real estate investment trusts and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives). *See* NYSE Arca Equities Rule 5.2(j)(3).

[11] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(5).

[13] Under Commentary .01(a) to NYSE Arca Equities Rule 5.2(j)(3), a series of a Derivative Securities Product may be included as a U.S. Component Stock or Non-U.S. Component Stock underlying a series of Units, so long as the shares of such series meet the definitions of U.S. Component Stock and Non-U.S. Component Stock, as applicable. *See supra* notes 7 and 10. *See also* Commentaries .01(a)(A)(5) and 01(a)(B)(5) to NYSE Arca Equities Rule 5.2(j)(3) (requiring that, in any event, all securities in the applicable index or portfolio must be a U.S. Component Stock listed on a national securities exchange and an NMS Stock, as defined in Rule 600 under the Act, or, in the case of an international or global index or portfolio, must be a Non-U.S. Component Stock that is listed and traded on an exchange that has last-sale reporting).

[14] The Commission notes that it has approved the adoption of certain amendments to NYSE Arca Equities Rule 5.2(j)(6) allowing an index or portfolio underlying a series of Equity Index-Linked Securities to consist, in whole or in part, of (1) securities of closed-end management investment companies, or (2) Units, which, in each case, are registered under the Investment Company Act of 1940. *See* Securities Exchange Act Release No. 56879 (December 3, 2007), 72 FR 69271 (December 7, 2007) (SR–NYSEArca–2007–110).

[15] *See supra* note 8.

[16] 15 U.S.C. 78s(b)(2).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] *See supra* note 5.

already have been listed and trading on an exchange that has last-sale reporting.

The Commission believes that the proposed rule change will facilitate the listing and trading of additional types of exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the listing and trading criteria set forth in the proposal are intended to protect investors and the public interest. As such, the Commission believes it is reasonable and consistent with the Act for the Exchange to modify the index component eligibility criteria for Units in the manner described in the proposal.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[19] that the proposed rule change (SR–NYSEArca–2008–29), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10025 Filed 5–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of: Health Professionals, Inc., Respondent; Order of Suspension of Trading

May 5, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Health Professionals, Inc. because it has not filed any periodic reports since it filed a Form 10–Q for the period ended December 31, 1997.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Health Professionals, Inc. is suspended for the period from 9:30 a.m. EDT on May 5, 2008 through 11:59 p.m. EDT on May 16, 2008.

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

By the Commission.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 08–1235 Filed 5–5–08; 11:37am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice: 6216]

30-Day Notice of Proposed Information Collection: Agency Form DS–4127, NEA/PI Online Performance Reporting System (PRS), OMB Control Number 1405–XXXX

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* NEA/PI Online Performance Reporting System (PRS).
- *OMB Control Number:* none.
- *Type of Request:* New collection.
- *Originating Office:* NEA/PI.
- *Form Number:* DS–4127.
- *Respondents:* Recipients of NEA/PI grants.
- *Estimated Number of Respondents:* 70 respondents annually.
- *Estimated Number of Responses:* 280 per year.
- *Average Hours Per Response:* 20.
- *Total Estimated Burden:* 5600 hours per year.
- *Frequency:* Quarterly.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATE(S): Submit comments to the Office of Management and Budget (OMB) for up to 30 days from May 7, 2008.

ADDRESSES: Direct comments and questions to Katherine Astrich, the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB), who may be reached at 202–395–4718. You may submit comments by any of the following methods:

- E-mail: *kastrich@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- Mail (paper, disk, or CD–ROM submissions): Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503.
- Fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Please direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to George Wilson, U.S. Department of State, Office of the Middle East Partnership Initiative (NEA/PI), Bureau of Near Eastern Affairs, NEA Mail Room—Room 6258, 2201 C St. NW., Washington DC, 20520, who may be reached on 202–776–8641 or at *wilsongr@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

Abstract of Proposed Collection

Since 2002, MEPI has obligated more than $430 million to over 250 organizations, who carry out more than 370 projects in support of the empowerment of women and political, economic, and education reform in 20 countries of the Middle East and North Africa. As a normal course of business and in compliance with OMB Guidelines contained in Circular A-110, recipient organizations are required to provide, and the U.S. State Department required to collect, periodic program and financial performance reports. The responsibility of the State Department to track and monitor the programmatic and financial performance necessitates a database that can help facilitate this in a consistent and standardized manner. The MEPI Performance Reporting System (PRS) enables enhanced monitoring and evaluation of grants through standardized collection and storage of relevant award elements, such as quarterly progress reports, workplans, results monitoring plans, grant agreements, financial reports, and other business information related to MEPI implementers. The PRS streamlines communication with implementers and allows for rapid identification of information gaps for specific projects.

Methodology

Information is entered into PRS electronically by respondents. Non-respondents submit their quarterly reports on paper.

Dated: April 16, 2008.

Barbara Hibben,

Deputy Director, Office of the Middle East Partnership Initiative, Bureau of Near Eastern Affairs, U.S. Department of State.

[FR Doc. E8–10115 Filed 5–6–08; 8:45 am]

BILLING CODE 4710–31–P

DEPARTMENT OF STATE

[Delegation of Authority 304]

Delegation by the Secretary of State to the Under Secretary for Arms Control and International Security of Authority To Submit Certain Non-proliferation Reports to the Congress

By virtue of the authority vested in me as Secretary of State, including section 1 of the State Department Basic Authorities Act, as amended (22 U.S.C. 2651a), I hereby delegate to the Under Secretary for Arms Control and International Security the authority to approve submission of reports to the Congress pursuant to:

(1) Section 1344 of the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law 107–228;

(2) Section 2809(c)(2) of the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105–277;

(3) Section 1343(a) of the Iran Nuclear Proliferation Prevention Act of 2002 (incorporated in the Foreign Relations Authorization Act, Fiscal Year 2003), Public Law 107–228;

(4) Section 204(c) of the International Emergency Economic Powers Act (50 U.S.C. 1701 *et. seq.*) and section 401(c) of the National Emergencies Act, (50 U.S.C. 1601 *et. seq.*);

(5) Section 1308(a) of the Foreign Relations Authorization Act for FY 2003, Public Law 107–228; and

(6) Determination and Congressional Reporting Requirement Concerning Israeli Participation in the IAEA required by the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Title II of Public Law 109–102.

Any act, executive order, regulation or procedure subject to, or affected by, this delegation shall be deemed to be such act, executive order, regulation or procedure as amended from time to time.

Notwithstanding this delegation of authority, the Secretary or the Deputy Secretary may at any time exercise any authority or function delegated by this delegation of authority. This delegation of authority shall be published in the **Federal Register**.

Dated: February 16, 2006.

Condoleezza Rice,

Secretary of State, Department of State.

[FR Doc. E8–10112 Filed 5–6–08; 8:45 am]

BILLING CODE 4710–10–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 March 14, 2008

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–1996–1131, DOT–OST–1996–1248, and DOT–OST–1996–1873.

Date Filed: March 14, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: April 4, 2008.

Description: Application of United Air Lines, Inc. requesting a renewal of its experimental certificate of public convenience and necessity for Route 130, segments 1, 4, 6, 7, 9, and 10 which authorize United to engage in scheduled foreign air transportation of persons, property and mail between various points in the United States and points in Japan, Vietnam and the Philippines.

Docket Number: DOT–OST–2008–0105.

Date Filed: March 14, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: April 4, 2008.

Description: Application of Federal Express Corporation (''FedEx Express'') requesting an exemption authorizing scheduled foreign air transportation of property and mail (1) between Oakland, California, on the one hand, and Guadalajara and Monterrey, Mexico, on the other hand, as of April 1, 2008, (2) between Lafayette, Louisiana and Guadalajara, Mexico as of May 1, 2008. FedEx Express also requests an amendment to its certificate of public convenience and necessity for Route 568 to engage in scheduled foreign air transportation of property and mail between a point or points in the United States and a point or points in Mexico.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–10056 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending March 14, 2008

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–2008–0090.

Date Filed: March 10, 2008.

Parties: Members of the International Air Transport Association.

Subject: TC12 North Atlantic-Middle East (except between USA and Jordan) Resolutions and Specified Fares Tables (Memo 0279) Minutes: TC12 North, Mid, South Atlantic-Middle East TC12 North, Mid, South Atlantic-Africa (Memo 0283/0267) Intended effective date: 1 April 2008.

Docket Number: DOT–OST–2008–0091.

Date Filed: March 10, 2008.

Parties: Members of the International Air Transport Association.

Subject: TC12 North Atlantic-Middle East between USA and Jordan Resolutions and Specified Fares Tables (Memo 0280) Minutes: TC12 North, Mid, South Atlantic-Middle East TC12 North, Mid, South Atlantic-Africa (Memo 0283/0267) Intended effective date: 1 April 2008.

Docket Number: DOT–OST–2008–0092.

Date Filed: March 10, 2008.

Parties: Members of the International Air Transport Association.

Subject: TC12 Mid Atlantic-Middle East Resolutions and Specified Fares Tables (Memo 0281) Minutes: TC12 North, Mid, South Atlantic-Middle East TC12 North, Mid, South Atlantic-Africa (Memo 0283/0267) Intended effective date: 1 April 2008.

Docket Number: DOT–OST–2008–0093.

Date Filed: March 10, 2008.

Parties: Members of the International Air Transport Association.

Subject: TC12 South Atlantic-Middle East Resolutions and Specified Fares Tables (Memo 0282) Minutes: TC12 North, Mid, South Atlantic—Middle East TC12 North, Mid, South Atlantic—Africa (Memo 0283 / 0267) Intended effective date: 1 April 2008.

Docket Number: DOT–OST–2008–0094.

Date Filed: March 10, 2008.

Parties: Members of the International Air Transport Association.

Subject: PTC COMP Mail Vote 561 Resolution 011b Global Indicators (Memo 1459) Intended effective date: 1 April 2008.

Docket Number: DOT–OST–2008–0096.

Date Filed: March 11, 2008.

Parties: Members of the International Air Transport Association.

Subject: PSC/RESO/141 dated February 8, 2007 Finally Adopted Resolutions & Recommended Practices r1–r33 PSC/MINS/023 dated February 28, 2006 MINUTES Intended effective date: June 1, 2008.

Docket Number: DOT–OST–2008–0097.

Date Filed: March 11, 2008.

Parties: Members of the International Air Transport Association.

Subject: Mail Vote 560—Resolution 002af TC23/123 Europe-Japan, Korea Special Passenger Revalidating Resolution 002af Between Europe and Korea (Rep. of Korea People's Dem. Rep. of) (Memo 0166) Intended effective date: 1 April 2008.

Docket Number: DOT–OST–2008–0098.

Date Filed: March 11, 2008.

Parties: Members of the International Air Transport Association.

Subject: Mail Vote 563 TC23 Middle East-Japan, Korea Special Passenger Amending Resolutions and Specified Fares Tables between Middle East and Japan, Korea (Rep. of) (Memo 0368) Intended effective date: 1 April 2008.

Docket Number: DOT–OST–2008–0099.

Date Filed: March 11, 2008.

Parties: Members of the International Air Transport Association.

Subject: Mail Vote 562 TC23 Africa-Japan, Korea Special Passenger Amending Resolutions and Specified Fares Tables Between Africa and Japan, Korea (Rep. of), Korea (Dem. Rep. of) (Memo 0366) Intended effective date: 1 April 2008.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–10058 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Mobile County, AL

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Rescind Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that the Notice of Intent published on August 28, 2002, to prepare an Environmental Impact Statement (EIS) for a proposed highway project in Mobile County, Alabama is being rescinded.

FOR FURTHER INFORMATION CONTACT: Mr. Mark D. Bartlett, Division Administrator, Federal Highway Administration, 500 Eastern Boulevard, Suite 200, Montgomery, Alabama 36117–2018, Telephone (334) 223–7370.

SUPPLEMENTARY INFORMATION: The FHWA is rescinding the notice of intent to prepare an EIS on a proposal to construct a ''loop'' around the western side of Mobile from I–10 southwest of the city of Mobile to I–65 north of Mobile. The project is being rescinded since the Alabama Department of Transportation has decided not to pursue this project at this time.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

William R. Van Luchene,

Environmental Engineer, Montgomery, Alabama.

[FR Doc. E8–10053 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice and Request For Comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. Each ICR describes the nature of the information collection and its expected burden. The **Federal Register** notice with a 60-day comment period soliciting comments on the collections of information listed below was published on February 26, 2008 (*See* 73 FR 10322).

DATES: Comments must be submitted on or before June 6, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 25, Washington, DC 20590 (telephone: (202) 493–6292), or Ms. Nakia Poston, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6073). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Pub. L. 104–13, section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On February 26, 2008, FRA published a 60-day notice in the **Federal Register** soliciting comment on ICRs that the agency was seeking OMB approval. 73 FR 10322. FRA received no comments in response to this notice.

Before OMB decides whether to approve this proposed collection of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30 day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30 day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5

CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The revised requirements are being submitted for clearance by OMB as required by the PRA.

Title: Railroad Locomotive Safety Standards and Event Recorders.

OMB Control Number: 2130–0004.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Form(s): FRA F 6180.49A.

Abstract: The Locomotive Inspection requires railroads to inspect, repair, and maintain locomotives and event recorders so that they are safe, free of defects, and can be placed in service without peril to life. Crashworthy locomotive event recorders provide FRA with verifiable factual information about how trains are maintained and operated, and are used by FRA and State inspectors for Part 229 rule enforcement. The information garnered from crashworthy event recorders is also used by railroads to monitor railroad operations and by railroad employees (locomotive engineers, train crews, dispatchers) to improve train handling, and promote the safe and efficient operation of trains throughout the country, based on a surer knowledge of different control inputs.

Annual Estimated Burden: 863,951 hours.

Title: Qualifications for Locomotive Engineers.

OMB Control Number: 2130–0533.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Form(s): N/A.

Abstract: Section 4 of the Rail Safety Improvement Act of 1988 (RSIA), Public Law 100–342, 102 Stat. 624 (June 22, 1988), later amended and re-codified by Public Law 103–272, 108 Stat. 874 (July 5, 1994), required that FRA issue regulations to establish any necessary program for certifying or licensing locomotive engineers. The collection of information is used by FRA to ensure that railroads employ and properly train qualified individuals as locomotive engineers and designated supervisors of locomotive engineers. The collection of information is also used by FRA to verify that railroads have established required certification programs for locomotive engineers and that these programs fully conform to the standards specified in the regulation.

Annual Estimated Burden: 271,000 hours.

Title: Roadway Worker Protection (Roadway Maintenance Machines).

OMB Control Number: 2130–0539.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Form(s): FRA F 6180.119.

Abstract: This rule establishes regulations governing the protection of railroad employees working on or near railroad tracks. The regulation requires that each railroad devise and adopt a program of on-track safety to provide employees working along the railroad with protection from the hazards of being struck by a train or other on-track equipment. Elements of this on-track safety program include an on-track safety manual; a clear delineation of employers' responsibilities, as well as employees' rights and responsibilities thereto; well-defined procedures for communication and protection; and annual on-track safety training. The program adopted by each railroad is subject to review and approval by FRA.

Annual Estimated Burden: 817,358 hours.

Title: Locomotive Cab Sanitation Standards.

OMB Control Number: 2130–0552.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Form(s): N/A.

Abstract: The collection of information is used by FRA to promote rail safety and the health of railroad workers by ensuring that all locomotive crew members have access to toilet/sanitary facilities—on as needed basis—which are functioning and hygienic. Also, the collection of information is used by FRA to ensure that railroads repair defective locomotive toilet/sanitary facilities within 10 calendar days of the date on which these units becomes defective.

Annual Estimated Burden: 1,272 hours.

Title: Positive Train Control.

OMB Control Number: 2130–0553.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Form(s): N/A.

Abstract: The collection of information is used by FRA to ensure that new or novel signal and train control technologies, essentially electronic or processor-based systems, meet the ''performance standard'' stipulated in FRA's rule and work as intended in the U.S. rail environment. These new signal and train control technologies are known as ''Positive Train Control'' (PTC).

Annual Estimated Burden: 250,966 hours.

Title: Post-Traumatic Stress in Train Crew Members After a Critical Incident.

OMB Control Number: 2130–0567.

Type of Request: Extension of a currently approved collection.

Affected Public: Train Crew Members.

Form(s): FRA–F–186, FRA–F–187, FRA–F–188.

Abstract: Nearly 1,000 fatalities occur every year in this country from trains striking motor vehicles at grade crossings and individual trespassers along the track. These events can be very traumatic to train crew members, who invariably are powerless to prevent such collisions. Exposure of train crews to such work-related traumas can cause extreme stress and result in safety-impairing behaviors, such as are seen in Post-Traumatic Stress Disorder or Acute Stress Disorder. Most railroads have Critical Incident Stress Debriefing (CISD) intervention programs designed to mitigate problems caused by exposure to these traumas. However, they are quite varied in their approach, and it is not certain which components of these programs are most effective. The purpose of this collection of information is to identify ''best practices'' for CISD programs in the railroad industry. By means of written and subsequent oral interviews with train crew members that will each take approximately 45 minutes, the approved study aims to accomplish the following: (1) Benchmark rail industry best practices of CISD programs; (2) Establish the extent of traumatic stress disorders due to grade crossing and trespasser incidents in the rail industry (not by region or railroad) and identify at-risk populations; and (3) Evaluate the effectiveness of individual components of CISD programs. It should be noted that only the components of CISD programs will be evaluated, not an individual railroad's overall intervention program.

Annual Estimated Burden: 2,043 hours.

ADDRESSES: Send comments regarding these information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC, 20503; Attention: FRA Desk Officer. Comments may also be sent via e-mail to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget at the following address: *oira_submissions@omb.eop.gov*.

Comments are invited on the following: Whether the proposed collections of information are necessary for the proper performance of the functions of FRA, including whether the information will have practical utility; the accuracy of FRA's estimates of the

burden of the proposed information collections; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC on May 1, 2008

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Kimberly Orben,

Acting Director, Office of Financial Management, Federal Railroad Administration.

[FR Doc. E8–10091 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2006–26275]

Petition for Rulemaking—Classification of Polyurethane Foam and Certain Finished Products Containing Polyurethane Foam as Hazardous Materials

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA).

ACTION: Notice; re-opening of comment period.

SUMMARY: On March 30, 2007, PHMSA published a notice soliciting comments on the merits of a petition for rulemaking filed by the National Association of State Fire Marshals (NASFM). The petitioner asked PHMSA to designate polyurethane foam and certain finished products containing polyurethane foam as hazardous materials when transported in commerce as a matter of safety for emergency responders and the general public. PHMSA is re-opening the comment period so that interested persons may submit additional comments on the March 30, 2007 notice and on supplemental information submitted by the petitioner. The comment period will remain open until further notice is published in the **Federal Register**.

DATES: The period for submitting comments on the NASFM petition for rulemaking will remain open until further notice is published in the **Federal Register**.

ADDRESSES: You may submit comments identified by the docket number PHMSA–2006–26275 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: All submissions must include the agency name and docket number for this notice at the beginning of the comment. Note that all comments received will be posted without change to the docket management system, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), which may also be found at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Helen Engrum or Susan Gorsky, Office of Hazardous Materials Standards (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

On October 31, 2006, the National Association of State Fire Marshals (NASFM) submitted a petition for rulemaking (P–1491) to the Pipeline and Hazardous Materials Safety Administration (PHMSA) under the provisions of 49 CFR 106.31. The NASFM asked PHMSA to amend the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) to designate polyurethane foam and certain finished products containing polyurethane foam as a hazardous material for purposes of transportation in commerce. The NASFM is made up of senior-level public safety officials from the 50 states and the District of Columbia.

On March 30, 2007, PHMSA published a notice [61 FR 15184] to solicit comments on the merits of the NASFM petition for rulemaking. The comment period closed June 28, 2007. Approximately 30 associations and individuals submitted comments in response to the notice. Most commenters oppose the designation of polyurethane foam and certain finished products containing polyurethane foam as hazardous materials under the HMR, stating that the transportation safety risks of such materials have not been documented and the costs of increased regulation would be prohibitive.

In a letter dated October 19, 2007, NASFM asked PHMSA to defer action on its petition and re-open the public docket to allow additional consideration of the flammability risks posed by polyurethane foam and finished products containing polyurethane foam. NASFM notes that polyurethane foam and products containing polyurethane foam ''do not fit neatly within the Agency's long-standing definitions'' for flammable solids, and suggests that the agency should consider whether another, more appropriate definition should be developed to convey the risks associated with these materials. NASFM also suggests that federal, state, and industry standards-setting agencies and organizations should consider developing a standard test and definition applicable to polyurethane foam. According to NASFM:

> Other branches of the U.S. Department of Transportation, the U.S. Coast Guard, and the U.S. Consumer Product Safety Commission regulate these materials and each agency has its own tests, standards and terms to define the same combustible properties. The same is true of the International Building Code, International Fire Code, and the National Fire Protection Association's standard for automatic fire extinguishers (NFPA 13), all of which contain the language to provide authority to regulate polyurethane foam as a hazardous material requiring special protection. These model codes are referenced in countless Federal, state and local statutes. In effect, the polyurethane foam in the dashboard of a truck is regulated while the polyurethane foam shipped on the truck is not. The polyurethane foam shipment is regulated as a fire hazard in the factories in which it is made and used, in the warehouses in which it is stored, in the retail stores that offer it to the public and in the home.

We appreciate and share NASFM's concern for public safety and effective emergency response. We agree the comment period on this issue should be extended to permit interested persons to provide more data and information on the definitional issue raised by NASFM in its October 19, 2007 letter.

II. Request for Comments

Issuance of this notice does not constitute a decision by PHMSA to undertake a rulemaking action on the substance of the petition. This notice is issued solely to obtain comments on the merits of the petition to assist PHMSA in making a decision of whether to proceed with a rulemaking. Comments are requested in regard to the safety implications of the proposals contained in the NASFM's petition. We are particularly interested in data and information related to regulation of polyurethane foam by other agencies, such as the Consumer Product Safety Commission, the Occupational Safety and Health Administration, the U.S. Coast Guard, and the National Fire Protection Association, and whether the standards used by these agencies could be adapted for use in the transportation environment. We invite interested persons to supplement comments they may have already submitted to address the issues raised in NASFM's October 19, 2007 letter, to highlight other issues that we should consider in making a decision on the petition, or to provide additional data and information in support of previously stated positions.

Issued in Washington, DC, on May 1, 2008.

Theodore L. Willke,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. E8–10101 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Financial Casualty & Surety, Inc.

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 11 to the Treasury Department Circular 570, 2007 Revision, published July 2, 2007, at 72 FR 36192.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company:

Financial Casualty & Surety, Inc. (NAIC #35009). Business Address: 3131 Eastside, Suite 600, Houston, TX 77098. Phone: (877) 737–2245. Underwriting Limitation b/: $784,000. Surety Licenses c/: AZ, CA, CT, DE, FL, ID, IN, KS, LA, MD, MI, MN, MS, NV, NJ, NY, NC, ND, OH, PA, SC, TN, TX, UT, VT, WA, WV. Incorporated In: Texas.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 (''Circular''), 2007 Revision, to reflect this addition. Certificates of Authority expire on June 30th each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (*see* 31 CFR part 223). A list of qualified companies is published annually as of July 1st in the Circular, which outlines details as to the underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: April 25, 2008.

Vivian L. Cooper,

Director, Financial Accounting and Services Division.

[FR Doc. E8–9960 Filed 5–6–08; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Individuals and Entities Pursuant to Executive Order 12978

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 24 newly-designated individuals and entities whose property and interests in property are blocked pursuant to Executive Order 12978 of October 21, 1995, ''Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers.''

DATES: The designation by the Director of OFAC of the 24 individuals and entities identified in this notice pursuant to Executive Order 12978 is effective on April 15, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

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

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), issued Executive Order 12978 (60 Fed. Reg. 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and Secretary of State, to play a significant role in international narcotics trafficking centered in Colombia; or (3) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to this order; and (4) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to this Order.

On April 15, 2008, the Director of OFAC, in consultation with the Attorney General and Secretary of State, as well as the Secretary of Homeland Security, designated 24 individuals and entities whose property and interests in property are blocked pursuant to the Order.

The list of additional designees is as follows:

1. AGROGANADERA LA ISABELA S.A., Avenida 4 No. 6N–61, Ofc. 510, Cali, Colombia; NIT # 900100335–6 (Colombia); (ENTITY) [SDNT].

2. CENTRO COMERCIAL GUSS S.A., Carrera 105 No. 14–01, Local 102, Cali, Colombia; NIT # 900105460–1 (Colombia); (ENTITY) [SDNT].

3. CONSTRUCCIONES LA RESERVA S.A., Carrera 105 No. 14–01, Local 102, Cali, Colombia; NIT # 900100336–3 (Colombia); (ENTITY) [SDNT].

4. CONSTRUCTORA JUANAMBU S.A., Carrera 105 No. 14–01, Local 102, Cali, Colombia; NIT # 900100334–9 (Colombia); (ENTITY) [SDNT].

5. CONSTRUCTORA LOMA LINDA S.A., Carrera 105 No. 14–01, Local 102, Cali, Colombia; NIT # 900100191–2 (Colombia); (ENTITY) [SDNT].

6. CONSTRUCTORA UMBRIA S.A., Carrera 105 No. 14–01, Local 102, Cali, Colombia; NIT # 900100194–4 (Colombia); (ENTITY) [SDNT].

7. FRONTERA VIRTUAL S.A., Carrera 12 No. 90–19, Piso 2, Bogota, Colombia; NIT # 830118496–9 (Colombia); (ENTITY) [SDNT].

8. INMOBILIARIA QUILICHAO S.A. (f.k.a. AGROPECUARIA B GRAND LTDA.); Avenida 4N No. 6N–61, Apt. 510, Cali, Colombia; NIT # 817002547–1 (Colombia); (ENTITY) [SDNT].

9. INVERSIONES INMOBILIARIA QUILICHAO S.A. Y CIA S.C.A. (f.k.a. RENGIFO OSPINA Y CIA S.C.S.); Avenida 4N No. 6N–61, Ofc. 510, Cali, Colombia; NIT # 8001329098 (Colombia); (ENTITY) [SDNT].

10. MIRACANA INMOBILIARIA QUILCHAO S.A. & CIA S.C.A., Avenida 4N No. 6N–61, Ofc. 510, Cali, Colombia; NIT # 805017200–1 (Colombia); (ENTITY) [SDNT].

11. RED DE SERVICIOS INMOBILIARIO PROFESIONALES S.A. (f.k.a. RED DE INMOBILIARIOS PROFESIONALES S.A.; a.k.a. ''RIPSA''); Carrera 12 No. 79–32, Ofc. 703, Bogota, Colombia; NIT # 830065743–4 (Colombia); (ENTITY) [SDNT].

12. RENGIFO MANCERA & CIA S.C.A., Carrera 12 No. 79–32, Ofc. 703, Bogota, Colombia; NIT # 800138803–3 (Colombia); (ENTITY) [SDNT].

13. RENGIFO O.A.M. Y CIA S.C.A., Carrera 12 No. 79–32, Ofc. 203, Bogota, Colombia; NIT # 900110717–9 (Colombia); (ENTITY) [SDNT].

14. RUIZ DE ALARCON 12 S.L., Calle Ruiz de Alarcon, 12, Madrid 28014, Spain; V.A.T. Number ES B83031682 (Spain); (ENTITY) [SDNT].

15. VENECIA INMOBILIARIA QUILICHAO S.A. & CIA S.C.A. (f.k.a. INVERSIONES RENGIFO E HIJOS LTDA.); Avenida 4N No, 6N–61, Ofc. 510, Cali, Colombia; NIT # 800026554–3 (Colombia); (ENTITY) [SDNT].

16. CURREA CORREA, Carlos Alberto (a.k.a. ''Cucu''; a.k.a. ''La Llaveria''); Calle 24 No. 20–22, Tulua, Valle, Colombia; Spain; Citizen Colombia; Nationality Colombia; Cedula No. 16347900 (Colombia); (INDIVIDUAL) [SDNT].

17. RENGIFO PUENTES, Ramiro (a.k.a. TORRIJOS, William; a.k.a. ''La Llaveria''); c/o RENGIFO MANCERA & CIA S.C.A., Bogota, Colombia; c/o RED DE SERVICIOS INMOBILIARIO PROFESIONALES S.A., Bogota, Colombia; c/o RUIZ DE ALARCON 12 S.L., Madrid, Spain; Calle 98 No. 9–41, Apt. 1102, Torre C, Bogota, Colombia; Calle 99 No. 10–72, Bogota, Colombia; Carrera 12 No. 90–19, Piso2, Bogota, Colombia; Madrid, Spain; DOB 18 Nov 1950; POB Cali; Citizen Colombia; Nationality Colombia; Passport AI912220 (Colombia) issued: 30 Jul 2003 exp: 30 Jul 2013; Cedula No. 19187359 (Colombia); National Foreign ID Number X3093421J (Spain); Passport AI206319 (Colombia); Passport AG589478 (Colombia); (INDIVIDUAL) [SDNT].

18. MORENO FERNANDEZ, Monica, c/o RUIZ DE ALARCON 12 S.L., Madrid, Spain; Spain; DOB 20 Apr 1963; Citizen Colombia; Nationality Colombia; Cedula No. 31903968 (Colombia); National Foreign ID Number X3881333Z (Spain); Passport AG744728 (Colombia); Passport AE613367 (Colombia); (INDIVIDUAL) [SDNT].

19. NARVAEZ PUENTES, James Orlando, c/o AGROGANADERA LA ISABELA S.A., Cali, Colombia; c/o CENTRO COMERCIAL GUSS S.A., Cali, Colombia; c/o CONSTRUCCIONES LA RESERVA S.A., Cali, Colombia; c/o CONSTRUCTORA JUANAMBU S.A., Cali, Colombia; c/o CONSTRUCTORA LOMA LINDA S.A., Cali, Colombia; c/o CONSTRUCTORA UMBRIA S.A., Cali, Colombia; c/o VENECIA INMOBILIARIA QUILICHAO S.A. & CIA S.C.A., Cali, Colombia; Carrera 66 No. 10–36, Cali, Colombia; Carrera 121 No. 13–76, Casa 7, Cali, Colombia; DOB 29 Nov 1959; Citizen Colombia; Nationality Colombia; Cedula No. 16634261 (Colombia); Passport AK279300 (Colombia) issued: 22 Jan 2007 exp: 22 Jan 2017; Passport AK279300 (Colombia); Passport AF366653 (Colombia); (INDIVIDUAL) [SDNT].

20. OSPINA PRADA, Maria del Carmen, c/o INVERSIONES INMOBILIARIA QUILICHAO S.A. Y CIA S.C.A., Cali, Colombia; c/o MIRACANA INMOBILIARIA QUILCHAO S.A. & CIA S.C.A., Cali, Colombia; Calle 98 No. 9–41, Apt. 1102, Bogota, Colombia; DOB 04 Jul 1953; POB San Luis, Tolima, Colombia; Citizen Colombia; Nationality Colombia; Cedula No. 41700627 (Colombia); Passport AH715906 (Colombia); Passport AH456850 (Colombia); (INDIVIDUAL) [SDNT].

21. RENGIFO AMAYA, Harvy Ramiro, c/o RED DE SERVICIOS INMOBILIARIO PROFESIONALES S.A., Bogota, Colombia; c/o CENTRO COMERCIAL GUSS S.A., Cali, Colombia; c/o CONSTRUCTORA UMBRIA S.A., Cali, Colombia; c/o FRONTERA VIRTUAL S.A., Bogota, Colombia; c/o INMOBILIARIA QUILICHAO S.A., Cali, Colombia; c/o MIRACANA INMOBILIARIA QUILCHAO S.A. & CIA S.C.A., Cali, Colombia; c/o VENECIA INMOBILIARIA QUILICHAO S.A. & CIA S.C.A., Cali, Colombia; DOB 02 Jan 1982; POB Colombia; Citizen Colombia; Nationality Colombia; Cedula No. 80201385 (Colombia); Passport AH406973 (Colombia); Passport AE948092 (Colombia); (INDIVIDUAL) [SDNT].

22. RENGIFO OSPINA, Edwin Amir, c/o AGROGANADERA LA ISABELA S.A., Cali, Colombia; c/o CONSTRUCCIONES LA RESERVA S.A., Cali, Colombia; c/o CONSTRUCTORA JUANAMBU S.A., Cali, Colombia; c/o CONSTRUCTORA LOMA LINDA S.A., Cali, Colombia; c/o CONSTRUCTORA UMBRIA S.A., Cali, Colombia; c/o CENTRO COMERCIAL GUSS S.A., Cali, Colombia; c/o RED DE SERVICIOS INMOBILIARIO PROFESIONALES S.A., Bogota, Colombia; c/o MIRACANA INMOBILIARIA QUILICHAO S.A. & CIA S.C.A., Cali, Colombia; c/o FRONTERA VIRTUAL S.A., Bogota, Colombia; Calle 82 No. 8–43, Apt. 201, Bogota, Colombia; DOB 20 Jun 1975; POB Bogota, Colombia; Citizen Colombia; Nationality Colombia; Cedula No. 79693032 (Colombia); Passport AI054522 (Colombia) issued: 16 May 2001 exp: 16 May 2011; Passport AF294763 (Colombia); (INDIVIDUAL) [SDNT].

23. RENGIFO OSPINA, Jefferson, c/o RED DE SERVICIOS INMOBILIARIO PROFESIONALES S.A., Bogota, Colombia; c/o MIRACANA INMOBILIARIA QUILCHAO S.A. & CIA S.C.A., Cali, Colombia; c/o CENTRO COMERCIAL GUSS S.A., Cali, Colombia; c/o FRONTERA VIRTUAL S.A., Bogota, Colombia; Calle 98 No. 9–41, Apt. 1202, Bogota, Colombia; DOB 19 Dec 1977; POB Cali, Colombia; Citizen Colombia; Nationality Colombia; Passport PO34555 (Colombia); Cedula No. 94511007 (Colombia); Passport AF237758 (Colombia); (INDIVIDUAL) [SDNT].

24. RENGIFO OSPINA, Lina Milayi, c/o FRONTERA VIRTUAL S.A., Bogota,

Colombia; c/o CENTRO COMERCIAL GUSS S.A., Cali, Colombia; c/o CONSTRUCTORA UMBRIA S.A., Cali, Colombia; c/o MIRACANA INMOBILIARIA QUILCHAO S.A. & CIA S.C.A., Cali, Colombia; c/o RED DE SERVICIOS INMOBILIARIO PROFESIONALES S.A., Bogota, Colombia; DOB 22 Oct 1983; POB Bogota, Colombia; Citizen Colombia; Nationality Colombia; Cedula No. 52965678 (Colombia); Passport AI087604 (Colombia); Passport AF295127 (Colombia); (INDIVIDUAL) [SDNT].

Dated: April 15, 2008.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. E8–10026 Filed 5–6–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–106527–98]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–106527–98 (TD 8902), Capital Gains, Partnership, Subchapter S, and Trusts Provisions (§ 1.1(h)–1(e)).

DATES: Written comments should be received on or before July 7, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Capital Gains, Partnership, Subchapter S, and Trusts Provisions.

OMB Number: 1545–1654.

Regulation Project Number: REG–106527–98.

Abstract: The regulation relates to sales, or exchanges of interests in partnerships, S corporations, and trusts. The regulations interpret the look-through provision of section 1(h), added by section 311 of the Taxpayer Relief Act of 1997 and amended by sections 5001 and 6005(d) of the Internal Revenue Service Restructuring and Return Act of 1998, and explain the rules relating to the division of the holding period of a partnership interest. The regulations affect partnerships, partners, S corporations, S corporation shareholders, trusts, and trusts beneficiaries.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and individual or households.

The burden estimates for requirement is reflected in the burden estimates for: Form 1040, U.S. Individual Income Tax Return; Form 1065, U.S. Partnership Return of Income; Form 1041, U.S. Income Tax Return for Estates and Trusts; and Form 1120S, U.S. Income Tax Return for an S Corporation.

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

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 23, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–10154 Filed 5–6–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[Regulation Section 601.201]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

Currently, the IRS is soliciting comments concerning an existing regulation, 26 CFR 601.201, Instructions for Requesting Rulings and Determination Letters.

DATES: Written comments should be received on or before July 7, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Instructions for Requesting Rulings and Determination Letters.

OMB Number: 1545–0819.

Regulation Project Number: 26 CFR 601.201.

Abstract: The IRS issues rulings letters and determination letters to

taxpayers interpreting and applying the tax laws to a specific set of facts. The procedural regulations set forth the instructions for requesting ruling and determination letters.

Current Actions: There is no change to the collection of information in this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: All taxpayers.

Estimated Number of Respondents: 271,914.

Estimated Time Per Respondent: The estimated annual burden per respondent varies from 15 minutes to 1 hour, depending on individual circumstances, with an estimated of 55 minutes.

Estimated Total Annual Burden Hours: 248,496.

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

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 22, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–10157 Filed 5–6–08; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Wednesday,
May 7, 2008

Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35

Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM04–7–001; Order No. 697–A]

Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities

Issued April 21, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order on Rehearing and Clarification.

SUMMARY: In this order on rehearing, the Commission affirms its basic determinations in Order No. 697, and grants rehearing and clarification regarding certain revisions to its regulations and to the standards for obtaining and retaining market-based rate authority for sales of energy, capacity and ancillary services to ensure that such sales are just and reasonable. The Commission also clarifies several aspects of the implementation process adopted in Order No. 697.

DATES: Effective Date: This rule will become effective June 6, 2008.

FOR FURTHER INFORMATION CONTACT: Debra A. Dalton (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6253, and Elizabeth Arnold (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8818.

SUPPLEMENTARY INFORMATION:

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Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

I. Introduction

1. On June 21, 2007, the Federal Energy Regulatory Commission (Commission) issued Order No. 697,[1] codifying and, in certain respects, revising its standards for obtaining and retaining market-based rates for public utilities. In order to accomplish this, as well as streamline the administration of the market-based rate program, the Commission modified its regulations at 18 CFR part 35, subpart H, governing market-based rate authorization. The Commission explained that there are three major aspects of its market-based regulatory regime: (1) Market power analyses of sellers and associated conditions and filing requirements; (2) market rules imposed on sellers that participate in Regional Transmission Organization (RTO) and Independent System Operator (ISO) organized markets; and (3) ongoing oversight and enforcement activities. The Final Rule focused on the first of the three features to ensure that market-based rates charged by public utilities are just and reasonable. Order No. 697 became effective on September 18, 2007.

2. On December 14, 2007, the Commission issued an order clarifying four aspects of Order No. 697.[2] Specifically, that order addressed: (1) The effective date for compliance with the requirements of Order No. 697; (2) which entities are required to file updated market power analyses for the Commission's regional review; (3) the data required for the horizontal market power analyses; and (4) what constitutes ''seller-specific terms and conditions'' that sellers may list in their market-based rate tariffs in addition to the standard provisions listed in Appendix C to Order No. 697. The Commission also extended the deadline for sellers to file the first set of regional triennial studies that were directed in Order No. 697 from December 2007 to 30 days after the date of issuance of the Clarification Order.

3. In this order, the Commission responds to a number of requests for rehearing and clarification of Order No. 697. In most respects, the Commission reaffirms its determinations made in Order No. 697 and denies rehearing of these issues. With respect to several issues, however, the Commission grants rehearing or provides clarification.

4. For example, the Commission affirms in large part the determinations made in Order No. 697 concerning the horizontal market power analysis, including the use of the 20 percent threshold for the indicative wholesale market share screen and the Delivered Price Test (DPT), the use of a 2,500 Hirschman-Herfindahl Index (HHI) threshold for the DPT analysis, and the use of the average peak native load as the native load proxy for the indicative wholesale market share screen and DPT analysis. The Commission also affirms its decision to use a balancing authority area or the RTO/ISO region as the default relevant geographic market. Similarly, the Commission affirms the decision that, where the Commission has made a specific finding that there is a submarket within an RTO/ISO, that submarket should be considered the default relevant geographic market. However, the Commission grants rehearing concerning the finding that Northern PSEG is a submarket within PJM. On reconsideration, we conclude that we erred in relying on a finding of a submarket in a particular proceeding that was subsequently vacated on procedural grounds.

5. In response to requests for clarification concerning existing mitigation in RTO/ISOs, the Commission adopts a rebuttable presumption that the existing Commission-approved RTO/ISO mitigation is sufficient to address market power concerns in the RTO/ISO market, including mitigation applicable to RTO/ISO submarkets. However, intervenors may challenge that presumption. Depending on the nature of the evidence submitted by an intervenor, the Commission will consider whether to institute a separate section 206 proceeding to investigate whether the existing RTO/ISO mitigation continues to be just and reasonable.

6. While the Commission affirms its determination to continue the use of historical data and a ''snapshot in time approach,'' the Commission will consider sensitivity studies, on a case-by-case basis, that present clear and compelling evidence that certain changes in a market should be taken into account as part of the market power analysis in a particular case.

7. With regard to simultaneous transmission import limit (SIL) studies, the Commission clarifies that the use of simultaneous total transfer capability (TTC) in the SIL study must properly account for all firm transmission reservations, transmission reliability margin, and capacity benefit margin.

8. The Commission affirms its determinations concerning the vertical market power analysis and clarifies that sellers are not required to report on financial transmission rights as part of the vertical market power analysis.

9. The Commission codifies in the regulations at 18 CFR 35.36 a definition of ''affiliate'' for purposes of Order No. 697 based on the definition adopted in the Affiliate Transactions Final Rule.[3] In addition, the Commission reiterates in this order a number of clarifications that it made in the Affiliate Transactions Final Rule regarding the term ''captive customers,'' the purpose of the definition, and its focus on ''cost-based regulation.'' Among other things, the Commission notes that if a state regulatory authority in a retail choice state does not believe that retail customers are sufficiently protected and that our affiliate restrictions should apply to the local franchised public utility, it may ask the Commission to deem its retail customers to be captive customers for purposes of applying the affiliate restrictions.

10. The Commission clarifies that the new affiliate restriction regulations promulgated in Order No. 697 supersede codes of conduct approved by the Commission prior to the effective date of Order No. 697. The Commission also provides a number of clarifications concerning employees who are not subject to the independent functioning requirement. Further, the Commission grants rehearing regarding the adoption of a two-way information sharing restriction in 18 CFR 35.39(d), finding, among other things, that a one-way information sharing restriction adequately protects captive customers.

11. The Commission for the most part affirms its determinations concerning mitigation, including retaining the Commission's default mitigation and declining to impose a generic ''must offer'' requirement. The Commission clarifies that it has not prejudged the types of specific situations in which it might impose a ''must offer'' requirement on a particular seller. In response to rehearing requests concerning the Commission's mitigation of long-term transactions based on the result of a failure of a short-term indicative screen, the Commission is modifying its policy with respect to

[1] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, 72 FR 39,904 (Jul. 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007) (Final Rule).

[2] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* 121 FERC ¶ 61,260 (2007) (*Clarification Order*).

[3] *Cross-Subsidization Restrictions on Affiliate Transaction,* Order No. 707, 73 FR 11013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264 (Feb. 21, 2008) (Affiliate Transactions Final Rule).

mitigation of long-term transactions (one year or more in duration). In this regard, the Commission will allow a mitigated seller to demonstrate on a case-by-case basis that it does not have market power with respect to a specific long-term contract.

12. Concerning the tariff provision adopted in the Final Rule for mitigated sellers that want to make market-based rate sales at the metered boundary between a balancing authority area in which the seller was found, or presumed, to have market power and a balancing authority area in which the seller has market-based rate authority, after considering comments raised regarding the difficulty of determining and documenting whether the power sold is intended to serve load in the balancing authority area in which the seller has market power, the Commission is revising the tariff language to eliminate the intent element.

13. The Commission affirms, among other things, its determination in Order No. 697 to create a category of market-based rate sellers (Category 1 sellers) that are not required to automatically submit updated market power analyses, as well as its decision to adopt a regional filing process for updated market power analyses. In response to concerns raised regarding the potential for Category 1 sellers to exercise market power in load pockets or other transmission-constrained areas, we explain that we are modifying our approach. To the extent that a Commission-identified submarket is under analysis (relevant submarket), if the Commission determines based on analysis of indicative screens filed by other sellers that there may be potential market power concerns with respect to any Category 1 sellers in the relevant submarket, the Commission will, if appropriate, require an updated market power analysis to be filed by such Category 1 sellers and allow other parties to comment. In this regard, the Commission would be exercising its right to require an updated market power analysis at any time.

14. The Commission also provides clarifications regarding other aspects of the Final Rule, including addressing questions that have arisen concerning the implementation process adopted in Order No. 697 and providing clarifications concerning the change in status reporting requirement.

15. Finally, the Commission rejects as without merit arguments raised by petitioners challenging the Commission's authority to adopt market-based rates and alleging that the market-based rate program fails to comply with the requirements of the FPA.

II. Discussion

A. Horizontal Market Power

1. Whether To Retain the Indicative Screens

Final Rule

16. In Order No. 697, the Commission adopted, with some modifications, two indicative market power screens (the uncommitted market share screen and the uncommitted pivotal supplier screen) to determine whether sellers may have market power and should be further examined. The Commission explained that sellers that fail either screen would rebuttably be presumed to have market power, but they would have an opportunity to present evidence (through the submission of a Delivered Price Test (DPT) analysis) demonstrating they do not have market power. The Commission concluded that, although some sellers disagree with the use of two screens or find flaws in them, the conservative approach of using two screens together would allow the Commission to more readily identify potential market power by measuring market power at both peak and off-peak times and both unilaterally and in coordinated interaction with other sellers. The Commission explained that a conservative approach at the indicative screen stage of the proceeding is warranted because, if a seller passes both of the indicative screens, there is a rebuttable presumption that it does not possess horizontal market power.[4] In conclusion, the approach represented an appropriate balance between the need to protect against market power and the desire not to place unnecessary filing burdens on utilities.[5]

17. The wholesale market share screen measures for each of the four seasons whether a seller has a dominant position in the market based on the number of megawatts of uncommitted capacity owned or controlled by the seller as compared to the uncommitted capacity of the entire relevant market. When calculating uncommitted capacity, a seller adds the total nameplate or seasonal capacity of generation owned or controlled through contract plus long-term firm purchases and deducts operating reserves, native load commitments, and long-term firm sales.[6]

18. The pivotal supplier analysis evaluates the potential of a seller to exercise market power based on uncommitted capacity at the time of the relevant market's annual peak demand, focusing on the seller's ability to exercise market power unilaterally. It examines whether the market demand can be met absent the seller during peak times; a seller is determined to be pivotal if demand cannot be met without some contribution of supply by the seller or its affiliates. For purposes of identifying the wholesale market, the Commission explained that the ''proxy for the wholesale load is the annual peak load (needle peak) less the proxy for native load obligation (*i.e.*, the average of the daily native load peaks during the month in which the annual peak load day occurs).'' [7]

19. The Commission chose not to adopt suggestions to alter the indicative screens in order to incorporate a contestable load analysis, as proposed by some commenters. Such an analysis would consider the amount of excess market supply available to serve the amount of wholesale demand seeking supply at a particular moment in time.[8] The Commission reasoned that such an analysis is essentially a variant on the pivotal supplier screen with differences in the calculation of wholesale load and the test thresholds since it addresses whether suppliers other than the seller can meet the demand in the relevant market. The Commission concluded that incorporating such an analysis would not improve its ability to establish a presumption of whether a seller has market power, and ''without the market share indicative screen, the Commission would have insufficient information because there would be no analysis of a seller's size relative to the other sellers in the market, and no information on the seller's market power during off-peak periods.'' [9] Additionally, the

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[4] Order No. 697 at P 62.

[5] *Id.* P 33, 35.

[6] Order No. 697 states that uncommitted capacity is determined by adding the total nameplate capacity of generation owned or controlled through contract and firm purchases, less operating reserves, native load commitments and long-term firm sales. Order No. 697 at P 38. Order No. 697 further states that uncommitted capacity from a seller's remote generation (generation located in an adjoining balancing authority area) should be included in the seller's total uncommitted capacity amounts. *Id.* However, one of the standard screen formats included at Appendix A to Order No. 697 does not capture these details. Part I—Pivotal Supplier Analysis, inadvertently does not include Row H (imported power) and Row M (average daily Peak Native Load in Peak month, a proxy for native load commitment) in calculating Row K (total uncommitted supply). We thus correct this error in the Revised Appendix A to include the missing variables of the equation.

[7] *Id.* P 41.

[8] *See Id.* P 49. Generally, advocates of the contestable load analysis believe that, if available non-applicant supply is at least twice the contestable load, that is sufficient to make a finding that the market is competitive.

[9] *Id.* P 66.

Commission noted that the contestable load analysis fails to consider the relative price of the competing supplies and thus whether the available non-applicant supply is competitively priced and, hence, in the market.[10]

Requests for Rehearing

20. On rehearing, Southern contends that the Final Rule violates the requirement in FPA section 206 that the Commission bears the burden of proof in section 206 proceedings and that the Commission's determinations be based on substantial evidence.[11] According to Southern, this shifting of the burden of proof occurs through the use of indicative screens that Southern submits are inherently flawed and which, if failed, result in a presumption of market power that must be rebutted by sellers. Southern states that once a screen failure occurs and a presumption of market power arises, a seller only has two options: either accept a determination that it has market power and adopt cost-based rate mitigation measures, or provide the Commission with a DPT analysis.[12] Southern concludes that by applying the indicative screens codified in the Final Rule, the Commission will effectively shift to sellers the evidentiary burden in a section 206 proceeding.[13] Southern argues that the screens are inherently flawed in their ability to definitively assess market power when none is actually present, noting that the Final Rule acknowledges that the screens are conservative in nature and may result in false positives indicating market power.[14] Southern argues that because of their conservative nature and propensity to result in false positives, such screens cannot properly provide a basis for shifting the burden of proof to sellers, and are incapable of providing substantial evidence of market power.

21. To remedy this, Southern argues that the Commission should reconsider its determination in the Final Rule that a failure of an indicative screen results in a presumption of market power. Instead, the Commission should determine that the indicative screens are only intended to identify sellers that appear to raise no horizontal market power concerns and thus can be considered for market-based rate authority without the necessity of further analysis. In other words, passing the screens should raise a favorable presumption that a seller does not have market power, and a seller would never be ''presumed'' to have generation market power.[15]

22. Southern further argues that the Final Rule's market share screen and its application of the DPT are arbitrary and capricious, not supported by substantial evidence, without a rational basis, and contrary to established legal precedent.[16] Specifically, Southern contends that the market share screen and the DPT improperly fail to account for the size of the wholesale market demand that could be served by the uncommitted capacity in the relevant region.[17] Southern argues that wholesale market demand should be considered in the market share screen and the DPT because market power concerns only exist if a seller has the power to raise prices above competitive levels or exclude competition in the relevant market for a not insubstantial amount of time.[18] According to Southern, even the Department of Justice (DOJ) merger analysis, on which the Final Rule relies, would take the wholesale market into account when determining an entity's ''market share.'' [19] Southern comments that in the Final Rule the Commission appeared to give four reasons why it was unwilling to consider market demand (*i.e.*, contestable load), and contends that these reasons provide an insufficient basis for rejecting a contestable load analysis.[20] Southern believes that the weight of the evidence clearly demonstrates that to be legitimate indicators of market power, the market share screen and DPT should take the relevant wholesale demand into account.

Commission Determination

23. We disagree with Southern's contention that the Final Rule violates the requirement in the FPA that the Commission bears the burden of proof in section 206 proceedings. We also disagree with Southern's view that failure of the indicative screen(s) does not provide a sufficient basis to establish a rebuttable presumption of market power.

24. As a general matter, we agree that the burden of proof in a section 206 proceeding is on the Commission where the Commission institutes the proceeding on its own motion. However, we find Southern's argument that the burden of proof in a section 206 proceeding is unlawfully shifted to entities that fail one of the indicative screens to be without merit. As an initial matter, the burden of going forward is on the Commission in the first instance, and ultimately, when the Commission institutes a proceeding under section 206 of the FPA. In the Final Rule, the Commission has established through rulemaking a generic test to support its burden of going forward: A seller's failure of one of the indicative screens establishes a rebuttable presumption of market power. The burden of going forward then shifts to the seller once such a proceeding is initiated to rebut the presumption of market power. Once the seller submits additional evidence to rebut the presumption of market power, the Commission must determine, based on substantial evidence in the record, whether the seller has market power. Thus, the ultimate burden of proof under FPA section 206 remains with the Commission.[21] On this basis, the

[10] Order No. 697 also dealt with the following issues, about which rehearing has not been sought: Control and commitment of generation resources; elimination of former 18 CFR 35.27, which had exempted newly-constructed generation from the horizontal market power analysis; reporting format for the indicative screens; nameplate capacity; and several procedural issues.

[11] Southern Rehearing Request at 7–8 (citing 16 U.S.C. 824e(a); *FPC* v. *Sierra Pacific Power Co.,* 350 U.S. 348 at 353 (1956) (*Sierra*); *Public Service Commission of New York* v. *FERC,* 642 F.2d 1335, 1345 (D.C. Cir. 1980); *Public Service Co. of New Mexico,* 115 FERC ¶ 61,090, at P 33 (2006)).

[12] *Id.* at 7 (citing Order No. 697 at P 63).

[13] *Id.* at 8.

[14] *Id.* (citing Order No. 697 at P 62, 71, 74, 89). Further, Southern asserts that only in instances of high market share should a prima facie case of market power be established, which would shift the burden of proof. *Id.* at 10 & n.10 (citing *U.S.* v. *Syufy,* 903 F.2d 659, 664 (9th Cir. 1990); *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.,* 627 F.2d 919, 924 (9th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981)).

[15] *Id.* at 11.

[16] *Id.* at 20 (citing 5 U.S.C. 706(2)(A) and (E) (2000); *Union Pac. Fuels, Inc.* v. *FERC,* 129 F.3d 157, 161 (D.C. Cir. 1997) (holding that review of Commission orders is made under the arbitrary and capricious standard of the Administrative Procedure Act); *Sithe Independence Power Partners* v. *FERC,* 165 F.3d 944 (D.C. Cir. 1999) (stating that the Commission must be able to demonstrate that it has ''made a reasoned decision based upon substantial evidence in the record'' and the ''path of [its] reasoning'' must be clear) (*quoting Town of Norwood* v. *FERC,* 962 F.2d 20, 22 (D.C. Cir. 1992)).

[17] *Id.* at 3–4 (citing *United States* v. *Grinnell Corp.,* 384 U.S. 563, 571 (1966); *MetroNet Services Corp.* v. *U.S. West Communications,* 329 F.3d 986 (9th Cir. 2003); *United States* v. *Dentsply International, Inc.,* 399 F.3d 181, 187 (3rd Cir. 2005)).

[18] *Id.* at 12–13.

[19] *Id.* at 13.

[20] *Id.* at 15 and Frame affidavit at ¶ 25, referring to Order No. 697 at P 66–67.

[21] *See AEP Power Marketing, Inc.,* 108 FERC ¶ 61,026, at P 30 (2004) (July 8 Order) (''Failure of a screen establishes a rebuttable presumption of market power, which satisfies the Commission's initial burden of going forward in such proceedings. The burden of going forward will then be upon the applicant once such a proceeding is initiated.''); *see Id.* P 29 (stating that passing both screens or failing one merely establishes a rebuttable presumption, and explaining that in the case of an intervenor in a section 205 proceeding that seeks to prove that the applicant possesses market power, ''the intervenor need only meet a 'burden of going forward' with

Continued

Commission is not unlawfully shifting the burden of proof to the seller that fails one of the screens.

25. Moreover, in Order No. 697, the Commission addressed an argument by Southern that failure of the screens does not provide a sufficient basis to establish a rebuttable presumption of market power, and Southern has failed on rehearing to convince us that a seller should never be presumed to have generation market power. In particular, the Commission explained that the indicative screens are intended to identify the sellers that raise no horizontal market power concerns and can otherwise be considered for market-based rate authority. Sellers failing one or both of the indicative screens, on the other hand, are identified as sellers that potentially possess horizontal market power and for which a more robust analysis is required. The Commission explained that the uncommitted pivotal supplier screen focuses on the ability to exercise market power unilaterally. Failure of this screen indicates that some or all of the seller's generation must run to meet peak load. The uncommitted market share analysis indicates whether a supplier has a dominant position in the market. Failure of the uncommitted market share screen may indicate that the seller has unilateral market power and may also indicate the presence of the ability to facilitate coordinated interaction with other sellers. It is on this basis that the Commission finds that a rebuttable presumption of market power is warranted when a seller fails one or both of the indicative screens. The screens themselves represent the first piece of evidence that the potential for market power exists since failure of one or both of the screens indicates that the seller may be a pivotal supplier in the market or has a high enough market share of uncommitted capacity to raise horizontal market power concerns.[22] In addition, we note that although we find that failure of an indicative screen is a sufficient basis to establish a presumption of market power, the Commission allows such a seller to continue to sell under market-based rate authority until a definitive finding is made, albeit with rates subject to refund to protect customers.

26. We disagree with Southern's argument that the indicative screens have a propensity to result in false positive indications of market power, do not provide substantial evidence of market power and, therefore, cannot provide a basis for shifting the evidentiary burden to sellers. As we explained in Order No. 697, the indicative screens are intended to screen out those sellers that raise no horizontal market power concerns and can otherwise be considered for market-based rate authority from those sellers that raise concerns but may not necessarily possess horizontal market power.[23] While we recognize that the conservative nature of the screens may result in some false positives, a conservative approach at the indicative screen stage is warranted because if a seller passes both of the indicative screens, there is a rebuttable presumption that it does not possess horizontal market power. Thus, we must weigh the risk of false positives and any resulting repercussions on a seller (e.g., section 206 proceeding, rate subject to refund, temporary regulatory uncertainty) against the costs of adopting a less conservative screen or eliminating the market share indicative screen.[24] In particular, if the screens result in a false positive indication of market power, the seller has the opportunity to rebut the presumption of market power while it continues to have market-based rate authority. However, if we were to adopt a less conservative screen, that could result in a false negative, *i.e.*, a false indication of no market power and customers would not be adequately protected. Accordingly, if the Commission were to adopt Southern's approach we are concerned that false negatives would become a reality and the Commission would not be able to fulfill its FPA section 205 and 206 mandate to ensure just, reasonable and not unduly discriminatory rates. On this basis, we believe that evidence of an indicative screen failure is sufficient to establish a rebuttable presumption of market power, in which case the seller will then have the opportunity to rebut that presumption of market power.

27. Additionally, in response to Southern's concerns regarding the conservative nature of the indicative screens, Order No. 697 changed the native load proxy under the market share indicative screen from the minimum native load peak demand for the season to the average of the daily native load peak demands for the season, making the native load proxy for the market share indicative screen consistent with the native load proxy under the pivotal supplier screen.[25] A native load proxy based on the average of peak load conditions is more representative, and thus more accurate, than a proxy based on minimum peak load conditions. Basing the native load proxy on the average of the peaks will make the screens more accurate in eliminating sellers without market power while focusing on ones that may have market power.[26] Thus, the updated native load proxy will reduce the likelihood that false positive indications of market power will occur.

28. Accordingly, we affirm our determination in the Final Rule that a failure of an indicative screen results in a presumption of market power, and reject Southern's proposal that a seller never be ''presumed'' to have horizontal market power as a result of an indicative screen failure.[27]

29. The Commission also disagrees with Southern's assertion that the market share screen and the DPT analysis do not account for the size of wholesale market demand, and are therefore arbitrary and capricious.[28] While Southern may disagree with our approach to considering wholesale market demand, both the market share screen and the DPT consider wholesale market demand by considering uncommitted capacity. Uncommitted capacity considers wholesale market demand by reducing the seller's available capacity by the amount of capacity committed to serve demand. In addition, in both the initial screen and the DPT, the Commission requires a pivotal supplier analysis, which looks at whether there is sufficient competing supply to serve wholesale demand.

30. In addition, we disagree with Southern that our choice of how to account for the wholesale market demand has resulted in the market share screen and the DPT being arbitrary and

evidence that rebuts the results of the screens. At that point, the burden of going forward would revert back to the applicant to prove that it lacks market power.'') (citing *Pennzoil Co.* v. *FERC,* 645 F.2d 360, 392 (5th Cir. 1981), *cert. denied,* 454 U.S. 1142 (1982); *accord Transcontinental Gas Pipe Line Corp.*, Opinion No. 135, 17 FERC ¶ 61,232, at 61,450 (1981) (''The presumption * * * is the same as that which arises from a prima facie case: It imposes on the party against whom it is directed the burden of going forward with substantial evidence to rebut or meet the presumption, but does not shift the burden of persuasion.''); *Generic Determination of Rate of Return on Common Equity for Electric Utilities,* Order No. 389–A, 29 FERC ¶ 61,223, at 61,458 (1984) (concluding that rebuttable presumption that a rate of return based on a benchmark is just and reasonable does not shift ultimate burden of proof imposed by Federal Power Act)); *see also Southern Companies Energy Marketing, Inc.,* 111 FERC ¶ 61,144, at P 24 (2005) (stating that a ''screen failure satisfies the Commission's burden of going forward and shifts to the applicant the burden of presenting evidence rebutting the presumption of market power''), *order dismissing reh'g as moot,* 119 FERC ¶ 61,300 (2007).

[22] *See* Order No. 697 at P 65.

[23] *Id.* P 62.

[24] *Id.* P 71.

[25] *Id.* P 135.

[26] *Id.* P 137.

[27] Southern Rehearing Request at 11.

[28] We further address Southern's arguments with regard to the DPT analysis below.

capricious. The development of the market share screen and the DPT resulted from lengthy public proceedings at which varying perspectives and arguments were taken into account. Over the years, and in light of the Commission's FPA responsibilities, the Commission has carefully considered various points of view in an open transparent dialogue with the electric industry and has based its determinations on sound regulatory principles. In particular, the market share screen provides a straightforward economically sound and accepted method to identify those sellers that have the potential to exercise market power.[29] The uncommitted pivotal supplier screen measures the ability of the firm to dominate the market at peak periods. Further, the market share screen indicates whether a supplier may have a dominant position in the market and measures the ability of a seller to affect coordinated interaction with other sellers that could be accomplished during both peak and off-peak times. The market share screen is useful in measuring market power because it measures a seller's size relative to others in the market, specifically, the seller's share of generating capacity that is uncommitted after accounting for its obligations to serve native load. It also provides a snapshot of these market shares in each season of the year.[30] Thus, the indicative screens measure a seller's market power at both peak and off-peak times and therefore indirectly measure market power potential during periods of both relatively high and low demand.[31] With regard to Southern's argument that in the Final Rule the Commission appeared to give four reasons why it was unwilling to consider market demand (*i.e.*, contestable load), and Southern's contention that these reasons provide an insufficient basis for rejecting a contestable load analysis, we reaffirm our determination that the contestable load analysis is flawed and essentially a variant on the pivotal supplier screen.[32] Like the pivotal supplier screen, the contestable load analysis addresses whether suppliers other than the seller can meet the demand in the relevant market. Thus, incorporating such an analysis would not improve our ability to establish a presumption of whether a seller possesses market power and would add little useful information.[33]

2. Indicative Market Share Screen Threshold Levels

Final Rule

31. Order No. 697 retained the 20 percent threshold for the wholesale market share screen (*i.e.*, with a market share of less than 20 percent, the seller passes the screen). The Commission reasoned that a relatively conservative threshold for passing the market share screen was appropriate, explaining that the screens are indicative of market power, not definitive. Responding to arguments that the Commission should use a 35 percent threshold as a presumption of market power because the U.S. Department of Justice (DOJ) merger guidelines state that only firms with 35 percent of more market share have market power, the Commission explained:

> In a market comprised of five equal-sized firms with 20 percent market shares, the HHI is 2,000, which is above the DOJ/FTC HHI threshold of 1,800 for a highly concentrated market, and in markets for commodities with low demand price-responsiveness like electricity, market power is more likely to be present at lower market shares than in markets with high demand elasticity.[34]

32. The Commission continued that, when arguing that a 20 percent threshold for the market share screen is too low, commenters ignored that the indicative screens are based on uncommitted capacity, not total capacity; as a result, a substantial amount of seller capacity may not be counted in measures of market share. The Commission, therefore, concluded that the 20 percent threshold strikes the right balance in seeking to avoid both false negative and false positive results.[35]

Requests for Rehearing

33. Southern asserts that the Final Rule arbitrarily utilizes a 20 percent market share threshold to establish a presumption of market power.[36] Further, Southern argues that the 20 percent threshold is contrary to legal precedent holding that a higher market share is required to warrant market power concerns.[37]

34. Southern argues that, contrary to the Commission's assertions, the 1984 Merger Guidelines do not support the 20 percent figure used in the market share screen. First, it states that while the particular sentence cited by the Commission from section 4.134 of the 1984 guidelines does actually contain the words ''market share of 20 percent,'' it does not support the application of a 20 percent threshold under the market share screen when considered in proper context, since other portions of the 1984 Merger Guidelines indicate that the DOJ's definition of ''market share'' in the context of merger evaluation is different from the Commission's definition of ''market share'' under its market share screen.[38] Second, Southern argues that according to the very sentence cited in the Final Rule from the 1984 Merger Guidelines, the 20 percent ''market share'' threshold refers only to the market share of the *acquired firm* in the overall context of a proposed merger of multiple firms. It does not refer to the market share of the merged firm post-acquisition, nor does it even refer to the market share of the acquiring firm. Third, Southern argues that the Commission's reliance on the 20 percent threshold in section 4.134 of DOJ's 1984 Merger Guidelines is misplaced because that provision is outdated—it is not included in DOJ's *current* horizontal merger guidelines. In this regard, the 1984 Merger Guidelines were used to evaluate both *vertical and horizontal* mergers. The newer versions of DOJ's *horizontal* merger guidelines subsequently adopted in 1992 and 1997 do not carry forward section 4.134's 20 percent market share threshold. Thus, the market share of a single firm does *not* automatically translate into a high HHI as the Commission suggests.[39]

35. Southern also argues on rehearing that section 2 of the Sherman Antitrust Act, which prohibits not only actual

[29] *See In the Matter of Merger Policy Under the Federal Power Act*, May 7, 1996, Comments of the U.S. Department of Justice, Docket No. RM96–6–000 (providing comments on the Commission's standards for determining whether a proposed merger is in the public interest, recommending that the Commission apply a market share screen to identify quickly those mergers that are unlikely to raise competitive issues and concluding that the Horizontal Merger Guidelines provide ''sound competitive analysis''); *see also* U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, section 2.0, reprinted at 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Issued April 2, 1992, Revised April 8, 1998).

[30] Order No. 697 at P 65.

[31] *Id.*

[32] *Id.* P 66.

[33] *Id.*

[34] *Id.* P 89.

[35] *Id.* P 91.

[36] Southern Rehearing Request at 4 (citing DOJ 1984 Merger Guidelines, Section 2.4; *Edison Mission Energy, Inc.* v. *FERC*, 394 F.3d 964, 968 (D.C. Cir. 2005) (stating that the Commission must ''articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' '') (quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[37] *Id.*

[38] The Final Rule cited section 4.134, stating ''[t]he 20 percent threshold is consistent with § 4.134 of the U.S. Department of Justice 1984 Merger Guidelines issued June 14, 1984, reprinted in Trade Reg. Rep. P 13,103 (CCH 1988): 'The Department [of Justice] is likely to challenge any merger satisfying the other conditions in which the acquired firm has a market share of 20 percent or more.' '' Order No. 697 at n.21.

[39] *Id.* at 16–19.

monopolization but also attempted monopolization and conspiracy to monopolize, has spawned a well-established body of law to address the type of market concerns that the Commission attempts to address in the Final Rule. Southern contends that the Commission's 20 percent threshold falls short when measured against the jurisprudence interpreting section 2 of the Sherman Act and that a more relevant threshold in a non-merger context would arguably be closer to 90 percent than 20 percent.[40] Whether the Commission's concern arises out of the unilateral ability of a utility to exert market power or the ability of two or more utilities to act concertedly in a way that restrains trade, Southern argues that jurisprudence interpreting the Sherman Act more appropriately addresses those concerns than does merger analysis. Aside from the authorities supporting a rule of law that less than at least a 50 percent market share should be insufficient to suggest market power, Southern argues that many cases and commentators may be cited for the proposition that the Commission's 20 percent threshold is misguided and lacks a rational basis; relatively low market shares should, as a matter of law, preclude findings of market power.[41] Southern adds that the courts have not only consistently held that market shares in the 20 percent range are insufficient to support a finding of actual monopoly power under section 2 of the Sherman Act, but also have found little difficulty in determining that such market share is not enough to sustain even a claim of attempted monopolization under section 2.[42]

36. NASUCA argues on rehearing that in calculating market share when screening for horizontal market power, the Commission should not subtract capacity needed for long-term contracts as ''committed'' if the contracts are indexed or linked to spot market prices. NASUCA asserts that a seller with a market share of capacity greater than 20 percent can reduce it, and pass a market power screen it would otherwise fail, by ''committing'' portions of its capacity. NASUCA states that it requested in its NOPR comments that the Commission clarify that it will not consider capacity dedicated to meeting long-term contract sales of energy to be ''committed''—and thus disregarded from market share—if the price of energy in the long-term contracts is indexed or linked to spot market prices. NASUCA contends that it identified relevant research in support of its request in citing a model that withdraws the capacity committed under the long-term contracts from the short-run market.[43] NASUCA states that the Commission overlooked NASUCA's request, and therefore requests that the Commission grant its requested clarification because research indicates that long-term contracts linked to spot market prices do not reduce, and may exacerbate, the ability of a seller to raise spot market prices above competitive levels.[44] In the alternative, NASUCA seeks further proceedings to examine the exercise of market power by sellers who pass market screens due to their contractual commitment to make long-term energy sales at rates indexed to spot market prices.

Commission Determination

37. We affirm our determination to retain the 20 percent threshold for the indicative wholesale market share screen. Use of the 20 percent market share threshold is appropriate since the screen is indicative, not dispositive. Southern's arguments suggest that the 20 percent is dispositive, but it is not. If a seller fails the indicative screens, it can submit a full DPT analysis in which a range of factors are considered, including market shares, HHIs (market concentration) and other factors affecting the relevant markets. A 20 percent market share is not even considered dispositive at that stage; rather, we have approved market-based rates in several cases where a supplier had a market share exceeding 20 percent.[45] In addition, we note that the cases cited by Southern, where much higher market shares were allowed, involve markets other than electricity.[46] Electricity markets possess unique characteristics including, but not limited to, inelastic demand and the need to balance the entire transmission grid in real-time. Economic theory and empirical estimates of the short-run elasticities of electricity demand suggest that these unique conditions allow sellers in wholesale electricity markets to exercise market power using a much more limited withholding of supply than industries listed in the cases cited by Southern.[47] Thus, the use of a conservative threshold such as a 20 percent market share is warranted, particularly for an indicative screen.

38. Southern asserts that the Final Rule's reliance on the 1984 Merger Guidelines for use of the ''20 percent market share'' is incorrect. Section 4.134 of the 1984 Merger Guidelines states:

> Entry through the acquisition of a relatively small firm in the market may have a competitive effect comparable to new entry. Small firms frequently play peripheral roles in collusive interactions, and the particular advantages of the acquiring firm may convert a fringe firm into a significant factor in the market. The Department is unlikely to challenge a potential competition merger when the acquired firm has a market share of five percent or less. Other things being equal, the Department is increasingly likely to challenge a merger as the market share of the acquired firm increases above the threshold. The Department is likely to challenge any merger satisfying the other conditions in which the acquired firm has a market share of 20 percent of [sic] more.[48]

[40] *Id.* at 20 (citing *Hiland Dairy* v. *Kroger*, 402 F.2d 968, 976 (8th Cir. 1968) (rejecting 60 or 33 percent market share); *Robinson* v. *Magovern*, 521 F. Supp. 842, 887 (W.D. Pa. 1981)).

[41] *Id.* at 22–23 (citing *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986) (noting that 20.4 percent market share is probably insufficient to sustain predatory pricing, and citing authorities indicating that 60 percent or more would be necessary); *Bailey* v. *Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002); *Yoder Bros., Inc.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1368 (5th Cir. 1976) (stating that a 20 percent market share was insufficient as a matter of law to prove market power)).

[42] *Id.* at 24 (citing *H.L. Hayden Co. of New York, Inc.*, v. *Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1017 (2nd Cir. 1989); *Nifty Foods Corp.* v. *Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2nd Cir. 1980) (one-third market share not enough); *U.S.* v. *ALCOA*, 148 F.2d 416, 424 (2nd Cir. 1945).

[43] NASUCA Rehearing Request at 8 (citing Chloe Lo Coq. *Index Contracts and Spot Market Competition,* University of California Energy Institute, Center for the Study of Energy Markets, June 2006, p. 15, available at *http://www.ucei.berkeley.edu/ThirdTierButtons/PDFButton_Off.jpg*).

[44] *Id.* (citing Order No. 697 at P 82–93).

[45] *PPL Montana, LLC,* 115 FERC ¶ 61,204, at P 41 (2006), *order denying reh'g,* 120 FERC ¶ 61,096 (2007); *Kansas City Power and Light Co.,* 113 FERC ¶ 61,074, at P 26, 30 (2005); *PacifiCorp,* 115 FERC ¶ 61,349, at P 29, 32 (2006); *Tampa Electric Co.,* 117 FERC ¶ 61,311, at P 26–27 (2006).

[46] *Hiland Dairy* v. *Kroger,* 402 F.2d 968 (8th Cir. 1968) (concerning a claim of monopolization in the milk and dairy business); *Robinson* v. *Magovern,* 521 F. Supp. 842 (W.D. Pa. 1981) (addressing an antitrust action against a hospital); *Cargill, Inc.* v. *Monfort of Colorado, Inc.,* 479 U.S. 104 (1986) (concerning a merger in the beef packing industry); *Bailey* v. *Allgas, Inc.,* 284 F.3d 1237 (11th Cir. 2002) (addressing an antitrust action arising from a price war between liquid propane gas competitors); *Yoder Bros., Inc.* v. *California-Florida Plant Corp.,* 537 F.2d 1347 (5th Cir. 1976) (addressing antitrust claims arising from infringement of plant patents); *H.L. Hayden Co. of New York, Inc.,* v. *Siemens Medical Systems, Inc.,* 879 F.2d 1005 (2nd Cir. 1989) (addressing antitrust claims relating to distribution of dental x-ray equipment); *Nifty Foods Corp.* v. *Great Atl. & Pac. Tea Co.,* 614 F.2d 832 (2nd Cir. 1980) (concerning an antitrust suit arising from the substitution of a supplier of frozen waffles); *U.S.* v. *ALCOA,* 148 F.2d 416 (2nd Cir. 1945) (concerning claims of monopolization of interstate and foreign commerce in the manufacture and sale of aluminum).

[47] Energy Information Administration, ''Assumptions to the Annual Energy Outlook 2006,'' Report #: DOE/EIA–0554 (2006); James A. Espey & Molly Espey, ''Turning on the Lights: A Meta-analysis of Residential Electricity Demand Elasticities,'' Journal of Agricultural and Applied Economics, 36:1, at 65–81 (April 2004).

[48] U.S. Department of Justice Non-Horizontal Merger Guidelines sec. 4.134, originally issued June 14, 1984, as part of the U.S. Department of Justice

39. Upon further review, the context discussed in this quote differs from the issue before us, and provides little guidance here. In the market-based rate context, we focus on whether the applicant has a 20 percent market share as a conservative measure because of the electricity market's characteristics including inelastic demand and the need to balance the entire transmission grid in real-time.[49] However, the Non-Horizontal Merger Guidelines provide that a firm with a 20 percent share is unlikely to be a ''fringe'' firm and an insignificant factor in the market. This is the same reason that we use the 20 percent threshold in our indicative screen: Firms with a 20 percent market share would be unlikely to hold a dominant position in the market.[50]

40. We also reject Southern's argument that the Commission's 20 percent threshold falls short when measured against the jurisprudence interpreting section 2 of the Sherman Act.[51] Economic theory suggests that it may be possible, given the unique conditions in electricity markets, for sellers to exercise market power, using a much more limited withholding of supply, than industries listed in the cases relied upon by Southern.[52] Moreover, in contrast to the cases cited, the Commission uses 20 percent as an *indicative* screen, not as a dispositive factor in determining whether market power exists. We have, as indicated, approved market-based rates for firms with market shares in excess of 20 percent.

41. We reject NASUCA's request that the Commission require sellers to treat capacity that is committed to long-term contracts that are indexed or linked to spot market prices as uncommitted capacity in calculating market share when screening for horizontal market power. As support, NASUCA cites a model that withdraws the capacity committed under the long-term contracts from the short-run market, and then concludes that the now reduced capacity traded in the spot market lowers the incentives for rival firms to deviate from any collusive behavior by reducing the number of firms in the market and their available capacity.[53] Therefore, the model cited by NASUCA subtracts capacity committed under long-term contracts from the capacity available in the short-run market, just as we do in our analysis. Similarly, the Commission believes that once capacity is committed long-term, regardless of how that capacity is priced (e.g., whether linked to spot prices or not), the ability of the firm to use that capacity to exercise market power in the spot market is severely limited or non-existent. The ability to collude will be determined by the remaining uncommitted capacity in the spot market, not the capacity that is already committed under long-term contracts. Therefore, we conclude that it is appropriate to subtract capacity committed under long-term contracts when calculating a seller's uncommitted capacity for purposes of performing the indicative screens.

3. DPT Criteria

Final Rule

42. In Order No. 697, the Commission announced that it would continue to use the DPT to make a definitive determination of whether a seller has market power and that it would continue to weigh both available economic capacity and economic capacity when analyzing market shares and Hirschman-Herfindahl Indices (HHI).[54] The Commission chose to retain the HHI threshold of 2,500 for passing the DPT, and to retain the 20 percent market share threshold. Responding to arguments that if a 2,500 HHI threshold is retained, it should be used with a 15 percent market share because these are the criteria of the oil pipeline test from which the 2,500 HHI was derived, the Commission noted that it ''had not seen cases where the HHI was over 2,500 and the seller's market share was between 15 and 20 percent, which would be the type of situation about which [commenters] are concerned.'' [55]

Requests for Rehearing

43. Montana Counsel argues that the Commission should clarify that capacity committed to a competitor's native load or otherwise unavailable on a firm basis should not be considered available to compete with the applicant's generation, and as such should not be included as available capacity in the DPT analysis. Montana Counsel states that in its order on PPL Montana's request for renewal of market-based rate authority, the Commission stated that it was ''not inconsistent with how DPTs have historically been conducted'' for PPL Montana to include as available competing generation capacity that was committed elsewhere.[56] Montana Counsel contends that this is inappropriate insofar as generation committed to serve another utility's native load cannot be available to compete with the applicant's generation on a firm basis. Montana Counsel states that while it appears that Order No. 697 remedies this mistake in stating that total supply is determined by adding the total amount of uncommitted capacity located in the relevant market (including capacity owned by the seller and competing suppliers) with that of uncommitted supplies that can be imported (limited by simultaneous transmission import capability) into the relevant market from the first-tier markets, the Commission does not explicitly change the Commission's prior policy.[57] Accordingly, Montana Counsel requests clarification that the Commission will not allow applicants to count as available economic capacity generation that is in fact committed; if necessary and in the alternative, Montana Counsel requests rehearing of this issue.

44. TDU Systems argue on rehearing that the Final Rule fails to explain how the adoption of a 2,500 HHI threshold is rationally related to the Commission's objective of precluding market-based rates in highly concentrated markets.[58] They assert that the Commission should lower the HHI threshold to 1,800 as the appropriate threshold for treating a market as highly concentrated, and that the Commission's refusal to do so in the Final Rule was arbitrary and capricious. TDU Systems state that, since the Commission set out in the Final Rule ''to provide 'a rigorous up-front analysis of whether market-based rates should be

Merger Guidelines, reprinted in Trade Reg. Rep. ¶ 13,103 (CCH 1988) (footnote omitted).

[49] A seller who has less than a 20 percent market share in a season will be considered to satisfy the market share analysis. *AEP Power Marketing, Inc.,* 107 FERC ¶ 61,018, at P 102 (April 14 Order), *order on reh'g,* 108 FERC ¶ 61,026 (2004) (July 8 Order).

[50] *See Id.* P 104.

[51] Southern Rehearing Request at 22–23.

[52] *See supra* n.46.

[53] ''If collective action is necessary for the exercise of market power, as the number of firms necessary to control a given percentage of total supply decreases, the difficulties and costs of reaching and enforcing an understanding with respect to the control of that supply might be reduced.'' U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, section 2.0, reprinted at 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Issued April 2, 1992, Revised April 8, 1998).

[54] Order No. 697 at P 13, 104, 106.

[55] *Id.* P 113.

[56] Montana Counsel Rehearing Request at 9 (citing *PPL Montana, LLC,* 115 FERC ¶ 61,204, at P 49 (2006)).

[57] *Id.* at 10 (citing Order No. 697 at P 37–38).

[58] TDU Systems state that ''The Final Rule fails to explain how the adoption of an 1,800 Herfindahl-Hirschman Index ('HHI') threshold is rationally related to its objective of precluding market-based rates in highly concentrated markets. TDU Systems Rehearing Request at 2 (citing *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 42–43 (1983); *Pac. Gas & Elec. Co.* v. *FERC,* 373 F.3d 1315, 1319 (D.C. Cir. 2004)). However, the Final Rule retained 2,500 as the appropriate threshold for passing the HHI component of the DPT.

granted,' it is somewhat puzzling as to why the Commission believes that the case for any change in the status quo must be 'compelling.' '' [59]

45. TDU Systems note that 1,800 is the level which the Commission uses in its merger regulations and contends that the Commission placed too much reliance on the 1994 DOJ recommendations [60] as to market rates in the very different oil pipeline market for arriving at the 2,500 HHI threshold. TDU Systems state that electric utilities do not face the same competition from other modes of transportation and demand elasticity as do oil pipelines. They state that these factors support their argument for a lower HHI.[61] If the Commission does not adopt the 1,800 level consistent with effective competition, TDU Systems contend that it should reduce the market-share threshold to 15 percent.[62]

46. TDU Systems argue that they made a strong case for reducing the triggering HHI level to 1,800 in their NOPR comments, and that the Commission appears not to have considered it carefully. They assert that if a market is regarded as ''highly concentrated,'' the DOJ guidelines indicate that even modest increases in concentration will likely raise significant competitive concerns. They contend that, in such a market, other agencies presume that an HHI increase of 100 or more is likely to create or enhance market power. They conclude that, regardless of what the Commission ordered in the April 14 Order, there is no good reason at this time to regard a market with a 2,000 HHI as not highly concentrated.[63]

47. Southern argues that for the same reasons that the market share screen should take into account the overall size of the wholesale market and include a contestable load analysis, the DPT should take into account the overall size of the wholesale market, or should be replaced by a contestable load analysis.[64]

Commission Determination

48. In response to the Montana Counsel's request, we clarify that capacity committed to a competitor's native load or otherwise unavailable on a long-term firm basis, will not be considered available to compete with the seller's generation, and as such will not be included as available economic capacity in the DPT analysis. We also note that Montana Counsel misrepresents our findings in the PPL Montana proceeding. In that proceeding, it was not argued that the capacity in question was committed elsewhere. Rather, the Commission addressed the argument that capacity ''may'' be committed. PPL Companies rebutted that argument by explaining that the buyers at issue did not have long-term firm transmission available to export the energy in question from the NorthWestern control area, and that because the buyers could elect to leave this capacity in the NorthWestern control area, the capacity in question should not be excluded from the available economic capacity in the NorthWestern control area. The Commission noted that PPL Companies' treatment of this capacity is not inconsistent with how DPTs have historically been conducted.

49. The Commission rejects TDU Systems' proposal to reduce the HHI threshold level to 1,800. The Commission will continue to use a 2,500 HHI and a 20 percent market share as the thresholds for the DPT analysis. The Commission believes that the market share/HHI thresholds of 20 percent and 2,500, respectively, enable the Commission to identify dominant firms in highly concentrated markets, rather than firms with market shares above 20 percent that operate in less concentrated markets (e.g., HHIs less than 2,500), resulting in fewer false positives.[65] Further, the Commission will continue to examine each DPT analysis on a case-by-case basis, weighing other factors, besides market share and HHIs, such as historical sales and transmission data.[66] Thus, we will retain 2,500 as the appropriate threshold for passing the HHI component of the DPT.[67] Notwithstanding TDU Systems' argument that the Final Rule fails to explain how the adoption of a 2,500 HHI threshold is rationally related to the Commission's objective of precluding market-based rates in highly concentrated markets, the Commission has explained why 2,500 is the appropriate threshold, and we reject TDU Systems' contention that the Commission did not carefully consider arguments for reducing the threshold to 1,800. At less than 2,500 HHI in the relevant market for all season/load conditions, there is little likelihood of coordinated interaction among suppliers in a market.[68] TDU Systems argue that the DOJ Merger Guidelines use an 1,800 HHI, but fail to note that the focus of the Guidelines is on *increases* in market concentration produced by a merger. For example, an existing market could have an HHI of 2,400 and the DOJ would take no action if the acquired firm was very small. It is therefore not the 1,800 HHI figure, standing alone, that merits scrutiny by the DOJ, but rather the relative *increase* in concentration that could cause the DOJ to investigate further. We therefore do not believe that our approach conflicts in any way with the DOJ merger guidelines. We also reaffirm our determination not to adopt TDU Systems' suggestion to lower the market share threshold to 15 percent from 20 percent. As we explained, we believe that the 20 percent threshold strikes the right balance in seeking to avoid both false negatives and false positives.[69]

50. With regard to Southern's argument that the DPT should take into account the overall size of the wholesale market or be replaced by a contestable load analysis, the Commission reaffirms its determination that the contestable load analysis is essentially a variant on the pivotal supplier screen, and therefore redundant. As a variant of the pivotal supplier screen, the contestable load analysis has differences in the calculation of wholesale load and the test thresholds. Like the pivotal supplier screen, it addresses whether suppliers other than the seller can meet the demand in the relevant market. Incorporating such an analysis would not improve our ability to establish a presumption of whether a seller possesses market power and would add little useful information.[70] In addition, because the indicative screens measure a seller's market power at both peak and off-peak times, they therefore measure market power potential during periods of both high and low demand, and this concern need not be addressed in the DPT.[71]

51. We also reject Southern's argument that the DPT should be replaced by the contestable load analysis. First, unlike the DPT, the contestable load analysis fails to consider relative prices of competing

[59] *Id.* at 12–13 (citing Order No. 697 at P 2).

[60] April 14 Order, 107 FERC ¶ 61,018, at P 110 & n.96 (citing Comments of the U.S. Dept. of Justice, Docket No. RM94–1–000 (Jan. 18, 1994)).

[61] TDU Systems Rehearing Request at 14.

[62] *Id.* at 6–7 (citing DOJ Comments, Docket No. RM94–1–000 (Jan. 18, 1994), at 13).

[63] *Id.* at 13.

[64] Southern Rehearing Request at 3–4, 11–16 and Frame Affidavit at ¶ 5, 21–22.

[65] As explained in Order No. 697 at P 100, lowering the HHI threshold to 1,800 will cause more false positives and direct capital away from the generation sector.

[66] Order No. 697 at P 96.

[67] *Id.* P 113; April 14 Order, 107 FERC ¶ 61,018, at P 111.

[68] April 14 Order, 107 FERC ¶ 61,018 at P 111.

[69] Order No. 697 at P 113; July 8 Order, 108 FERC ¶ 61,026 at P 95–97; NOPR at P 41.

[70] Order No. 697 at P 66.

[71] *Id.* P 65–66.

suppliers.[72] Second, contrary to Southern's claim, the DPT does consider wholesale load because it analyzes ten different seasons/load periods and the Available Economic Capacity (AEC) analysis deducts the native load commitments of all suppliers, which includes wholesale commitments.

4. Other Products and Models

Final Rule

52. Regarding relevant product markets, the Commission stated in the Final Rule:

> [w]e will not generically alter the indicative screens or the DPT to allow different product analyses for short-term or long-term power as some commenters suggest. As the Commission has stated in the past, absent entry barriers, long-term capacity markets are inherently competitive because new market entrants can build alternative generating supply. There is no reason to generically require that the horizontal analysis consider those products that are affected by entry barriers. Instead, we will consider intervenors' arguments in this regard on a case-by-case basis.[73]

53. The Commission also rejected suggestions by some commenters that it adopt behavioral modeling, such as game theory, in addition to or in place of the indicative screens and the DPT. The Commission explained that, although game theory has been used in laboratory experiments and in theoretical studies where the number of players and choices available to players are limited, it is not a practical approach given the volume of analyses the Commission must perform. The Commission noted that a large number of choices are available in market power analyses and many of those are unobservable, and concluded that data gathering and analysis burden imposed on sellers and the Commission if it were to adopt behavior modeling would be overly burdensome and impractical.[74]

Requests for Rehearing

54. NASUCA argues that the Commission must investigate whether sellers are able to raise electricity auction market rates to higher non-competitive levels, without collusion, through strategic bidding and gaming behavior in Commission-approved auction markets.[75] NASUCA states that experience, mathematical game theory analysis, judicial decisions, and laboratory simulations indicate that market participants who pass market power screens nonetheless may be able to elevate prices in Commission-approved auction markets through non-collusive strategic bidding, withholding, and gaming tactics.[76] NASUCA states that the Commission's market power screens are based on a static analysis of single sellers' market shares, stating that less than a 20 percent share of the relevant market capacity is sufficient and less than the supply margin on the annual peak day satisfies the ''supply margin assessment.'' NASUCA concludes that neither of these tools addresses the problem identified in the research that sellers in these specialized markets repeatedly communicate through their bidding behavior.[77]

55. NASUCA states that, to its knowledge, the Commission has never publicly discussed mathematical game theory analysis in depth in its orders, has not investigated the problem, and has held no technical conference or workshop to invite researchers to present their findings regarding gameability of the wholesale electricity markets.[78] NASUCA argues that strategic market behavior analysis is needed to assess whether current market designs allow participants, without overt collusion, to elevate market prices to unreasonable and non-competitive levels. The purpose of such analysis would be to take corrective action to prevent gaming behavior, by revising market designs or rules. NASUCA asserts that the Commission misunderstood NASUCA's request in finding that consideration and analysis of such behavior would be burdensome.[79]

56. NASUCA argues that the ''primary purpose'' of the FPA and the Commission is protection of utility consumers. NASUCA states that, in order to achieve confidence that rates set in Commission-sanctioned markets are reasonable, the Commission must investigate strategic bidding and market gaming by market participants.[80] NASUCA therefore requests that, at a minimum, the Commission commence a proceeding to investigate this and begin it by inviting researchers who have identified strategic auction market gaming as a problem in auction markets of the type used for the sale of electricity to present their research at a public technical conference.

57. APPA/TAPS argue that, in addition to the existing indicative screens, the Commission should require that the market share screen be submitted using only firm transmission capacity.[81] In this regard, APPA/TAPS state that applicants should be required to ''submit a 'firm transmission Market Share Screen' where the SIL [simultaneous transmission import limit] study reflects only firm transmission capacity.''[82] According to APPA/TAPS, running the market share screen using only firm transmission in the SIL study would provide evidence about who could realistically compete to sell long-term, firm products. Further, APPA/TAPS argue that the pivotal supplier screen is not well adapted to examining market conditions for long-term products, and that the firm transmission market share screen could be performed to provide better insight into the market for long-term products. APPA/TAPS assert that to understand what long-term generation capacity may be available and backed by firm transmission service, the market share screen should be run using an SIL study of firm transmission capacity only, preferably using available transfer capability (ATC) for the upcoming annual period, but at a minimum, run without capacity benefit margin (CBM) modeled as available, even on a non-firm basis.[83] APPA/TAPS also argue that the Commission should require sellers to calculate the simultaneous available import capability of their systems using the firm ATC values that transmission customers are given, and use those results to prepare one of the iterations of the market share screen.[84]

Commission Determination

58. We have considered the strategic bidding literature and various theoretical models which demonstrate that market participants who pass market power screens nonetheless may be able to elevate prices in Commission-approved auction markets through ''non-collusive strategic bidding, withholding, and gaming tactics.'' However, the Commission does not think it is necessary to investigate the possibility of whether sellers or market participants are able to engage in strategic bidding, withholding and gaming tactics to elevate prices in auction markets in order to determine whether to grant market-based rate authority. First, these theoretical or gaming models require consideration of numerous assumptions and hypothetical future behavior that may quickly become invalid because of the

[72] *Id.* P 67.

[73] *Id.* P 122.

[74] *Id.* P 124.

[75] NASUCA Rehearing Request at 5.

[76] *Id.* at 2.

[77] *Id.* at 6.

[78] *Id.* at 7 (citing Order No. 697 at P 121, 124).

[79] *Id.* at 7 (citing Order No. 697 at P 124).

[80] *Id.* (citing *Electrical Dist. No. 1* v. *FERC*, 774 F.2d 490, 492–93 (D.C. Cir. 1984)).

[81] APPA/TAPS Rehearing Request at 13.

[82] *Id.*

[83] *Id.* at 16.

[84] *Id.* at 17.

changing behavior of market participants, changes in the market or changes in other factors, e.g., supply or demand. Accordingly, the Commission is concerned that they would not be reliable tools in helping assess whether a seller has market power. Second, the type of behavior described by NASUCA may be prohibited by the Commission's Anti-Manipulation Rule at section 1c.2 of the Commission's regulations.[85] Violations of the Anti-Manipulation Rule include behavior constituting a fraud that had the purpose of impairing, obstructing, or defeating a well-functioning market.[86] The Commission's Office of Enforcement monitors activity in the electric markets and conducts investigations to determine whether market participants are violating the Anti-Manipulation Rule. To the extent that NASUCA or any other entity has specific allegations of market manipulation, that entity should contact the Commission's Enforcement Hotline or the Division of Investigations of the Office of Enforcement. Finally, as the Commission stated in Order No. 697, for practical considerations the data gathering and analysis burden imposed on sellers and the Commission to consider all the hypothetical types of behavior would be overly burdensome and impractical.[87]

59. With regard to APPA/TAPS' argument that the existing indicative screens should be altered so that sellers are required to ''submit a 'firm transmission Market Share Screen' where the SIL study reflects only firm transmission capacity'' in order to examine market conditions for long-term products, we reiterate that the indicative screens are intended to identify sellers that raise no horizontal market power concerns in short-term markets, and we decline to allow different product analyses for short-term or long-term power. We address the issue of the analysis of the competitiveness of long-term markets in the section of this order addressing mitigation. Thus, we reject APPA/TAPS' argument that sellers should be required to submit a firm transmission market share screen where the SIL study reflects only firm transmission capacity.

5. Native Load Deduction

Final Rule

60. In Order No. 697, the Commission modified the native load proxy for the market share screen from the minimum peak day in the season to the average peak native load, averaged across all days in the season, making the native load proxy for the market share indicative screen consistent with the native load proxy under the pivotal supplier indicative screen. The Commission found that using the existing native load proxy did not provide an accurate picture of the conditions throughout the season. The Commission explained that a native load proxy based on the average of peak load conditions is more representative, and thus more accurate, than a proxy based on extreme (minimum) peak load conditions, and further, that basing the native load proxy on the average of the peaks is more accurate by eliminating sellers without market power while focusing on ones that may have market power.

61. In addition, the Commission clarified that native load can only include load attributable to native load customers based on the definition of native load in section 33.3(d)(4)(i) of the Commission's regulations and gave sellers the option of using seasonal capacity instead of nameplate capacity.

Requests for Rehearing

62. TDU Systems assert on rehearing that the Commission's failure to explain how its modification of the native load proxy in the wholesale market share screen is rationally related to the objective of accurately detecting the market power of electric utilities in their home control areas is arbitrary and capricious.[88]

63. TDU Systems argue that the Commission should maintain the existing native load proxy for use in the wholesale market share screen [89] because the Commission does not provide a reasoned analysis and supporting evidence for increasing the native load proxy for the market share indicative screen from the minimum daily native load peak demand for the season to the average daily native load peak demand for the season.[90]

64. TDU Systems point out the Commission's explanation that the virtue of having the two indicative screens is that they each measure different market conditions,[91] and assert that, to achieve that purpose, they should use different proxies for native load obligations. TDU Systems conclude that the Commission should revise the market share screen to use the minimum native load during the season as the proxy.[92]

Commission Determination

65. In response to TDU Systems' assertion that changing the native load proxy is arbitrary and capricious and may not accurately detect the market power of electric utilities in their home balancing authority areas, we acknowledge that increasing the native load proxy may have the effect of reducing the market share for traditional utilities and could result in fewer failures of the market share screen.[93] However, as we explained in Order No. 697, the native load proxy adopted in Order No. 697 more accurately describes the conditions faced by sellers across seasons rather than simply at the most extreme peak load conditions.[94] For instance, using the minimum peak day in the native load proxy only measures sellers' available capacity on a single day, and does not reflect the more general conditions faced by sellers throughout the season. Because changing the native load deduction will lead to a more accurate measure of uncommitted capacity for load-serving entities, there will be a more accurate measure of the conditions faced by competing suppliers. Thus, the native load proxy is more accurate in detecting the market power of electric utilities in their home balancing authority areas.

66. We reject TDU Systems' argument that because the pivotal supplier and market share screens measure different market conditions they should therefore use different native load proxies. We disagree and find that is not appropriate to use different native load proxies for the different screens. Although the screens themselves use inherently different methodologies, the native load does not vary depending on which

[85] *Prohibition of Energy Market Manipulation*, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202 (2006), *reh'g denied*, 114 FERC ¶ 61,300 (2006).

[86] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50–53.

[87] Order No. 697 at P 124.

[88] TDU Systems Rehearing Request at 3 (citing *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42–43 (1983); *Pac. Gas & Elec. Co.* v. *FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004)).

[89] *Id.* at 7.

[90] *Id.* at 8, 18.

[91] April 14 Order, 107 FERC ¶ 61,018 at P 90 (2004).

[92] TDU Systems Rehearing Request at 20.

[93] We note that use of the average daily native load peak demand for the season is also applicable to first-tier competitors. Thus, while a traditional utility applicant will have a lower amount of uncommitted capacity than it would have had using a native load proxy based on the minimum daily native load peak demand for the season, so too will traditional utility sellers in first-tier markets. Accordingly, although the traditional utility applicant's uncommitted capacity is reduced, so too is the relative size of the market considering imports from first-tier markets. All else being equal, the market shares of the traditional utility applicant may not change much if at all.

[94] 94 Order No. 697 at P 137.

screen is used. Accordingly, we find that use of the average peak native load as the native load proxy for both screens provides an accurate picture of the conditions throughout the season.

67. We also clarify the definition of native load as it is used in the DPT analysis. With regard to the statement in the Final Rule that under the DPT, a seller ''will be considered pivotal if the sum of the competing suppliers' economic capacity is less than the load level (plus a reserve requirement that is no higher than State and Regional Reliability Council operating requirements for reliability) for the relevant period'' [95] we clarify that the analysis should also be performed using available economic capacity to account for sellers' and competing suppliers' native load commitments. We further clarify that native load in the relevant market (sellers' and competing suppliers') should be subtracted from the total load in each season/load period, and that the native load subtracted should be the average of the hourly native load for each season load condition.[96]

6. Relevant Geographic Market

Final Rule

68. In Order No. 697, the Commission adopted its existing approach with respect to the default relevant geographic market, with some modifications. The Commission announced that it would continue to use a seller's balancing authority area [97] or the RTO/ISO market,[98] as applicable, as the default relevant geographic market, explaining that the use of defined default geographic markets provides the industry with as much certainty as possible while also providing parties the right to challenge the default geographic market definition and submit pertinent evidence.[99]

69. With respect to traditional (non-RTO/ISO) markets, the Commission adopted a rebuttable presumption that the seller's default relevant geographic market under both indicative screens would be the balancing authority area where the seller is physically located, and each of its neighboring first-tier balancing authority areas.[100]

70. With respect to RTO/ISO markets, the Commission stated that sellers located in and members of the RTO/ISO may consider the geographic region under the control of the RTO/ISO as the default relevant geographic market for purposes of completing their horizontal analyses, unless the Commission has already found the existence of a submarket. Where the Commission makes a specific finding that there is a submarket within an RTO/ISO, that submarket becomes the default relevant geographic market for sellers located within the submarket for purposes of the market power analysis (both indicative screens and DPT). In the Final Rule, the Commission concluded that sellers located in these RTO/ISO submarkets should not use the entire RTO/ISO footprints as their relevant geographic markets. The Commission explained that this policy is consistent with how it has treated such submarkets in the context of mergers; the Final Rule cited several cases to support this proposition, including *Exelon Corp.*,[101] where the Commission found that PJM-East and Northern PSEG are sub-markets within PJM Interconnection (PJM).

71. The Commission stated that it would continue to allow sellers and intervenors to present evidence on a case-by-case basis to show that some other geographic market should be considered as the relevant market in a particular case. To the extent that the Commission finds that a submarket exists within an RTO/ISO, intervenors or sellers can provide evidence to the contrary; thus, a submarket, like the other default geographic markets, is a rebuttable default geographic market.[102] The Commission explained that it will also consider arguments that a seller operates in an RTO/ISO submarket even if the Commission has not previously found that a submarket exists. Likewise, sellers and intervenors also may present evidence that the relevant market is broader than a particular balancing authority area or RTO/ISO footprint or submarket.

72. The Commission stated that sellers may incorporate the mitigation they are subject to in RTO/ISO markets or submarkets with Commission-approved market monitoring and mitigation as part of their market power analysis.[103] By way of example, if a market power analysis indicates that a seller may have market power, the seller may point to the RTO/ISO mitigation rules as evidence that its market power has been adequately mitigated. The same is true for submarkets; for instance, New York City will be treated as a separate default market for market-based rate study purposes, and its existing In-City mitigation will be used to assess whether any concerns over market power are already mitigated.[104]

Requests for Rehearing

73. TDU Systems and NRECA object to the Commission's determination to use a balancing authority area or RTO/ISO region as a default relevant geographic market; they believe that a seller should always have the burden of defining the appropriate geographic market or submarket and that the Commission cannot lawfully place the burden on customers or intervenors to show that the ''default'' market is *not* the relevant geographic market.[105] Thus, NRECA argues that the Commission's determination to use the applicant public utility's balancing authority area or the RTO/ISO region as the default relevant geographic market is arbitrary, capricious, contrary to law, in excess of statutory authority, and not supported by substantial evidence.[106] Further, according to NRECA, the Final Rule did not adequately respond to NRECA's argument that default geographic markets should not be used because the Commission cannot place the burden on intervenors to demonstrate that the default market is not the relevant geographic market, and failed to satisfactorily explain the Commission's action '' 'including a rational connection between the facts found and the choice made.' '' [107]

74. TDU Systems state that, although the Commission has attempted to create a ''balanced approach,'' it is arbitrary and capricious to grant market-based rate authority based on the inaccurate assumption that in most cases, the Commission will rely on RTO/ISO regions as default geographic markets. TDU Systems cite *Keystone* for the proposition that evidentiary presumptions are only permissible in the presence of a connection between

[95] *Id.* P 108.

[96] *See id.* P 150 (citing 18 CFR 33.3(d)(4)(i)).

[97] Previously, the Commission had used the term ''control area,'' but in the Final Rule it replaced that term with ''balancing authority area'' with regard to relevant geographic markets.

[98] An RTO/ISO must have a sufficient market structure and a single energy market with Commission-approved market monitoring and mitigation.

[99] Order No. 697 at P 235.

[100] *Id.* P 231–32.

[101] 112 FERC ¶ 61,011, *reh'g denied*, 113 FERC ¶ 61,299 (2005) (*Exelon*). The Commission noted that Exelon later terminated the merger. Order No. 697 at P 236 and n.220.

[102] *Id.* P 238.

[103] *Id.* P 241.

[104] *Id.* P 242.

[105] TDU Systems Rehearing Request at 15; NRECA Rehearing Request at 18.

[106] NRECA Rehearing Request at 2–3 (citing *Secretary of Labor* v. *Keystone Coal Mining Corp.*, 151 F.3d 1096, 1100 (D.C. Cir. 1998) (*Keystone*); 5 U.S.C. 556(d); 5 U.S.C. 706(2)(A), (C), (E); 16 U.S.C. 824d(e); 16 U.S.C. 825l(b); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12265 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 901–1094 (2007), *order on reh'g and clarification*, Order No. 890–A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007)).

[107] *Id.* at 20 (quoting *Pac. Gas & Elec. Co.* v. *FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004)).

proven and inferred facts, and asserts that, ''[e]ven with the submarkets the Commission identifies in the Final Rule (at P 246), the exceptions to the rule are still far too numerous to declare that the proposal can pass the 'so probable that it is sensible' test.'' [108] It argues that public utility sellers should have an affirmative obligation, meeting the strict standard for burden shifting, to identify the relevant geographic market and justify the market used in their horizontal market power analyses. Using the wrong default geographic markets prevents the Commission from accurately assessing the public utility's market power and thus contravenes the statutory prerequisites.

75. NRECA and TDU Systems claim that the use of RTO/ISO regions and balancing authority areas as default relevant markets in many cases will not produce valid screen results because they do not take into account well-known binding transmission constraints and load pockets, such as those the Commission has found in the New York Independent System Operator (NYISO) and the ISO New England (ISO–NE) submarkets.[109] They assert that the Commission should eliminate the use of the seller's balancing authority area or RTO/ISO region as the relevant market and instead require an applicant to identify the relevant geographic market based on actual data including grid topology and existing transmission constraints.[110]

76. In contrast to the arguments raised on rehearing by NRECA and TDU Systems, PSEG and Reliant find fault with the Commission's ruling that the larger RTO/ISO region will not be used as the default geographic market for market-based rate sellers located in RTO/ISO areas where the Commission has found submarkets to exist. PSEG claims that the ruling departs from many years of Commission policy utilizing the RTO/ISO as the default relevant geographic market and is inconsistent with the Commission's confidence in the impact of RTO/ISO market monitoring and mitigation.[111] PSEG asserts that this major change in policy is not supported by substantial evidence, is not a product of reasoned decision making,[112] and claims that ''it is difficult to discern the legal or factual basis for the change.'' [113] Regarding the Commission's explanation that the consideration of submarkets is consistent with the Commission's merger analysis, PSEG states that ''simply because the Commission needed to examine submarket impacts in the context of an individual merger proceeding does not make that submarket appropriate as a default geographic market to be applied going forward on a generic basis for all sellers in that submarket.'' [114] PSEG argues that the focus of the market power analysis is substantively different in the two types of proceedings, and that the public was not on notice that the Commission might rely on findings from a merger proceeding to create a generic rule applicable to all parties located in the same area, thus constituting ''retroactive rulemaking.'' Moreover, PSEG contends that by basing a generic determination of submarkets on prior merger filings rather than after a systematic review of market power in a region, the Commission adopts a policy that discriminates against some market participants because a market-based rate seller can be located in an RTO/ISO sub-region that has greater instances of transmission constraints than any of the submarkets specifically identified in Order No. 697, but will still be able to proceed with a market-based rate application using the RTO/ISO as the default relevant geographic market.[115] PSEG asserts that a fairer approach would be to review potential submarkets comprehensively as part of the regional review process that will be conducted according to the schedule provided in Appendix D of the Final Rule.[116]

77. Reliant states that the record does not support the use of submarkets in indicative screens, noting that one commenter advocated use of a submarket when applying the DPT but that no commenters suggested that the indicative screens should be performed utilizing a submarket. Reliant argues that when a submarket is used within an RTO/ISO in indicative screens, the applicable default market used will be smaller than the full market within which a seller participates. Reliant claims that this is inconsistent with the design and intent of the indicative screens because identification of a submarket is unpredictable, and because a submarket identified in another potentially unrelated proceeding may be used.[117]

78. PSEG argues further that the Commission ignored record evidence proving the lack of technical and policy merit in creating submarkets when performing market power analyses submitted by the three RTO/ISOs that commented on the issue; and it claims that California ISO (CAISO), ISO–NE, and NYISO agree that there is no technical and structural need for the examination of RTO/ISO submarkets.[118] According to PSEG, the Commission's failure to meaningfully consider that evidence and to respond to it was arbitrary and capricious and not reasoned decisionmaking.[119]

79. PSEG contends that submarkets are inappropriate as default relevant geographic markets because they are largely a product of transmission constraints that periodically create short-term price differences between neighboring geographic areas. Such differences, it states, are not static and can be altered over the long term by transmission reinforcements, new generation entry, and changes in load.[120] It concludes that the unpredictable nature of those forces makes submarkets unreliable for assessing market power, and believes that the Commission should have retained the RTO/ISO as the default relevant geographic market so long as the RTO/ISO has market monitoring and

[108] TDU Systems Rehearing Request at 15.

[109] NRECA Rehearing Request at 19 (''Given that the Commission was able to find submarkets in relatively compact and contiguous regions such as [NYISO] and [ISO–NE], then the notion of using far-flung RTO/ISO regions such as the Midwest ISO and SPP as default markets is untenable''); TDU Systems Rehearing Request at 15.

[110] NRECA Rehearing Request at 20; TDU Systems Rehearing Request at 16.

[111] PSEG Rehearing Request at 2–3 (*quoting* Order No. 697 at P 290 (''We believe that a single market with Commission-approved market monitoring and mitigation and transparent prices provides added protection against a seller's ability to exercise market power * * *'')).

[112] *Id.* at 6 (citing *Moraine Pipeline Co.* v. *FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) (reasoned decision making requires that the Commission must not just acknowledge arguments made, but must ''respond to [such] arguments and * * * articulate its decision based on evidence in the record''); *Motor Vehicles Mfrs. Ass'n.* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 48, 57 (1983); *Williams Natural Gas Co.* v. *FERC*, 90 F.3d 531, 533 (D.C. Cir. 1996) (To be upheld, the Commission's order must be ''supported by substantial evidence and reached by reasoned decision-making—that is, a process demonstrating the connection between the facts found and the choice made.'')).

[113] *Id.* PSEG also cites *Missouri Public Service Commission* v. *FERC*, 234 F.3d 36, 40 (D.C. Cir. 2000) (when ''the Commission balances competing interests in arriving at its decision, it must explain on the record the policies which guide it.'').

[114] *Id.* at 6–7. *See also* Reliant Rehearing Request at 5–6, warning that sellers may have no choice but to intervene and potentially litigate in additional proceedings where the Commission may possibly make a finding that identifies a new submarket.

[115] *Id.* at 8.

[116] *Id.* at 9.

[117] Reliant Rehearing Request at 5–6.

[118] PSEG Rehearing Request at 4–6 (citing NYISO NOPR comments at 3–4; ISO–NE NOPR comments at 4 and 6; and CAISO NOPR comments at 13).

[119] *Id.* at 6 (citing *Moraine Pipeline Co.* v. *FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) (holding that the Commission must not just acknowledge arguments made but must respond to such arguments)).

[120] Reliant Rehearing Request at 7–8; PSEG Rehearing Request at 9–10. Reliant limits its objections to the use of submarkets in indicative screens.

mitigation programs in place in conjunction with a regional transmission expansion planning program.

80. With specific reference to the Commission's generic finding of submarkets in Eastern PJM and Northern PSEG, PSEG alleges that the Commission erred in relying on a prior ruling in the Exelon-PSEG merger proceeding,[121] which merger was subsequently terminated. According to PSEG, the Commission cannot rely on the Exelon-PSEG merger proceeding because that analysis was dependent on the assumption that Exelon and PSEG would merge; the termination of the merger changed key assumptions that were material to the market power analysis examining what changes to competitive conditions would occur as a consequence of the merger.

Commission Determination

81. We affirm our decision to use a balancing authority area or RTO/ISO region as a default relevant geographic market. In Order No. 697, the Commission fully explained the basis for using default geographic markets. The Commission explained that the use of defined default geographic markets provides sellers and intervenors a measure of certainty regarding the relevant market while also providing parties the right to challenge the default geographic market definition and submit pertinent evidence of an alternative geographic market based on actual data.

82. As discussed more fully below, we reject NRECA's and TDU Systems' argument that the Commission's determination to use the applicant public utility's balancing authority area or the RTO/ISO region as the default relevant geographic market is arbitrary, capricious, contrary to law, in excess of statutory authority, and not supported by substantial evidence. In Order No. 697 the Commission carefully considered and balanced various arguments on both sides of the issue concerning whether it is appropriate to use default geographic markets for purposes of the horizontal analysis.

83. Our use of the applicant public utility's balancing authority area or the RTO/ISO region as the default relevant geographic market is supported by the evidence. In particular, with regard to traditional (non-RTO/ISO) markets, the Commission adopted as the default geographic market first the balancing authority area where the seller is physically located and, second, the markets directly interconnected to the seller's balancing authority area (first-tier balancing authority area markets). Our decision to use the balancing authority area or the RTO/ISO region as the default geographic market closely tracks our guidance provided in Order No. 697 on what constitutes a market.[122] Our experience has indicated that typically there are frequently recurring physical impediments to trade between balancing authority areas that would prevent competing supplies from first-tier markets from reaching wholesale customers.[123] Thus, our decision to consider balancing authority areas as the default geographic market is neither arbitrary nor capricious but, rather, firmly embedded in the characteristics of our jurisdictional markets.

84. In addition, with regard to public policy considerations and regulatory certainty, the Commission explained in Order No. 697 that using balancing authority areas allows the Commission and the public to rely on publicly available data provided for balancing authority areas that are relevant to the market-based rate analysis.[124] Further, it is the interconnection and coordination between balancing authority areas that provides a foundation for the Commission to analyze transmission limitations and other transfers of energy and provides reasonable measures of the relevant geographic market under typical circumstances.[125]

85. With regard to RTO/ISO markets, the Commission's approach has been well considered and consistent with our approach described above regarding traditional markets. After weighing all the facts, including our experience regulating these markets, the Commission concluded that the geographic region under the control of the RTO/ISO is the appropriate market absent evidence to the contrary. Thus, as a starting point and consistent with our guidance on what constitutes a market, the Commission has made a finding that the geographic region under the control of the RTO/ISO is appropriate for use as the default geographic market. In addition, where the Commission has made a specific finding that there is a submarket within an RTO/ISO, the Commission explained that the submarket should be considered as the default relevant geographic market. Thus, our decision to consider the geographic region under the control of the RTO/ISO as the default geographic market, unless the Commission makes a specific finding of the existence of a submarket, is neither arbitrary nor capricious, but similarly embedded in the characteristics of our jurisdictional markets.

86. With regard to TDU Systems' and NRECA's assertion that a seller should always have the burden of defining the appropriate geographic market or submarket and that the Commission cannot lawfully place the burden on customers or intervenors to show that the ''default'' market is not the relevant geographic market, we disagree. As stated above, after careful consideration and based on the facts before us, the Commission has made findings regarding these geographic markets. We reject TDU Systems' and NRECA's argument that under *Keystone*, the Commission may not grant market-based rate authority based on the assumption that, in most cases, the Commission will rely on RTO/ISO regions as default geographic markets because such a presumption shifts the burden of establishing the relevant geographic market from the seller to intervenors. In *Keystone*, the court found that an evidentiary presumption is only permissible if there is ''a sound and rational connection between the proved and inferred facts.'' [126] Contrary to TDU Systems' and NRECA's argument that there is no evidence to support use of RTO/ISO regions as default geographic markets, and, as explained in the Final Rule, the RTO/ISO regions have historically been used as default geographic markets.[127] As

[121] PSEG Rehearing Request at 10, referring to *Exelon Corp.*, 112 FERC ¶ 61,011, *order on reh'g*, 113 FERC ¶ 61,299 (2005).

[122] Order No. 697 at P 231–232.

[123] *Id.* P 268.

[124] *Id.* P 233.

[125] *Id.* P 251. Similar to a control area, a balancing authority area is physically defined with metered boundaries that we refer to as the balancing authority area. Every generator, transmission facility, and end-use customer must be in a balancing authority area. The responsibilities of a balancing authority include the following: (1) *Match*, at all times, the power output of the generators within the balancing authority area and capacity and energy purchased from or sold to entities outside the balancing authority area, with the load within the balancing authority area in compliance with the Reliability Standards; (2) maintain scheduled interchange and control the impact of interchange ramping rates with other balancing authority areas, in compliance with Reliability Standards; (3) have available sufficient generating capacity, and Demand Side Management to maintain Contingency Reserves in compliance with Reliability Standards; and (4) have available sufficient generating capacity, Demand Side Management, and frequency response to maintain Regulating Reserves and Operating Reserves in compliance with Reliability Standards. *Id.* (citing Approved Reliability Standards. *http://www.ferc.gov/industries/electric/indus-act/reliability/standards.asp*).

[126] *Keystone*, 151 F.3d 1096 at 1100.

[127] *See* April 14 Order at P 41, 187 (stating that when performing the generation market power analysis, applicants located in RTOs/ISOs with sufficient market structure may consider the geographic region under the control of the RTO/ISO

Continued

explained in the Final Rule and prior orders, we have used RTO/ISO regions as the default market for many reasons, including the central commitment and dispatch in most RTOs/ISOs, the elimination of trade barriers within those regions (e.g., pancaked rates), common market mitigation and other factors.[128] On rehearing, TDU Systems and NRECA have presented no empirical evidence demonstrating that RTO/ISO regions should not be used as default geographic markets, or that the use of RTO/ISO regions as default geographic markets is inadequate or insufficient for the typical situation.

87. We agree with NRECA and TDU Systems that we should take into account binding transmission constraints and load pockets in both RTO/ISO regions and balancing authority areas and Order 697 does so. Based on our findings on binding transmission constraints, the Commission has identified six submarkets in NYISO, PJM, and ISO–NE, as described in Order No. 697.[129] Where the Commission has made a specific finding that there is a submarket within an RTO/ISO or within any other market, the market-based rate analysis (both the indicative screens and the DPT) should consider that submarket as the default relevant geographic market.[130] We note that NRECA and TDU Systems' argument that the use of RTO/ISO regions and balancing authority areas as the default relevant market in many cases will not produce valid screen results because this use does not take into account ''well-known binding transmission constraints and load pockets'' is overly simplistic. The Commission has provided in Order No. 697[131] guidance as to the record information needed to make a determination that an alternative geographic market is appropriate (e.g., expanded market, submarket). The Commission will, and has,[132] carefully considered record evidence regarding geographic markets. In particular, ''well-known'' is an arbitrary term and does not meet the type of evidence needed for the Commission to base a determination. Accordingly, we will continue to use a seller's balancing authority area or the RTO/ISO market, as applicable, as the default relevant geographic market, unless the Commission makes a specific finding of the existence of a submarket.

88. We disagree with PSEG's statement that, ''simply because the Commission needed to examine submarket impacts in the context of an individual merger proceeding does not make that submarket appropriate as a default geographic market to be applied going forward on a generic basis for all sellers in that submarket.'' As discussed above, our determination of what constitutes a geographic market is not dependent upon whether the type of proposal before us is in the context of a market-based rate or merger proceeding. Rather, we base our determination on facts relating to a particular region and the guidelines we have provided regarding what constitutes a geographic market. Whether in a merger proceeding, RTO proceeding, or market-based rate proceeding the fundamental characteristics of a market does not change nor should we ignore our findings because administratively they were made in a different proceeding.

89. With regard to PSEG's argument that the public was not on notice that the Commission might rely on findings from a merger proceeding that could apply in subsequent market-based rate proceedings, we reiterate that, to the extent that the Commission finds that a submarket exists within an RTO/ISO, intervenors or sellers can provide evidence to the contrary (*i.e.*, the submarket, like our other default geographic markets, is rebuttable).[133] Moreover, in the NOPR in this proceeding, the Commission explained that its experience with corporate mergers and acquisitions indicates that the RTO/ISOs that the Commission has identified as meeting the criteria for being considered a single market for purposes of performing the generation market power screens have, at times, been divided into smaller submarkets for study purposes because frequently binding transmission constraints prevent some potential suppliers from selling into the destination market. Therefore, the Commission sought comment on its approach under the market-based rate program of considering the entire geographic region under control of the RTO/ISO, with a sufficient market structure and a single energy market, as the default relevant market. Further, the NOPR asked whether the Commission should continue its approach of considering the entire geographic region as the default market for purposes of the indicative screens but consider RTO/ISO submarkets for purposes of the DPT.[134] Thus, contrary to PSEG's argument, since the issuance of the NOPR in May 2006, the public has been on notice that the Commission might rely on findings from a merger proceeding that could apply in determining RTO/ISO submarkets that may be used in market-based rate proceedings.

90. However, we will grant PSEG's request for rehearing regarding the Commission's determination in the Final Rule that because the Commission made a prior finding in the Exelon-PSEG merger proceeding that Northern PSEG is a separate market in PJM, sellers in PJM should use that submarket as the default geographic market for their market-based rate analysis. After the parties in that case terminated the merger, the U.S. Court of Appeals for the D.C. Circuit vacated the Commission's orders on procedural grounds. In light of the ultimate disposition of Exelon/PSEG merger proceeding, on reconsideration, we conclude that we erred in relying on a prior finding of submarkets that was made in that proceeding.[135]

91. With regard to PJM East, however, we note that in proceedings other than the Exelon/PSEG merger, the

as the relevant default geographic region for purposes of completing their analyses, and comparing the practice to the Commission's earlier approach under the hub and spoke analysis).

[128] *See, e.g.*, April 14 Order at P 187–191; July 8 Order at P 177; *Mystic I, LLC*, 111 FERC ¶ 61,378, at P 14–19 (2005) (rejecting challenge to the use of ISO–NE market as the relevant geographic market on the basis that local market power mitigation is in place: ''[W]ithout specific evidence to the contrary, we are satisfied that ISO–NE has Commission-approved tariff provisions in place to address instances where transmission constraints would otherwise allow generators to exercise local market power and that these rules and procedures will apply in the NEMA/Boston zone within ISO–NE.''); *Wisconsin Electric Power Co.*, 110 FERC ¶ 61,340, at P 19–20, *reh'g denied*, 111 FERC ¶ 61,361, at P 13–15 (2005) (rejecting challenge to use of Midwest ISO market as the relevant geographic market on basis that local market power mitigation measures exist: ''The tighter thresholds in NCAs such as WUMS in the Midwest ISO, and the resulting tighter mitigation of bids, are local market power mitigation measures'' and should adequately address specific concerns regarding the possibility that Wisconsin Electric can exercise market power in the WUMS region). *Accord AEP Power Marketing, Inc.*, 109 FERC ¶ 61,276 (2004), *reh'g denied*, 112 FERC ¶ 61,320, at P 23–25 (2005), *aff'd*, *Industrial Energy Users-Ohio* v. *FERC*, No. 05–1435 (D.C. Cir. Feb. 16, 2007) (use of PJM footprint as relevant geographic market; noting existence of Commission-approved market monitoring and mitigation). *See also Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,157, at P 463 (2004) (noting that the Midwest ISO-wide market will not be considered as the default geographic market until such time as the Midwest ISO becomes a single market and performs functions such as single central commitment and dispatch with Commission-approved market monitoring and mitigation).

[129] *Id.* P 236.

[130] *Id.*

[131] *Id.* P 267–278.

[132] *See Pinnacle West Capital Corp.*, 122 FERC ¶ 61,035 (2008).

[133] Order No. 697 at P 238.

[134] NOPR at P 61; Order No. 697 at P 215.

[135] *Exelon Corp.*, 112 FERC ¶ 61,011, *reh'g denied*, 113 FERC ¶ 61,299 (2005), *vacated*, *PPL Electric Utilities Corp.* v. *FERC, No. 06–1009 (D.C. Cir. Dec. 21, 2006).*

Commission also treated PJM-East as a market within PJM.[136] Accordingly, we reaffirm our finding in the Final Rule that because the Commission already has found that PJM-East constitutes a separate market in PJM, sellers located in PJM should use PJM-East as the default geographic market.

92. We reject PSEG's argument that the Commission's policy discriminates against some market participants. In particular, PSEG contends that a market-based rate seller can be located in an RTO/ISO sub-region that has greater instances of transmission constraints than any of the submarkets specified in the Final Rule, but will be able to proceed with a market-based rate application using the RTO/ISO as the default relevant market. As the Commission has stated, default geographic markets are adequate and sufficient for the typical situation, and by defining default geographic markets, we provide the industry as much certainty as possible while also providing affected parties the right to challenge the default geographic market definition and provide evidence in that regard.[137] Thus, in the example posited by PSEG, if there is evidence that indicates high instances of transmission constraints within an RTO that has not been previously found to constitute a submarket, intervenors have the opportunity to present that evidence to the Commission. Accordingly, because all market participants have the opportunity to challenge the default geographic market definition, this policy does not discriminate against some market participants. Rather, the Commission's policy in this regard recognizes the findings the Commission has already made and Order No. 697 provides guidance to parties that wish to challenge the default geographic markets.

93. With regard to PSEG's claims that the Commission failed to consider evidence submitted by CAISO, ISO-NE, and NYISO that there is no technical and structural need for the examination of RTO/ISO submarkets, we find that where the Commission has made a specific finding that there is a submarket within an RTO/ISO, the market-based rate analysis should reflect the facts and consider that submarket as the default relevant geographic market. To do otherwise would be inconsistent with our findings of a submarket in the first instance. In particular, the Commission has consistently stated that the Commission-approved market monitoring and mitigation provides added protection against a seller's ability to exercise market power, but cannot replace the generation market power analysis.[138] While we consider carefully comments by interveners, this Commission will also consider all the facts before us before making a finding.

94. In addition, while PSEG is correct that transmission constraints can be temporary, as noted above, all of the submarkets that the Commission has identified result from frequently binding transmission constraints during historical seasonal peaks examined; these particular constraints have not tended to be temporary in nature. Evidence with respect to whether a transmission constraint is temporary or is frequently binding will be considered in determining whether a submarket exists. To the extent that some existing constraints may be alleviated by construction of new transmission facilities, parties may bring these situations to our attention for further consideration.

95. Without a correctly defined submarket, sellers with market power in the RTO/ISO market may not be identified, and their market power mitigated in both the real-time and day-ahead markets. While we acknowledge PSEG's claim that the Commission's determination on RTO/ISO submarkets departs from Commission policy utilizing the RTO/ISO as the default relevant geographic market, we disagree with PSEG's claim that this is inconsistent with Commission confidence in the impact of RTO/ISO market monitoring and mitigation. The purpose of this rulemaking proceeding has been to consider and evaluate the Commission's current market-based rate policy and to make adjustments to this approach, as warranted. Thus, we have carefully considered the facts before us, including our historical approach, and found it reasonable that where the Commission has made a specific finding that there is a submarket within an RTO/ISO, the market-based rate analysis should reflect those facts and consider that submarket as the default relevant geographic market because to do otherwise would be inconsistent with our findings of a submarket in the first instance. In addition, the Commission has been in the process of developing and improving policies that best protect customers and promote market competition in a manner that accounts for the changing nature of developing electricity markets. We will not depart from this basic approach.

96. Moreover, PSEG overstates the difference between our prior policy and the policy adopted in Order No. 697. Prior to Order No. 697, the Commission did not identify submarkets within an RTO/ISO as default geographic markets, but one of the principal reasons for this policy was the ability to rely on Commission-approved mitigation in submarkets within RTOs/ISOs to mitigate any localized market power. Although Order No. 697 changed our approach to geographic market definition as it relates to submarkets, applicants may propose to continue to rely on Commission-approved mitigation in these submarkets as adequate to address any market concerns.

RTO/ISO Exemption

Final Rule

97. Prior to the April 14 Order, the Commission exempted sellers located in markets with Commission-approved market monitoring and mitigation from providing generation market power analyses stating that such sellers will be governed by the specific thresholds and mitigation provisions approved for the particular markets.[139] In the April 14 Order, the Commission determined that it would no longer exempt these sellers, on the basis that requiring sellers located in such markets to submit screen analyses provided an additional check on the potential for market power. In Order No. 697, the Commission declined the request by commenters that it reinstate the pre-April 14 Order exemption for sellers located in markets with Commission-approved market monitoring and mitigation from providing generation market power analyses. Instead, the Commission indicated that it would continue to require generation market power analyses from all sellers, including those in RTO/ISO markets. The Commission noted that while a single market with Commission-approved market monitoring and mitigation and transparent prices provides added protection against a seller's ability to exercise market power, it cannot replace the generation market power analysis.[140]

Requests for Rehearing

98. Reliant and PSEG argue that the Commission should reconsider its decision not to exempt sellers located in markets with Commission-approved

[136] *See,* e.g., *El Paso Energy Corporation,* 92 FERC ¶ 61,076 (2000), *Energy East Corporation,* 96 FERC ¶ 61,322 (2001), *Potomac Electric Power Company,* 96 FERC ¶ 61,323 (2001).

[137] *Id.* P 234.

[138] *See* Order No. 697 at P 290.

[139] *See AEP Power Marketing, Inc.,* 97 FERC ¶ 61,219 (2001).

[140] *Id.* P 290.

market monitoring and mitigation from submitting horizontal market power analyses. Reliant contends that the Commission did not explain what value a separate horizontal market power analysis would have, given that market monitoring by an independent market monitor consistent with Commission-approved rules and mitigation already identifies and mitigates market power. According to Reliant, market monitoring and mitigation provides a better picture of market power issues in RTO/ISO markets as compared to an individual seller's separate horizontal market power analysis which considers only market power at a fixed moment in time and also provides relief from the costs and burdens of producing a horizontal market power analysis.[141] In the alternative, if the Commission declines to reinstate the exemption, Reliant asserts that the Commission should clarify that Commission-approved mitigation rules presumptively mitigate a seller's market power and, in addition, the Commission should reconsider its decision to utilize previously identified RTO/ISO submarkets as the relevant geographic market for the indicative screens.

99. Reliant opines that a fundamental purpose and objective of market monitoring and mitigation is to detect actual, and the potential for, market power and to safeguard against it so as to ensure that no seller in the market can dominate the market, manipulate price, or otherwise act to stifle competition.[142] Accordingly, Reliant argues that a presumption that a seller's market power is adequately mitigated where Commission-approved market monitoring and mitigation rules are in effect is entirely appropriate, unless an intervenor can demonstrate why Commission-approved mitigation is insufficient in a particular case. According to Reliant, it is not appropriate to add the administrative burden of applying indicative screens if the Commission believes that market monitoring and mitigation is generally working.[143]

100. PSEG asserts that the Commission erred in failing to create a presumption that, even when the Commission has found submarkets to exist, no further analysis of the submarkets is required so long as a robust RTO/ISO market monitoring and mitigation scheme is in place. According to PSEG, a demonstration of a lack of market power in submarkets should only be required if there is reason to question whether such local market power is being addressed. RTO/ISO markets with Commission-approved market monitoring and mitigation programs in place should have a presumption that analysis of potential submarkets is not required. PSEG states that, to the extent other market participants believe otherwise, the burden should fall on them to show that an analysis of these submarkets was in fact required.[144]

101. To further support its position, PSEG notes that none of the three RTO/ISOs that filed comments on the NOPR saw any reason for applying mitigation outside of their existing programs. PSEG states that not accepting the efficacy of the RTO/ISO mitigation for purposes of the market-based rate assessment potentially undermines the authority and role of the RTO/ISOs.[145] PSEG suggests that the Advanced Notice of Proposed Rulemaking on organized markets would be a preferable way for the Commission to fine-tune the market monitoring and mitigation functions of such organizations on a prospective basis.[146]

102. Similarly, EEI requests that the Commission clarify that ''mitigated sellers in RTOs and ISOs may rely on Commission-approved market monitoring and mitigation for sales within the RTOs and ISOs without each seller having to demonstrate that such mitigation suffices in place of the default mitigation, unless a complainant demonstrates that the RTO and ISO monitoring and mitigation does not suffice as to a particular seller.'' [147] EEI is concerned that the Commission may unnecessarily burden sellers in the organized markets with having to demonstrate in each individual proceeding that the RTO/ISO mitigation measures suffice as an alternative to Order No. 697's default mitigation.

103. NRG believes that Order No. 697 creates ambiguity regarding how the Commission's default market power mitigation regime will interact with existing mitigation regimes that have been approved in organized RTO/ISO markets. NRG asserts that this ambiguity will discourage suppliers from building new generation in constrained areas. Thus, NRG seeks clarification, and, alternatively, rehearing, on two points. First, NRG asks that the Commission clarify that it will rebuttably presume that existing RTO/ISO regimes adequately mitigate market power for any sellers located in an RTO/ISO market that fail to pass indicative screens and a DPT analysis.[148] Second, in the event that a seller's market power is found not to be adequately mitigated, the Commission should clarify that the seller is allowed to propose its own tailored mitigation measures not necessarily based on embedded costs.[149]

104. On the first point, NRG explains that the Final Rule does not explicitly state that RTO/ISO monitoring and mitigation protocols will provide sufficient mitigation for any market power presumed if a seller fails the screens. NRG asserts that any generation market power a seller might possess has already been mitigated by those protocols. Thus, such sellers should not automatically be treated the same way as other mitigated sellers and subjected to default mitigation. However, NRG contends that the Final Rule leaves in question whether existing RTO/ISO mitigation regimes or the conflicting mitigation regime adopted in the Final Rule will govern in future seller-specific cases. NRG warns that this regulatory uncertainty will put new investment at risk, an outcome that should be avoided given the great efforts made to put in place alternatives to RMR contracts.[150] In addition, NRG claims that the ambiguity threatens to harm state-sanctioned competitive procurement programs, which typically require binding bids which cannot be conditioned on obtaining subsequent Commission approval.[151]

105. Regarding the second requested clarification, NRG notes that in several places in the Final Rule, the Commission states that it will retain existing cost-based default mitigation rates, but is unclear whether alternative, tailored mitigation rates must be cost-

[141] Reliant Rehearing Request at 2–3.

[142] *Id.* at 3 (citing *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators,* 111 FERC ¶ 61,267, at P 1 (2005) (market monitoring units perform an important role in enhancing competitiveness of RTO/ISO markets by, among other things, monitoring organized wholesale markets to identify potential anticompetitive behavior by market participants and providing comprehensive market analysis critical for informed policy decision making); April 14 Order, 107 FERC ¶ 61,018 at P 186, 190 (recognizing the pro-competitive benefits of RTO/ISO markets with market monitoring and mitigation)).

[143] *Id.* at 7.

[144] PSEG Rehearing Request at 11–12.

[145] *Id.*

[146] *Id.* at 12 (citing *Wholesale Competition in Regions with Organized Electric Markets, Advanced Notice of Proposed Rulemaking*, 72 FR 36276 (July 2, 2007), FERC Stats. & Regs. ¶ 32,617 (2007) (considering potential reforms to attributes of organized markets, including market monitoring).

[147] EEI Rehearing Request at 4–5.

[148] NRG Rehearing Request at 2.

[149] *Id.* at 3.

[150] *Id.* at 7 (citing *Devon Power LLC,* 115 FERC ¶ 61,340 (2006) (concerning the New England FCM settlement) and *PJM Interconnection, L.L.C.,* 117 FERC ¶ 61,331 (2006) (concerning the PJM RPM settlement)).

[151] *Id.* at 10–12.

based. NRG seeks clarification that the apparent limitation to cost-based alternatives was inadvertent. In addition, NRG states that ''the Commission should make clear that in reviewing alternative mitigation measures proposed by merchant generators in RTOs, it will consider whether the proposed measures will support and attract necessary investment on reasonable terms, and recover the supplier's cost of capital.'' [152]

106. NYISO states that it is unclear whether the Commission intended to adopt a default mitigation measure that would be inconsistent with its previously approved market design and mitigation measures for the NYISO's bid-based, uniform clearing-price auction markets.[153] In particular, NYISO argues that there is no evidentiary or policy basis that would justify the imposition of default mitigation in the form of a revenue cap, rather than a bid cap, in Commission-approved Locational Based Marginal Price markets like NYISO.[154]

107. NYISO argues that the imposition of default market power mitigation in the form of revenue caps rather than bid caps would be incompatible with the principles underlying uniform clearing price auctions. NYISO ensures that the market clearing price will either be a competitive price or it will be a mitigated price.[155] Thus, NYISO requests clarification that cost-based mitigation will limit a mitigated entity's permissible maximum bid, but not constrain the mitigated entity from receiving the market clearing price if it is not the marginal seller. Additionally, NYISO argues that if the Commission's default cost-based mitigation is interpreted to impose a revenue cap as well as a bid cap, the NYISO states that it will face significant administrative burdens if revenue caps are imposed rather than bid caps.[156]

108. APPA/TAPS, on the other hand, believe that the Commission should clarify that a seller relying on RTO/ISO mitigation to remedy its market power must demonstrate those measures' effectiveness. APPA/TAPS note that the Final Rule indicates sellers can incorporate existing RTO/ISO mitigation as part of their market power analyses, but asks for clarification that an applicant must make a specific showing that those mitigation measures in fact address the specific concerns in the market-based rate analysis. APPA/TAPS assert that the scope of RTO/ISO mitigation is much narrower than the default, cost-based mitigation the Commission prescribes; it notes that the Commission has stated that RTO/ISO mitigation and the market-based rate analysis are different and that'' 'pieces of one should not automatically be used as precedent for the other.' '' [157] APPA/TAPS state that RTO/ISO mitigation measures apply only to spot markets and day-ahead and/or real time, but do not apply to weekly, monthly or long-term transactions, including those negotiated on a bilateral basis, and that RTO/ISO mitigation is often far less protective than the Commission's cost-based default of incremental cost plus 10 percent. APPA/TAPS explain that they are not asking the Commission to make a generic finding that all RTO/ISO mitigation is insufficient to mitigate sellers' generation market power, but that they seek a ruling that the burden of proof that the RTO/ISO mitigation adequately addresses the seller's market power falls on the seller, rather than intervenors. If the Commission does not make that clarification, APPA/TAPS state that it should clarify that it will allow intervenors to challenge such claims and will give meaningful consideration to those challenges.[158]

Commission Determination

109. The Commission denies the requests of PSEG and Reliant to reconsider its decision to require sellers located in markets with Commission-approved market monitoring and mitigation to submit horizontal market power analyses. As we explained in Order No. 697, while the Commission-approved market monitoring and mitigation in RTO/ISO markets provides protection against a seller's ability to exercise market power, it cannot replace the horizontal market power analyses which provide the Commission and the industry with critical information regarding the potential market power of sellers in the market.

110. We conclude that the dual protections of individual market power analyses and mitigation rules of the RTO/ISOs provide the Commission with better ability to discern and protect against potential market power. While, as discussed below, mitigation rules for the individual RTO/ISOs in most cases should be sufficient to guard against the exercises of market power, we are not comfortable at this time with dispensing of the requirement for sellers in RTO/ISOs to provide us with horizontal market power analyses. Any administrative burden of submitting such analyses is outweighed by the additional information gleaned with respect to a specific seller's market power.

111. APPA/TAPS request that the Commission clarify on rehearing that a seller relying on RTO/ISO mitigation to mitigate its market power must demonstrate the effectiveness of those measures. A number of other petitioners, on the other hand, request that the Commission clarify that it will rebuttably presume that existing RTO/ISO regimes adequately mitigate market power for any sellers located in an RTO/ISO market that fail the indicative screens and the DPT analysis. In response to these requests, to the extent a seller seeking to obtain or retain market-based rate authority is relying on existing Commission-approved RTO/ISO market monitoring and mitigation, we adopt a rebuttable presumption that the existing mitigation is sufficient to address any market power concerns. However, intervenors may challenge the effectiveness of that mitigation. We agree with PSEG that the challenging party should have the burden of proof to demonstrate that existing RTO/ISO mitigation is not sufficient. Thus, because existing RTO/ISO mitigation has been found to be just and reasonable by the Commission in the context of a proceeding specific to a particular RTO/ISO and involving all of its stakeholders, we believe it appropriate and clarify herein that there is a rebuttable presumption that such RTO/ISO mitigation is adequate to mitigate market power in the RTO/ISO market, including Commission-approved mitigation applicable to RTO/ISO submarkets such as In-City New York. To the extent that a party wishes to challenge that presumption, the challenging party will have the burden of proof.

[152] *Id.* at 16.

[153] NYISO Rehearing Request at 4 (citing *New York Independent System Operator, Inc.,* 89 FERC ¶ 61,196 (1999), *order on compliance and reh'g,* 90 FERC ¶ 61,317, *clarified,* 91 FERC ¶ 61,154 (2000) (orders addressing the NYISO's proposed Market Mitigation Measures); *New York Independent System Operator, Inc., et al.*, 99 FERC ¶ 61,246 (2002) (order on the NYISO's comprehensive mitigation measures filing); *Midwest Independent Transmission System Operator, Inc.,* 108 FERC ¶ 61,163, at P 257, *order on reh'g,* 109 FERC ¶ 61,157 (2004) (''We find that the conduct and impact approach with its associated thresholds is an appropriate approach to mitigation in the Midwest ISO's market. The conduct and impact approach allows for a lighter handed approach to mitigation, in which the market is allowed to function as is, except when problems are detected.'')).

[154] *Id.* at 7.

[155] *Id.* at 2, 3, 5.

[156] *Id.* at 7.

[157] APPA/TAPS Rehearing Request at 24 (citing *Midwest Independent Transmission System Operator, Inc.,* 109 FERC ¶ 61,157, at P 242 (2004), *order on reh'g,* 111 FERC ¶ 61,043 (2005)).

[158] *Id.* at 26–27.

112. In response to EEI, to the extent the Commission has considered a challenge to existing mitigation and has found it to be adequate, any additional challenges must demonstrate a change in circumstances rather than just rearguing issues on which the Commission has already ruled.

113. A number of petitioners raise issues regarding the types of mitigation that the Commission might impose on mitigated sellers in RTOs/ISOs. NRG requests that, in the event a seller's market power is found not to be adequately mitigated, the Commission should clarify that the seller may propose tailored mitigation measures that are not necessarily based on embedded costs. NYISO states that it is unclear whether the Commission intended to adopt a default mitigation measure for any sellers located in an RTO/ISO market that fail to pass the indicative screens and the DPT analysis and seeks clarification that cost-based mitigation will only limit a mitigated entity's permissible maximum bid, but will not constrain the mitigated entity from receiving the market clearing price if it is not the marginal seller.

114. In response to these issues raised regarding the types of mitigation that the Commission might impose on mitigated sellers in RTO/ISO, the Commission will, depending on the nature of the evidence submitted by an intervenor, consider whether to institute a separate section 206 proceeding that would be open to all interested entities to investigate whether the existing RTO/ISO mitigation continues to be just and reasonable and, if not, how such mitigation should be revised. Any intervenor in such a section 206 proceeding may present evidence on the adequacy of the existing mitigation. If appropriate, the Commission will consider modifying that mitigation on an RTO/ISO-wide basis, rather than on a seller-specific basis, because RTO/ISO mitigation is designed to mitigate market power generally. In other words, if existing mitigation is found to be inadequate for a particular seller, then it is likely to be insufficient for all similarly situated sellers. We note that in reviewing alternative mitigation measures in the context of RTOs, the Commission will consider whether the proposed mitigation measures will adequately deter the exercise of market power, are consistent with the RTO/ISO's market design and will support and attract necessary investment on reasonable terms, and recover the suppliers' cost of capital. With regard to NYISO's request, as discussed above, with regard to sellers located in an RTO/ISO market that fail to pass the indicative screens and the DPT analysis, we will not impose default cost-based rate mitigation (which is used in non-RTO/ISO markets) in addition to RTO/ISO mitigation. Rather, we adopt a rebuttable presumption that the existing mitigation is sufficient to address any market power concerns.

115. With regard to APPA/TAPS' assertion that the scope of RTO/ISO mitigation is much narrower than the default cost-based rate mitigation and its argument that RTO/ISO mitigation provides less protection than the Commission's default mitigation of incremental cost plus 10 percent, we understand that RTO/ISO mitigation measures apply to day-ahead and/or real-time markets, and we reiterate that RTO/ISO mitigation is determined to be just and reasonable when it is approved by the Commission.[159] We review and approve mitigation rules in RTO/ISO markets on the basis of the specific facts and circumstances prevailing in such markets. Thus, customers and other interested parties are fully able, in the context of those proceedings, to comment on whether the mitigation rules are sufficiently strong to deter the exercise of market power. In addition, pursuant to the Final Rule, customers or other affected parties may argue, in the context of a specific market-based rate application or triennial review, that changed circumstances have rendered such mitigation no longer just, reasonable and not unduly discriminatory.

7. Use of Historical Data

Final Rule

116. The Commission held in the Final Rule that it would retain the ''snapshot in time'' approach for the indicative screens and the DPT, so that sellers will be required to use actual historical data for the previous calendar year in their market power analyses. After careful consideration of the comments received, the Commission chose not to adopt the NOPR proposal that the DPT analysis allow sellers and intervenors to account for changes in the market that are known and measurable at the time of filing. Instead, the Commission decided to retain its existing practice that sellers are required to use unadjusted historical data in the preparation of a DPT for a market-based rate analysis and clarified that it would require the use of the actual historical data for the previous calendar year.

117. The Commission distinguished this treatment from the approach in the Commission's merger analysis, which requires applicants and intervenors to account for changes in the market that are known and measurable at the time of filing. The Commission found that the purpose of using the DPT in market-based rate proceedings is different from that in a merger analysis. Whereas a merger analysis is forward-looking and it is difficult and costly to undo a merger, the market-based rate analysis is a ''snapshot in time'' approach where the Commission's focus is on whether the seller passes the indicative screens and the DPT based on unadjusted historical data. The Commission considered that its grant of market-based rate authority is conditioned on, among other things, the seller's obligation to inform the Commission of any change in status from the circumstances the Commission relied on in granting it market-based rate authority on an ongoing basis. Thus, the change in status reporting requirement allows the Commission to evaluate changes when they actually happen rather than relying on projections, making it unnecessary and redundant for the Commission to allow sellers to account for known and measurable changes in the DPT.

Requests for Rehearing

118. Montana Counsel argues that the Commission erred in refusing to allow adjustments to the DPT analysis to account for known and measurable future changes, such as contracts for the sale of capacity belonging to the seller that will expire during the term of its market-based rate authority. Montana Counsel asserts that by refusing to consider known and measurable changes, the Commission is intentionally allowing the DPT analysis to be conducted based on data and assumptions that are known not to be representative of reality.[160] Montana Counsel argues that it is inherently irrational, arbitrary, and capricious to allow companies whose generation market power is being analyzed to deduct the generation that is being tested from its supply on grounds that the generation is committed, as the Commission does when the contracts for power from that generation are expiring. Montana Counsel states that such a market power test is inherently flawed, and that this flawed test has concrete

[159] APPA/TAPS rely on *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,157, at P 242 (2004), *order on reh'g*, 111 FERC ¶ 61,043 (2005) (Midwest ISO) in arguing that RTO mitigation and the market-based rate analysis are different. We recognize that in Midwest ISO the Commission stated that its market-based rate analysis and mitigation in the Midwest ISO differ, and, as stated above, we reiterate that RTO mitigation is determined to be just and reasonable when it is approved by the Commission.

[160] Montana Counsel Rehearing Request at 7.

results, with negative impacts for consumers. Montana Counsel cites the Commission's May 2006 renewal of PPL Montana's market-based rate authority, in spite of the fact that the main utility in Montana, NorthWestern Energy, must buy from PPL Montana to serve its load, as an example of the negative impact that the market power test can have on consumers.[161]

119. Montana Counsel notes that the Final Rule distinguishes the market-based rate process from the Commission's merger analysis by saying that while mergers are difficult to undo, sellers with market-based rate authority must file change in status reports, allowing the Commission to evaluate changes when they happen. Montana Counsel argues that the Commission misses the point that if the change in status is caused by the expiration of a long-term contract for the sale of capacity, then by the time the change in status report is submitted, the seller may have already re-sold the capacity at a price reflecting the seller's underlying market power.[162]

120. Montana Counsel contends that the refusal to consider known and measurable changes is especially inappropriate in light of the fact that the Commission considers mitigation proposed by the seller.[163] Montana Counsel argues that, if the Commission will consider an applicant's '' 'propos[al] to transfer operational control of enough generation to a third party such that the applicant would satisfy [the Commission's] generation market power concerns' '' it should also consider whether an applicant's available capacity will increase during the market-based rate authorization period when contracts expire.[164]

121. NRECA similarly asserts that the Final Rule's failure to require applicants and allow intervenors to incorporate known and measurable changes to historical data in the indicative screens and the DPT in favor of a rigid ''snapshot'' analysis of historical data is arbitrary, capricious, contrary to law, and in excess of statutory authority.[165] NRECA argues that, if the Commission knows a change will take place, it would be arbitrary and capricious to grant market-based rate authority based on an assumption that the change will not take place.[166] Long-term contracts will expire on a known schedule, and the seller should not be allowed to assume that the capacity will remain committed to the buyer. According to NRECA, the Commission cannot, consistent with the FPA, ignore that pending change in circumstances. At a minimum, intervenors should have the opportunity to demonstrate the applicant's market power using data reflecting conditions after the contracts expire.[167]

122. NRECA states that the Commission's reliance on change in status filings as the means to report the expiration of a long-term contract is illogical and does not constitute reasoned decision making.[168] NRECA believes that absent a full market power analysis, it is impossible to adequately determine the effect of the change. NRECA submits that the triennial review will often come too late to protect customers.[169]

123. TDU Systems also argue that the Commission should require applicants' market-power analyses to reflect imminent changes which are known and measurable. They agree that historical data are more objective, but object that when they are not representative of market conditions that will exist during the three-year period of market-based rate authority, considering imminent changes is legally required.[170] For soon-to-expire long-term contracts, TDU Systems assert that the seller should not be permitted to assume that the capacity will remain committed to the buyer. The burden should not be shifted to the intervenors to propose the adjustment; rather, an applicant should be required to include it as part of the analysis.[171]

Commission Determination

124. We will continue the use of historical data for both the indicative screens and the DPT in market-based rate cases. We reject several petitioners' requests that the Commission require sellers to reflect imminent changes that are known and measurable, and therefore we deny rehearing on this issue. Regarding the Commission's reliance upon historical rather than projected data in analyzing market power studies, and its determination not to require sellers to reflect changes that are known and measurable, the Commission's practice for many years has been to use a ''snapshot in time approach'' based on the most recently available historical data at the time of filing, *i.e.*, to rely upon studies based on unadjusted historical data. We continue to allow intervenors to submit sensitivity analyses including projected data, but we reject the proposal that applicants include adjustments to historical data as part of the required analyses.

125. There are several reasons why this approach benefits customers and is otherwise in the public interest. First, as we explained in the Final Rule, historical data are more objective, readily available, and less subject to manipulation by applicants than future projections.[172] If the Commission were to allow applicants to submit studies based on their future projections or that reflect ''imminent changes,'' then sellers would be able to selectively ''cherry pick'' those changes that benefited the seller in obtaining market-based rate authorization while ignoring other equally likely future changes that would undermine the seller's chances for obtaining such authorization. Second, this approach benefits customers, state commissions and other affected intervenors because it requires the use of a consistent methodology that can be replicated by intervenors, rather than allowing sellers to submit customized market power studies that, due to myriad selective adjustments, are difficult to analyze and can hide the presence of market power. Third, it is important to note that the ''snapshot in time'' approach does not preclude the Commission from considering future changes in market conditions; rather, the Commission's grant of market-based rate authority is conditioned, among other things, on the seller's obligation to inform the Commission of any change in status from the circumstances the Commission relied upon in granting it market-based rate authority.

[161] *Id.* at 7–8 (citing *PPL Montana, LLC*, 115 FERC ¶ 61,204 (2006) (*PPL Montana*)). Montana Counsel includes its request for rehearing of *PPL Montana*, filed June 16, 2006 in Docket No. EL05–124, *et al.*, as Attachment A to its request for rehearing of Order No. 697. *Id.* at 8. The Montana Counsel's rehearing request in the PPL Montana proceeding asserts that the Commission's decision to renew the market-based rate authority of the PPL Montana Companies is error insofar as it is contrary to record evidence and the requirements of the Federal Power Act. The Commission denied Montana Counsel's request for rehearing in *PLL Montana LLC*, 120 FERC ¶ 61,096 (2007).

[162] *Id.* at 8–9.

[163] *Id.* at 9 (citing Order No. 697 at P 25, 63 n.46).

[164] *Id.*

[165] NRECA Rehearing Request at 3, 21 (citing *Cal. ex rel. Lockyer* v. *FERC*, 383 F.3d 1006 (9th Cir. 2004) (*Lockyer*); 5 U.S.C. 706(2)(A), (C)).

[166] *Id.* at 21 (citing *Mo. Pub. Serv. Comm'n* v. *FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003) (''Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decision making.'')).

[167] *Id.* at 22.

[168] *Id.* (citing Motor *Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Pac. Gas & Elec. Co.* v. *FERC*, 373 F.3d at 1319).

[169] *Id.* at 23 (citing *Lockyer*, 383 F.3d at 1014–15. *See also* TDU Systems Rehearing Request at 17.

[170] TDU Systems Rehearing Request at 7, 16 (citing *Mo. Pub. Serv. Comm'n* v. *FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003)).

[171] *Id.* at 17.

[172] Order No. 697 at P 299.

Accordingly, the market-based rate change in status reporting requirement allows the Commission to evaluate changes when they actually happen rather than relying on projections, making it unnecessary and redundant for the Commission to allow sellers to account for predicted changes in the DPT for market-based rate purposes.

126. Furthermore, accounting for ''imminent changes'' would be excessively burdensome with regard to expiring contracts because, for an accurate representation, a review of all expiring contracts and all contracts being negotiated inside all balancing authority areas in the relevant market and the seller's first-tier markets might be necessary. In addition, because the definition of ''imminent'' is a matter of interpretation and may change depending on the circumstances, it would produce regulatory uncertainty. Furthermore, future changes are not necessarily known and measurable. For example, a long-term contract may be expiring in a year, but until it expires, it often can be renewed for the same term(s). Therefore, an analysis that assumes that the long-term capacity of that contract was uncommitted would not always be correct, and therefore could overstate the seller's market power. When a change does occur the Commission has a method to evaluate the new situation through its requirement that sellers with market-based rate authority report changes in status and what effect, if any, such a change has on the grant of market-based rate authority. In any event, the Commission may require a full market power analysis at any time including as a result of a seller's change in status filing.

127. With regard to Montana Counsel's argument that the Commission should allow evidence of known and measurable changes rather than a strict adherence to historical data because if a change in status is caused by the expiration of a long-term contract for the sale of capacity, then by the time a seller's change in status filing is submitted, a seller may have already re-sold the capacity at a price reflecting the seller's underlying market power, we recognize that a seller's change in status filing would not be filed until after a long-term contract expires. However, there are countervailing reasons why the Commission believes that the use of historical data is appropriate and reaffirms its practice of using a ''snapshot in time approach.'' [173] As explained above, the Commission adopted this approach because historical data are more objective, readily available, and less subject to manipulation by sellers than future projections. We reiterate our concern that if the Commission were to require sellers to submit studies or change in status filings based on their future projections such as ''imminent changes,'' then sellers would be able to selectively ''cherry pick'' those changes that benefited the seller in retaining market-based rate authorization while ignoring other equally likely future changes that would undermine the seller's chances for obtaining or retaining market-based rate authorization. Similarly, intervenors could introduce only those imminent changes that result in higher market shares for a seller, thus artificially increasing the seller's market shares. In addition, requiring a seller to submit market power analyses that reflect future or ''imminent changes'' such as the future expiration of a long-term contract would be excessively burdensome because, for an accurate representation, review of all expiring contracts, and all contracts being negotiated inside the relevant market and the seller's home balancing authority area and its first-tier markets may be necessary. Otherwise, the seller's analysis might be incomplete and produce invalid results.

128. In addition, as explained above, future changes are not necessarily known and measurable since a long-term contract may be expiring in a year, but until it expires, it often can be renewed for the same term. Likewise, the Commission does not allow the seller to deduct capacity that it is currently negotiating to sell to third parties. To do so would allow the seller to argue that it has an ''imminent'' sale and the Commission should consider that capacity to be committed, resulting in lowering the seller's market shares. The danger in this circumstance is, like the expiring contract that could be extended, the sale may not actually occur and the seller could appear to have rebutted the presumption of market power when in fact, based on actual data, it has market power. Therefore, an analysis that assumes that the long-term capacity associated with an expiring contract is uncommitted would not always be correct. In addition, because the definition of ''imminent'' is a matter of interpretation and may change depending on the circumstances, it would produce regulatory uncertainty. For all of these reasons, our determination to rely on unadjusted historical data in the indicative screens and the DPT analysis is based on reasoned decision making.

129. Notwithstanding our policy requiring the use of historical data and a ''snapshot in time approach,'' in previous cases we nevertheless have addressed evidence presented by intervenors who sought to demonstrate that upon expiration of a long-term contract, a seller would be able to exercise market power.[174] Indeed, in cases where this issue has arisen, the Commission considered the impact of the expiring long-term contract on the seller's market power and concluded that even when adjustments were made to the available economic capacity measure to account for expiring contracts, the seller did not fail the indicative screens.[175]

130. While we continue to believe that the ''snapshot in time approach'' is appropriate, and will continue to require the use of historical data in the market power analysis, we nevertheless will consider, on a case-by-case basis, clear and compelling evidence presented by sellers and intervenors that seek to demonstrate that certain changes in the market, such as the expiration of a long-term contract, should be taken into account as part of the market power analysis in a particular case. Entities who seek to make this demonstration must present clear and compelling evidence in support of their argument. The Commission will address any countervailing factors that affect whether the seller will have the ability to exercise market power. Such countervailing factors could include, but are not limited to, any competitor that similarly has expiring long-term contracts and any other factors that might impact the market power analysis such as plant retirements, transmission access, and generation upgrades. In this regard, we remind entities that they must perform the market power screens as designed but may also provide a sensitivity analysis consistent with the discussion above.

131. We reject Montana Counsel's argument that, if the Commission considers a seller's proposal to transfer operational control of enough generation to a third party as part of its proposed mitigation so that the seller would satisfy the Commission's horizontal market power concerns, then the Commission should also consider imminent changes that would increase a

[173] For the reasons stated above, we also reject NRECA's argument that the triennial review and the change in status filing will come too late.

[174] *PPL Montana, LLC*, 115 FERC ¶ 61,204, at P 46 (2006), *order denying reh'g*, 120 FERC ¶ 61,096, at P 52–54 (2007); *Boralex Livermore Falls LP*, 122 FERC ¶ 61,033, at P 43 (2008).

[175] *Id.*

seller's market shares. Consideration of a proposal to transfer operational control of generation as part of a seller's proposed mitigation, unlike consideration of imminent changes as part of a seller's market power analysis, does not run the risk that a seller's market power may be hidden. Moreover, the act of transferring control may be enough to reduce the seller's market shares sufficiently to address market power concerns.

8. Transmission Imports

Final Rule

132. In Order No. 697, the Commission adopted the proposal to continue to measure limits on the amount of capacity that can be imported into a relevant market based on the results of a simultaneous transmission import limit (SIL) study.[176] Thus, a seller that owns transmission will be required to conduct simultaneous transmission import capability studies for its home balancing authority area and each of its directly-interconnected first-tier balancing authority areas consistent with the requirements set forth in the April 14 Order, as clarified in *Pinnacle West Capital Corp.*[177] The Commission commented that ''the SIL study is 'intended to provide a reasonable simulation of historical conditions' and is not 'a theoretical maximum import capability or best import case scenario.' '' [178] To determine the amount of transfer capability under the SIL study, the Commission stated that historical operating conditions and practices of the applicable transmission provider should be used and the analysis should reasonably reflect the transmission provider's OASIS operating practices. The Commission will also continue to allow sensitivity studies, but the sensitivity studies must be filed in addition to, not in lieu of, an SIL study.[179]

133. In response to a commenter's suggestion, the Commission stated it would allow the use of simultaneous total transfer capability (TTC) values, provided that these TTCs are the values that are used in operating the transmission system and posting availability on OASIS. In addition, the Commission stated that ''[s]ellers submitting simultaneous TTC values must provide evidence that these values account for simultaneity, account for all internal transmission limitations, account for all external transmission limitations existing in first-tier areas, account for all transmission reliability margins, and are used in operating the transmission system and posting availability on OASIS.''[180]

134. The Commission also agreed with several commenters that short-term firm reservations can be unpredictable, driven by real-time system conditions, and do not necessarily indicate that the associated transmission capacity is not available for competing supplies. Thus, the Commission concluded that, in calculating simultaneous transmission import limits, short-term reservations of 28 days or less in effect during the study periods need not be accounted for.[181]

135. The Commission stated that when actual OASIS practices conflict with the instructions in Appendix E of the April 14 Order, sellers should follow OASIS practices and must provide documentation of these practices.[182] The Commission further stated that the SIL is a benchmark of historical conditions, including peak load, and that if additional supplies could be imported above a market's study year peak load, the Commission will consider a sensitivity study that is submitted in addition to the required SIL study and supported by record evidence.[183]

136. The Commission adopted the requirement for use of the SIL study as a basis for transmission access for both the indicative screens and the DPT analysis.[184] The Commission stated that this requirement assures that all factors important in determining transmission access to the seller's market are taken into account.[185]

Requests for Rehearing

137. APPA/TAPS request clarification that the use of simultaneous TTC in the SIL study must properly account for all firm transmission reservations, transmission reliability margin, and capacity benefit margin.[186] First, APPA/TAPS assert that the Commission should state that clarifications provided in the Final Rule regarding firm reservations apply to any use of simultaneous TTC.[187] APPA/TAPS argue that transmission reserved by a third party should not be double-counted via pro-rata allocation of unused transmission capacity.[188] Second, APPA/TAPS read the Final Rule's mention of the need for simultaneous TTC to ''account for all transmission reliability margins'' [189] as affirming that TRM set-asides should not be included in transmission capability, consistent with the July 8 Order.[190] Third, APPA/TAPS ask the Commission to affirm that it will apply to simultaneous TTC its prior findings in the July 8 Order that CBM set-asides should be reflected in transmission capability as non-firm capability unless they are used for reliability during seasonal peaks, in which case they should not be treated as part of import capability.[191] APPA/TAPS point out that transmission providers do not make CBM available on a firm basis, and when it is used for reliability, it should not be deemed available at all to competing suppliers.[192]

138. Southern states that the Final Rule concludes that short-term reservations of more than 28 days are to be ''accounted for'' in the simultaneous study, which suggests that they should be deducted from the resulting import values. Southern submits that this treatment, if intended by the Commission, is inappropriate and thus should be reconsidered.[193] Instead, Southern argues that such reservations should be assigned to the entity ''that actually controls that generation capacity on a long-term basis and who, by virtue of that long-term control, might actually receive extra financial benefits if the exercise of market power in wholesale electricity markets caused wholesale prices to rise.'' [194] Southern argues that there is a conflict between the section on Control and Commitment, where the Commission concludes ''that the determination of control is appropriately based on a review of the totality of circumstances on a fact-specific basis,'' [195] and the SIL section that effectively assigns to applicants any short-term purchases that they make between one month and one year in duration so long as those purchases are covered with firm transmission reservations. [196]

139. Southern argues that the Commission's ''after-the-fact'' examination of short-term transmission reservations to see how many were more

[176] Order No. 697 at P 354.

[177] 110 FERC ¶ 61,127 (2005).

[178] Order No. 697 at P 354 (internal citations omitted).

[179] *Id.* P 355.

[180] *Id.* P 364.

[181] *Id.* P 368.

[182] *Id.* P 356.

[183] *Id.* P 361.

[184] *Id.* P 384.

[185] *Id.* P 386.

[186] APPA/TAPS Rehearing Request at 28–29 (citing Order No. 697 at P 364, 369; July 8 Order, 108 FERC ¶ 61,026).

[187] *Id.* at 28 (citing Order No. 697 at P 369).

[188] *Id.*

[189] Order No. 697 at P 364.

[190] APPA/TAPS Rehearing Request at 28–29.

[191] *Id.* at 29.

[192] *Id.*

[193] Southern Rehearing Request at 32.

[194] *Id.* at 32–33 (quoting Frame Affidavit at ¶ 20).

[195] Order No. 697 at P 174.

[196] Southern Rehearing Request, Frame Affidavit at ¶ 19.

than 28 days in duration and who made those reservations is arbitrary and capricious decision-making. Southern also contends that the Final Rule is ambiguous and internally inconsistent when the Commission states that short-term firm transmission reservations longer than 28 days must be accounted for in the simultaneous import capability study.[197] The Final Rule also provides that applicants do not need to account for short-term reservations of one month or less. However, according to Southern, the Commission then arbitrarily states that since the shortest month of the year has only 28 days (in non-leap years), reservations longer than 28 days must be accounted for in a simultaneous import capability study. Thus, the Final Rule is internally inconsistent with regard to what constitutes a month, and the Commission selected the length of a month that is contrary to the evidence and is thus arbitrary and capricious.[198] According to Southern, the Commission should grant rehearing and make clear that applicants are not required to address short-term firm transmission reservations in their simultaneous import capability studies.[199]

140. Southern states that although Appendix E required the use of generation scaling for calculating simultaneous import limit, the Final Rule allowed sellers to use another methodology when their actual OASIS practice conflicts with the instructions in Appendix E. Based on this clarification, Southern states that Southern is to use the same load shift methodology that it has historically used in calculating transfer capability for OASIS posting instead of the Appendix E mandated generation scaling. Southern states that in order to simulate a power transfer under the load shift methodology to determine simultaneous import capability into the Southern Companies' balancing authority area for seasonal peak conditions, load in the power flow case is initially set to the seasonal peak load level and served by a comparable amount of generation in accordance with the engineering principle that for each control area, generation must equal load plus losses plus interchange. According to Southern, in order to perform transfer analysis using the load shift methodology, load is uniformly increased in the Southern Companies balancing authority area, while load is simultaneously decreased in first-tier control areas to simulate the appropriate transfer of power between the areas. Southern states that this commonly used methodology has the effect of increasing loads during the transfer to levels that, by definition, exceed the seasonal peak load represented in the power flow case.[200] Southern requests clarification that, for purposes of performing transfer analysis under the load shift methodology, transmission providers may allow the load shift methodology to effect load levels that are higher than the historical peak load levels as the means of simulating transfers. Otherwise, Southern contends that the Final Rule will contain inherently conflicting provisions that, on the one hand direct the use of historical practices related to load shift transfer analyses, but at the same time forbid the methodological process whereby the load shift approach simulates the power flows under study.[201]

141. Southern agrees that a simultaneous import capability study conducted in accordance with Appendix E or historical practice for seasonal peaks may be appropriate for the indicative screens. Further, the same study approach used for the screens may be appropriate for use in a DPT. However, Southern states that there is no legal or policy justification for seeking a more complete analysis of competitive conditions on the generation side, while not permitting a comparable effort pertaining to transmission. Southern argues that to treat these issues differently could potentially lead to serious distortions of the competitive analysis. Therefore, Southern requests that the Commission clarify that the Final Rule does not foreclose an applicant from presenting a more thorough simultaneous import capability study based upon historical conditions as part of a DPT study. Of course, any such presentation would have to be considered on a case-specific basis and it would have to be consistent with the fundamental determinations of Appendix E related to simultaneous feasibility, historical practices and the like.[202]

Commission Determination

142. In response to the comments from APPA/TAPS, we clarify that the use of simultaneous TTC in the SIL study must properly account for all firm transmission reservations, transmission reliability margin, and capacity benefit margin. We agree that the clarifications provided in the Final Rule regarding firm reservations apply to all simultaneous transmission import limit studies, including those that use simultaneous TTC.[203] We agree that transmission reserved by a third party should not be double-counted, such as by assuming it is available a second time to other competitors via pro-rata allocation of unused transmission capacity.[204] We affirm that the Final Rule's mention of the need for simultaneous TTC to ''account for all transmission reliability margins'' [205] means that TRM set-asides should not be included in transmission capability, consistent with the July 8 Order.[206] We also affirm that our prior findings in the July 8 Order that capacity benefit margin set-asides should be reflected in transmission capability as non-firm capability unless they are used for reliability during seasonal peaks, in which case they should not be treated as part of import capability, also apply to studies that use simultaneous TTC.[207] APPA/TAPS has correctly interpreted the Final Rule in these respects.

143. Southern argues that there is inconsistency between the proposed treatment of short-term transmission reservations and the Control and Commitment section of Order No. 697. We disagree. In the Control and Commitment section, we refer to the control of a generation asset, including the ability to dispatch the generation asset. In the SIL section, we refer to a firm transmission reservation. These are different. The objective of the SIL calculation is to determine the amount of transmission imports available to bring in supply from first-tier areas.[208]

[197] *Id.* at 33.

[198] *Id.* at 34 (citing *General Chemical Corp.*, 817 F.2d at 857 (reversing an order that was internally inconsistent); *East Texas Electric Co-op* v. *FERC*, 218 F.3d 750, 754 (D.C. Cir. 2000); *McElroy Elecs. Corp.* v. *FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (finding that agency rule would be arbitrary and capricious if the explanation runs counter to the evidence before the agency); *FPL* v. *Lorion*, 470 U.S. 729, 744 (1985)).

[199] *Id.* at 34–35.

[200] *Id.* at 31.

[201] *Id.*

[202] *Id.* at 35.

[203] Order No. 697 at P 369.

[204] APPA/TAPS Rehearing Request at 28.

[205] Order No. 697 at P 364.

[206] APPA/TAPS Rehearing Request at 28–29.

[207] *Id.* at 29.

[208] The Commission recognizes that there may be confusion concerning the use of a pro-rata allocation of generation capacity when performing a simultaneous transmission import limit (SIL) study and the requirement that, when performing the indicative screens, ''[a]ny simultaneous transmission import capability should first be allocated to the seller's uncommitted remote generation. Any remaining simultaneous transmission import capability would then be allocated to any uncommitted competing supplies.'' *See* Order No. 697 at P 38.

With regard to performing a SIL study, pro-rata allocation is used to assign shares to two ''groups''

An applicant's firm transmission reservations represent transmission that is not available to competing suppliers. Applicants who believe that their firm transmission reservations should be treated as available to import competing supply may present evidence that the Commission will consider on a case-by-case basis.

144. In response to Southern's comments regarding short-term transmission reservations, we clarify that for the reasons described in Order No. 697,[209] applicants are not required to address short-term firm reservations in the market power screens. Currently, the Commission's EQR Data Dictionary defines monthly as more than 168 consecutive hours up to one month, and seasonal as greater than one month and less than 365 consecutive days.[210] Twenty-eight days fits within the definition of a month, and is a reasonable limit to separate short-term reservations from long-term reservations for purposes of the generation market power screens. Since the market power screens are conducted for four seasonal periods, and they are designed to model historical conditions during the four seasonal peak periods, the screens must account for transmission reservations typical for each season. It is not practical to require applicants to provide data on every transmission reservation, yet we cannot ignore the impact of transmission reservations on the potential for market power. Requiring applicants to account for reservations greater than one month in duration strikes a balance between allowing the screens to reasonably model historical conditions without requiring unreasonable amounts of information from applicants. Therefore, we will require applicants to allocate their seasonal and longer transmission reservations to themselves from the calculated SIL, where seasonal reservations are greater than one month and less than 365 consecutive days in duration, as defined in the Commission's EQR Data Dictionary.

145. We grant the clarification Southern seeks in part. We would allow sellers to use load shift methodology to calculate simultaneous import limit while scaling their load beyond the historical peak load, provided they submit adequate support and justification for the scaling factor used in their load shift methodology and how the resulting SIL number compares had the company used a generation shift methodology.

146. In response to Southern's request for clarification regarding whether applicants may present more thorough simultaneous import capability studies based upon historical conditions as part of a DPT study, we clarify that, as we stated in the Final Rule, applicants may submit additional sensitivity studies, including a more thorough import study as part of the DPT. We reaffirm, however, that any such sensitivity studies must be filed in addition to, and not in lieu of, an SIL study.[211]

9. Further Guidance Regarding Control and Commitment of Capacity

147. In Order No. 697, the Commission concluded that the determination of control is appropriately based on a review of the totality of circumstances on a fact-specific basis. We explained that no single factor or factors necessarily results in control. We further explained that the electric industry remains a dynamic, developing industry, and no bright-line standard will encompass all relevant factors and possibilities that may occur now or in the future. If a seller has control over certain capacity such that the seller can affect the ability of the capacity to reach the relevant market, then that capacity should be attributed to the seller when performing the generation market power screens.[212]

148. We determined that the circumstances or combination of circumstances that convey control vary depending on the attributes of the contract, the market and the market participants. Therefore, we concluded that it would be inappropriate to make a generic finding or generic presumption of control, but rather that it is appropriate to continue making our determinations of control on a fact-specific basis. We explained, however, that we continue our historical approach of relying on a set of principles or guidelines to determine what constitutes control. Thus, we stated that we continue to consider the totality of circumstances and attach the presumption of control when an entity can affect the ability of capacity to reach the market. We explained that our guiding principle is that *an entity controls the facilities when it controls the decision-making over sales of electric energy, including discretion as to how and when power generated by these facilities will be sold.*[213]

149. We declined to adopt commenters' suggestions that we require all relevant contracts to be filed for review and determination by the Commission as to which entity controls a particular asset (e.g., with an initial application, updated market power analysis, or change in status filing). While we noted that under section 205 of the FPA, the Commission may require any contracts that affect or relate to jurisdictional rates or services to be filed, we explained that the Commission uses a rule of reason with respect to the scope of contracts that must be filed and does not require as a matter of routine that all such contracts be submitted to the Commission for review. Our historical practice has been to place on the filing party the burden of determining which entity controls an asset. Therefore, we required a seller to make an affirmative statement as to whether a contractual arrangement transfers control and to identify the party or parties it believes control the generation facility, but explained that the Commission retains the right at the Commission's discretion to request the seller to submit a copy of the underlying agreement(s) and any relevant supporting documentation.

150. Given the increased level of investment in the electric utility industry as a result of the Energy Policy Act of 2005 (EPAct 2005)[214] and our implementing rules and regulations, we find it necessary to provide further guidance with respect to the representations that a seller should make regarding which entity controls a particular asset. An increasing number

of uncommitted generation capacity in the aggregated first-tier market. The seller must first calculate the sum of its owned and affiliated uncommitted generation capacity, then it must sum all other sellers' uncommitted generation capacity. The seller then divides these two numbers to compute a ratio of the seller's (and affiliated) uncommitted generation capacity to all other sellers' uncommitted generation which determines the ''share'' that each seller is allocated to import into the study area. In other words, when performing the SIL study, any uncommitted generation capacity in the aggregate first-tier market is allocated pro-rata for the purpose of determining the value of the SIL.

With regard to performing the indicative screen analyses, all of the seller's and its affiliated uncommitted generation capacity in first-tier markets (remote capacity) should be allocated to the seller's total uncommitted capacity in the relevant market (study area), up to the SIL limit. Any remaining simultaneous transmission import capability is then allocated to any uncommitted competing generation.

For example, if the SIL limit is 200 MW, the seller and its affiliates' uncommitted generation capacity in first-tier markets is 150 MW, and competing uncommitted generation capacity in first-tier markets is 350 MW, then to properly perform the indicative screens the seller's uncommitted generation capacity in the relevant market is increased by 150 MW and competing supply in the relevant market is increased by 50 MW.

[209] Order No. 697 at P 368.

[210] *Order Adopting Electric Quarterly Report Data Dictionary*, Order No. 2001–G, 72 FR 56735 (Oct. 4, 2007), 120 FERC ¶ 61,270, at P 35 (2007).

[211] *Id.* P 355.

[212] Order No. 697 at P 174.

[213] *Id.* P 175.

[214] Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005).

of investors are acquiring interests in assets that may be relevant to a seller's market-based rate authority. As we explained in Order No. 697, we will continue to place on the filing party the burden of determining which entity controls an asset. We will rely on the seller's representations regarding control, absent extenuating circumstances. Therefore, to provide further guidance to the industry, we reiterate that the seller, in advising the Commission of its determinations of control, should specifically state whether a contractual arrangement transfers control and should identify the party or parties it believes control(s) the generation facility. In doing so, the seller should make its representation in light of our discussion in Order No. 697 and cite to that order as the basis for which it has made its determination.

B. Vertical Market Power

1. OATT Violations and Market-Based Rate Revocation

Final Rule

151. In the Final Rule, the Commission stated it will revoke an entity's market-based rate authority in response to an OATT violation upon a finding of a nexus between the specific facts relating to the OATT violation and the entity's market-based rate authority, and reiterated that an OATT violation may subject the seller to other remedies the Commission may deem appropriate, such as disgorgement of profits or civil penalties.[215] The finding that an OATT adequately mitigates transmission market power rests on the assumption that individual entities comply with the OATT and that there may be OATT violations in circumstances that, after applying the factors in the Enforcement Policy Statement,[216] merit revocation or limitation of market-based rate authority. The Final Rule found, however, that it is inappropriate to revoke a seller's market-based rate authority for an OATT violation unless there is a nexus between the specific facts relating to the OATT violation and the seller's market-based rate authority. The Commission declined to adopt a rebuttable presumption that any OATT violation has the requisite nexus to support revocation of market-based rate authority, explaining that there is a wide range of types of OATT violations, including ones that may be inadvertent and others that are neither intended to affect, nor in fact affect, the market-based rate sales of the transmission provider or its affiliates.[217]

152. The Commission stated that determining what constitutes a sufficient factual nexus is best left to a case-by-case consideration, explaining that the wide range of positions among commenters on how to define a sufficient factual nexus itself suggested that this finding is best made after review of a specific factual situation. Some commenters had asserted that a finding of a ''material'' violation of the OATT would be sufficient. The Commission disagreed. While a seller's inconsequential OATT violation would not serve as a basis for revoking that entity's market-based rate authority, the Commission stated that revocation is warranted only when an OATT violation has occurred and the violation had a nexus to the market-based rate authority of the violator or its affiliates.[218] The Commission also clarified that it will allow intervenors on a case-by-case basis to file evidence if they believe they have been denied transmission access in violation of the OATT.[219]

153. The Commission emphasized in the Final Rule that it has discretion to fashion remedies for OATT violations that relate to the violator's market-based rate authority in instances in which the Commission does not find sufficient justification for revocation of that authority. For example, in appropriate circumstances, the Commission may modify or add additional conditions to the violator's market-based rate authority or impose other requirements to help ensure that the violator does not commit future, similar misconduct. The Commission also explained that it will consider whether to impose sanctions such as assessment of civil penalties for particularly serious OATT violations in addition to revocation of the violator's market-based rate authority.[220]

Requests for Rehearing

154. NRECA and TDU Systems argue that the Final Rule's determination that the Commission will not revoke the market-based rate authority of a public utility or its affiliates upon the utility's violation of its OATT unless there is a ''nexus'' between the ''specific facts'' of the violation and the violator's market-based rate authority is arbitrary, capricious, contrary to law, and in excess of statutory authority. NRECA also argues that the Final Rule does not provide clear guidance as to what would constitute a sufficient nexus.[221]

155. TDU Systems state that the Commission must clarify the circumstances in which it will find that there is a sufficient nexus between a transmission provider's OATT violations and the revocation of market-based rate authorization of the provider or its affiliates, and reconsider its decision to determine what constitutes a sufficient factual nexus on a case-by-case basis.[222] TDU Systems state that, apart from trivial violations, which could be screened out by the kind of materiality filter suggested by APPA/TAPS,[223] the Commission has not explained why material OATT violations should not create at least a presumption that market-based rate authorization is inappropriate.[224] TDU Systems state that, because having an OATT on file and being bound by its terms are necessary to mitigating the public utility's vertical market power, there is logical reason to be concerned that a violation may have undermined a premise for the authorization. TDU Systems therefore assert that an OATT violation should automatically trigger a Commission proceeding in which the violator has the burden of justifying its continued market-based rate authority.[225] Furthermore, TDU Systems state that shifting the burden to the transmission provider could encourage transmission providers to be in full compliance with coordinated and open regional planning.[226]

156. TDU Systems also argue that the Commission needs to address further the content of the ''nexus'' requirement. They contend that transmission-owning public utilities might read Order No. 697 to allow for revocation of their market-based rate authority only when it would be arbitrary and capricious for the Commission not to do so.[227] TDU Systems contend that the Commission has offered no clue to understanding why it may be relevant whether the alleged violator has committed an OATT violation in order to further a specific sale under its own market-based rate tariff or that of an affiliate. TDU Systems conclude that if such a connection is indeed critical, there would appear to be a substantial danger of deflecting attention from the characteristics of a transmission

[215] Order No. 697 at P 417.

[216] *Enforcement of Statutes, Orders, Rules and Regulations,* 113 FERC ¶ 61,068 (2005) (Enforcement Policy Statement).

[217] Order No. 697 at P 417.

[218] *Id.* P 418.

[219] *Id.* P 421.

[220] *Id.* P 419.

[221] NRECA Rehearing Request at 28 (citing Order No. 697 at P 418).

[222] TDU Systems Rehearing Request at 8, 20.

[223] *Id.* at 21 (citing APPA/TAPS Initial Comments at 81).

[224] *Id.* at 8, 21.

[225] *Id.* at 21.

[226] *Id.* at 8.

[227] *Id.* at 22.

provider's conduct, *i.e.*, whether it is anticompetitive or reflects the exercise of market power.[228]

157. These petitioners claim that the Commission's position appears to place the burden of proof on customers, competitors, or the Commission to demonstrate the nexus, rather than requiring the violator to demonstrate the lack of any such nexus.[229]

158. NRECA asserts that when a public utility violates its OATT, one of the preconditions to the grant of market-based rate authority is violated. It argues that, under the FPA, the seller, not customers, must bear the burden of proof that its continuing sales under its market-based rate tariff remain at just and reasonable levels.[230] NRECA therefore contends that there should be a presumption that there is a ''nexus'' between the OATT violation and the seller's market-based rate authority.[231] NRECA states that the burden, consistent with the FPA, should be on the seller to rebut this presumption; however, it suggests that the Commission could evaluate the seller's showing, and if the issue is in doubt, set the matter for investigation or hearing and order a temporary suspension of market-based rate authority until the matter is resolved.[232]

Commission Determination

159. The Commission denies rehearing of the decision to require a factual nexus between a substantial OATT violation and the entity's market-based rate authority to justify revocation of that authority. As the Commission explained in Order No. 697, the ''nexus condition'' is required in order to ensure that our actions are not arbitrary or capricious or based on an inadequate factual record. We disagree with NRECA and TDU Systems that any material OATT violation should necessarily justify revocation of the entity's market-based rate authority since the violation may have no relation to the market-based rate authority. In such circumstances, the Commission will consider such other remedies as may be appropriate. We also decline to provide specific examples of what would constitute a sufficient nexus between an entity's market-based rate authority and an OATT violation because the factual circumstances involved in a claimed violation will be unique to the company and, therefore, any list would be incomplete. This is especially true in light of continually developing markets. We continue to believe that the determination of what would be a sufficient factual nexus between an OATT violation and revocation of the violator's market-based rate authority is best left to case-by-case consideration.

160. With regard to the transmission provider's planning obligations in particular, violations of the planning-related requirements of the *pro forma* OATT may or may not have a sufficient factual nexus with the transmission provider's market-based rate authority. A case-by-case analysis will be necessary to determine if the violation justifies revocation of the transmission provider's market-based rate authority. We agree with TDU Systems that OATT violations by a transmission provider that may not be explicitly connected with its market-based rate authorization may nonetheless promote conditions in which the violator could gain an advantage in future transactions. However, we note that this is an example of why a case-by-case determination is needed so that the Commission can consider the violation, the seller's market-based rate authority, and market conditions in determining what remedy, if any, best suits the situation. Therefore, we will apply the mechanisms adopted in Order No. 890 to aid us in determining on a case-by-case basis if a particular violation puts that company at an advantage vis-á-vis its market-based rate authority.[233]

161. We disagree with TDU Systems and NRECA that the Commission inappropriately shifted the burden of proof regarding whether there is a nexus. We anticipate that the Commission's consideration of a seller's OATT violation and whether or not there is a nexus with its market-based rate authority would normally arise as part of a Commission-initiated enforcement proceeding. In enforcement proceedings, the Commission has considerable discretion in how to fashion an appropriate remedy and the burden of justifying any remedial actions taken against a violator, including revocation of market-based rate authority and determining what remedies are required to ensure that any future sales, market-based rate or otherwise, are at just and reasonable rates. Moreover, even if the issue arose in publicly noticed proceedings (such as a section 206 or 306 complaint), the Commission would exercise its remedial discretion based on the facts presented and accordingly bear the burden of justifying any remedy imposed on the transmission provider for a violation of its OATT. Whether or not a violation justifies revocation of the seller's market-based rate authority will depend on the facts and circumstances involved in each case; therefore, it would not be appropriate to adopt a presumption of that nexus, as requested by petitioners. The Commission will make a determination based on the facts of each particular case as to whether or not an OATT violation has a nexus to the seller's market-based rate authority. In sum, the Commission's action in Order No. 697 does not shift the burden of proving a nexus to customers and competitors.

162. Contrary to TDU Systems' assertion, Order No. 697 does not limit the Commission to revoking a seller's market-based rate authority only in circumstances where it would be arbitrary and capricious not to do so. If an OATT violation occurs, the Commission will investigate whether or not the facts surrounding the violation have a nexus to the seller's market-based rate authority. It would not be just and reasonable for the Commission to revoke a seller's market-based rate authority if in fact the violation had no bearing on the seller's market-based rate position. The way to make such a determination is based on an adequate factual record and that is what would be established in such a proceeding before making any determinations.

2. Treatment of FTRs

Final Rule

163. In the Final Rule, the Commission stated that provisions concerning the reassignment or sale of transmission capacity or firm transmission rights, congestion contracts, or fixed transmission rights (as a group, FTRs) are not required to be included in a seller's market-based rate tariff, nor is it appropriate to include transmission-related services in a seller's market-based rate tariff.[234] The Commission explained that Commission-approved market rules for RTO/ISOs address resales of FTRs and virtual trading to ensure that no market power is exercised in such trades. In addition, sellers engaging in these activities sign a participation agreement with RTO/ISOs which require them to abide by those market rules. Hence, the approval of the market rules in conjunction with approval of the generic participation agreement by the Commission constitutes authorization for public utilities to engage in the

[228] *Id.*

[229] NRECA Rehearing Request at 3, 27–29; TDU Systems Rehearing Request at 3–4, 20.

[230] NRECA Rehearing Request at 28 (citing *Lockyer,* 383 F.3d at 1014–15; 16 U.S.C. 824d(e)).

[231] *Id.* at 29.

[232] *Id.*

[233] *See* Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 1037.

[234] Order No. 697 at P 920.

resale of FTRs and virtual transactions, and no separate authorization is required under the FPA.

Requests for Rehearing

164. Morgan Stanley states that, when assessing whether a potential market-based rate seller has market power, the Commission has focused on ownership and control of physical transmission (except for that which is necessary to interconnect generation to the transmission grid).[235] Morgan Stanley requests that the Commission clarify whether a seller is required to include and report the acquisition of financial transmission rights when assessing whether it has vertical market power. Morgan Stanley states that the Commission declined to adopt such a requirement as part of Order No. 652 governing changes in status.[236] However, Morgan Stanley asserts that ''Commission staff and others have taken inconsistent positions on whether the failure to disclose the acquisition of financial transmission rights constitutes a violation of a seller's market-based rate tariff.''[237]

Commission Determination

165. The Commission clarifies herein that sellers are not required to report on financial transmission rights as part of the vertical market power assessment. Thus, failure to disclose the acquisition of financial transmission rights in an application for market-based rate authority, a three-year update or a change in status filing does not constitute a violation of a seller's market-based rate tariff. While ownership of financial transmission rights could affect a seller's incentive to exercise market power, we find that there are adequate mechanisms and protections in place to minimize a seller's ability to do so (e.g., market monitoring and mitigation in RTO/ISOs; the requirement that a seller must abide by its OATT and any violation thereof could constitute a violation of a seller's market-based rate tariff; the Commission's enforcement proceedings). Moreover, the Commission does not analyze *physical* rights that a seller has to transmission service when analyzing vertical market power, and the Commission will treat financial rights in an equal manner. Physical and financial rights to transmission service do not enable the customer to control transmission capacity in a way that withholds the capacity from the market. To the extent there is an issue with potential market manipulation by a seller, the Commission would address this through an Office of Enforcement proceeding.

3. Other Barriers to Entry

Final Rule

166. The Final Rule adopted the NOPR proposal to consider a seller's ability to erect other barriers to entry as part of the vertical market power analysis, but modified the requirements when addressing other barriers to entry. It also provided clarification regarding the information that a seller must provide with respect to other barriers to entry (including which inputs to electric power production the Commission will consider as other barriers to entry) and modified the proposed regulatory text in that regard.[238]

167. In the Final Rule, the Commission drew a distinction between two categories of inputs to electric power production: One consisting of natural gas supply, interstate natural gas transportation (which includes interstate natural gas storage), oil supply, and oil transportation; and another consisting of intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, sites for generation capacity development, and sources of coal supplies and the transportation of coal supplies such as barges and rail cars.[239]

168. With regard to the first category, the Commission removed the inputs from the vertical market power analysis. Thus, the Final Rule did not require a description of or affirmative statement with regard to ownership or control of, or affiliation with an entity that owns or controls, natural gas and oil supply, including interstate natural gas transportation and oil transportation.[240] The Commission explained that prices for wellhead sales of natural gas were decontrolled by Congress,[241] and that the Commission has granted other sellers blanket authority to make such sales at market rates. In the case of transportation of natural gas, the Commission noted that pipelines operate pursuant to the open and non-discriminatory requirements of Part 284 of the Commission's regulations;[242] these regulations mandate that all available pipeline capacity be posted on the pipelines' website, and that available capacity cannot be withheld from a shipper willing to pay the maximum approved tariff rate. The Commission noted that, to the extent intervenors are concerned about a seller's market power from ownership or control of interstate natural gas transportation, this would be actionable first in a complaint proceeding under section 5 of the Natural Gas Act before turning to market-based rate consequences, if any.[243]

169. Similarly, the Commission noted that oil pipelines are common carriers under the Interstate Commerce Act, specifically under section 1(4), that they are required to provide transportation service ''upon reasonable request therefore,'' and that Congress has not chosen to regulate sales of oil.[244]

170. With regard to the second category of inputs to electric power production, the Commission adopted a rebuttable presumption that sellers cannot erect barriers to entry with regard to the ownership or control of, or affiliation with any entity that owns or controls, those inputs.[245] The Commission noted that, to date, it has not found such ownership, control or affiliation to be a potential barrier to entry warranting further analysis in the context of market-based rate proceedings. However, unlike the first category of inputs, the Commission does not have sufficient evidence to remove these inputs from the analysis entirely. Accordingly, the Commission stated that it will rebuttably presume that ownership or control of, or affiliation with an entity that owns or controls, any of the second category of inputs does not allow a seller to raise entry barriers, but intervenors will be allowed to

[235] Morgan Stanley Rehearing Request at 1–2 (citing *Iowa Power Partners,* 81 FERC ¶ 61,058, at 61,281 (1997)).

[236] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority,* Order No. 652, 70 FR 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g,* 111 FERC ¶ 61,413 (2005).

[237] Morgan Stanley Rehearing Request at 2. (citing *Enron Power Marketing,* 119 FERC ¶ 63,013 (2007) (discussing Enron's use of FTRs to exercise market power and its failure to report its FTRs to the Commission)).

[238] Order No. 697 at P 440.

[239] *Id.* P 441.

[240] *Id.* P 442.

[241] *INGAA* v. *FERC,* 285 F.3d 18 (D.C. Cir. 2002); Natural Gas Decontrol Act of 1989, H.R. Rep. No. 101–29, 101st Cong., 1st Sess., at 6 (1989).

[242] Order No. 697 at P 443 (citing *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation*; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 FR 13267 (Apr. 16, 1992), FERC Stats. & Regs., Regulations Preambles January 1991–June 1996 ¶ 30,939 (Apr. 8, 1992); *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,091 (Feb. 9, 2000); *clarified,* Order No. 637–A, FERC Stats. & Regs., Regulations Preambles July 1996–December 2000) ¶ 31,099 (May 19, 2000); *reh'g denied,* Order No. 637–B, 92 FERC ¶ 61,062 (2000); *aff'd in part and remanded in part sub nom.*).

[243] Order No. 697 at P 445.

[244] *Id.* P 444 (quoting 49 App. U.S.C. 1(4)).

[245] *Id.* P 446. The Commission modified the definition of ''inputs to electric power production'' in 18 CFR 35.36(a)(4) to reflect this clarification.

demonstrate otherwise. The Final Rule noted that this rebuttable presumption only applies if the seller describes and attests to these inputs to electric power production in its market power analysis, as discussed below.[246]

171. The Commission required a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, any of the second category of inputs. The Final Rule required sellers to provide this description and to make an affirmative statement, with some modifications to the affirmative statement from what was proposed in the NOPR. Instead of requiring sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market, the Final Rule required sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market. The Final Rule clarified that the obligation in this regard applies both to the seller and its affiliates, but is limited to the geographic market(s) in which the seller is located.[247]

172. Therefore, the Final Rule modified the proposed regulations to require a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls these types of assets, to ensure that this information is included in the record of each market-based rate proceeding. In addition, the Commission required sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.[248]

173. The Commission also modified the change in status reporting requirement in § 35.42 of the Commission's regulations to be consistent with the other barriers to entry part of the vertical market power analysis as adopted in the Final Rule.

Requests for Rehearing

174. Southern notes that the Final Rule modified the change in status regulations adopted by the Commission in Order No. 652. Specifically, Southern states that the Commission modified the definition of inputs to electric power production to mean '' 'intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for new generation capacity development; sources of coal supplies and the transportation of coal supplies such as barges and railcars,' '' [249] and comments that under the change in status reporting regulations, sellers would be required to notify the Commission of any changes to such inputs. Southern requests clarification of what is meant by the phrase ''sources of coal supplies and the transportation of coal supplies such as barges and railcars'' in the context of the definition of ''inputs to electric power production.'' Because such inputs to electric power production are considered in the Commission's vertical market power analysis,[250] Southern believes that the Commission's intention is for this phrase to mean *physical* coal sources (*i.e.*, coal mines) and ownership or control over *who may access* transportation of coal via barges and railcar trains (e.g., control of a train system, a railcar manufacturing or supply company, or a barge production or supply company), rather than merely entering into a coal supply contract with a coal vendor. Southern argues that if a change in status filing were required every time a large utility entered into a coal purchase agreement, purchased or leased a single railcar or barge, or engaged in other such routine activities, which Southern asserts are a necessary and inherent part of keeping power plants operating so that they can reliably serve a utility's customers, the Commission could find itself inundated with submissions. Accordingly, Southern requests that the Commission clarify that the phrase ''inputs to electric power production'' is intended to encompass physical coal sources and ownership of control over who may access transportation of coal via barges and railcar trains.

175. APPA/TAPS request that the Commission clarify that intervenors may introduce evidence that control and/or ownership of interstate natural gas supply, transportation or storage, as well as oil supply and transportation, creates entry barriers.[251] APPA/TAPS request clarification that the Final Rule's stated case-by-case consideration of other entry barriers will include evidence that a seller's or its affiliate's ownership or control of the first category of entry barriers will be considered.[252] According to APPA/TAPS, if, as the Commission believes, markets in the first category are competitive, intervenors will rarely raise concerns about them in specific cases, which means there is no basis to reject this requested clarification on grounds that allowing intervenors to raise entry concerns will be unduly burdensome for applicants or the Commission. APPA/TAPS contend that if there are concerns about these entry barriers, the Commission provides no justification for requiring an intervenor to undertake the time and expense of a '' 'complaint proceeding under section 5 of the Natural Gas Act before turning to market-based rate consequences.' '' [253] Further, APPA/TAPS state that by allowing intervenor evidence regarding market issues surrounding the first category of inputs, the market-based rate program '' 'will allow unique or newly developed barriers to entry to be brought before the Commission.' '' [254]

Commission Determination

176. We agree with Southern that it was not the Commission's intent for the term ''inputs to electric power production'' to encompass every instance of a seller entering into a coal supply contract with a coal vendor in the ordinary course of business. The Commission clarifies that Order No. 697 encompasses *physical* coal sources and ownership of or control over *who may access* transportation of coal via barges and railcar trains. Thus, the Commission will revise its definition of ''inputs to electric power production'' in § 35.36(a)(4) as follows: ''intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for new generation capacity development; physical coal supply sources and ownership of or control over who may access transportation of coal supplies.''

177. The Commission denies APPA/TAPS' request that the Commission clarify that intervenors may introduce evidence that control and/or ownership of interstate natural gas supply, transportation or storage, as well as oil supply and transportation, create entry barriers. As explained above and in Order No. 697, prices for wellhead sales were decontrolled by Congress,[255] and the Commission has granted other sellers blanket authority to make such sales at market rates. In the case of transportation of natural gas, pipelines operate pursuant to the open and non-discriminatory requirements of Part 284 of the Commission's regulations; [256]

[246] *Id.* P 446.

[247] *Id.* P 447.

[248] *Id.* P 448.

[249] Southern Rehearing Request at 41 (citing Order No. 697 at P 1016).

[250] *Id.* at 41 (citing Order No. 697 at P 446).

[251] APPA/TAPS Rehearing Request at 29–30 (citing Order No. 697 at P 441–49; *United States* v. *Enova Corp.*, 107 F. Supp. 2d 10 (D.D.C. 2000)).

[252] *Id.* at 30.

[253] *Id.* (quoting Order No. 697 at P 445).

[254] *Id.* (quoting Order No. 697 at P 449).

[255] *INGAA* v. *FERC*, 285 F.3d 18 (D.C. Cir. 2002); Natural Gas Decontrol Act of 1989, H.R. Rep. No. 101–29, 101st Cong., 1st Sess., at 6 (1989).

[256] Order No. 697 at P 443 (*and cases cited therein*).

these regulations require that all available pipeline capacity be posted on the pipelines' Web site, and that available capacity cannot be withheld from a shipper willing to pay the maximum approved tariff rate. Similarly, the Final Rule noted that oil pipelines are common carriers under the Interstate Commerce Act, specifically under section 1(4), that they are required to provide transportation service ''upon reasonable request therefore,'' and that Congress has not chosen to regulate sales of oil.[257]

178. As stated in the Final Rule, to the extent intervenors are concerned about a seller's market power from ownership or control of interstate natural gas transportation, this would be actionable first in a complaint proceeding under section 5 of the Natural Gas Act before turning to any market-based rate consequences.

179. The Commission found in Order No. 697 and we reiterate here that there is no need to address these inputs to electric power production as potential barriers to entry in the context of the market-based rate program. In light of the precedent described above, we conclude that sellers cannot erect barriers to entry with regard to such inputs.

180. Regarding APPA/TAPS' assertion that the Commission provides no justification for requiring an intervenor to file a complaint proceeding under section 5 of the Natural Gas Act when a concern arises regarding interstate natural gas transportation, as explained in Order No. 697, natural gas pipelines operate pursuant to the open and non-discriminatory requirements of Part 284 of the Commission's regulations. On this basis, the appropriate forum for addressing a concern that may arise regarding interstate natural gas transportation would initially be a proceeding under the Natural Gas Act, not the FPA. Thus, a market-based rate proceeding would not be the proper forum for such a complaint. The place to challenge a particular seller's potential market power in interstate natural gas transportation markets is in a complaint proceeding under section 5 of the Natural Gas Act.

C. Affiliate Abuse

181. In Order No. 697, the Commission determined that affiliate abuse should no longer be considered a separate ''prong'' of the market-based rate analysis, and instead codified the affiliate requirements and restrictions as an explicit requirement in section 35.39 of the Commission's regulations. The affiliate requirements and restrictions must be satisfied on an ongoing basis as a condition of obtaining and retaining market-based rate authority.[258] The regulations expressly prohibit power sales between a franchised public utility with captive customers and any market-regulated power sales affiliate, without first receiving Commission authorization for the transaction under section 205 of the FPA. The regulations also include the requirements formerly known as the market-based rate ''code of conduct,'' as revised in Order No. 697.

1. General Affiliate Terms & Conditions

a. Affiliate Definition

182. As an initial matter, we clarify that the term ''affiliate'' for purposes of Order No. 697 and the affiliate restrictions adopted in § 35.39 of our regulations is defined as that term is used in the regulations adopted in the Affiliate Transactions Final Rule. In the Affiliate Transactions Final Rule, the Commission considered the use of the term affiliate in the context of the Affiliate Transactions NOPR, the Commission's Standards of Conduct for Transmission Providers, and other precedent.[259] The Commission also reviewed the affiliate definitions contained in both the Public Utility Holding Company Act of 1935 (PUHCA 1935) [260] and the Public Utility Holding Company Act of 2005 (PUHCA 2005) [261]. After taking into account these differing definitions of affiliate, and recognizing the need to provide greater clarity and consistency in our rules, the Commission explained that it believes it is important to try to adopt a more consistent definition in its various rules and also one that is sufficiently broad to allow us to adequately protect customers.[262] On this basis, the definition of affiliate as adopted in the Affiliate Transactions Final Rule explicitly incorporates the PUHCA 1935 definition of affiliate for EWGs (rather than incorporate it by reference as previously has been done).[263] The definition also adopts a parallel definition of affiliate for non-EWGs, but with adjustments to reflect the previously-used 10 percent voting interest threshold for non-EWGs and to eliminate certain language not applicable or necessary in the context of the FPA.

183. In light of the Commission's goal to have a more consistent definition of affiliate for purposes of both EWGs and non-EWGs to the extent possible, as well as to strengthen the Commission's ability to ensure that customers are protected, we clarify that, for purposes of Order No. 697, we will define ''affiliate'' as that term is used in the Affiliate Transactions Final Rule, codified in § 35.43(a)(1) of the Commission's regulations. Accordingly, as discussed herein, we will codify the definition of affiliate in our market-based rate regulations at § 35.36.

b. Definition of Market-Regulated Power Sales Affiliate

Final Rule

184. The Commission explained in Order No. 697 that the market-based rate affiliate restrictions codified in § 35.39 govern the relationship between a franchised public utility with captive customers and its market-regulated power sales affiliates.[264] The affiliate restrictions codified in the regulations include a provision expressly prohibiting power sales between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization.[265] The

[257] *Id.* P 444 (quoting 49 App. U.S.C. 1(4)).

[258] A seller seeking market-based rate authority must provide information regarding its affiliates and its corporate structure or upstream ownership. To the extent that a seller's owners are themselves owned by others, the seller seeking to obtain or retain market-based rate authority must identify those upstream owners. Sellers must trace upstream ownership until all upstream owners are identified. Sellers must also identify all affiliates. Finally, an entity seeking market-based rate authority must describe the business activities of its owners, stating whether they are in any way involved in the energy industry.

[259] *See,* e.g., *Morgan Stanley Capital Group, Inc.*, 72 FERC ¶ 61,082, at 61,436–37 (1995) (*Morgan Stanley*).

[260] 15 U.S.C. 79a *et seq.*

[261] EPAct 2005 at 1261 *et seq.*

[262] For example, we adopt this definition of affiliate for purposes of section 203 of the FPA in the Affiliate Transactions Final Rule.

[263] We note that in EPAct 2005 section 1277(b)(2), Congress enacted a conforming amendment which amended FPA section 214 to refer to the section 2(a) PUHCA 2005 definition of ''affiliate'' rather than the section 2(a) PUHCA 1935 definition of ''affiliate.'' Our Affiliate Transactions Final Rule did not recognize this conforming amendment. However, the conforming amendment is ambiguous. There is no section 2(a) in PUHCA 2005 and, inexplicably, the text of PUHCA 2005 retained only a portion of the full PUHCA 1935 definition of ''affiliate;'' although it retained the PUHCA 1935 threshold of five percent, it dropped much of the statutory text, thus leaving a potential gap in the scope of entities that could be considered affiliates. It is unclear whether this was a drafting oversight, but we do not believe Congress intended to preclude the Commission, in adopting regulations preventing cross-subsidization, undue preferences or the exercise of market power from using an ''affiliate'' definition that provides greater customer protection with respect to EWG transactions. Our Affiliate Transactions Final Rule and this rule thus use the 1935 statutory text framework for EWGs. We adopt the definition of affiliate promulgated in the Affiliate Transactions Final Rule with a modification to reflect the approach discussed herein.

[264] *Id.* at P 549.

[265] *Id.* at P 467.

Commission defined market-regulated power sales affiliate to mean ''any power seller affiliate other than a franchised public utility, including a power seller affiliate, whose power sales are regulated in whole or in part at market-based rates.'' [266]

Requests for Rehearing

185. Occidental states that, in its current form, Order No. 697 could be interpreted to permit franchised public utilities to require their captive customers to subsidize their market-based rate activities, so long as their regulated and market-based rate activities were combined in a single entity.[267] To prevent that result, Occidental requests that the Commission explicitly require that the functional attributes, rather than the arbitrary structure of a utility, be considered in determining compliance with the rule's affiliate abuse provisions.[268] Occidental states that the Commission should focus on potential market-based rate seller conduct rather than on artificial structural distinctions selected by the seller.[269]

186. Specifically, Occidental argues that, because Order No. 697 focuses solely on conduct between a utility and a legally separate affiliate, it would allow a utility to benefit its market-based rate activities at the expense of its captive regulated customers simply by collapsing its regulated and market-based rates sales activities into a single entity that, while not technically an affiliate of the utility, could attempt to engage in the abuses that Order No. 697 seeks to prevent.[270] Occidental asserts that the Commission can focus on potential market-based rate seller conduct, rather than on artificial structural distinctions selected by the seller, by clarifying that it will not focus solely on the narrow definitions of franchised public utility, captive customer, and market-regulated power sales affiliate, but instead will use a functional test that broadly applies the concept embodied in the rule to seller conduct.

187. Occidental states that the Commission should either clarify that the affiliate abuse requirements of the rule apply equally to market-regulated functions performed within a franchised public utility, or revise the definition of market-regulated power sales affiliate to achieve that same result.[271] In the alternative, Occidental states the Commission should grant rehearing and modify ''market-regulated power sales affiliate'' to ''market-regulated power sales function'' which would necessitate removing the provision stating that such an entity is not a franchised public utility.[272]

Commission Determination

188. We deny Occidental's request for rehearing and clarification. As we explained in Order No. 697, we ''are concerned that there exists the potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliates and its stockholders to the detriment of the captive customers.'' [273] Accordingly, we have adopted in our regulations affiliate restrictions intended to guard against such behavior.

189. If an entity decides to encompass its marketing function within the franchised public utility's corporate structure, then there is no longer any affiliate entity to trigger the concerns of affiliate abuse that the market-based rate affiliate restrictions are designed to address. For example, one of our primary concerns in adopting affiliate restrictions is to prevent a franchised utility from making below-market sales to its merchant affiliate and to prevent the merchant affiliate from making above-market sales to its franchised utility affiliate.

In particular, Occidental's argument rests on the premise that the franchised public utility that encompasses its marketing function within the franchised public utility corporate structure could benefit its market-based rate activities at the expense of its captive customers. Occidental appears to be suggesting that revenues from the franchised public utility's off-system sales at market-based rates would be funneled to the utility's shareholders rather than credited to the utility's customers. However, such a scenario is at odds with Commission precedent requiring that off-system sales be reflected through allocation or revenue credits in the rates of the utility's customers.[274]

190. Additionally, state commissions have oversight authority for franchised public utilities with captive customers that make retail sales. Therefore, the states should be able to ensure that a franchised public utility with captive customers does not attempt any ''internal'' cross-subsidization to the detriment of captive customers. Generally, states similarly require revenue crediting to the utility's retail customers.

191. Thus, we will deny Occidental's request for rehearing and clarification and retain the current requirements for the affiliate restrictions. We will also retain the current definition of market-regulated power sales affiliate under Order No. 697.

c. Definition of Captive Customers

Final Rule

192. As adopted in Order No. 697, 18 CFR 35.36(a)(6) defines captive customer as ''any wholesale or retail electric energy customers served under cost-based regulation.'' [275] The Commission clarified that the definition of captive customers did not include those customers who have retail choice, *i.e.*, the ability to select a retail supplier based on the rates, terms, and conditions of service offered. Rather, retail customers who have no ability to choose an electric energy supplier are considered captive because they must purchase from the local utility pursuant to cost-based rates set by a state or local regulatory authority; that is, they are served under cost-based regulation.

193. The Commission further explained in Order No. 697 that retail customers who choose to be served under cost-based rates, even though they have the ability to choose one retail supplier over another, are not considered to be under ''cost-based regulation'' and therefore are not captive under the definition.

194. While much of the discussion in Order No. 697 focused on retail customers, the Commission stated ''regarding wholesale customers, sellers should continue to explain why, if they have wholesale customers, those customers are not captive.'' [276]

195. The Commission also declined to include transmission customers in the definition of captive customers for purposes of market-based rates for public utilities. The Commission stated that the open access policies in Order

[266] *Id.* at P 490.

[267] Occidental Rehearing Request at 2.

[268] *Id.*

[269] *Id.* at 5.

[270] *Id.* at 4.

[271] *Id.* at 8.

[272] *Id.*

[273] Order No. 697 at P 513.

[274] *See, e.g., Public Service Co. of New Mexico*, Opinion No. 146, 20 FERC ¶ 61,290 at 61,546–48 (crediting revenue from intersystem opportunity sales to native load customers), *reh'g denied*, 21 FERC ¶ 61,334 (1982); *Golden Spread Electric Cooperative, Inc.*, Opinion No. 501, 123 FERC ¶ 61,047 at P 94–98 (crediting revenue from intersystem opportunity sales to native load customers) (2008); *Boston Edison Co.*, Opinion No. 53, 8 FERC ¶ 61,077 at 61,283 (allocating costs to firm services where the revenue crediting methodology may result in over-allocation of costs to the customers whose rates were at issue), *reh'g denied*, Opinion No. 53–A, 9 FERC ¶ 61,002 (1979).

[275] Order No. 697 at P 478 (to be codified at 18 CFR 35.36(a)(6)).

[276] Order No. 697 at P 480.

No. 890 protect transmission customers from the exercise of vertical market power.

Requests for Rehearing

196. Occidental argues that, just as with retail customers that have retail choice, wholesale customers with alternatives should also not be deemed to be ''captive customers.'' [277] Occidental argues that wholesale customers, whether buying under cost-based or market-based rates, have alternatives and are therefore not captive. Occidental states that a wholesale seller does not have any obligation to sell to any buyer, nor is a wholesale buyer obligated to buy from any particular seller. Occidental argues that the Commission's conclusion that retail customers with retail choice ''are not served under cost-based regulation, since that term indicates a regulatory regime in which retail choice is not available'' dictates that a wholesale cost-based customer cannot be captive because choice is, by definition, available.[278] Accordingly, Occidental requests that the Commission remove wholesale customers from the definition of captive customers.

Commission Determination

197. With regard to Occidental's request for rehearing concerning whether wholesale customers should be included in the definition of ''captive customers,'' we note that Occidental raised the same argument in its comments in the Affiliate Transactions rulemaking. In the course of responding to Occidental's concerns in that proceeding, the Commission provided a number of clarifications regarding the term ''captive customers,'' the purpose of the definition, and its focus on ''cost-based regulation'' that we reiterate here.

198. The Commission explained that its fundamental goal in categorizing certain customers as ''captive'' is to protect customers served by franchised public utilities from inappropriately subsidizing the market-regulated or non-utility affiliates [279] of the franchised public utility or otherwise being financially harmed as a result of affiliate transactions and activities. In other words, we are concerned about the potential for the inappropriate transfer of benefits from such customers to the shareholders of the franchised public utility or its holding company.[280] Where customers are served under market-based regulation as opposed to cost-based regulation, it is presumed that the seller has no market power over a customer and that the customer has a choice of suppliers; thus, there is less opportunity for a customer to involuntarily be in a situation in which its rates subsidize or support another entity.

199. Under a regime of cost-based regulation, however, we cannot make these same assumptions. If a franchised public utility is selling at a wholesale cost-based rate under the FPA, the franchised utility seller may be in the position of potentially trying to flow through its cost-based rates costs that should instead be borne by its affiliates, *i.e.*, potentially subsidizing the ''non-regulated'' activities of its market-regulated power sales affiliates to the detriment of the franchised public utility's customer(s). As the Commission stated in the Affiliate Transactions Final Rule, while there is some merit to Occidental's assertion that wholesale customers, by definition, have alternatives and that there is no obligation for a wholesale customer to sell to any buyer, nor for a buyer to buy from any particular seller, for the customer protection reasons stated above, we believe it is important to err on the side of a broad definition of captive customers. On this basis, we deny Occidental's request for rehearing that the Commission change its existing analysis and generically exclude wholesale customers from the definition of captive customers.

200. Nevertheless, as the Commission noted in the Affiliate Transactions Final Rule, although we are erring on the side of a broad definition of captive customers, we recognize that there may well be circumstances in which customers fall within our definition, even though there are sufficient protections in place to protect such customers against any risk of harm from transactions between the franchised public utility and its affiliates. For example, it is possible that wholesale customers with fixed rate contracts would be adequately protected and that the affiliate restrictions should not apply to utilities whose customers all have fixed rate contracts with no fuel adjustment clause.[281] The Commission explained that it is not prepared at this time to generically exclude such customers from the definition of captive customers but instead will allow franchised public utilities, on a case-by-case basis, to argue that the affiliate restrictions should not apply. This will allow the Commission to closely examine the facts related to each franchised public utility. There may be circumstances other than fixed rate contracts in which we may be willing to find that the affiliate restrictions do not apply, but a public utility will need to demonstrate that there is no opportunity for wholesale customers of the franchised public utility to be harmed as a result of affiliate transactions.

201. We note that in Order No. 697, we stated that ''regarding wholesale customers, sellers should continue to explain why, if they have wholesale customers, those customers are not captive.'' [282] Consistent with the foregoing discussion, we will modify that statement. If sellers have wholesale customers, instead of explaining why those customers are not captive, the sellers should explain why those customers are adequately protected against affiliate abuse.

202. We also will revise the definition of captive customers to be consistent with the definition adopted in the Affiliate Transactions Final Rule. In that Final Rule, the Commission modified the definition of captive customers to make explicit what was only implicit in its earlier rules—that the definition is intended to apply to customers served by a franchised public utility under cost-based regulation. Accordingly, we will revise the definition of captive customers in 18 CFR 35.36(a)(6) to mean ''any wholesale or retail electric energy customers served *by a franchised public utility* under cost-based regulation.''

203. Additionally, as the Commission recently stated in the Affiliate

[277] Occidental Rehearing Request at 9.

[278] *Id.*

[279] We note that the affiliate restrictions adopted in Order No. 697 apply to power sales and non-power goods and services transactions between franchised public utilities with captive customers and their market-regulated power sales affiliates, whereas the Affiliate Restrictions Final Rule applies to franchised public utilities with captive customers and their market-regulated power sales affiliates as well as their non-utility affiliates. Accordingly, the discussion herein is limited to market-regulated power sales affiliates.

[280] For example, if a market-regulated seller sells power to its affiliated franchised public utility at an above market price, the customers of the franchised public utility pay more than they need to for power and the affiliate makes a higher profit for the holding company's shareholders. Similarly, if a franchised public utility sells temporarily excess fuel to its market-regulated power seller affiliate at a price below its cost, the customers of the franchised utility end up subsidizing the affiliate's operating costs, to the benefit of shareholders and the detriment of the customers of the franchised utility. In other contexts, an extreme example would be a holding company that siphons funds from a franchised public utility to support its failing market-regulated power sales affiliate company; again, this results in financial benefit to shareholders at the expense of customers.

[281] The Commission would need to be assured that all wholesale customers of a franchised public utility have adequate fixed rate contracts, not just a sub-set of the customers. Further, because such contracts may have different expiration dates, the Commission might need to place temporal conditions on such a waiver.

[282] Order No. 697 at P 480.

Transactions Final Rule, if a state regulatory authority in a retail choice state does not believe that retail customers are sufficiently protected and that our affiliate restrictions should apply to the local franchised public utility, it may file a petition for declaratory order to deem its retail customers to be captive customers for purposes of applying the affiliate restrictions.[283] A state regulatory authority may also raise such an argument as part of its comments in a market-based rate proceeding.

d. Electric Cooperatives

Final Rule

204. The Commission declined to subject to the affiliate restrictions and regulations in § 35.39 electric cooperatives that may otherwise be subject to the Commission's jurisdiction. In Order No. 697, the Commission reasoned that ''affiliate abuse takes place when the affiliated public utility and the affiliated power marketer transact in ways that result in a transfer of benefits from the affiliated public utility (and its ratepayers) to the affiliated power marketer (and its shareholders).'' [284] The Commission explained that, where a cooperative is involved, the cooperative's members are both the ratepayers and the shareholders. Therefore, there is no potential danger of shifting the benefits from the ratepayers to the shareholders.[285]

Requests for Rehearing

205. El Paso E&P argues that the Commission's concerns regarding affiliate transactions should apply equally to sales by jurisdictional public utility cooperatives to their affiliated members,[286] and that the Commission cannot abdicate its obligation to protect captive customers. According to El Paso E&P, the fact that a cooperative is comprised of its member distribution cooperatives could actually facilitate the exercise of market power, because a cooperative, through its member board, has an incentive to charge as much as it can to captive customers in order to subsidize the rates paid by its residential and commercial customers.[287]

206. El Paso E&P contends that the Commission abdicated its responsibility under the FPA to protect captive customers by claiming lack of jurisdiction over the cooperatives.[288] El Paso E&P explains that no Commission precedent addresses the situation where sales at market-based rates are ultimately made to captive customers of the distribution cooperatives. El Paso E&P points out that, unlike other cases, a generation and transmission cooperative seller's affiliate distribution cooperatives are not the ultimate consumers of the power.[289] Therefore, El Paso E&P maintains, they do intend to pass on potential excessive purchased power costs to captive customers.

207. For example, El Paso E&P argues that the fact that Deseret and Moon Lake may receive above-market rates from El Paso E&P will not necessarily result in profit to either entity. Rather, the collection of such monopoly rents could be used by either Deseret or Moon Lake to subsidize the costs paid by other ratepayers in their members' franchised service territories. Even if it did result in profits to either Deseret or Moon Lake, El Paso E&P asserts that there is no assurance that El Paso E&P would receive any share of such profits since it is not a member of Deseret's board and has no say in what Deseret charges to its members. Because it also is not a member of Moon Lake's board, El Paso E&P argues it has no ability to vote on whether any profits that may be earned by Deseret, and may be credited to Moon Lake, are actually paid back to it.[290]

208. El Paso E&P also argues that the Commission erred in justifying its failure to protect captive ratepayers of cooperatives on the ground that El Paso E&P's concern is really about discrimination in the allocation of benefits and burdens among retail ratepayers, which is a state law issue. El Paso E&P argues that this cannot be squared with the protection that the Commission provides in Order No. 697 for captive ratepayers of non-cooperative sellers.[291] El Paso E&P takes the position that, if the Commission permits cooperatives to charge market-based rates, then the Commission is obligated to ensure that all captive customers are protected from any abuse or excessive rates resulting from those market-based rates.[292]

209. Moreover, El Paso E&P argues that the Commission has not explained how state commissions could deny pass-through of market-based rates by distribution cooperatives to their retail customers when the rates have been approved by the Commission.[293] It asserts that the cases cited by the Commission are not on point. Specifically, the exception to federal pre-emption discussed in *Nantahala Power and Light Co.* v. *Thornburg* [294] relates to the quantity purchased, not the price paid. El Paso E&P contends that this exception is not applicable to cooperatives because their cooperative structure requires the distribution cooperative members to purchase their power from their generation and transmission cooperative.[295]

Commission Determination

210. We deny El Paso E&P's request for rehearing. El Paso E&P has not raised any new arguments on rehearing, and it has not persuaded us to reverse our finding from Order No. 697 that electric cooperatives are not subject to the Commission's affiliate restrictions codified in § 35.39.

211. The Commission explained in Order No. 697 that, even if an electric cooperative is not exempt from public utility regulation by the FPA under section 201(f), the Commission previously determined that transactions of an electric cooperative with its members do not present dangers of

[283] Affiliate Transactions Final Rule at P 45.

[284] Order No. 697 at P 526 (citing *Heartland Energy Services, Inc.,* 68 FERC ¶ 61,223, at 62,062 (1994)).

[285] Order No. 697 at P 526 (citing *Old Dominion Electric Cooperative,* 81 FERC ¶ 61,044, at 61,236 (1997)).

[286] El Paso E&P Rehearing Request at 8 (citing *Illonova Power Marketing, Inc.,* 88 FERC ¶ 61,189 (1999); *First Energy Trading & Power Marketing, Inc.,* 84 FERC ¶ 61,214 (1998)).

[287] *Id.* at 6, 12.

[288] *Id.* at 6.

[289] *Id.* at 11.

[290] *Id.* at 12–13.

[291] *Id.* at 14.

[292] *Id.* at 8.

[293] *Id.* at 7, 15 (citing *Arkansas Power & Light Co.* v. *Missouri Public Service Commission,* 829 F.2d 1444, 1452–53 (8th Cir. 1987)) (Arkansas P&L) (holding that the ordinary state-law process of suspension and investigation of retail rates is not preempted by the FPA ,and there is no language in the FPA to indicate that Commission orders on wholesale rates require an immediate pass-through of those wholesale rates).

[294] 476 U.S. 953 (1986). *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore,* 487 U.S.354 (1958) (holding that state commissions must treat Commission-approved costs for wholesale power as reasonably incurred operating expenses for the purposes of setting retail rates, but state commissions are precluded from setting retail rates that would ''trap'' the costs a seller was mandated to pay under a Commission order, or from undertaking a prudence review for the purpose of deciding whether to approve such retail rates.); *Central Vermont Public Service Corporation,* 84 FERC ¶ 61,194 (1998)) (holding that state commissions are preempted by federal law from reviewing the prudence of power purchases, if, as a result of wholesale power supply allocation directed by the Commission, the purchaser has no legal choice but to make a particular purchase and to permit such a review would interfere with the Commission's plenary authority over interstate wholesale rates).

[295] *Id.*

affiliate abuse through self-dealing.[296] Where a cooperative is involved and the cooperative's members are both the ratepayers and the shareholders, any profits earned by the cooperative will inure to the benefit of the cooperative's ratepayers. As such, no potential danger exists of shifting benefits from the ratepayers to the shareholders. Deseret is not a for-profit entity with an incentive to maximize its rates for the benefit of its shareholders; rather, its ratepayers and shareholders are the same entities. Similarly, Moon Lake is not a power marketer concerned only with passing its costs through to its ratepayers for the benefit of its shareholders. Rather, Moon Lake is responsible to its members, including El Paso E&P, which is entitled to vote in Moon Lake's Board elections and is entitled to the same single vote held by each residential and commercial ratepayer of Moon Lake.[297]

212. Moreover, if Deseret charges Moon Lake higher rates than Deseret charges its other five member cooperatives, it may be engaging in discrimination, which is barred by sections 205 and 206 of the FPA. As we explained in Order No. 697, El Paso E&P's concern is not one that can be addressed through affiliate restrictions in market-based rates, but is rather more of a concern of discrimination in the allocation of benefits and burdens among retail ratepayers.[298]

213. Therefore, we deny El Paso E&P's request for rehearing and reaffirm our finding that electric cooperatives are not subject to the affiliate restrictions codified in § 35.39 because there is no danger of affiliate abuse through self-dealing.

e. Public Utility Holding Company Act of 2005 as a ''Commission Rule or Order'' Permitting At-Cost Pricing

Final Rule

214. Order No. 697 requires that sales of any non-power goods or services by a market-regulated power sales affiliate to an affiliated franchised public utility with captive customers will not be at a price above market, unless otherwise permitted by Commission rule or order.[299] The Commission also adopted the proposal to require that sales of non-power goods or services by a franchised public utility with captive customers to a market-regulated power sales affiliate be at the higher of cost or market price, unless otherwise authorized by the Commission. The Commission explained that these requirements will protect captive customers against affiliate abuse by ensuring that the utility with captive customers does not recover too little for goods and services provided to a market-regulated power sales affiliate and that the franchised public utility with captive customers does not pay too much for goods and services provided by a market-regulated power sales affiliate.[300]

Requests for Rehearing

215. EEI states that the Final Rule requires market-regulated affiliates to sell non-power goods and services to utilities with captive customers at or below market prices, unless otherwise authorized by the Commission. It seeks rehearing of the Final Rule as that requirement may apply to centralized service companies.[301] Specifically, EEI notes that in Order No. 667, the Commission issued a final rule implementing the Public Utility Holding Company Act of 2005, with a rebuttable presumption that centralized service companies may use ''at cost'' pricing for services to affiliate utilities, unless complainants demonstrate that the at-cost pricing exceeds the market price.[302] EEI requests that the Commission clarify that Order No. 667 constitutes a ''Commission rule or order'' generally authorizing use of at-cost pricing by centralized service companies to utility affiliates under Order No. 697, absent complainant evidence that such pricing exceeds the market price.[303]

Commission Determination

216. We will grant EEI's request and clarify that Order No. 667 constitutes a Commission rule or order generally authorizing the use of at-cost pricing by a centralized service company to utility affiliates absent any demonstration that at-cost pricing exceeds the market price.

217. In Order No. 667, the Commission allowed centralized service companies to sell non-power goods and services to affiliated franchised utilities using an ''at cost'' standard, stating that ''there is a rebuttable presumption that such 'at-cost' sales for non-power goods and services between a centralized service company and its affiliates are reasonable.''[304] The Commission made clear that the rebuttable presumption for ''at-cost'' sales for non-power goods and services only applies to sales by a centralized service company to its affiliates. Sales of non-power goods and services made by market regulated or unregulated affiliates other than centralized service companies to their franchised utility affiliates are subject to the Commission's ''no higher than market'' standard.[305] The Commission also explained that while it will apply a rebuttable presumption that costs incurred under ''at-cost'' pricing for services provided by centralized service companies are reasonable, the Commission will entertain complaints that ''at-cost'' pricing for such services exceeds the market price.[306]

218. Given the Commission's reasoning set forth in Order No. 667 and Order No. 667–A, we clarify that, for centralized service companies, as defined in Order No. 667 and § 366.5 of the Commission's regulations, Order No. 667 constitutes a ''Commission rule or order'' generally authorizing use of at-cost pricing by centralized service companies to their franchised public utilities with captive customers, absent complainant evidence that such at-cost pricing exceeds the market price.

f. Sales of Non-Power Goods and Services

Final Rule

219. In Order No. 697, the Commission held that sales of non-power goods or services by a franchised public utility with captive customers to a market-regulated power sales affiliate are to be at the higher of cost or market price, unless otherwise authorized by the Commission. The Commission also codified the requirement that sales of any non-power goods or services by a market-regulated power sales affiliate to an affiliated franchised public utility with captive customers will not be at a price above market, unless otherwise authorized by the Commission.[307]

Requests for Rehearing

220. FP&L seeks limited clarification or, in the alternative, reconsideration of Order No. 697 on the issue of pricing of non-power goods and services provided for affiliates by either franchised public utilities or their market-regulated power sales affiliates when those services are

[296] Order No. 697 at P 526 (citing *Heartland Energy Services, Inc.,* 68 FERC ¶ 61,223, at 62,062 (1994)).

[297] *See* El Paso E&P Rehearing Request at 13, n.7.

[298] Order No. 697 at P 527.

[299] *Id.* at P 597; 18 CFR 35.39(e).

[300] *Id.*

[301] EEI Rehearing Request at 2.

[302] *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005,* Order No. 667, FERC Stats. & Regs. ¶ 31,197, at P 169 (2005), *order on reh'g,* Order No. 667–A, FERC Stats. & Regs. ¶ 31,213, *order on reh'g,* Order No. 667–B, FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh'g,* Order No. 667–C, 118 FERC ¶ 61,133 (2007).

[303] EEI Rehearing Request at 4, 7–8.

[304] Order No. 667–A, FERC Stats. & Regs. ¶ 31,213 at P 38.

[305] *Id.*

[306] Order No. 667, FERC Stats. & Regs. ¶ 31,197 at P 169.

[307] Order No. 697 at P 597 (to be codified at 18 CFR 35.39(e)).

comparable to shared services provided by a centralized service company.

221. FP&L requests clarification that when a franchised public utility provides its market-regulated power sales affiliates with non-power goods or services, or a market-regulated power sales affiliate provides its affiliated franchised public utility with non-power goods and services, and those services are comparable to those provided by a centralized service company, then those non-power goods and services may be provided at fully-loaded cost as a reasonable proxy for market price.[308] FP&L also requests that the Commission clarify that the grandfathering provision in the Affiliate Transactions Final Rule (which provides that the pricing rules adopted therein are prospective only) also applies with respect to the requirements of Order No. 697 where existing inter-affiliate transactions involving non-power goods and services are comparable to those provided by a centralized service company.

Commission Determination

222. Issues similar to those raised here by FP&L also have been raised on rehearing of the Affiliate Transactions Final Rule, which applies the same standards for the pricing of non-power goods and services as Order No. 697. To ensure consistency in our approach to pricing of non-power goods and services between both rulemaking proceedings, the Commission will address FP&L's arguments concerning Order No. 697 in a supplemental order.[309]

2. Power Sales Restrictions

a. Sales Between Two Affiliates Requiring Prior Commission Approval

Final Rule

223. In paragraph 467 of the Final Rule, the Commission stated that it was adopting in the regulations a provision expressly prohibiting power sales between a franchised public utility with captive customers and any market-regulated power sales affiliates without first receiving Commission authorization for the transaction under section 205 of the FPA.[310]

224. The Commission further noted (in paragraph 492) that while it has historically placed affiliate restrictions only on the relationship between a franchised public utility with captive customers and any affiliated market-regulated power sales affiliate, the Commission believes there may be circumstances in which it also would be appropriate to impose similar restrictions on the relationship of two affiliated franchised public utilities where one of the affiliates has captive customers and one does not. The Commission said it would not generically impose the affiliate restrictions on such relationships but will evaluate whether to impose the affiliate restrictions in such situations on a case-by-case basis.[311]

Requests for Rehearing

225. Ameren argues that paragraphs 467 and 492 of Order No. 697, taken together, provide that power sales between two affiliated franchised public utilities—one with captive customers and one without—are not prohibited, do not require prior authorization under section 205 of the FPA, and are not generally subject to the affiliate restrictions. Instead, the Commission said that it will consider applying the restrictions on a case-by-case basis.[312] Given that position, Ameren is confused by § 35.39(h) of the new regulations, which provides:

> *If necessary*, any affiliate restrictions regarding separation of functions, power sales or non-power goods and services transactions, or brokering involving two or more franchised public utilities, one or more of whom has captive customers and one or more of whom does not have captive customers, will be imposed on a case-by-case basis. [313]

226. Ameren states this provision is meaningless if prior authorization of such transactions is not required. With regard to the Commission's statement that it will consider applying the affiliate restrictions on a case-by-case basis, Ameren states that the Commission fails to explain how it will conduct such an analysis of the need to apply the restriction or when such an obligation to abide by this particular restriction would arise.

227. Ameren states that the Commission should do one of three things. Because the Commission itself noted that commenters did not show a potential for affiliate abuse in such a situation, the Commission could clarify, consistent with precedent, that prior authorization of power sales between affiliated franchised public utilities is not required and therefore § 35.39(h) will be deleted. Alternatively, the Commission could clarify that, absent a specific finding imposed prospectively under sections 205 or 206 of the FPA, a utility has no obligation to seek prior authorization of power sales between affiliated franchised public utilities. Conversely, Ameren maintains that, if the Commission intends that public utilities seek pre-approval of such transactions, then it should clearly state that intention. Without such clarification, Ameren asserts that franchised public utilities face an uncertain regulatory regime when transacting with another franchised public utility.[314]

Commission Determination

228. In response to Ameren's request, we clarify that when a franchised public utility receives section 205 authority to sell at market-based rates, it does not have to obtain a separate section 205 authority for power sales to another franchised public utility, as would be the case if it wanted to make power sales to a non-franchised, market-regulated power sales affiliate. Thus, an additional authorization is not required for power sales between two affiliated franchised public utilities, one with captive customers and one without captive customers. We clarify that, when we said we would evaluate these situations on a case-by-case basis, we meant that the Commission, on its own motion or in response to a complaint, may decide to examine the circumstances of any power sales between two such affiliated franchised public utilities, where one has captive customers and the other does not. Any determination based on such an examination would be prospective only.

b. Affiliate Restrictions' Applicability to Franchised Public Utilities and Commission Jurisdictional Market-Regulated Power Sales Affiliates

Final Rule

229. The Commission explained in Order No. 697 that the market-based rate affiliate restrictions codified in § 35.39 govern the relationship between a franchised public utility with captive customers and its market-regulated power sales affiliates. This ensures that captive customers are protected from any potential for harm as a result of affiliate dealings.

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[308] FP&L March 24, 2008 Request for Clarification at 4.

[309] The Commission need not address all issues raised in a proceeding at one time. *See Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Companies,* 498 U.S. 211 (1991) (holding that an agency enjoys broad discretion in determining procedurally how best to handle related yet discrete issues). *See also Colorado Office of Consumer Counsel* v. *FERC,* 490 U.S. 954 (D.C. Cir. 2007) (holding that the Commission need not revisit all elements of a tariff upon finding one aspect to be unjust and unreasonable).

[310] Order No. 697 at P 467.

[311] *Id.* P 492.

[312] Ameren Rehearing Request at 5.

[313] Emphasis added.

[314] *Id.* at 6.

Requests for Rehearing

230. FP&L states that it remains unclear whether the restrictions are intended to cover non-franchised power marketers whose sales are not subject to Commission jurisdiction—for example power marketers selling exclusively into the Electric Reliability Counsel of Texas (ERCOT).[315] FP&L requests that the Commission clarify that the affiliate restrictions apply only to the relations between franchised public utilities with captive customers and their Commission-jurisdictional market-regulated power sales affiliates, and do not apply to affiliates engaged in power sales exclusively within ERCOT.[316] FP&L states that, given the magnitude of an expansion of the affiliate restrictions to cover non-Commission-jurisdictional power marketers, and the absence of any explicit discussion in either the proposed rule or the Final Rule in this proceeding, FP&L does not believe the Commission intends such an expansion.[317]

Commission Determination

231. We grant in part FP&L's request for clarification. The Commission's market-based rate regulations, including the affiliate restrictions, do not apply to entities that are not considered public utilities under FPA section 201(e), which would include entities engaged in power sales exclusively within ERCOT.

232. The Commission's market-based rate regulations apply to any public utility with market-based rates. If a franchised public utility with market-based rates sells to an affiliate company in ERCOT (which would be a non-public utility), the affiliate restrictions would apply to the franchised public utility's dealings with the affiliate. It could not sell to or purchase from the ERCOT affiliate unless consistent with our regulations. The affiliate restrictions would not apply to the ERCOT affiliate's dealings with the other non-public utility affiliates since the ERCOT affiliate is not a public utility.

3. Market-Based Rate Affiliate Restrictions

233. In codifying the affiliate restrictions in the regulations, the Commission established certain restrictions that govern the separation of functions, sharing of market information, sales of non-power goods or services, and power brokering to govern the relationship between franchised public utilities with captive customers and their market-regulated affiliates. As a condition of receiving and retaining market-based rate authority, the Commission required sellers to comply with these affiliate restrictions unless otherwise permitted by Commission rule or order.[318]

a. Two-Way Information Sharing Restriction

Final Rule

234. The Commission adopted a two-way information sharing restriction in § 35.39(d) prohibiting a franchised public utility with captive customers from sharing information with a market-regulated power sales affiliate, and vice-versa.[319]

Requests for Rehearing

235. Southern argues the Commission erred in Order No. 697 by adopting a two-way information restriction (§ 35.39(d)) that prevents a franchised public utility from receiving information from its market-regulated power sales affiliate. Southern claims that the Commission failed to demonstrate that communications from a market-regulated power sales affiliate to a franchised public utility would harm captive customers and that the existing one-way communication restriction currently in many Commission-accepted codes of conduct is insufficient.

236. Southern states that the Commission provided one example of how information shared with a franchised public utility by its market-regulated affiliate might harm captive customers. Specifically, the Commission stated that in an RFP situation where both a franchised public utility and its market-regulated affiliate are considering whether to submit a bid and the market-regulated affiliate is allowed to share its price and quantity information, the franchised public utility could possibly use the information for the benefit of its stockholders at the expense of its captive customers. However, Southern submits that § 35.39(d) is written much broader than is necessary to address this concern, and could serve to unnecessarily prevent a franchised public utility from receiving operational information under Commission-approved generation pooling arrangements. Southern argues that the Commission has not suggested much less demonstrated that a franchised public utility's knowledge of the status of its market-regulated affiliate's units could advantage the market-regulated affiliate at the expense of the franchised public utility's captive customers. Accordingly, Southern alleges Order No. 697 is without a rational basis in this regard and unsupported by substantial evidence.[320]

237. Southern believes that the two-way restriction would actually harm captive customers by impairing the pooling arrangement, thereby denying them the traditional benefits of integration and coordinated operations and by triggering costs and inefficiencies that far outweigh any conceivable benefit. Accordingly, Southern requests that the Commission reconsider the two-way information sharing restriction.

238. Moreover, according to Southern, the Commission failed to recognize the implementation burden that will be imposed by the two-way restriction. Southern submits that the Commission has grossly underestimated the expense and effort that will be required for utilities to implement the two-way restriction.[321] Based on its actual experience, Southern believes that compliance with the two-way restriction will be very costly to utilities and require a substantial amount of time to complete, potentially in excess of six months (a much longer period than is allowed by an effective date of 60 days after the Final Rule's publication in the **Federal Register**).[322] While some utilities may be able to complete their implementation of the two-way restriction within this period, Southern argues it is more likely that most utilities will need more time to ensure compliance. Thus, to the extent the Commission maintains the two-way restriction, Southern requests that the Commission allow utilities and their market-regulated power sales affiliates sufficient time to implement the two-way restriction.[323]

239. To the extent the Commission maintains the restriction, in any form, Southern requests that the Commission clarify the scope of § 35.39(d) and limit the types of information that are

[315] FP&L Rehearing Request at 11.

[316] *Id.* at 10, 12.

[317] *Id.* at 12.

[318] Order No. 697 at P 549. To the extent that the Commission did not impose a code of conduct requirement on a seller as a condition of market-based rate authority because the seller had demonstrated that it did not have captive customers, that waiver remains in effect provided that the seller still does not have captive customers.

[319] *Id.* P 583.

[320] Southern Rehearing Request at 6 (citing *Motor Vehicles Mfrs. Ass'n.*, 463 U.S. at 43 (1983) (stating that the agency must articulate a ''rational connection between the facts found and the choice made''); *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 168 (1962); *Western Union* v *FCC*, 856 F.2d 315, 318 (D.C. Cir. 1988) (stating that an agency must demonstrate a ''rational connection between the facts found and the choice made'')).

[321] *Id.* at 37.

[322] Order No. 697 at P 1133.

[323] Southern Rehearing Request at 36, 39.

restricted to be consistent with the above-described example set forth in Order No. 697.[324] Southern states that, at a minimum, the Commission should provide an exception for information provided to franchised public utilities by their market-regulated affiliate pursuant to participation in Commission-approved pooling arrangements. Finally, and to the extent the Commission retains any two-way restrictions, it should allow franchised public utilities and their market-regulated power sales affiliates sufficient time to assess their organizations and technology infrastructures and implement the measures necessary to ensure compliance.[325]

Commission Determination

240. After consideration of Southern's arguments, we will grant Southern's request for rehearing on this issue.

241. As previously explained, the purpose of the affiliate restrictions is to ensure that captive customers of a franchised public utility are adequately protected from any harm that may arise from affiliate dealings. In an attempt to provide regulatory certainty, and upon further review, we find that the one-way information sharing restriction, which prohibits a franchised public utility with captive customers from sharing market information with a market-regulated power sales affiliate, adequately protects captive customers. We have not been presented with any specific examples of how captive customers have been harmed by a market-regulated power sales affiliate sharing market information with its franchised public utility with captive customers. We also note that adopting a one-way information sharing restriction is consistent with the Commission's approach in the Standards of Conduct.

242. While we are granting Southern's request for rehearing on this issue, we remind sellers that the information sharing provision, like all affiliate restrictions, is subject to the no-conduit rule. The no-conduit rule allows permissibly-shared employees to receive market information so long as they are not conduits for sharing that information with employees that are not permissibly shared. Additionally, we remind all market-based rate sellers that the FPA prohibits any seller from providing an undue preference to an affiliate or any other seller.[326]

b. Affiliate Restrictions' Precedence Over Pre-Existing Codes of Conduct

Final Rule

243. As stated above, the Commission expressly stated in Order No. 697 that the regulations at 18 CFR part 35, Subpart H, including the affiliate restrictions, will become effective 60 days after publication of Order No. 697 in the **Federal Register**.[327] Order No. 697 became effective on September 18, 2007.

Requests for Rehearing

244. Ameren asserts that a reasonable interpretation of Order No. 697 is that sellers with market-based rate authority are to follow the affiliate restrictions in § 35.39 upon the effective date of the regulation, but states nothing is said regarding the potential for conflicts between the new regulations and existing affiliate restrictions/codes of conduct and how such conflicts will be resolved. Ameren states that the Commission apparently intended the new regulations to supersede the existing affiliate restrictions/codes of conduct, but asserts that clarification is needed. Thus, in order to avoid uncertainty and increase transparency, Ameren asks the Commission to clarify whether the new regulations take precedence over the affiliate restrictions/codes of conduct currently on file upon the effective date of the new regulations.[328]

Commission Determination

245. The Commission clarifies that the new affiliate restriction regulations promulgated in Order No. 697 and codified in § 35.39 supersede the codes of conduct approved by the Commission prior to Order No. 697's effective date.[329] The affiliate restrictions in § 35.39 now govern the relationship between a franchised public utility with captive customers and its market-regulated power sales affiliates. In the event of a conflict between a seller's previously approved code of conduct and the new affiliate restriction regulations, the regulations supersede a previously approved code of conduct. For example, if a seller's previous code of conduct prohibited information sharing of any market information, public or non-public, because the definition of market information in the regulations does not prohibit the disclosure of publicly available information, a seller may share public market information under the new affiliate restrictions.[330]

246. Nevertheless, where the Commission had imposed in a Commission order in a particular case specific limitations that are more restrictive than those codified in § 35.39, such limitations would continue to be in effect. We also clarify that, while all sellers with market-based rate authority must abide by the affiliate restrictions as set forth in § 35.39 of the Commission's regulations, if a seller wishes to impose a more restrictive limitation than currently exists in the affiliate restrictions, such seller may propose additional tariff provisions for the Commission to review in a filing under FPA section 205.

c. Treatment of ''Field & Maintenance'' Employees and Shared Operation and Maintenance Staff in Affiliate Restrictions

Final Rule

247. In the Final Rule, the Commission codified in its regulations the requirement that, to the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers (independent functioning requirement). The Commission adopted an exception to the independent functioning requirement that permits a franchised public utility with captive customers and its market-regulated power sales affiliates to share senior officers and members of the board of directors, support employees, and field and maintenance employees that perform purely manual, technical, or mechanical duties and do not have planning or direct operational responsibilities.[331]

Requests for Rehearing

248. FP&L states that certain of these changes and refinements to the affiliate restrictions (formerly code of conduct) appear subject to interpretation, and certain interpretations may be more restrictive than intended.[332] Specifically, FP&L states the Commission should clarify that ''field and maintenance employees'' include technical and engineering personnel engaged in generation-related activities, provided that such employees do not themselves: (1) Buy or sell energy; (2) make economic dispatch decisions; (3) determine (as opposed to implement) outage schedules; or (4) engage in power

[324] *Id.* at 39.

[325] *Id.* at 40–41.

[326] *See* 16 U.S.C. 824d (2001).

[327] *Id.* at P 924.

[328] Ameren Rehearing Request at 7.

[329] Clarification Order, 121 FERC ¶ 61,260 at P 5.

[330] *See id.* P 592.

[331] *Id.* P 561–63, 565; 18 CFR 35.39(c)(2)(ii).

[332] FP&L Rehearing Request at 2, 4.

marketing activities.[333] FP&L states that sharing such employees does not diminish or jeopardize the requirement of separation of functions ''to the maximum extent practical,'' and is ''unlikely to harm captive customers.'' [334]

249. Additionally, FP&L urges that the Commission clarify that ''field and maintenance employees'' include non-commercial technical and engineering personnel involved in nuclear plant operations.[335] FP&L notes that, in the context of nuclear plant operations, adherence to Nuclear Regulatory Commission (NRC) requirements and safe operations in general often are facilitated by the creation of a broad knowledge pool using all of a company's personnel with expertise in nuclear operations.[336]

250. EEI notes that Order No. 697 allows franchised public utilities with captive customers and their market-regulated power sales affiliates to share field and maintenance employees and their supervisors, but that it conditions this allowance on the employees and supervisors not exercising ''control'' over generation facilities.[337] If interpreted broadly, EEI argues this condition could eliminate the ability to share such staff that work on generation facilities, because operation and maintenance of generation facilities necessarily involve the ability to curtail or stop operation of the facilities. EEI requests that the Commission clarify that companies may share such employees and supervisors even if the employees and supervisors have the authority to curtail or stop the operation of generation facilities as part of their operation and maintenance functions, so long as the employees are not involved in decisions regarding the marketing or sale of electricity from the facilities.[338]

Commission Determination

251. We grant FP&L's request for clarification that ''field and maintenance employees'' includes technical and engineering personnel engaged in generation-related activities, provided that such employees do not themselves: (1) Buy or sell energy; (2) make economic dispatch decisions; (3) determine (as opposed to implement) outage schedules; or (4) engage in power marketing activities.

252. We have no evidence that such field and maintenance employees have engaged in behavior that would adversely affect captive customers. Additionally, we note that such field and maintenance employees are still subject to the no-conduit rule. Based on the evidence before us, the existing regulations and the overarching purpose of the affiliate restrictions, we find that excepting field and maintenance employees from the independent functioning requirement, provided such employees do not engage in prohibited actions as outlined above, is consistent with the affiliate restrictions. This clarification also is applicable to FP&L's request regarding shared employees involved in nuclear plant operations.[339]

253. In response to EEI's request for clarification, although Order No. 697 states that operational employees may not be shared, the Commission clarifies that companies may share employees and supervisors who have the authority to curtail or stop the operation of generation facilities solely for operational reasons. However, shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, may not make economic dispatch decisions, and may not determine the timing of scheduled outages for facilities. The Commission did not create the exception for permissibly-shared field and maintenance employees to enable those employees to confer a benefit on a franchised power utility's market regulated power sales affiliate to the detriment of captive customers. Thus, to ensure that captive customers are not harmed, shared field and maintenance employees may not make economic dispatch decisions or determine when scheduled maintenance outages (as opposed to emergency forced outages) will occur.

d. Risk Management Employees Under the No-Conduit Rule

Final Rule

254. With regard to the independent functioning requirement in the affiliate restrictions, the Commission adopted a ''no-conduit rule'' that prohibits a franchised public utility with captive customers and a market-regulated power sales affiliate from using anyone, including asset managers, as a conduit to circumvent the affiliate restrictions.[340] Otherwise, Order No. 697 did not specifically address the sharing of risk management employees.

Requests for Rehearing

255. FP&L requests that the Commission clarify that, subject to the no-conduit rule, risk management employees may permissibly be shared under the affiliate restrictions.[341] FP&L states that, while it does not believe Order No. 697 establishes a prohibition against shared risk management employees, in the absence of an explicit reference to risk management in § 35.39(c)(2)(ii), Order No. 697 has created confusion.[342]

Commission Determination

256. We find that risk management personnel do not fall within the scope of the independent functioning rule, so long as they are acting in their roles as risk management personnel rather than as marketing function employees, as defined in the standards of conduct. Of course, such risk management employees remain subject to the no-conduit rule and may not pass market information to marketing function employees.[343]

e. Definition of ''Market Information''

Final Rule

257. In Order No. 697, the Commission adopted a definition of market information: ''non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, or historical generator volumes.'' [344] The Commission explained that market information includes information that, if shared between a franchised public utility and a market-regulated affiliate, could result in a detriment to the franchised public utility's captive customers.[345]

Requests for Rehearing

258. Ameren argues that, in introducing its new definition of ''market information,'' for purposes of the restrictions on affiliates sharing

[333] *Id.* at 3, 6–7.

[334] *Id.* at 6.

[335] *Id.* at 7.

[336] *Id.*

[337] EEI Rehearing Request at 5 (citing Order No. 697 at P 565).

[338] EEI Rehearing Request at 3–4 and 5–6.

[339] Order No. 697 permits the sharing of information to enable nuclear power plants to comply with the requirements of the NRC as described in the NRC's February 1, 2006 Generic Letter 2006–002, Grid Reliability and the Impact on Plant Risk and the Operability of Offsite Power. Order No. 697 at P 581.

[340] Order No. 697 (to be codified at 18 CFR 35.39(g)).

[341] FP&L Rehearing Request at 8.

[342] *Id.* at 10.

[343] *See Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, 73 FR 16,228 (March 27, 2008), FERC Stats. & Regs. ¶ 32,630 (March 21, 2008) (Standards of Conduct NOPR).

[344] Order No. 697 at P 591 (to be codified at 18 CFR 35.36(a)(8)).

[345] *Id.* P 593.

information, the Commission incorrectly quotes from its 1996 order in *UtiliCorp United, Inc.*[346] Specifically, Ameren alleges that the Commission recited the list of types of data from *UtiliCorp*, but added ''past'' to the litany. According to Ameren, this ''misquote'' sets the stage for the new definition to include past information, such as ''historical generator volumes'' and ''past sales and purchase activities.'' Ameren requests rehearing of this expansion of the definition of the term ''market information'' to include past information. In addition, Ameren states that the Commission does not explain how past information, such as historical generator volumes, could be used to the detriment of the franchised public utility's captive customers.[347]

Commission Determination

259. The Commission denies Ameren's request for rehearing. The Commission is intentionally including past market information in the information disclosure prohibitions because there are instances in which the sharing of historical (or past) market information between a franchised public utility with captive customers and a market-regulated power sales affiliate can potentially harm captive customers. For example, if a market-regulated power sales utility had knowledge of its affiliated franchised public utility's prior costs of purchasing power, it could use this information to outbid a competitor in a request for proposals to supply power to the franchised public utility. We note, however, that the restriction on sharing market information, whether past, present, or future, does not apply to information that is publicly available.[348]

D. Mitigation

1. Cost-Based Rate Methodology

a. Selecting the Particular Units that Form the Basis of the ''Up To'' Rate

Final Rule

260. Where a seller adopts the default cost-based mid-term rate or otherwise proposes a cost-based rate designed on the unit or units expected to run, the Final Rule continues to allow the seller flexibility in proposing the particular units that form the basis of the ''up to'' rate. The Commission determines whether such proposals are just and reasonable on a case-by-case basis. The Final Rule also reiterated that any seller proposing an alternative mitigation methodology carries the burden of justifying its proposal.[349]

Requests for Rehearing

261. TDU Systems and NRECA suggest that allowing sellers to choose the unit or units expected to run can affect the ''up to'' default rate for mid-term sales, and also skew the default incremental cost rate for short-term sales.[350] TDU Systems [351] and NRECA [352] claim that the Final Rule failed to adopt measures to ensure that the mitigated rates of large public utilities reflect their actual cost of service. TDU Systems and NRECA submit that the Commission should adopt more stringent controls over sellers' discretion in establishing cost-based rates for mid-term sales in markets where a seller has been found, or is presumed, to have market power.[353] NRECA reiterates a proposal made in its comments to the NOPR that, for mid-term sales, the Commission should enforce a matching or consistency principle: The same generating units should be used as the basis for the fixed and variable costs in determining the default embedded-cost rate.[354] NRECA asserts that a matching or consistency principle would help to ensure that a mitigated seller cannot mix high-fixed-cost units with high-variable-cost units to artificially inflate the embedded-cost rate. At the same time, NRECA adds that if a seller can show that a portfolio of generating units is likely to be used to provide service, then the seller might be permitted to use a weighted average of the fixed and variable costs of the portfolio.

262. NRECA also proposes that the Commission require public utilities, in addition to justifying their mitigated rates prior to the rate becoming effective, to also file *ex post* quarterly reports of the actual sales and the actual incremental or embedded costs incurred in making sales for terms of one year or less. Such mitigated cost-based rate sales, NRECA reasons, would be subject to a cost-based formula rate, and thus subject to refund. In NRECA's view, providing for a case-by-case review of proposed cost-based rates prior to implementation of the rates does not address concerns that arise after the mitigated cost-based rates become effective.[355]

263. NRECA contends that it is inconsistent with the FPA [356] to place the burden on customers to file a complaint pursuant to section 206 [357] in order to ensure that the mitigated rates are just and reasonable in the first instance. Moreover, NRECA claims that because any rate relief would be prospective from the date of the complaint,[358] this would allow unjust and unreasonable rates to be charged until a complaint is filed.[359]

Commission Determination

264. On the issue of selecting the particular units that form the basis of the ''up to'' rate for mitigated mid-term sales, we will continue to apply our current methodology. TDU Systems and NRECA are concerned that the Final Rule failed to adopt measures to ensure that proposed mitigated rates for sales of less than one year reflect the mitigated sellers' actual cost of service. These entities assert that imposing a matching or consistency principle on mitigated sellers' proposed cost-based rate methodologies would help to prevent mitigated sellers from mixing high fixed-cost units with high variable-cost units that could artificially inflate the mitigated seller's embedded cost rate. We find that the Commission's current methodology allows mitigated sellers reasonable discretion to propose units to use in determining a cost-based rate while at the same time requiring any such proposal to be cost-justified and approved by the Commission. This balancing of a seller's right under the FPA to propose rates with the obligation to cost-justify such rates to the Commission provides the Commission adequate oversight to ensure that rates remain just and reasonable, and to prevent the mitigated seller from artificially inflating its cost-based rates. Once a seller files proposed rates, they are noticed for comment, and interested parties may file requests to intervene and comments. If there are issues of material fact as to the proposed rates, such issues may be set for hearing. The Commission reviews the mitigated seller's proposed rates, including a

[346] 75 FERC ¶ 61,168 (1996) (*UtiliCorp*).

[347] Ameren Rehearing Request at 8.

[348] Order No. 697 at P 592. To use an example cited by Ameren, once past sales information is filed with the Commission in an EQR, such information would not be covered by the information disclosure prohibition.

[349] *Id.* P 649.

[350] NRECA Rehearing Request at 25; TDU Systems Rehearing Request at 9.

[351] TDU Systems Rehearing Request at 4 (citing *K N Energy, Inc.* v. *FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1991)).

[352] NRECA Rehearing Request at 3 (citing *N. States Power Co.* v. *FERC*, 30 F.3d 177, 181–82 (D.C. Cir. 1994); 5 U.S.C. 706(2)(A), (C)).

[353] TDU Systems Rehearing Request at 4 (citing *American Mining Congress* v. *EPA*, 907 F.2d 1179, 1187 (D.C. Cir. 1990)).

[354] *Id.* at 27 (citing *N. States Power Co.* v. *FERC*, 30 F.3d 177, 181–82 (D.C. Cir. 1994)); *see also* TDU Systems Rehearing Request at 26–27.

[355] *Id.* at 25–26.

[356] *Id.* at 26 (citing *Mun. Light Bds.* v. *FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)).

[357] *Id.* (citing 16 U.S.C. 824e).

[358] *Id.*(citing 16 U.S.C. 824e(b)).

[359] *Id.* at 27 (citing *Arkla* v. *Hall*, 453 U.S. 571, 582 (1981)).

stacking analysis to determine the seller's generation unit(s) likely to provide the service.[360] In addition, the Commission analyzes the cost-justifications for the proposed rates to determine if the proposed rates meet the just and reasonable standard. As such, while a mitigated seller has the discretion to propose its choice of units, the Commission's process of reviewing the rate resulting from a seller's proposal ensures that such sellers do not have ''excessive leeway'' in proposing a cost-based rate, despite NRECA's claim to the contrary.

265. NRECA argues that placing the burden on customers to file a section 206 complaint to ensure mitigated rates are just and reasonable in the first instance is inconsistent with the FPA. Rather than placing a burden on customers to ensure just and reasonable rates, the Commission first requires the mitigated seller to cost-justify any proposed cost-based rates. To wit, the mitigated seller may propose cost-based rates for Commission review; however, the seller does not have authorization to charge such rates until the Commission acts on the seller's proposal. Thus, the Commission's process does ensure that a mitigated seller's rates are just and reasonable in the first instance. To the extent that a mitigated seller's cost of providing the service decreases, the Commission's long-standing practice is to consider claims of over-recovery in complaint proceedings.[361] Moreover, beyond proposing its matching principle, NRECA has failed to explain how adding this requirement would improve our current mitigation methodology. NRECA also provides no justification for treating mitigated sellers using a cost-based rate differently than any other cost-based rate sellers.

266. NRECA also complains that without a reporting procedure for mid-term sales requiring ex-post filings of quarterly reports of actual sales and costs incurred, the Commission cannot ensure that the default cost-based rates for mitigated mid-term sales reflect the actual cost of service and are just and reasonable.[362] However, as the Commission determined in Order No. 697, when a mitigated seller proposes cost-based mitigation, such an entity is obligated to comply with the Commission's accounting and reporting regulations, found in Parts 41, 101 and 141 [363] of the Commission's regulations.[364] As the Commission explained, these requirements are imposed in order to maintain adequate financial information with regard to mitigated sellers so that the Commission can exercise its duties and responsibilities under the FPA to ensure that rates remain just and reasonable and not unduly discriminatory or preferential.[365] The Commission and customers and competitors can rely on these financial forms to evaluate the adequacy of existing cost-based rates.[366] The Commission expects that customers' access to this data will allow them to demonstrate if rates have become unjust and unreasonable.[367]

b. Sales of One Year or Greater

Final Rule

267. The Final Rule retained the existing default mitigation policy for sales of one year or more (long-term). Specifically, the Commission determined that it will continue to require mitigated sellers to price long-term sales on an embedded cost of service basis and to file each such contract with the Commission for review and approval prior to the commencement of service.[368] We note that our mitigation in this regard is prospective and does not impact any existing long-term contracts.

268. Furthermore, the Final Rule retained the existing generation market power analyses (renamed to be a horizontal market power analysis) with minor changes and dismissed the request that the Commission consider different product analyses for short- and long-term products.[369] Instead, the Final Rule retained the existing mitigation where a failure to rebut the presumption of short-term market power results in the mitigation of both a seller's short-term and long-term sales.

Requests for Rehearing

269. Long-Term Sellers (LT Sellers),[370] Ameren, Southern, EEI, and OG&E take positions, in whole or in part, that the Commission erred in the Final Rule by adopting a policy that (1) generically mitigates long-term transactions based on a finding of market power under the Commission's horizontal market power analyses which focuses on short-term markets; (2) fails to recognize that absent entry barriers, long-term capacity markets are inherently competitive; and (3) does not account for previously recognized distinctions between short-term and long-term transactions.[371] Some assert that mitigation of long-term transactions is inconsistent with the Commission's finding in Order No. 697 that long-term markets are presumptively competitive, could reduce competition and raise prices in long-term markets, and have the effect of discouraging long-term transactions and investment, which the Commission has encouraged.[372] They seek clarification and/or rehearing of this policy.

270. They put forth the following arguments and rationale in support of

[360] A stacking analysis is performed in order to determine the fixed costs associated with the generating units likely to participate in off-system sales, where the related energy is priced based on incremental costs. The first portion of the analysis is the stacking of the generating units where data is recorded from each unit in the order of increasing Fuel O&M cost per kWh (lowest to highest). Power for off-system sales will only be provided after the utility has met its firm native load. The analysis assumes that the native load approximates the company's annual peak (in other words, any unit needed to serve the utility's minimum annual peak will not be available for off-system sales). The next part of the analysis is to determine which units will participate in the off-system sale. This part of the analysis can be a judgmental process. First, one eliminates those units that are uneconomical to make the sale. Next, one selects those units that are (1) usually stacked just above the peak and (2) have fuel costs that are economical to make the off-system sale.

[361] *Allegheny Power System Operating Cos.*, 111 FERC ¶ 61,308, at P 46 (2005) (''if a concern arises regarding over-recovery of transmission costs, such parties are free to seek relief by filing a complaint * * * pursuant to section 206 of the FPA.''); *Michigan Wolverine Power Supply Coop., Inc.*, 99 FERC ¶ 61,326 (2002).

[362] We note that while public utilities are required to file electric quarterly reports detailing transaction information, including price, for all market-based and cost-based power sales, such reports do not contain ex-post details of individual cost components.

[363] Part 41 pertains to adjustments of accounts and reports; Part 101 contains the Uniform System of Accounts for public utilities and licensees; Part 141 describes required forms and reports. Section 301(a) of the FPA authorizes the Commission to prescribe rules and regulations concerning accounts, records and memoranda as necessary or appropriate for the purposes of administering the FPA.

[364] Order No. 697 at P 986, 992.

[365] *Id.* P 993.

[366] *See*, e.g., *Quarterly Financial Reporting and Revisions to the Annual Reports*, Order No. 646, FERC Stats. & Regs. ¶ 31,158, at P 16–17, *order on reh'g*, Order No. 646–A, FERC Stats. & Regs. ¶ 31,163 (2004).

[367] *See Houlton Water Company*, 55 FERC ¶ 61,037 (1991) (dismissing complaint where customers failed to present prima facie case of excessive rates and noting that they had access to utility's Form No. 1 data, among other data, and could prepare cost study on that basis).

[368] *Id.* P 659 (citing April 14 Order, 107 FERC ¶ 61,018 at P 151, 155).

[369] *Id.* P 122.

[370] LT Sellers include Public Service Company of New Mexico, Duke Energy Corporation, E.ON U.S., Progress Energy, Inc. (filing on behalf of its subsidiaries), Oklahoma Gas and Electric Company, PacifiCorp, Tucson Electric Power Company, Arizona Public Service Company, and Pinnacle West Marketing & Trading Co., LLC.

[371] Southern Rehearing Request at 26 (citing *Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,617, at P 85 (2007), and Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005), sec. 1253).

[372] Ameren Rehearing Request at 9; LT Sellers Rehearing Request at 3, 10. *See also* EEI Rehearing Request at 11; OG&E Rehearing Request at 11.

their requests, and offer specific options for the Commission to consider in terms of relief. Southern states that, according to the Final Rule, the indicative screens are only ''snapshots in time,'' utilize only short-term data inputs focusing only on existing capacity holdings and consider only historical energy markets; thus, they cannot provide any reasonable information regarding supply and demand conditions in future markets. Southern and OG&E argue that the Commission should abandon the indicative screens and the DPT as bases for mitigation measures in long-term markets and that a more appropriate analysis for determining whether market power exists in long-term markets is whether potential suppliers are barred from entering the market.[373] LT Sellers, Southern, and EEI argue that the analysis of long-run market power should consider vertical market power.[374] EEI offers that, absent barriers to entry and vertical market power, buyers in long-term markets have competitive alternatives, including the option to build new generation or to enter long-term transactions for third parties to do so, that will preclude sellers from exercising market power. EEI requests that the Commission clarify that it will consider the ability of a seller to exercise vertical market power or to erect other barriers to entry, rather than horizontal market power, in determining whether sellers may enter long-term transactions at market-based rates.[375]

271. In terms of specific ways the Commission may address the issue of long-run market power, LT Sellers asked the Commission to find that the Final Rule allows sellers who fail one or both indicative screens to file a separate tariff for long-term capacity and energy sales at market-based rates, and that such a tariff would be accepted if that seller satisfies the Commission's vertical market power analysis, which addresses the relevant issues regarding long-term sales: Transmission market power and barriers to entry.[376] According to LT Sellers, such tariffs could be limited by their terms to contracts of sufficient duration and that begin sufficiently far into the future to ensure that self-building or new construction by others is a viable option and, thus, that the threat of new entry disciplines the prices under the contracts subject to the tariff.[377]

272. LT Sellers recognizes that there will be circumstances in which a tariff for long-term sales at market-based rates may not be appropriate for a particular seller. Therefore, LT Sellers contends that the Commission should establish several safe harbors for factual circumstances in which the Commission can take comfort in the lack of long-term market power such that a seller can file stand-alone long-term contracts with the Commission under a rebuttable presumption that the contract rate is just and reasonable.[378] For example, LT Sellers suggests that a safe harbor would be appropriate where a seller demonstrates that its buyer conducted an *Allegheny*-type request for proposals, or where it conducted an informal procurement and provides sufficient evidence that the contract was not the result of any market power.

273. Southern, Ameren, OG&E, and EEI similarly request that the Commission clarify that even if a seller's blanket market-based rate authority is revoked, the seller may still seek Commission approval of long term market-based rate contracts on an individual basis.[379] Southern argues that this clarification is necessary and appropriate because the absence of blanket authorization to make market-based rate sales should not preclude a seller from entering into long-term market-based rate transactions with individual buyers over whom the seller does not have market power. Southern also requests that the Commission clarify the standards that it would utilize in determining whether to approve individual long-term market-based rate contracts on a case-by-case basis. In this regard, Southern submits that for each such long-term transaction filed with the Commission for approval, there would be no presumption that the seller has market power over the applicable buyer. Instead, there would be a separate evaluation process that would consider the specific circumstances applicable to each particular transaction and buyer.[380] According to Southern, the Commission should consider establishing other exceptions to allow sellers without blanket market-based rate authority to transact on a long-term basis, and the Commission should undertake to identify the types of circumstances where market power concerns generally are not present, irrespective of whether a seller ultimately passes the Final Rule's criteria for blanket authority.[381]

274. Several petitioners take a contrary view. APPA/TAPS and Montana Counsel, in whole or in part, are concerned that the Commission's statement about the inherent competitiveness of long-term markets may invite public utilities to seek to avoid any examination of market power in long-term markets, even on a case-specific basis.[382]

275. While Montana Counsel agrees that ''[t]he markets for short-term energy purchases and long-term firm capacity supplies are undeniably distinct,'' it states that the Commission should not assume that there can be no market power for long-term firm capacity supplies; instead, it should require market-based rate applicants to demonstrate that they do not possess market power in the long-term market.[383] In particular, Montana Counsel argues that the Commission seems to assume that barriers to entry are the exception rather than the rule, and that generation will usually be built to counteract long-term market power. Montana Counsel argues that the Commission's reliance on an academic hypothesis for its statement that ''[a]s the Commission has stated in the past, absent entry barriers, long-term capacity markets are inherently competitive because new market entrants can build alternative generating supply'' in support of a major policy is unsupported, arbitrary, and capricious. Montana Counsel offers that at least one recent analysis of barriers to entry in generation markets weighs against the Commission's assumption.[384]

276. Montana Counsel states that the presence in a market of a seller with market power can itself be a barrier to entry, especially if the market is isolated by transmission constraints; for example, any new entrant would face the risk of predatory pricing by the incumbent seller, and transmission constraints would prevent the newly-built generation from being ''moved'' to a more hospitable market. Montana Counsel states that if the Commission grants market-based rate authority to a seller based on a presumption that new generation can enter the market and that

[373] Southern Rehearing Request at 27–28; OG&E Rehearing Request at 10.

[374] LT Sellers Rehearing Request at 10; Southern Rehearing Request at 28; and EEI Rehearing Request at 5, 10–11.

[375] EEI Rehearing Request at 10–11. *See also* Ameren Rehearing Request at 10.

[376] *Id.* at 21.

[377] *Id.* at 10–11.

[378] LT Sellers Rehearing Request at 11, 24–27.

[379] Southern Rehearing Request at 29–30; Ameren Rehearing Request at 10; OG&E Rehearing Request at 11.

[380] Southern Rehearing Request at 29.

[381] *Id.* at 30.

[382] APPA/TAPS Rehearing Request at 12–13.

[383] *Id.* at 7.

[384] Montana Counsel Rehearing Request at 4–5 (citing John M. Kelly, *Power Plants Don't Fly—and Other Non-Artificial Barriers to Competition in Wholesale Power Markets*, 26th USAEE/IAEE North American Conference Plenary Session, (Sept. 25, 2006)).

seller in fact has market power, it will be allowing unjust and unreasonable rates.[385]

277. APPA/TAPS also challenge the Commission's statement regarding the competitiveness of long-term markets, arguing that an examination of the evidence shows a lack of factual support for this conclusion.[386] In addition, they assert that the scope of RTO/ISO mitigation is much narrower than the default, cost-based mitigation the Commission prescribes; they note that the Commission has stated that RTO/ISO mitigation and the market-based rate analysis are different and that '' 'pieces of one should not automatically be used as precedent for the other.' '' [387] APPA/TAPS state that RTO/ISO mitigation measures apply only to spot markets and day-ahead and/or real-time, but do not apply to weekly, monthly or long-term transactions, including those negotiated on a bilateral basis, and that RTO/ISO mitigation is often far less protective than the Commission's default cost-based rates.

278. Montana Counsel states that the Commission should consider evidence on the subject of barriers to entry in generation markets in this rulemaking, and in individual proceedings it should require sellers seeking market-based rate authority to present data on current generation markets from which the Commission can develop a factual record on which it can base a reasoned decision.[388] Montana Counsel argues that the burden of demonstrating the existence of barriers to entry should not be on intervenors; rather the burden should be on the seller seeking the privilege of market-based rate authority to demonstrate the absence of barriers to entry, *i.e.*, the existence of a competitive market for long-term power supply.

Commission Determination

279. As discussed below, we will grant rehearing in part and modify our policy regarding the mitigation of long-term sales. The Commission has long held that long-term markets may be presumed to be competitive, absent barriers to entry, and has taken actions within its authority to eliminate barriers to entry.[389] Even if a seller is found to have market power in the short-term, that market power can be mitigated or eliminated by the meaningful opportunity for other sellers to enter the market in order to compete with the seller and drive down prices.[390] Given adequate time, notice, and the absence of entry barriers, proposals for new infrastructure will emerge in response to price signals. Sellers and buyers will have an opportunity to plan and respond, as their needs dictate. Whether there is a meaningful opportunity for entry and when that opportunity is expected to occur may vary depending on such factors as the type or size of resource needed (e.g., system, peaking), whether multiple resources are needed (e.g., transmission and generation), and siting and permitting considerations.

280. In this regard, we agree with some of the concerns raised by petitioners and will allow sellers to demonstrate on a case-by-case basis that they do not have market power with respect to long-term contracts. We have considered the arguments raised by LT Sellers, Ameren, Southern, EEI and OG&E that the Commission erred in the Final Rule by adopting a policy that in all circumstances mitigates long-term sales based on a finding of market power under the Commission's horizontal market power analyses. We agree that the indicative screens and the DPT only examine the presence of market power in the short-term; the Final Rule did not alter the indicative screens or the DPT to allow different product analyses for short-term or long-term power. In response to Southern's assertion that the short-term analyses cannot provide any reasonable information regarding supply and demand conditions in future markets, we find that historical data, while perhaps an imperfect fit with regard to analyzing market power in forward markets and not to be relied on solely, does provide some indication as to the seller's ability to exercise market power. This notwithstanding, we believe that there is merit to petitioners' claims regarding the differences between long- and short-term markets, and the potential impact of the Final Rule on long-term contracting. As such, we grant clarifications and rehearing as discussed herein. Our decision to do so ensures just and reasonable rates while not impeding long-term contracting. To this end, and as discussed below, we are not, as Montana Counsel argues, simply relying on an unsupported hypothesis that entry will occur and discipline these markets to ensure just and reasonable rates. Rather, we will assess the facts and record presented with each individual section 205 application.

281. Accordingly, we grant rehearing in part and provide that any seller who fails the Commission's market-based rate test or surrenders market-based rate authority (referred to herein as ''mitigated sellers'') may file with the Commission under FPA section 205, on a case-by-case basis, a request for contract-specific market-based rates based on a demonstration that the seller does not have market power with respect to the specific long-term contract being filed. The Commission will not in this rulemaking promulgate tariffs of general applicability or provide generic safe harbors for long-term sales. As petitioners note, the market-based rate program focuses on short-term markets. The record before us is not sufficient to justify a generic market-based rate tariff for long-term sales or to create a ''safe harbor'' for such transactions.

282. Therefore, on a case-by-case basis, the mitigated seller must show that a buyer under a long-term contract has viable alternatives including the

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[385] Montana Counsel Rehearing Request at 5 (citing FPA sections 205–206; *Gulf States Utils. Co.* v. *FPC*, 411 U.S. 747 (1973)).

[386] APPA/TAPS Rehearing Request at 6 (citing *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 155 (2004) (April 14 Order). APPA/TAPS also cites a study that concluded that investment was not occurring in high-priced LMP areas, which in theory should attract new entry. The study concluded ''that the LMP price signals are overwhelmed by other factors in these areas, such as *structural barriers to entry*, competing economic incentives, and the lack of a clear mechanism for assuring return on investment in certain types of projects.'' Synapse Energy Economics, Inc., *LMP Electricity Markets: Market Operations, Market Power, and Value for Consumers*, Executive Summary (Feb. 5, 2007) available at *http://www.appanet.org/files/PDFs/SynapseLMPElectricityMarketExecSumm013107.pdf* (emphasis added by APPA/TAPS).

[387] APPA/TAPS Rehearing Request at 24 (citing *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,157, at P 242 (2004), *order on reh'g*, 111 FERC ¶ 61,043 (2005).

[388] *Id.* at 5 (citing 5 U.S.C. 706(2); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

[389] *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, *order on reh'g*, Order No. 888–A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 535 U.S. 1 (2002); *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003) *order on reh'g*, Order No. 2003–A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003–B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003–C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs* v. *FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665 (1985); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890–A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007).

[390] *See, e.g.*, W. Kip Viscusi, *et al.*, *Economics of Regulation and Antitrust* 153–55, (MIT Press 2000) (1992).

entry of an appropriate amount of third-party newly-constructed resources during the relevant future period as an alternative to purchasing under the contract at issue. In order to make the relevant showing, the seller would have to show that its proposed contract is of a sufficiently long duration and provides for service to commence sufficiently far into the future, such that other sellers had a reasonable opportunity to enter the market; and that a buyer had other viable, comparable alternatives, which could include self-build options and third-party new construction. This builds upon the LT Sellers' proposal (albeit in the context of a tariff) that such contracts ''could be limited by their terms to contracts of sufficient duration and that begin sufficiently far into the future to ensure that self-building or new construction by others is a viable option and, thus, that the threat of new entry disciplines the prices under the contracts subject to the tariff.'' [391] At this time we are not imposing any specific requirements on the evidence that the mitigated sellers must submit with their application. Nevertheless, we observe that mitigated sellers who identify a specific buyer for a proposed contract will be better able to provide the Commission with an understanding of the viable and comparable alternatives that the particular buyer may have.

283. The fact that the Commission will review all of these contracts under section 205 of the FPA and provide notice and opportunity for comment addresses Montana Counsel's concern that the Commission would rely on an academic hypothesis of entry without regard to the justness and reasonableness of rates. Sellers bear the burden in an FPA section 205 proceeding to demonstrate that rates are just and reasonable.[392] We have also addressed Montana Counsel's concern that we have placed the burden of proving barriers to entry on the intervenor. As stated above, the seller has the burden to show that its rates are just and reasonable and is required to make the requisite showing. The Commission will carefully examine the evidence that will be presented, and we will deny authority to charge a market-based rate for a long-term contract when the mitigated seller cannot meet its evidentiary burden. Intervenors are therefore in the position of rebutting this evidence; they do not carry the initial (or ultimate) burden of proof. Moreover, in any application for market-based rate authority, the seller has the burden to make the requisite disclosures regarding inputs to electric power production, describing its ownership of, control over, or affiliation with entities that own or control such facilities, as well as make an affirmative statement regarding whether it has erected barriers to entry in the relevant market and committing not to erect such barriers in the future. As noted in the Final Rule, ''we are not preventing intervenors from raising other barriers to entry concerns for consideration on a case-by-case basis.'' [393]

284. We do not share the concern espoused in Montana Counsel's example of predatory pricing by the incumbent seller. Predatory pricing occurs when a firm sets prices below the competitive level in order to drive competitors out of business, then, once competitors exit the market, uses its market power to drive the price above the competitive level. The economic theory of predatory pricing requires *both* the ability and incentive to do so. In Montana Counsel's example, if the mitigated firm did sell below the competitive price and drive out the competitors, it could not use its market power to raise the price at that time because it would be mitigated by the Commission to a cost-justified rate. In other words, such a strategy would be self-defeating because once competitors exit a particular market the remaining firm would no longer pass the indicative market power screens, and this would lead to its transactions being mitigated. Therefore, while a mitigated firm could, in theory, set prices below the competitive level to minimize or eliminate competitors, the Commission's mitigation policy creates an economic disincentive to do so, which erodes Montana Counsel's theory of economic harm.

285. With regard to APPA/TAPS' suggestion that the scope of RTO/ISO mitigation is much narrower than the Commission's default cost-based mitigation, we do not believe that such a distinction should require that cost-based mitigation be imposed on long-term contracts entered into by sellers with market power in RTO/ISO markets. In RTO/ISOs, buyers have access to centralized, bid-based short-term markets which will discipline a seller's attempt to exercise market power in long-term contracts because the would-be buyer can always purchase from the short-term market if a seller tries to charge an excessive price. The RTO/ISOs have Commission-approved market mitigation rules that govern behavior and pricing in those short-term markets. Further, the RTO/ISOs have Commission-approved market monitoring, where there is continual oversight to identify market manipulation.

c. Alternative Methods of Mitigation

Final Rule

286. The Commission determined that it will address on a case-by-case basis whether the use of an agreement that is not tied to the cost of any particular seller but rather to a group of sellers is an appropriate mitigation measure.[394]

287. Specifically, the Final Rule concluded that use of the Western Systems Power Pool Agreement (WSPP Agreement) as a mitigation measure may be unjust, unreasonable or unduly discriminatory or preferential for certain sellers. The Commission instituted in Docket No. EL07–69–000 a proceeding under section 206 of the FPA to investigate whether the WSPP Agreement ceiling rate is just and reasonable for a public utility seller in a market in which such seller has been found to have market power or is presumed to have market power.[395]

288. The Final Rule noted that the Commission had previously accepted the use of the WSPP Agreement ceiling rate as mitigation by a number of sellers. The Final Rule allowed the sellers to continue to use the WSPP Agreement ceiling rate as mitigation, subject to refund (as of the refund effective date established in Docket No. EL07–69–000) and subject to the outcome of the section 206 proceeding.[396]

289. The Commission issued an order in the section 206 proceeding on February 21, 2008, determining that the WSPP Agreement's demand charge ceiling rate is no longer just and reasonable for use by public utility sellers in the market in which the sellers do not have market-based rate authority, unless such sellers can cost-justify the rate.[397] The Commission found that in markets in which a seller has or is presumed to have market power it is unjust and unreasonable to allow such a seller to continue to use the WSPP-wide ''up-to'' demand charge as a ceiling rate unless the seller can justify the costs of that charge based on its own costs.

290. The Final Rule continued to permit alternative methods of mitigation to be cost-based. However, while the Commission did not allow the use of

[391] LT Sellers Rehearing Request at 11.

[392] 18 CFR 35.3(a).

[393] Order No. 697 at P 449.

[394] *Id.* P 667.

[395] *Id.*

[396] *Id.* P 673–74.

[397] *Western Systems Power Pool,* 122 FERC ¶ 61,139 (2008).

alternative ''market-based'' mitigation on a generic basis, the Commission held that it will permit sellers to submit alternative non-cost-based mitigation proposals for Commission consideration on a case-by-case basis.[398]

Requests for Rehearing

291. No entities sought rehearing regarding use of the WSPP Agreement to mitigate market power. APPA/TAPS request clarification that the Commission will entertain proposals for structural mitigation as a condition of the privilege of market-based rate authority in specific, future cases.[399] APPA/TAPS argue that the Commission, on the one hand, approves structural measures to mitigate horizontal market power, such as the transfer of existing generation to third parties but, on the other hand, declares that structural conditions, such as joint planning and construction of new generation, are too burdensome.[400] Where the Commission can impose conditions on an applicant's market-based rate authority, APPA/TAPS support structural mitigation as a potential condition, and urge the Commission to identify, in specific cases, structural conditions that would allow applicants to obtain market-based rate authority rather than be limited to cost-based mitigation.[401]

Commission Determination

292. As the April 14 Order and Final Rule both explained, ''[p]roposals for alternative mitigation * * * could include cost-based rates or other mitigation that the Commission may deem appropriate.'' [402] While APPA/TAPS complain that the Final Rule suggested some structural measures are too burdensome, in fact the Commission only determined that entities advocating structural mitigation as a condition on market-based rate authorization had not justified imposing such a burden on a generic basis. Rather than foreclosing the possibility of structural measures, the Commission will continue to permit sellers to submit non-cost-based mitigation proposals, including those involving structural measures, for Commission consideration on a case-by-case basis based on their particular circumstances.

293. APPA/TAPS also request that the Commission identify in specific cases structural conditions that will enable applicants to obtain market-based rate authority, as an alternative to ordering cost-based mitigation. The Commission believes that, because mitigation proposals are evaluated upon the particular facts and circumstances of individual proceedings, it would be premature to identify or list specific structural measures on a generic basis. Further, it has been the Commission's practice to allow sellers to propose mitigation to address market power concerns rather than the Commission imposing specific mitigation on mitigated sellers.

2. Protecting Markets With Mitigated Sellers

a. Must Offer

Final Rule

294. In the Final Rule, the Commission determined not to impose an across-the-board ''must offer'' requirement for mitigated sellers, explaining that there was insufficient record evidence to support instituting a generic ''must offer'' requirement, as had been proposed by several commenters. While commenters proposed several methods for implementing a must offer requirement,[403] the intent of these proposals was to preclude the mitigated seller from selling its available capacity in markets where it retains market-based rate authority without first requiring the mitigated seller to offer available capacity in the balancing authority area in which it is mitigated. The Commission found that although wholesale customer commenters raised theoretical concerns that they would be unable to access power absent a ''must offer'' requirement, they did not provide any concrete examples of harm nor did they explain how the potential harm justified the generic remedy they sought.[404] The Commission also found that there are potential remedies available on a case-by-case basis to a wholesale customer alleging undue discrimination or other unlawful behavior on the part of a mitigated seller.[405]

295. While the Commission did not impose a generic ''must offer'' requirement in the Final Rule, the Commission did not rule out the possibility of finding that the imposition of a ''must offer'' requirement, or some other condition on the seller's market-based rate authority, would be an appropriate remedy in a particular case, depending on the facts and circumstances, as the Commission has done in the past.[406]

296. For many of the same reasons that the Commission declined to impose a generic ''must offer'' requirement, the Commission also declined to adopt a ''right of first refusal'' as proposed by NRECA, whereby captive customers would have the right of first refusal to purchase at a market price energy or capacity that the mitigated seller proposes to sell outside of the balancing authority area in which it is mitigated. The Commission determined that there was insufficient record evidence to support imposition of such an across-the-board requirement.[407]

Requests for Rehearing

297. APPA/TAPS and NRECA request that the Commission clarify that the Final Rule does not pre-judge the circumstances in which a must offer condition may be necessary and appropriate to remedy undue discrimination or ensure that rates are just and reasonable.[408] APPA/TAPS state that the Commission appropriately ties a must offer condition to the need for a remedy to ensure that wholesale rates are just, reasonable and not unduly discriminatory, but objects that the Commission seems to be limiting any must offer condition or similar remedy only to cases involving OATT violations.[409]

298. NRECA states that one member of the Commission expressed uncertainty about whether a ''must offer'' requirement would be appropriate absent a showing that ''the mitigated seller is the only entity physically able to meet all of the buyer's needs.'' [410] NRECA requests that the Commission clarify that it has not pre-determined that it will set the bar for a must offer requirement to the standard of total monopoly because it is

[398] Order No. 697 at P 693.

[399] APPA/TAPS Rehearing Request at 22 (citing *California Indep. Sys. Operator Corp.* v. *FERC,* 372 F.3d 395 (D.C. Cir. 2004)).

[400] *Id.*

[401] APPA/TAPS Rehearing Request at 22–23 (citing *California Indep. Sys. Operator Corp.* v. *FERC,* 372 F.3d 395 (D.C. Cir. 2004)).

[402] April 14 Order, 107 FERC ¶ 61,018 at n.142; *see also,* Order No. 697 at n.46 and P 698.

[403] *See,* e.g., *id.* P 732.

[404] *Id.* P 759–60.

[405] *Id.* P 763.

[406] *Id.* P 764.

[407] *Id.* P 771.

[408] APPA/TAPS Rehearing Request at 4, 19 (citing *Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000)); NRECA Rehearing Request at 29.

[409] APPA/TAPS Rehearing Request at 4. Additionally, APPA/TAPS disagrees with the characterization of its position as urging a ''generic remedy'' in the Final Rule. APPA/TAPS argues that it was careful to specify that the market power concerns posed by the particular market-based rate applicant would determine when a must offer condition would be appropriate. APPA/TAPS therefore states that it does not view the Final Rule as a rejection of its position. *Id.* at 18.

[410] NRECA Rehearing Request at 30 (citing Open Meeting Tr. at 61 (June 21, 2007)).

inconsistent with the standards adopted in the Final Rule.

299. NRECA argues that if a public utility seller is subject to mitigation in its home balancing authority area, the seller either has a dominant market share, its generation is critical for meeting peak-period demand, or both. In such cases, NRECA contends that the withholding of the seller's generation in its home balancing authority area could have a profound effect on the ability of a captive wholesale customer to provide electricity at a reasonable price.[411] NRECA further argues that if a total-monopoly standard were applied, a customer would not be entitled to relief so long as it could find another entity able to sell power to it. But, if that single alternative supplier had market power in the absence of competition from the ''mitigated'' seller, then the customer would be forced to buy that alternative supplier's power at monopoly prices, and the supposedly ''mitigated'' seller would be let off the hook. If that single alternative supplier were also subject to mitigation, then it too might choose to sell all of its power outside the balancing authority area, leaving the customer with no power at any price, contrary to FPA obligations.[412]

300. NRECA further argues that there is no clear guidance on who would have the burden of proof either to demonstrate that a must offer requirement or some alternative remedy is necessary or unnecessary, but that the Final Rule suggests that the customer would have the burden to prove such a remedy is necessary.[413] NRECA argues that the seller should bear the burden of proof in a particular case to demonstrate that this requirement or an alternative remedy is unnecessary.[414]

301. TDU Systems also argue that the Final Rule's determination not to impose an across-the-board ''must offer'' requirement for mitigated sellers leaves the Commission without any effective measures to assure that the granting of market-based rate authority in competitive markets will not make things worse in adjacent uncompetitive markets[415] and asserts that the Commission should reconsider the narrow range of mitigation measures it will employ in the first instance and include must offer conditions, annual open seasons, and rights of first refusal.[416] TDU Systems argue that the Commission's vague statement that it could consider such remedies in particular cases is not sufficient.[417] TDU Systems argue that if the Commission does not embrace a ''must offer'' requirement, regulations should list it as an option[418] because *National Fuel*[419] does not hold that the Commission must always determine that existing remedies and procedures are inadequate before it adopts any new regulation.[420]

302. Additionally, TDU Systems argue that if the Commission declines to impose a ''must offer'' requirement, it should, upon a finding of market power in a seller's home balancing authority area, deny market-based rate authorization in first-tier markets.[421] The immediate concern is the effects upon the public utility's continuing obligations to provide service at conventionally regulated rates in markets where it has market power.[422]

303. TDU Systems argue that it may be appropriate to impose upon sellers the initial burden of coming forward with the proposed remedy.[423] TDU Systems argue that the regulations should state that the Commission will look favorably upon a public utility's proposal to mitigate market power by entering into an enforceable commitment to provide additional transmission capacity.[424]

304. Finally, TDU Systems argue that the Commission has been aware that relying upon the rights of individual customers to file complaints after the fact is often not enough to assure overall achievement of FPA mandates.[425]

Commission Determination

305. In response to issues raised by APPA/TAPS and NRECA, we clarify that we have not pre-judged the types of specific situations in which we might impose a ''must offer'' requirement on a particular seller.

306. With respect to which party bears the burden of proof regarding a ''must offer'' requirement, we cannot make that determination in the abstract. The public utility seller has the burden under section 205 to demonstrate that its mitigation proposal is just, reasonable and not unduly discriminatory. Circumstances in which a must-offer requirement warrants consideration cannot be determined in advance, as we made clear in the Final Rule. If the public utility seller can meet its burden of showing that its mitigation proposal is just and reasonable without a must-offer requirement, however, then the burden would be on the challenging party to show that more is required.

307. TDU Systems continue to advocate the need for the Commission to impose an across-the-board ''must offer'' requirement on mitigated sellers; however, they do not provide evidence supporting such a requirement. For example, they have not provided evidence of a widespread and pervasive situation where customers were unable to access power due to a mitigated seller's business decision to sell its power outside of the balancing authority area in which the seller has been found, or presumed, to have market power. Absent such compelling evidence, we will not impose an across-the-board ''must offer'' requirement. As discussed in the following section, we also reject TDU Systems' request that the Commission, upon a finding of market power in a seller's balancing authority area, deny market-based rate authorization in first-tier markets.

308. We also reject TDU Systems' argument that the Commission list ''must offer'' in its regulations as a mitigation option. Section 35.38 of the Commission's regulations provides that a mitigated seller ''may adopt the default mitigation * * * or may propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power.''[426] We find that defining in the regulations the mitigation options that are available to all sellers provides sufficient regulatory certainty and we decline to provide a list of possible remedies that may not be

[411] *Id.* at 31. NRECA also states that ''[t]he Commission allows wholesale contracts executed or filed after July 9, 1996, to terminate by their own terms without prior notice to and approval by the Commission. Thus, a captive wholesale customer with a 'new' long-term contract may have no regulatory assurance of continued service even in a control area where the seller has generation market power.'' NRECA at n.94 (citing 18 CFR 35.15(b)).

[412] *Id.* at 31 (citing 16 U.S.C. 824a(a) (authorizing Commission actions for 'assuring an abundant supply of electric energy throughout the United States with the greatest possibly economy'); 16 U.S.C. 824d(a) (requiring all rates to be just and reasonable); Energy Policy Act of 2005, section 1233, 119 Stat. 594, 957 (2005) (adding section 217 to FPA, to be codified at 16 U.S.C. 824q, to ensure long-term transmission rights to load-serving entities); *Am. Gas Ass'n* v. *FERC,* 912 F.2d 1496, 1516–18 (D.C. Cir. 1990) (remanding FERC's pre-granted abandonment rule for failing to address the ''protection of customers from pipeline exercise of monopoly power through refusal of service at the end of a contract period'')).

[413] *Id.* at 30.

[414] *Id.* at 4 (citing *Farmers Union Cent. Exch.* v. *FERC,* 734 F.2d at 1510; *NAACP* v. *FPC,* 520 F.2d 432, 438 (D.C. Cir. 1975); 5 U.S.C. 556(d); 5 U.S.C. 706(2)(A), (C); 16 U.S.C. 824d(e)); NRECA Rehearing Request at 30 (citing 5 U.S.C. 556(d); 16 U.S.C. 824d(e)).

[415] *Id.* at 4 (citing *Farmers Union Cent. Exch., Inc.* v. *FERC,* 734 F.2d 1486, 1510 (D.C. Cir. 1984)).

[416] *Id.* at 8–9.

[417] *Id.* at 9, 22.

[418] *Id.* at 25.

[419] *Id.* at 23 (citing *National Fuel Gas Supply Corp.* v. *FERC,* 468 F.3d 831 (D.C. Cir. 2006)).

[420] *Id.* at 23–24.

[421] *Id.* at 9, 26.

[422] *Id.* at 24.

[423] *Id.* at 25.

[424] *Id.* at 26.

[425] *Id.* at 25.

[426] 18 CFR 35.38(a).

applicable to all sellers. To do otherwise would introduce needless regulatory uncertainty.

309. TDU Systems argue that it may not be sufficient to rely on a customer's right to file a complaint. However, customers are not limited to filing a complaint. At the time that a seller proposes mitigation, a customer has the opportunity to make its case regarding concerns it may have with respect to its ability to access power if the seller is mitigated in the balancing authority area. The Commission fully considers comments made by intervenors and, on a case-specific basis, if the facts and circumstances demonstrate a ''must offer'' provision is needed to mitigate market power, the Commission may impose such a remedy.

b. First-Tier Markets

Final Rule

310. In the Final Rule, the Commission retained its policy to limit mitigation to the balancing authority area in which a seller is found, or presumed, to have market power. The Commission did not place limitations on a mitigated seller's ability to sell at market-based rates in balancing authority areas in which the seller has not been found to have market power.[427]

Requests for Rehearing

311. APPA/TAPS request the Commission to clarify that, while it sees no basis as part of the current proceeding to revoke an applicant's market-based rate authority beyond the balancing authority areas in which the applicant has been found to have (or has accepted the presumption of) market power, it is not ruling out broader remedies where required to mitigate the applicant's market power in a specific case.[428]

312. APPA/TAPS assert that they did not urge that widespread revocation of market-based rate authority beyond the home balancing authority area occur on a generic basis, but rather, that the Commission not narrowly circumscribe its own remedial authority in a specific case where mitigation of a particular seller's market power may require revocation of its market-based rate authority beyond its home balancing authority area.[429] APPA/TAPS argue that the Commission's statement that comments ''favoring revocation of a mitigated seller's market-based rate authority in markets where there has been no finding of market power, as well as those supporting broadening mitigation to first-tier markets, have not provided a sufficient legal basis for such a policy,'' [430] could be used against the Commission when it seeks to broaden the scope of mitigation in that future case where a more expansive remedy is factually and legally justified.[431]

Commission Determination

313. The Commission allows market-based rate sales of energy and capacity in all balancing authority areas where the seller has been granted market-based rate authority. As the Commission explained in the Final Rule, ''[w]e generally agree that it is desirable to allow market-based rate sales into markets where the seller has not been found to have market power.'' [432]

314. With regard to APPA/TAPS' concern that the Commission should not narrowly circumscribe its own remedial authority in a specific case where mitigation of a particular seller's market power may require revocation of its market-based rate authority beyond its home balancing authority area, we clarify that the Commission neither has nor will foreclose its authority to remedy market power.

c. Sales That Sink in Markets Without Mitigated Sellers

Final Rule

315. In the Final Rule, the Commission continued to apply mitigation to all sales in the balancing authority area in which a seller is found, or presumed, to have market power.[433] However, the Commission allowed mitigated sellers to make market-based rate sales at the metered boundary between a balancing authority area in which a seller is found, or presumed, to have market power and a balancing authority area in which the seller has market-based rate authority, under certain circumstances.[434]

316. The Final Rule determined that allowing market-based rate sales by a seller that has been found to have market power, or has so conceded, in the very balancing authority area in which market power is a concern, is inconsistent with the Commission's responsibility under the FPA to ensure that rates are just and reasonable and not unduly discriminatory.[435]

Requests for Rehearing

317. OG&E complains that the Commission erred by barring utilities from selling power within a balancing authority area in which a seller is found, or presumed, to have market power where the buyer's load sinks in a non-mitigated balancing authority area.[436] OG&E claims that the Final Rule mistakenly assumes that the point of sale is relevant to the market power analysis rather than the location of the load.[437] OG&E states that the Final Rule acknowledges that buyers taking title to power ''at a metered boundary for delivery to serve load in a balancing authority where the seller has market-based rate authority have competitive choices and therefore are not required to transact with the seller found to have market power within the mitigated balancing authority area(s).'' [438] OG&E suggests that this reasoning applies with equal force to a transaction where the buyer chooses to buy power at the seller's generator bus for load that is located in a balancing authority area where the seller has market-based rate authority because such a buyer also has competitive choices. OG&E argues that these choices are not reduced by the location at which title to the energy is transferred.[439]

318. OG&E also claims that the Commission's mitigation policy harms competition and consumers by undermining the ability of a mitigated company to compete in other markets within an RTO where that seller does not have market power.[440] OG&E asserts that if a power purchaser located in a non-mitigated market within an RTO already takes network transmission service under an OATT and that purchaser solicits power supply bids based on the premise that the purchaser will arrange and pay for any necessary transmission service, then potential suppliers not subject to mitigation will bid on a ''power only'' basis. In contrast, a mitigated supplier's bid would include the cost of transmission service to take the power to the metered boundary of the control area where the

[427] Order No. 697 at P 790.

[428] APPA/TAPS Rehearing Request at 4 (citing *Niagara Mohawk Power Corp.* v. *FPC,* 379 F.2d 153 (D.C. Cir. 1967)).

[429] *Id.* at 20.

[430] Order No. 697 at P 791.

[431] *Id.* at 4, 20–21.

[432] *Id.* P 819.

[433] Although the Commission used the term ''mitigated market'' in Order No. 697, the Commission later determined that ''balancing authority area in which a seller is found, or presumed, to have market power'' is a more accurate way to describe the area in which a seller is mitigated. *Clarification Order,* 121 FERC ¶ 61,260, at P 7 & n.10.

[434] Order No. 697 at P 817 (citing North American Electric Reliability Corporation. *Glossary of Terms Used in Reliability Standards* at 2 (2007), available at *ftp://www.nerc.com/pub/sys/all_updl/standards/rs/Glossary_02May07.pdf*).

[435] Order No. 697 at P 819.

[436] OG&E Rehearing Request at 3.

[437] *Id.* at 4–5.

[438] Order No. 697 at P 820.

[439] OG&E Rehearing Request at 5.

[440] *Id.*

seller is mitigated. OG&E complains that in such an instance, the transmission service is not needed because the purchaser would prefer to use its existing network service—priced on the basis of load—to arrange for transmission. OG&E contends that the added transmission costs imposed on a mitigated supplier in such a scenario would undermine the competitiveness of a mitigated supplier's bid, thereby reducing the competitive options available to the purchaser. OG&E contends that the Commission's policy, because it can result in additional transmission costs for a mitigated supplier as described above, imposes a pancaked rate structure on mitigated suppliers, which undermines an essential benefit associated with RTO participation. This, OG&E complains, is inconsistent with the Commission's goal of eliminating pancaked rates by establishing RTOs, and will interfere with the development and efficiency of competitive wholesale markets.[441] OG&E adds that the Final Rule provides no justification for a policy under which a mitigated supplier may incur the cost of transmission service to take the power to the metered boundary of the control area when it seeks to sell power to a potential customer located in another non-mitigated balancing authority area within an RTO. These effects are even greater, OG&E asserts, because the Commission has approved other utilities' mitigation proposals that allow them to sell power at their generator bus so long as that power sinks in another balancing authority area. OG&E argues that those tariffs remain in full force and effect after Order No. 697. Like these sellers, OG&E should be permitted to compete on an equal basis to serve customers whose loads sink outside OG&E's mitigated balancing authority area.[442]

319. OG&E argues that the Final Rule fails to acknowledge that the Commission's new mitigation policy departs from prior policy.[443] OG&E asserts that in several recent cases where sellers failed the market share screens in their balancing authority area, the Commission imposed mitigation prohibiting the seller from making sales to ''loads that sink'' in that balancing authority area.[444] While the Commission later rejected this language, OG&E contends that it never has explained this change in position.[445] When the Commission departs from established policy without explanation, as OG&E claims it did here, it acts arbitrarily and fails to engage in the reasoned decision making required by the law.[446]

Commission Determination

320. OG&E complains that the Commission erred by barring utilities from selling power within a balancing authority area in which a seller is found, or presumed, to have market power when the buyer's load sinks in a non-mitigated balancing authority area. As noted in the Final Rule, another commenter similarly asserted that any buyer purchasing power at a generator bus or elsewhere in a balancing authority area in which a seller is found, or presumed, to have market power for purposes of moving that power beyond that mitigated balancing authority area should be treated no differently than a buyer who takes delivery of purchased power outside of that balancing authority area. OG&E, like earlier commenters advocating this approach, has failed to adequately address how the Commission could effectively monitor such sales to ensure that improper sales are not being made in the balancing authority area in which a seller is found, or presumed, to have market power. As the Commission stated in the Final Rule, several commenters noted the complex administrative problems that would be associated with trying to monitor compliance with such a policy.[447]

321. Moreover, as the Commission explained in the Final Rule, allowing market-based rate sales by a seller found to have market power, or has so conceded, in the very balancing authority area in which market power is a concern is inconsistent with the Commission's responsibility under the FPA to ensure that rates are just and reasonable and not unduly discriminatory. While we generally agree that it is desirable to allow market-based rate sales into balancing authority areas where the seller has not been found to have market power, a mitigated seller cannot make market-based rate sales anywhere within a balancing authority area in which a seller is found, or presumed, to have market power. It is unrealistic to believe that sales made anywhere in a balancing authority area can be traced to ensure that no improper sales are taking place. In contrast, sales made at the metered boundary for export do more readily lend themselves to being monitored for compliance, and the nature of these types of sales do not unduly disadvantage customers or competitors. Prohibiting market-based rate sales at the metered boundaries of a balancing authority area in which a seller is found, or presumed, to have market power could prevent or adversely impact cross border sales at these unique locations and reduce market liquidity unnecessarily in markets where the seller does not possess market power.

322. OG&E also claims that not allowing sales at the generator bus undermines the ability of a mitigated company to compete in other markets within an RTO where that seller does not have market power. For example, if a mitigated seller attempts to transact with a purchaser willing to use the purchaser's existing network transmission service, OG&E asserts that a mitigated seller's ability to compete is undermined. OG&E claims that because a mitigated seller must incur transmission costs to deliver the power in the above scenario to the metered boundary rather than simply to a generator bus in the balancing authority area in which a seller is found, or presumed, to have market power, the mitigated seller would be unable to bid on a ''power only'' basis and would be forced to pay an additional transmission cost that is redundant due to the purchaser's ability to use its network service if the mitigated seller could sell at the generator bus. This, OG&E suggests, not only undermines that mitigated seller's ability to compete beyond the mitigated balancing authority area, but also would reduce the competitive options available to the buyer.

323. OG&E's concern regarding mitigation undermining a seller's ability to compete fails to appreciate that mitigated sellers are prohibited from making sales at a generator bus in that particular balancing authority area because they have been shown to have, or conceded, market power in that market area. Mitigated sellers lose the privilege of market-based rate sales at generator bus locations within a balancing authority area in which a seller is found, or presumed, to have market power. Unlike sales at the generator bus bar, sales made at the metered boundary for export do lend themselves to being monitored for compliance, and these sales do not

[441] *Id.* at 6.

[442] *Id.* at 6–7.

[443] *Id.* at 7.

[444] *Id.* at 2 (citing *Duke Power,* 113 FERC ¶ 61,192 (2005); *AEP Power Marketing, Inc.,* 114 FERC ¶ 61,025 (2006); *LG&E Energy Marketing Inc.,* 113 FERC ¶ 61,229 (2005); *South Carolina Electric and Gas Co.,* 114 FERC ¶ 61,143 (2006); *Florida Power Corp.,* 113 FERC ¶ 61,131 (2005)).

[445] *Id.* (citing Order No. 697 at P 794; *MidAmerican Energy Co.,* 114 FERC ¶ 61,280 (2006); *Carolina Power & Light Co.,* 114 FERC ¶ 61,294 (2006); *Aquila, Inc.,* 114 FERC ¶ 61,281 (2006)).

[446] *Id.* at 8.

[447] Order No. 697 at P 818.

unduly disadvantage customers or competitors.

324. OG&E also claims that its ability to compete is undermined because the Commission approved several tariffs that permit a mitigated entity to sell power at their generator bus so long as that power sinks beyond the balancing authority area in which a seller is found, or presumed, to have market power. However, a recent Commission order explained that such tariffs are inconsistent with the Commission's policy as set forth in Order No. 697, as of the effective date of Order No. 697 (September 18, 2007).[448] In that order, the Commission explained that its acceptance of a mitigation proposal and tariff provisions that focused on sales that did not sink within the balancing authority area in which the seller was found, or presumed, to have market power was inconsistent with the April 14 and July 8 Orders and, therefore, in error.[449] Moreover, the Commission's recent order clarifying the Final Rule explained that sales made after September 18, 2007 must be in compliance with the requirements of Order No. 697.[450] Because a mitigated entity is precluded from limiting its mitigation to sales that sink in the balancing authority area in which it is found, or presumed to have, market power, all mitigated sellers are now on the same footing with regard to their ability to serve customers whose loads sink outside mitigated balancing authority areas.

d. Tariff Language

Final Rule

325. In the Final Rule, the Commission adopted a requirement that mitigated sellers wishing to make market-based rate sales at the metered boundary between a balancing authority area in which the seller was found, or presumed, to have market power and a balancing authority area in which the seller has market-based rate authority maintain sufficient documentation and use a specific tariff provision for such sales.[451] In particular, the Final Rule requires that mitigated sellers that want to make market-based rate sales at the metered boundary adopt the following tariff provision:

> Sales of energy and capacity are permissible under this tariff in all balancing authority areas where the Seller has been granted market-based rate authority. Sales of energy and capacity under this tariff are also permissible at the metered boundary between the Seller's mitigated balancing authority area and a balancing authority area where the Seller has been granted market-based rate authority provided: (i) legal title of the power sold transfers at the metered boundary of the balancing authority area where the seller has market-based rate authority; (ii) any power sold hereunder is not intended to serve load in the seller's mitigated market; and (iii) no affiliate of the mitigated seller will sell the same power back into the mitigated seller's mitigated market. Seller must retain, for a period of five years from the date of the sale, all data and information related to the sale that demonstrates compliance with items (i), (ii), and (iii) above.

Requests for Rehearing

326. Pinnacle requests clarification of the provision's requirement that ''any power sold is not intended to serve load in the seller's mitigated market.'' As written, Pinnacle argues that this requirement could limit liquidity, particularly for term sales transactions, in the market trading hubs.[452] For example, Pinnacle states that it transacts at several liquid points in the Western markets such as Four Corners, which is at the border of the APS balancing authority area. Pinnacle explains that although it can assess its intent for the destination of power purchased at the border point, it does not have control over the intent of third parties purchasing the power. Further, Pinnacle asserts that it is unlikely that counterparties at liquid market hubs would agree to contractual limitations on where power can sink for term transactions.[453] Pinnacle adds that the Commission has not placed any limits on the time at which intent is determined. For example, if a buyer intends to sink the power outside of the market in which the seller has or is presumed to have market power at the time of purchase, but at the time of delivery determines that it must liquidate its positions and sell power back into that market, the Final Rule is unclear whether the mitigated seller may be liable for this sale into the market in which it has market power. Pinnacle argues that without the clarification on intent, mitigated sellers may be limited to cost-based sales at the border. Pinnacle requests the Commission clarify that intent is only directed at the determination of the mitigated seller.

327. If the Commission does not so clarify, Pinnacle requests on rehearing that the Commission revise the second requirement in the tariff provision to state: ''(ii) the seller does not intend for any power sold to serve load in the seller's mitigated market.'' Pinnacle claims that this revision will provide greater regulatory certainty.

328. Morgan Stanley similarly is unclear on how the Commission will ensure that a mitigated seller knows what an unaffiliated buyer intends to do with power. It adds that a restriction forbidding unaffiliated buyers from purchasing power at the metered boundary from a mitigated seller and then selling the same power back into a balancing authority area in which the seller was found, or presumed, to have market power would be burdensome because every sale would have to be tracked.[454] Morgan Stanley therefore requests the Commission to clarify that buyers unaffiliated with a mitigated seller may purchase power at the metered boundary to sell to customers that serve load in the mitigated seller's balancing authority area. It argues that if restrictions are imposed on unaffiliated buyers' purchases at the metered boundary, the Commission should explain or, in the alternative, grant rehearing.[455]

329. Pinnacle is further concerned about the metered boundary tariff provision's requirement that mitigated sellers commit to and demonstrate that ''no affiliate of the mitigated seller will sell the same power back into the mitigated seller's mitigated market.'' Pinnacle submits that it might generally have immediate documentation to meet the above requirement for real-time transactions because the NERC tag (that notes the sink point for the power) will be made upon the execution of a real-time transaction. However, in the context of a term sale, Pinnacle explains that NERC tags are generally created not at the time of the transaction, but rather the last scheduling day prior to the start of the sale. The result, Pinnacle submits, is that no immediate documentation is created to show that the mitigated seller intended to sink the sale outside of the mitigated market where a term sale followed by a ''coincidental sale'' [456] that results in power returning to the

[448] *See South Carolina Electric and Gas Company,* 121 FERC ¶ 61,263 at P 12 (2007).

[449] *Id.*

[450] Clarification Order, 121 FERC ¶ 61,260 at P 4–8.

[451] Order No. 697 at P 830.

[452] Pinnacle Rehearing Request at 4. Although Pinnacle does not provide a definition for ''term sale,'' we understand their use of that phrase to refer to a sale that is neither executed nor tagged immediately, and whose sink location is unknown at the time of the sale.

[453] *Id.* at 5.

[454] Morgan Stanley Rehearing Request at 3.

[455] *Id.* at 2–3.

[456] Pinnacle describes a ''coincidental sale'' as the situation where, after a mitigated seller makes a term sale to an unaffiliated counter-party at the metered boundary, an affiliate of the mitigated seller enters into an unrelated transaction to buy that same power from the unaffiliated counterparty.

balancing authority area in which the seller has been found, or presumed, to have market power. Pinnacle therefore seeks clarification, or in the alternative rehearing, on whether the requirement that a mitigated seller commit to and demonstrate that ''no affiliate of the mitigated seller will sell the same power back into the mitigated seller's mitigated market'' applies in the following scenario: A mitigated seller sells a term product to an unaffiliated counterparty at the metered boundary for delivery sometime in the future. Thereafter, an affiliated seller purchases the power in a coincidental sale and, despite any lack of arrangement, the affiliate of the mitigated seller then re-sells that power to the balancing authority area in which the mitigated seller has been found, or presumed, to have market power.[457] If the unaffiliated counterparty does not advise the affiliate of the mitigated seller that the unaffiliated counterparty is selling to the affiliate of the mitigated seller the same power that the unaffiliated counterparty originally purchased from the mitigated seller, Pinnacle claims that it will only become apparent that the mitigated seller is sourcing the transaction between the unaffiliated counterparty and the affiliate of the mitigated seller when the NERC tags are prepared.[458]

330. Pinnacle also seeks clarification, or in the alternative rehearing, as to the types of documentation that the Commission requires to show the intent of the seller, and particularly whether the Commission would consider audio tapes of transactions to be sufficient. Pinnacle states that, generally, representative documentation for real-time trading is created. For a term sale, however, a representative tag is not created at the time of the transaction but rather around the last scheduling prior to the start of the sale. Therefore, when a term sale is involved, no immediate tag at the time of contracting is created that can be evidenced as intent to sink the sale outside of the market in which the seller has market power.

331. Pinnacle also requests clarification that the physical point of the metered boundary is the mitigated seller's side of the electrical boundary, and does not include points at the border that are in an adjacent balancing authority area.[459] If the Commission does not provide the requested clarification, Pinnacle requests rehearing of this requirement. Pinnacle argues that, as currently written, the tariff language on metered boundaries does not provide the regulatory certainty necessary to accurately implement the requirements.[460]

332. OG&E complains that the Final Rule's new mitigation policy is improperly based on the assumption that utilities will violate their tariffs despite the fact that such a purposeful circumvention of a company's mitigation tariff would subject the violator to the risk of substantial civil penalties. Moreover, OG&E adds that such conduct also could violate the Commission's Market Manipulation Rule.[461] OG&E points out that, in the Final Rule, the Commission rejected fears of gaming because such conduct would violate its existing rules.[462] OG&E asserts that the same logic applies to the Commission's concerns that a seller might violate its market-based rate tariff to purposefully make sales to a customer whose load sinks in the balancing authority area in which that seller was found, or presumed, to have market power. OG&E argues that, where a particular set of actions already are prohibited by the Commission's rules, the Commission cannot impose new requirements unless it first finds that the existing rules are ineffective.[463]

Commission Determination

333. As an initial matter, we will revise the tariff language governing market-based sales at the metered boundary to conform with the discussion in the Clarification Order regarding use of the term ''mitigated market.'' As we explained in the Clarification Order, we believe that ''balancing authority area in which a seller is found, or presumed, to have market power'' is a more accurate way to describe the area in which a seller is mitigated.

334. After considering comments raised regarding the difficulty of determining and documenting intent, we have decided to eliminate the intent element of the tariff provision, which states that ''any power sold hereunder is not intended to serve load in the seller's mitigated market.'' As we are eliminating the seller's intent requirement, we will modify the other tariff provision to require that ''the mitigated seller and its affiliates do not sell the same power back into the balancing authority area where the seller is mitigated.'' [464] Because we are eliminating the intent requirement, we need not address issues raised regarding documentation necessary to demonstrate the mitigated seller's intent.

335. Pinnacle also asks whether a mitigated seller would be liable if an affiliate purchases power from an unaffiliated intermediate party, then arranges to re-sell that power back into the mitigated seller's balancing authority area, and it is subsequently discovered, when the NERC tags are prepared, that the mitigated seller was the initial source of that power via a term sale with the unaffiliated intermediate party. Under these circumstances, the mitigated seller would have violated its market-based rate tariff. Whether or not prearranged by affiliates, a series of transactions involving what Pinnacle describes as a ''coincidental sale'' that may result in an affiliate re-selling power back into the balancing authority area in which the seller has been found, or presumed, to have market power are prohibited by Order No. 697. This is because mitigated sellers and their affiliates are prohibited from selling power at market-based rates in the balancing authority area in which a seller is found, or presumed, to have market power. Accordingly, an affiliate of a mitigated seller is prohibited from selling power that was purchased at a market-based rate at the metered boundary back into the balancing authority area in which the seller has been found, or presumed, to have market power.

336. To the extent that the mitigated seller or its affiliates believe that it is not practical to track such power, they can either choose to make no market-based rate sales at the metered boundary or limit such sales to sales to end users of the power, thereby eliminating the danger that they will violate their tariff by re-selling the power back into a balancing authority in which they are mitigated.

337. We also clarify that when using the term ''metered boundary,'' the Commission intends that applicable mitigation applies to sales made at the metered boundary regardless of at which ''side'' of the border the sale takes place. We adopt this approach as a concession to mitigated sellers that wish to make sales that may technically take place in a balancing authority area where they do not have market-based rate authority. However, in adopting this approach we do not intend to do so with such precision that we are drawn

[457] Pinnacle Rehearing Request at 7–8.

[458] *Id.*

[459] Pinnacle Rehearing Request at 8.

[460] *Id.* at 8–9.

[461] OG&E Rehearing Request at 9.

[462] *Id.* at 10.

[463] *Id.*

[464] To provide additional regulatory certainty for mitigated sellers, we clarify that once the power has been sold at the metered boundary at market-based rates, the mitigated seller and its affiliates may not sell that same power back into the mitigated balancing authority area, whether at cost-based or market-based rates.

into evidentiary hearings on this matter, which could result in long drawn out contractual disputes to determine the precise spot at which the sale took place. We further deny Pinnacle's request for rehearing to seek a precise definition of ''metered boundary'' because we believe, with the clarification provided herein, the existing tariff language on metered boundaries does provide the regulatory certainty necessary to accurately implement Order No. 697's requirements.

338. We disagree with OG&E's contention that our policy is based on the assumption that utilities will purposely violate their tariffs. We make no such assumption; however, it would not be sensible for us to establish conditions that we are unable to monitor for compliance. Sales at the metered boundary are unique physical locations that lie on the borders of balancing authority areas, and we believe that we can monitor compliance for sales at the metered boundary more effectively than sales made anywhere within the balancing authority area. As explained above, such limitation is justified by the Commission's need to monitor compliance with its conditions on sales within the balancing authority area in which the seller is mitigated.

339. Consistent with the preceding discussion, we will revise the tariff provision for market-based rate sales at the metered boundary as follows (bold font indicates new text):

Sales of energy and capacity are permissible under this tariff in all balancing authority areas where the Seller has been granted market-based rate authority. Sales of energy and capacity under this tariff are also permissible at the metered boundary between the Seller's mitigated balancing authority area and a balancing authority area where the Seller has been granted market-based rate authority provided: (i) legal title of the power sold transfers at the metered boundary of the balancing authority area where the seller has market-based rate authority; **and** (ii) **the Seller and its affiliates do not sell the same power back into the balancing authority area where the seller is mitigated.** Seller must retain, for a period of five years from the date of the sale, all data and information related to the sale that demonstrates compliance with items (i) **and** (ii) above.

340. Any sellers that have already adopted the tariff language prescribed in Order No. 697 are directed to revise the provision in accordance with this discussion on the next occasion when they otherwise would be required to file revised tariff sheets with the Commission, a change in status filing, or triennial review.

E. Implementation Process

Final Rule

341. In Order No. 697, the Commission created a category of market-based rate sellers (Category 1 sellers) that are exempt from the requirement to automatically submit updated market power analyses. These Category 1 sellers include ''wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.'' [465] Market power concerns for Category 1 sellers will be monitored through the change in status reporting requirement [466] and through ongoing monitoring by the Commission's Office of Enforcement. Category 2 sellers (all sellers that do not qualify for Category 1) will be required to file regularly scheduled updated market power analyses in addition to change in status reports.

342. In addition, to ensure greater consistency in the data used to evaluate Category 2 sellers, the Commission modified the timing for the submission of updated market power analyses.[467] Order No. 697 requires analyses to be filed for each seller's region on a pre-determined schedule, rotating by geographic region where two regions are reviewed each year, with the cycle repeating every three years.[468] This process allows evaluation of each individual seller's market power at the same time that other sellers in the same region are examined. For corporate families that own or control generation in multiple regions, the corporate family will be required to file an update for each region in which members of the corporate family sell power during the time period specified for that region.

1. Category 1 and 2 Sellers

a. Establishment of Category 1 and 2 Sellers

Requests for Rehearing

343. On rehearing, NASUCA argues that the exemption from market power review for Category 1 sellers lacks factual and legal justification. NASUCA contends that this exemption is inconsistent with the justifications the Commission has previously given to the courts. In particular, NASUCA argues that it is inconsistent with the Commission's arguments before the court that it carefully assesses the market power of any entity allowed to sell at market-based rates.[469]

344. NASUCA contends that in *Lockyer* v. *FERC,* 383 F.3d 1006 (9th Cir. 2004) (*Lockyer*), the Ninth Circuit mistakenly believed that the market power assessment under current Commission orders is made triannually (*i.e.*, once every four months) when it is only required triennially (once every three years).[470] NASUCA believes that, because the Final Rule would completely eliminate the triennial review for many sellers in Category 1, the basis for the decision in *Lockyer,* to the extent it is based on the Court's belief that the Commission reviews the market power of all sellers four times a year, is undermined. NASUCA concludes that the blanket exemption from market power review of all sellers owning or controlling less than 500 MW capacity is inconsistent with the Commission's stated rationale for allowing a market-based rate system.

345. NASUCA also argues that the Commission has reversed the burden previously placed on applicants for the ''privilege'' of having market-based rates.[471] NASUCA notes that the Final Rule states, '' '[w]hile it is true that a portion of these sellers will continue to sell at market-based rates for a time until their updated market power analyses (in the case of Category 2 sellers) or their filings addressing qualification as Category 1 sellers are due, *no commenter has submitted compelling evidence that Category 1 sellers have unmitigated market power.*' '' [472] NASUCA contends that Order No. 697 essentially granted all

[465] 18 CFR 35.36(a)(2) (citations omitted).

[466] *See* 18 CFR 35.42.

[467] Previously, updated market power analyses were submitted within three years of any order granting a seller market-based rate authority, and every three years thereafter.

[468] *See* Order No. 697 at Appendix D. The regions include the Northeast, Southeast, Central, Southwest Power Pool, Southwest, and Northwest.

[469] NASUCA Rehearing Request at 12–13.

[470] *Id.* at 13.

[471] *Id.* at 13–14 (citing *Schaffer* v. *Weast,* 546 U.S. 49 (2005); *Lavine* v. *Milne,* 424 U.S. 577, 585 (1976)).

[472] *Id.* (quoting Order No. 697 at P 334) (emphasis added by NASUCA).

Category 1 sellers market-based rates without their submitting an application demonstrating a lack of market power, and required objectors to submit ''compelling evidence'' in a non-evidentiary proceeding.

346. NASUCA argues that the Commission cannot presume that the market price demanded by all Category 1 sellers will be a ''competitive'' price or a just and reasonable rate.[473] NASUCA states that the Supreme Court ''rejected any conflation of 'competitive' market price with the 'just and reasonable' rate required by statute.'' [474] NASUCA contends that for Category 1 sellers, which it asserts are now exempt from any market power test, ''the 'prevailing price in the marketplace' is indeed the 'final' measure of the rates being demanded, changed and charged,'' a result contrary to the intent of Congress.[475]

347. NASUCA also argues that there is no basis in the record of this proceeding to assume that power marketers or producers who own or control less than 500 MW of generation lack market power at all times.[476] NASUCA notes that in load pockets or other transmission-constrained areas, sellers with less than 500 MW of capacity could exercise market power, either alone or acting strategically without overt collusion to inflate rates when supply margins are tight. NASUCA states that changing circumstances also may affect the opportunity of seemingly small sellers to exercise market power.

348. Additionally, NASUCA argues that, because the definition of seller includes not only owners of generating plants but also power marketers, this loophole might encourage power marketers to control segments of power plants up to 499.9 MW and through strategic bidding and other methods exercise subtle market power in certain locations at certain times.[477] NASUCA states that, as a result of this exemption, sales from these facilities will be at prices solely determined by market forces, in contravention of *FPC* v. *Texaco.* NASUCA therefore concludes that if the Commission desires to identify a threshold below which a seller cannot exercise market power, it should commence a new proceeding, conduct technical workshops, gather evidence from the public and from RTO market monitors, and receive comments before adopting an evidence-based standard.

Commission Determination

349. NASUCA's argument on rehearing that the Commission did not adequately justify its decision to exempt Category 1 sellers from filing regularly scheduled updated market power analyses is misplaced. As we reiterate below, we thoroughly discussed the basis of our decision in Order No. 697, including that exempting Category 1 sellers is fully consistent with our statutory mandate to ensure just and reasonable rates and with the court decisions that have construed that obligation.[478] Moreover, as discussed below, in a number of instances NASUCA does not accurately describe the exemption or our justification for it.

350. With regard to NASUCA's argument that exempting sellers from market power reviews undermines the court's decision in *Lockyer,* we note that the Commission addressed this concern in Order No. 697. Specifically, the Commission stated that ''the reporting requirement relied upon by the court in *Lockyer* is the transaction-specific data found in EQRs, which we continue to require of all sellers, and not the updated market power analyses. Thus, exempting Category 1 sellers from routinely filing updated market power analyses does not run counter to *Lockyer.*'' [479] The court in *Lockyer* emphasized that the Commission ''has broad discretion to establish effective reporting requirements'' for administering tariffs, and that the FPA ''explicitly leaves the timing and form'' of rate filings to the Commission's discretion.[480]

351. In any case, NASUCA fails to recognize that the Commission has not exempted Category 1 sellers from initial market power reviews. In addition, the Commission left in place the change in status reporting requirements that allow the Commission to review market power of sellers on an ongoing basis. Thus, we reject NASUCA's contention that this exemption is inconsistent with the justifications the Commission has previously given to the courts.

352. We also reject NASUCA's contention that the Commission has reversed the burden previously placed on applicants for the ''privilege'' of having market-based rates by not requiring Category 1 sellers to file regularly scheduled updated market power analyses. As an initial matter, NASUCA argues incorrectly that Order No. 697 ''essentially granted all Category 1 sellers market[-based] rates without their applying and demonstrating a lack of market power, and required objectors to submit 'compelling evidence' in a non-evidentiary proceeding.'' [481] Order No. 697 did not grant Category 1 sellers market-based rate authority without requiring the submission of an application demonstrating a lack of market power. To the contrary, all sellers seeking market-based rate authorization (including sellers that qualify as Category 1 sellers) must initially demonstrate either a lack of market power or that any market power is adequately mitigated in order to obtain Commission market-based rate authorization.[482] All such proceedings are noticed and allow for public comment. Any party to the proceeding has an opportunity during these proceedings to argue that a seller has market power.[483] Although Category 1 sellers are not required to file regularly scheduled updated market power analyses, they retain the initial burden of proof to demonstrate that they do not have or have adequately mitigated market power in the first instance. In addition, Category 1 sellers continue to have the burden of informing the Commission of any change in the circumstances that the Commission relied on in granting them market-based rate authority.

353. Further, NASUCA takes the Commission's statement regarding the submission of compelling evidence out of context. The passage that NASUCA quotes from the Final Rule (Order No. 697 at P 334) discusses the elimination of the exemption for new generation (formerly § 35.27(a) of the Commission's regulations), and the lack of compelling evidence that the Commission referenced there related to commenters' unpersuasive reasons for retaining the § 35.27(a) exemption.[484] The

[473] *Id.* at 14.

[474] *Id.* (citing *FPC* v. *Texaco,* 417 U.S. at 397).

[475] *Id.* at 15 (quoting *FPC* v. *Texaco,* 417 U.S. at 397).

[476] *Id.*

[477] *Id.* at 16.

[478] Order No. 697 at P 848.

[479] *Id.* P 854.

[480] *Lockyer,* 383 F.3d 1006, 1013.

[481] NASUCA Rehearing Request at 14.

[482] A seller who previously was not required to demonstrate a lack of horizontal market power based on the exemption contained in 18 CFR 35.27(a) and that believes it qualifies as a Category 1 seller, will be required to provide support for its claim to Category 1 status. This filing will give the Commission and interested parties an opportunity to review and, if appropriate, challenge a seller's claim that it qualifies as a Category 1 seller. To the extent that an intervenor has concerns about a seller's potential to exercise market power, the Commission will entertain them at that time. Order No. 697 at P 333.

[483] Additionally, if a seller's circumstances change from those which the Commission reviewed and made a determination upon, it is required to inform the Commission in a change in status filing.

[484] The Commission was responding to NASUCA's concern that sellers that initially

Continued

Commission discussed the establishment of Category 1 and 2 sellers in a separate part of the Final Rule (Order No. 697 at P 848–62); the Commission nowhere intimated that Category 1 sellers need not demonstrate that they lack market power. Accordingly, NASUCA's contention is rejected in this regard.

354. With respect to NASUCA's assertion that there is no basis in the record to assume that power marketers or producers who own or control less than 500 MW of generation lack market power at all times, in Order No. 697 the Commission fully explained the rationale underlying the adoption of Category 1, as well as the rationale for adopting 500 MW or less of generating capacity per region as the cutoff. The Commission explained that Category 1 sellers have been carefully defined to have attributes that are not likely to present market power concerns: Ownership or control of relatively small amounts of generation capacity; no affiliation with an entity with a franchised service territory in the same region as the seller's generation facility; little or no ownership or control of transmission facilities and no affiliation with an entity that owns or controls transmission in the same region as the seller's generation facility; and no indication of an ability to exercise vertical market power. The Commission further explained that, based on a review of past Commission orders, it is aware of no entity that would have qualified as a Category 1 seller but would nevertheless have failed the indicative screens, necessitating a more thorough analysis.[485] Furthermore, we believe that we have maintained an ample degree of monitoring and oversight to detect sellers that are not required to file regularly scheduled market power updates but nevertheless obtain enough additional generation as to raise market power concerns. This is so because we require all sellers seeking market-based rate authority to conduct a market power analysis and, once market-based rate authority is obtained, to submit change in status filings when the circumstances on which the Commission has granted market-based rate authority have changed. In these filings, such sellers must report on what effect, if any, the additional generation has on their market power. In addition, the Commission reserves the right to require an updated market power analysis from any market-based rate seller at any time.[486] Finally, all sellers with market-based rates, whether Category 1 or Category 2 sellers, must file electronically with the Commission an EQR of transactions no later than 30 days after the end of each reporting quarter.

355. Nevertheless, in light of concerns raised regarding the potential for Category 1 sellers to exercise market power in load pockets or other transmission-constrained areas, we will modify our approach when analyzing the indicative screens (e.g., as a result of regularly scheduled updated market power analyses). Specifically, to the extent that a Commission-identified submarket is under analysis, we will consider whether there is an indication that any sellers in that submarket, including Category 1 sellers, have market power. While we will not routinely require Category 1 sellers with generation assets in a submarket to submit a regularly scheduled updated market power analysis, when evaluating the market power analyses of Category 2 sellers, we will conduct our own analysis, based on publicly available information, of whether there are any market power concerns related to any Category 1 seller in a submarket. If, based on our analysis, we determine that there may be potential market power concerns with respect to any Category 1 sellers in a submarket, we will, if appropriate, require an updated market power analysis to be filed by such sellers. We will also notice such filings for public comment, thus allowing parties to raise concerns regarding market power for Commission consideration.

356. Regarding concerns about the specific threshold chosen, when the Commission proposed in the NOPR the establishment of Category 1 and Category 2 sellers, the Commission proposed to define Category 1 sellers as power marketers and power producers that own or control 500 MW or less of generation capacity in aggregate, among other requirements. The Commission received a variety of comments concerning the proposed threshold. After careful review of these comments, the Commission concluded that 500 MW or less of generation capacity per region is an appropriate threshold. The Commission explained in Order No. 697 that the 500 MW threshold would be used as a cutoff because, during the Commission's 15 years of experience administering the market-based rate program, there had only rarely been allegations that sellers with capacity of 500 MW or less (in any geographic region) had market power. The Commission noted that when those claims have been raised, the Commission's review either found no evidence of market power or found that the market power identified was adequately mitigated by Commission-enforced market power mitigation. The Commission explained that, while some commenters urged it to adopt either a higher or lower threshold, the Commission believes that a 500 MW threshold is both a reasonable balance as well as conservative enough to ensure that those unlikely to possess market power will be granted market-based rate authority. Moreover, 500 MW is a clear, bright line that will be easy to administer. On this basis, we reject NASUCA's suggestion that the Commission should commence a new proceeding, conduct technical workshops, gather evidence from the public and from RTO market monitors, and receive comments to further address the appropriate threshold.

b. Threshold for Category 1 Sellers

Requests for Rehearing

357. On rehearing, PPM contends that Order No. 697 does not provide any explanation as to why Category 1 membership is based on the ownership or control of generation in a ''region,'' as opposed to in the geographic area used to measure market power.[487] PPM submits that the appropriate geographic area for measuring ownership or control of electric generation for purposes of identifying Category 1 sellers is the same area used to assess market power: The balancing authority area or, for RTOs and ISOs, the relevant RTO/ISO market or submarket. PPM submits that the use of regions for determining Category 1 membership would result in a seller owning or controlling 500 MW of generating capacity located entirely in one balancing authority area being considered to have less chance of possessing market power than a seller owning or controlling 300 MW of generating capacity each in two separate balancing authority areas separated by hundreds of miles but located in the same region pursuant to the map provided in Appendix D to the Final Rule. PPM contends that there is neither evidence nor a rational basis for concluding that the seller in the second

received market-based rate authority without any generation market power assessment pursuant to 18 CFR 35.27(a) would, as Category 1 sellers, be exempted from filing update market power analyses. The Commission explained that it would rely on additional procedures, namely the change in status filing requirements (triggered by the acquisition of additional generation), EQR transaction filings, and the Commission's ability to require an updated market power analysis from any seller at any time, to address NASUCA's concern.

[485] *See* Order No. 697 at P 864.

[486] *Id.* P 853.

[487] PPM Rehearing Request at 2–3.

example should be included in Category 2 and the seller in the first example should be included in Category 1. Thus, PPM concludes that the Commission's basis for distinguishing between Category 1 and Category 2 sellers is arbitrary and capricious.

358. PPM also asserts that the Commission should treat ownership or control of intermittent generating capacity differently from thermal generating capacity for the purposes of establishing whether a seller falls within Category 1 or Category 2. PPM claims that it is extremely unlikely that any public utility will attain market power as a result of its ownership or control of wind generation capacity due to the intermittent nature of such capacity.[488] Thus, it argues that the Commission should adopt a less stringent limitation for purposes of establishing Category 1 status for sellers of power from intermittent generating capacity. PPM notes that the Commission rejected this suggestion from commenters, stating ''[w]e believe that many sellers with wind and other non-thermal capacity will fall below the 500 MW threshold; those that do not may take advantage of simplifying assumptions and other means to minimize the burden of filing an updated market power analysis.'' [489] However, PPM asserts that, other than gas, wind power is the fastest growing source of electric generating capacity.[490] According to PPM, several wind power developers already own or control more than 500 MW of intermittent generation capacity in a region, as designated by Appendix D, and several more are likely to attain this status before long. PPM contends that, as the United States seeks to promote investment in electric generation technologies that enhance national energy security and do not emit greenhouse gases, it would be unwise to impose a burden on wind power generators that will not enhance the competitiveness of wholesale electric markets.

Commission Determination

359. With regard to PPM's argument that the use of regions for determining Category 1 membership would result in a seller owning or controlling 500 MW of generating capacity located entirely in one balancing authority area being considered to have less chance of possessing market power than a seller owning or controlling 300 MW of generating capacity each in two separate balancing authority areas separated by hundreds of miles but located in the same region pursuant to the map provided in Appendix D to the Final Rule, we find that PPM misses the point. The Commission's creation of a category of sellers (Category 1 sellers) that are not required to submit regularly scheduled updated market power analyses is based in part on recognizing the administrative burden imposed on smaller sellers that are unlikely to possess market power. In doing so, the Commission intends to remain conservative in its approach to identifying such sellers. While PPM's argument may make sense from a strictly analytical viewpoint, it also greatly increases the universe of sellers that would not be required to submit regularly scheduled updated market power analyses. We are not willing to do so.

360. The Commission explained in Order No. 697 that, ''[i]n keeping with our conservative approach with regard to which entities qualify for Category 1, we find that aggregate capacity in a given region best meets our goal of ensuring that we do not create regulatory barriers to small sellers seeking to compete in the market while maintaining an ample degree of monitoring and oversight that such sellers do not obtain market power.'' [491] The Commission considered other formulations for a threshold, but it concluded that the other ''methodologies are inconsistent with a straightforward, conservative means of screening sellers * * *.'' [492] Thus, we deny PPM's request to define Category 1 sellers based on their ownership or control of generation capacity located in a balancing authority area or an RTO/ISO market rather than based on ownership in a region.

361. With regard to PPM's request that the Commission adopt a less stringent limitation for purposes of establishing Category 1 status for sellers of power from intermittent generating capacity, as PPM acknowledges, the Commission considered and rejected this suggestion in the Final Rule. The Commission stated that it believed ''that many sellers with wind and other non-thermal capacity will fall below that 500 MW threshold'' [493] and reiterated that those sellers that exceed it may take advantage of simplifying assumptions to minimize the burden of filing an updated market power analysis. While there may theoretically be some merit to PPM's assertion that it is unlikely that any public utility will attain market power as a result of its ownership or control of wind generation capacity due to the intermittent nature of such capacity, nevertheless, PPM's remark that wind power is the fastest growing source of generating capacity (other than gas) is further reason that intermittent capacity should not be treated differently from thermal generating capacity for purposes of establishing Category 1 status. There may be a time when a very large wind power facility could possibly have market power and will warrant Commission scrutiny. We note that PPM argues that the Commission should adopt a less stringent limitation for purposes of establishing Category 1 status for sellers of power from intermittent generating capacity because, in its view, it would be unwise to impose a burden on wind power generators that will not enhance the competitiveness of wholesale electric markets. However, PPM does not claim such a burden would be unduly burdensome. Nor should it. Our approach is balanced, reasonable, and consistent with our approach to examining market power of sellers seeking to obtain or retain market-based rate authority. On this basis, we believe it is appropriate that wind generators be subject to the same 500 MW threshold for Category 1 status as other sellers. At the same time, we note that we already afford intermittent generation more flexibility in conducting market power analyses than, for example, thermal generating capacity. In particular, we allow energy-limited resources to provide a market power analysis based on historical capacity factors to more accurately capture hydroelectric or wind availability, in lieu of using nameplate or seasonal capacity.[494] This is an option not available to thermal generating units. In addition, as we stated in the Final Rule, such sellers can take advantage of simplifying assumptions (such as performing the indicative screens assuming no import capacity or treating the host balancing authority area utility as the only other competitor). As a result, to the extent that a wind power generator exceeds the 500 MW threshold and therefore is considered a Category 2 seller, we believe that any burden imposed on that

[488] *Id.* at 4.

[489] *Id.* (citing Order No. 697 at P 867).

[490] *Id.* (citing Florence, Joseph, Global Wind Power Expands in 2006, ''Wind is the world's fastest-growing energy source with an average annual growth rate of 29 percent over the last ten years. In contrast, over the same time period, coal use has grown by 2.5 percent per year, nuclear power by 1.8 percent, natural gas by 2.5 percent, and oil by 1.7 percent.'' June 28, 2006 *http://www.earth-policy.org/Indicators/Wind/2006.htm*).

[491] Order No. 697 at P 865.

[492] *Id.* P 868.

[493] *Id.* P 867.

[494] *Id.* P 344. We also remind sellers that they may seek exemption from Category 2 status on a case-by-case basis. *See id.* P 868.

seller to file an updated market power analysis would be minimal.

2. Regional Review and Schedule

Requests for Rehearing

362. On rehearing, FirstEnergy and MidAmerican object to the regional filing approach adopted in the Final Rule.

363. FirstEnergy argues that the Commission erroneously and unreasonably ruled that for corporate families that own or control generation in different regions, the corporate family would be required to file an update for each region in which members of the corporate family sell power during the time period specified for that region.[495] FirstEnergy contends that a corporate family with generation assets in adjacent geographic markets finds it far more efficient to prepare and submit a single, all-encompassing, updated market power analysis every three years than to prepare separate analyses for each region.[496] It claims that adoption of a single filing date for all entities within a corporate family that have market-based rates will permit all necessary tariff revisions to be filed at the same time, and will thereby reduce the possibility for discrepancies among tariffs within the same corporate family.

364. FirstEnergy reasons that it is unlikely that there are a significant number of corporate families that have affiliated generation suppliers operating in adjacent geographic markets. For that reason, FirstEnergy states that there is no reason to believe that authorizing affected sellers to make a single, all-encompassing, triennial market power update filing every three years will significantly undermine the Commission's ability to obtain a complete view of market forces in each region in order to ensure that seller's rates remain just and reasonable.[497] In the event that the Commission permits all companies within a corporate family that operate in adjacent geographic markets to file a single market power updated analysis during a three-year filing cycle, FirstEnergy requests that the filing companies be given the option of selecting the region with which they will participate.[498]

365. MidAmerican seeks a filing schedule that permits it to submit a single market power analysis reflecting the generating facilities within its own balancing authority area (part of the Central region) as well as its Quad Cities Station (QCS), which is located on the border of that balancing authority area (part of the Northeast region). MidAmerican seeks to align the filing schedules to lessen the burden on the Commission in evaluating MidAmerican's market power, and the burden on MidAmerican in preparing multiple filings.[499] Its affiliate Cordova operates a generating facility also electrically located within the Northeast region, and MidAmerican states that Order No. 697 could be construed to require Cordova to file with the Northeast region.

366. MidAmerican states that, as affiliates, it and Cordova historically have prepared market power analyses that have evaluated the competitive effects of the aggregate generation owned and controlled by both. For that reason, Cordova is seeking to file on the same schedule as MidAmerican. QCS and Cordova's facility electrically are located immediately adjacent to MidAmerican's balancing authority area, and the metering points within the respective substations form part of the border between the Northeast and Central regions; each facility is geographically within the MidAmerican service territory and directly interconnected with the MidAmerican transmission system through facilities owned by MidAmerican.[500]

367. MidAmerican seeks clarification that its undivided ownership interest in QCS will not cause it to be deemed a seller that ''operates'' in the Northeast region subject to that region's filing schedule.[501] If the Commission is not willing to construe Order No. 697 in this manner, then, for the same reasons, MidAmerican seeks waiver of the filing schedule to permit QCS to be treated as part of MidAmerican's on-system generating resources; *i.e.*, as if QCS were within the Central region along with the other MidAmerican generating resources.[502] Cordova also seeks a similar clarification or waiver of Order No. 697 to permit its updated market power analysis to be made pursuant to the Central region schedule applicable to MidAmerican. MidAmerican states that its request is narrowly tailored to the circumstances applicable to itself and Cordova, whose relevant generation is located electrically either within or at the border of MidAmerican's balancing authority area in the Central region. By way of distinction, MidAmerican *is not* requesting permission to make a single filing for its entire corporate family.[503]

Commission Determination

368. The Commission specifically addressed FirstEnergy's argument in Order No. 697. The Commission stated that its decision to adopt a regional review properly and fairly balances the need to effectively monitor and mitigate market power in the wholesale markets with the desire to minimize any administrative burden associated with the filings and review of updated market power analyses. The Commission recognized that some sellers may have to file updated market power analyses more frequently than they would have had to before Order No. 697, but the Final Rule carefully balanced the interests of all involved. The Commission explained that the regional approach will enhance the Commission's ability to continue to ensure that sellers either lack market power or have adequately mitigated such market power.[504] We recognize FirstEnergy's contention that it is more efficient to prepare and submit a single, all-encompassing, updated market power analysis every three years than to prepare separate analyses for each region. However, such an approach does not satisfy our desire to ensure greater consistency in the data used to evaluate sellers' market power. If corporate families are allowed to combine all of their facilities nationwide into a single updated market power analysis, the study year and associated data may not be consistent with that required for the corresponding region, and thus the Commission's ability to ensure greater consistency in the data used to evaluate sellers' market power and to reconcile conflicting submissions would be undermined. Thus, we deny FirstEnergy's request for rehearing in this regard.

369. With regard to FirstEnergy's claim that adoption of a single filing date for all entities within a corporate family that have market-based rates will permit all necessary tariff revisions to be filed at the same time, and will thereby reduce the possibility for discrepancies among tariffs within the same corporate family, from an administrative perspective, we agree and note that nothing in Order No. 697 prohibits FirstEnergy or any other seller from making such a filing revising all of its market-based rate tariffs at the same time. Our concern addressed above pertaining to data consistency is not present with regard to making a

[495] FirstEnergy Rehearing Request at 3.

[496] *Id.* at 5.

[497] *Id.* at 6–7.

[498] *Id.* at 7. Alternatively, FirstEnergy suggests that the Commission should establish a process by which it would determine which cycle should be followed.

[499] MidAmerican Rehearing Request at 2.

[500] *Id.* at 4.

[501] *Id.* at 10.

[502] *Id.* at 10–11.

[503] *Id.* at 3–4.

[504] Order No. 697 at P 883.

corporation's market-based rate tariffs Order No. 697 compliant. Our analysis of market-based rate tariffs' compliance with Order No. 697 is not dependent on analyzing data but rather analyzing whether the tariffs meet the standards set forth in Order No. 697. Unlike analysis of data that can vary depending on the source of the data and the underlying assumptions, Order No. 697 set forth the standard by which the market-based rate tariff will be judged and those standards do not vary nor are they subject to assumptions.

370. We will deny MidAmerican's request for clarification. To the extent that a seller's generation facilities are electrically located in different regions, the intent of the regional review approach is for those facilities to be studied with their separate regions. We note that, prior to the adoption of the Final Rule, sellers were required to prepare a market power analysis for all of their generation assets nationwide. Some sellers with assets in multiple regions chose to submit their individual updated market power analyses when each was due rather than combining them into a single updated market power analysis. Others filed one updated market power analysis for the entire corporate family, with individual analyses of the different markets in which their assets are located. Either way, the same analyses were required to be filed before and after the Final Rule. Although the timing of the filings may differ post-Final Rule, the increased burden, if any, of filing pursuant to the regional approach is minimal.

371. With respect to MidAmerican's company-specific request for waiver from the requirements of Order No. 697, we will decline to act in the context of this generic rulemaking proceeding. We do not believe that this rehearing order is the proper vehicle to consider a waiver request which, as MidAmerican describes it, is narrowly tailored to itself and Cordova. MidAmerican's request for waiver may be submitted in another individual proceeding, and the Commission will consider the merits of its request at that time.

3. Clarifications on Implementation Process

372. During the period since Order No. 697 became effective, a number of implementation questions have come to the Commission's attention, either as a result of questions received from sellers or as raised in various filings. As we describe above, several of these issues were addressed in the Clarification Order issued on December 14, 2007. We will use this opportunity to provide additional guidance.

373. In the Clarification Order, among other things, the Commission explained that there may have been confusion concerning which data and market share calculations must be submitted as part of sellers' updated horizontal market power analyses.[505] The Commission clarified that market shares calculated for the wholesale market share screen and the DPT analysis should be based on the four seasons, as defined in the April 14 Order,[506] rather than the four quarters of the calendar year. The Clarification Order revised Appendix D to Order No. 697 to incorporate this clarification and explained that the study period runs from December of one year through November of the following year.

374. In the Clarification Order, the Commission also clarified which entities are required to file their updated market power analyses first. In Order No. 697, the Commission discussed the need for entities that have the information necessary to perform simultaneous transmission import limit studies to file in advance of those who will rely on that information.[507] In Appendix D of Order No. 697, the Commission identified those required to file first as ''Transmission Operators.'' However, the Commission explained in the Clarification Order, consistent with the discussion in paragraph 889 of Order No. 697, that *transmission-owning* utilities with market-based rate authority and their affiliates with market-based rate authority are the entities required to file their updated market power analyses first in each region.[508] Accordingly, revised Appendix D makes clear that transmission owners and their affiliates have earlier filing periods than other entities required to file in each region.

375. In the Final Rule, the Commission stated that it will entertain individual requests for exemption from Category 2, and that such requests must be filed no later than 120 days before a seller's next updated market power analysis is due. However, the period for filing updated market power analyses is not a specific date, but a month-long period (either December or June of each year). In response to questions regarding how to calculate 120 days prior to the filing period, we clarify that a seller must make a filing requesting an exemption from Category 2 no later than 120 days prior to the *first day* of the month in which its next updated market power analysis is due.[509]

376. In Order No. 697, the Commission explained that a power marketer that does not own or control generation assets in any region must submit a filing explaining why it meets the criteria for Category 1 and directed that such filings be submitted with the first scheduled geographic region in which the power marketer makes any sales.[510] Because the Commission has received several inquiries regarding this directive, we will provide further clarification here. If an unaffiliated power marketer has made no sales at any point in time since it obtained its market-based rate authority, it should make this submission during the next filing period, *i.e.*, June 1–30, 2008. We also clarify that, once a seller is determined to be in Category 1, it is not required to file updated market power analyses, or evidence of Category 1 status, for the other regions in which it makes sales so long as it continues to meet the criteria for a Category 1 seller.[511]

377. Additionally, in response to inquiries from certain sellers in the Central region, we will clarify the geographic area included in that region. Specifically, the Central region will now be defined to include portions of NERC Region RFC as follows: Central (Midwest ISO, NERC Regions MRO and RFC (not including PJM)).[512] Appendix D has been revised to reflect this description of the Central region.

378. Additionally, in Order No. 697 the Commission adopted a requirement that all sellers include an appendix listing generation assets as well as electric transmission and natural gas intrastate pipelines and/or gas storage facilities with certain filings, consistent with the example in Appendix B of Order No. 697.[513] We clarify that the transmission facilities that we require to be included in that asset appendix are limited to those the ownership or control of which would require an entity to have an OATT on file with the Commission (even if the Commission has waived the OATT requirement for a particular seller).

[505] We note that, in an effort to continue to improve upon the accuracy and consistency of data used within a region and to provide the Commission and the public with a more complete picture of the market, the Commission will allow RTO/ISOs to conduct market power studies that the RTO/ISO members can rely on in their market power filings.

[506] April 14 Order, 107 FERC ¶ 61,018 at n.85.

[507] Order No. 697 at P 889.

[508] Clarification Order, 121 FERC ¶ 61,260 at P 9.

[509] *See id.* P 868.

[510] *Id.* at n.1027.

[511] *See id.* P 849 (stating that subsequent to being found to be in Category 1, ''all Category 1 sellers will not be required to file regularly scheduled updated market power analyses.'')

[512] *Id.* at Appendix D.

[513] Order No. 697 at P 895.

379. Further, we clarify the manner in which transmission assets should be identified and described in the asset appendix. In order to lessen the reporting burden for sellers with large numbers of transmission facilities, we will allow a company to combine lines of a common size into one ''line item'' for purposes of the appendix; *i.e.*, 12 individual 500 kV lines could be identified as one line item in the appendix. For companies using this approach, rather than listing each line separately, the appendix must be filled out in a slightly different manner. Specifically, under the Asset Name and Use section of the appendix, rather than using the actual line name, a seller would insert an appropriate asset identifier. For example, if combining all 500 kV lines together the asset identifier would be ''Combined 500kV Lines.'' As a result, the Size section of the appendix would also change. Rather than identifying the actual size of each line, the seller would include the transmission asset size, described as the total combined length of all the lines of that size. Because the combined lines could run through several balancing authority areas and regions, the seller should split up its combined assets into separate balancing authority areas. Accordingly, the transmission asset aspect of the appendix would be filled out similar to the following:

Filing entity and its energy affiliates	Asset name and use	Owned by	Controlled by	Date control transferred	Location		Size
					Balancing authority area	Geographic region (per Appendix D)	
ABC Corp	Combined 500kV Lines.	ABC Corp	ABC Corp	NA	New York ISO and Tucson BA.	Northeast and Southwest.	Approx. 305 combined miles.
ABC Corp	Combined 500kV Lines.	ABC Corp	XYZ Inc	Jan. 1, 2000	Tucson BA	Southwest	185 combined miles.

380. However, we note that this combined approach can only be used if lines of the same size are controlled by the same entity. If there are lines of the same size controlled by different entities, they must be identified in different line items; *i.e.*, each combined set of lines can only be identified as controlled by one entity. Thus, if the 500 kV lines are owned or controlled by two different entities, there would have to be two line items for 500 kV lines listed in the appendix. We believe this approach will allow the Commission to continue to obtain the information it seeks regarding a seller's affiliated transmission assets while allowing those entities with a great number of assets to simplify their appendices.

381. Lastly, with regard to the asset appendix, we wish to make clear that sellers must submit both tables in their entirety. Even if a seller has no assets to list in a specific section, both the Market-Based Rate Authority and Generation Assets table, as well as the Electric Transmission Assets and/or Natural Gas Interstate Pipelines and/or Gas Storage Facilities table must be submitted. As stated in Appendix B to Order No. 697, a seller should indicate the fact that it has no assets or that a field is not applicable by inputting N/A.

4. Market-Based Rate Tariff Clarifications

382. In Order No. 697 the Commission adopted a requirement that all sellers include a provision in their market-based rate tariffs identifying all limitations on their market based rate authority (including markets where the seller does not have market-based rate authority) and any exemptions from, waivers of, or blanket authorizations under the Commission's regulations that the seller has been granted (such as exemption from the affiliate sales restrictions; waiver of the accounting regulations; blanket authority under part 34 for the issuances of securities and assumptions of liabilities). The Commission stated that this provision must include cites to the Commission orders approving each limitation, exemption, waiver or blanket authorization.[514] On further review, the Commission will take this opportunity to clarify several aspects of this requirement.

383. First, we clarify that if a seller's market-based rate authority is not subject to any limitations (for example, the seller's market-based rate authority is not limited to certain markets) or if the seller has not been granted any exemptions, waivers, or blanket authorizations under the Commission's regulations, then the seller should so state in the required ''Limitations and Exemptions'' provision in its market-based rate tariff, *i.e.*, including ''not applicable,'' or ''N/A.'' [515]

384. Second, we provide additional guidance on the format for citations to pertinent Commission orders or proceedings in which the Commission imposed limitations on the seller's market-based rate authority or granted the seller's requested exemptions, waivers, or blanket authorizations. In particular, sellers which already have been granted market-based rate authorization and which have previously been placed under any limitation or granted any exemption, waiver or blanket authorization should include the cite to the relevant orders in one of the following two citation forms:

Cal. Contract Power, 99 FERC ¶ 61,xxx, at P xx (2002).

WWW Corp., Docket No. ER03–xxxx–000, at 2 (Apr. 12, 2003) (unpublished letter order).

385. When a seller files an application for market-based rate authority seeking certain exemptions, waivers or blanket authorizations, the seller should include in its proposed tariff sheets the docket number associated with the filing. Under current Commission procedure, a docket number is not assigned until after an application has been filed. However, to enable an applicant to identify and include the docket number of its filing in its proposed tariff sheets, the Commission is establishing a new process for sellers to obtain a docket number for their submission before filling. The Commission is creating a location on its Web site where a new applicant for market-based rate authorization will e-mail [516] the Commission and retrieve a docket number under which its filing can be made and which will be a substitute for the required citation in the ''Limitations and Exemptions'' provision of its tariff.[517] The point of this process is to

[514] Order No. 697 at P 916.

[515] *See Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275 at P11 (2007) (*Niagara Mohawk*).

[516] Any sellers unable to obtain this docket number via the internet or e-mail will be directed to include the pertinent information in their tariff sheets in a compliance filing.

[517] We note that while this approach will allow most new applicants to comply with the Commission's citing requirement in the ''Limitations and Exemptions'' provision of the

alleviate the need for compliance filings just to add a docket number or citation once the Commission issues an order on the request. Any modifications to the information submitted with the application would be directed to be made in a compliance filing. Once the docket number is obtained, the filing must be submitted to the Commission within 72 hours or the docket number will expire and the applicant must request a new one. This reserved docket number should be included in the tariff and the transmittal sheet, and a copy of the Commission's response assigning this docket number should be attached as the first page of the filing. Accordingly, the process for a seller newly filing for market-based rate authorization will now require reserving a docket number before submitting the filing.

386. In Appendix C of Order No. 697, the Commission provided certain applicable tariff provisions that sellers must include in their market-based rate tariffs to the extent they are applicable based on the services provided by the seller. One of these is to be used if a seller makes sales of ancillary services as a third-party provider.[518] We are revising this applicable provision so that it is consistent with the other ancillary service provisions by inserting the phrase ''Seller offers.'' Thus, the ''Third Party Provider'' provision that should be included in all applicable market-based rate tariffs is as follows:

Third-party ancillary services: Seller offers [include all of the following that the seller is offering: Regulation Service, Energy Imbalance Service, Spinning Reserves, and Supplemental Reserves]. Sales will not include the following: (1) Sales to an RTO or an ISO, *i.e.*, where that entity has no ability to self-supply ancillary services but instead depends on third parties; (2) sales to a traditional, franchised public utility affiliated with the third-party supplier, or sales where the underlying transmission service is on the system of the public utility affiliated with the third-party supplier; and (3) sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers.

387. Additionally, regarding other applicable tariff provisions, which include those needed if a seller makes sales of ancillary services in certain RTO/ISOs, the seller must include the standard ancillary services provision(s) in its tariff, as applicable, without variation.[519] To the extent that a seller with market-based rate authority does not already have authority to make sales of ancillary services at market-based rates in one or more of the RTO/ISOs included in Appendix C, but wishes to do so, it may file revised tariff sheets including the standard applicable ancillary service tariff provision(s) without seeking separate authorization from the Commission under FPA section 205. Separate authorization for specific sellers is not needed given that Order No. 697 implicitly granted authorization for ancillary services sales by sellers with market-based rate authority by providing standard tariff provisions for ancillary services sales.[520]

388. The Commission also stated in Order No. 697 that it would permit sellers to list in their market-based rate tariffs additional seller-specific terms and conditions that go beyond the standard provisions set forth in Appendix C.[521] In the Clarification Order, we clarified that these seller-specific terms and conditions do not include those provisions that the Commission has codified in 18 CFR Part 35, Subpart H. Specifically, we stated that '' 'seller-specific terms and conditions' are those provisions that are commonly found in power sales agreements, such as creditworthiness, force majeure, dispute resolution, billing, and payment provisions.'' [522] In addition, we clarify here that we expect that all provisions that were contained in a seller's market-based rate tariff but that are now codified in the Commission's regulations are to be removed from each seller's market-based rate tariff at the time the seller modifies its existing tariff to include the required provisions and any applicable provisions set forth in Appendix C of Order No. 697. For example, sellers should remove from their tariffs codes of conduct (which have been replaced by the affiliate restrictions in § 35.39), any language prohibiting affiliate sales without first receiving Commission authorization (which is codified in § 35.39(b)), market behavior rules (which are codified in § 35.41), and the change in status reporting requirement (which is codified in § 35.42).

389. We remind sellers that, consistent with § 35.9(b)(4), all tariff sheets must include a proposed effective date. The regulation requires that the seller must place the specific effective date proposed by the company on the tariff sheets. To alleviate any confusion, we stated in the Clarification Order that, notwithstanding the fact that Order No. 697 did not require market-based rate sellers to make immediate compliance filings amending their market-based rate tariffs, the Commission intended that all requirements and limitations applicable to market-based rate sellers set forth in the Final Rule should become effective on September 18, 2007. The Clarification Order explained that, effective September 18, 2007, provisions in market-based rate tariffs that are inconsistent with the requirements of Order No. 697 are no longer in effect.[523] Accordingly, sellers filing revised tariff sheets solely to comply with Order No. 697 should use September 18, 2007 as the effective date of the tariff sheets. However, if there are any additional revisions other than those required by the Final Rule, whether it be a name change or the addition or modification of any provision for any other reason, sellers should propose the date on which they wish the tariff sheets to become effective. We note that, while the sheets will be made effective on the date that the seller proposes, the provisions relating to and required by Order No. 697 are still effective as of the effective date of Order No. 697.[524]

390. Additionally, the Commission provides clarification regarding requests for waiver of affiliate restrictions (including the affiliate sales restriction and what was formerly the codes of conduct). If a seller was granted waiver of a restriction by the Commission prior to the effective date of Order No. 697, and the seller still qualifies for that waiver, the waiver remains effective and no further action is needed.[525] However, if a seller has not previously been granted waiver of the affiliate restrictions and seeks a finding that the affiliate restrictions do not apply to it, a seller must file a request with the

market-based rate tariff, there may be some instances in which the Commission will require a seller to make a subsequent filing to include a full citation to the Commission order approving a limitation, exemption, waiver or blanket authorization. An example of when the Commission may require such a compliance filing is when the Commission exempts a seller from affiliate restrictions which have been codified in 18 CFR 35.39 or when approving mitigation measures. However, unless an applicant is informed by order to revise its tariff to include a citation, the docket number used in the tariff in the initial submission will suffice.

[518] *See* Order No. 697 at P 917–18.

[519] *Id.* P 916–917; *see* Appendix C for a listing of the standard ancillary services provisions. *See also Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 14 & n.22 (2007) (directing seller to conform with Appendix C).

[520] *See Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 18 (2007) (accepting tariff provisions that were new for National Grid that comported with ancillary services previously approved by the Commission for sale at market-based rates and were listed in Appendix C of Order No. 697).

[521] Order No. 697 at P 919–22.

[522] Clarification Order, 121 FERC ¶ 61,260 at P15.

[523] *Id.* at P 5.

[524] *See* Clarification Order, 121 FERC ¶ 61,260 at P 5.

[525] Pursuant to Order No. 697, however, such a waiver must be identified in a seller's tariff. *See* Order No. 697 at P 916 and Appendix C.

Commission pursuant to FPA section 205.

391. Lastly, in order to identify which sellers must file updated market power analyses, we will now require each seller to specify in its market-based rate tariff whether it is a Category 1 or Category 2 seller. In a separate provision of the market-based rate tariff entitled Seller Category, each seller should state whether it believes it is in Category 1 or Category 2.[526] Specifically, the following provision should be included in each market-based rate tariff:

Seller Category: Seller is a [insert Category 1 or Category 2] seller, as defined in 18 CFR 35.36(a).

392. The Commission will make a finding on the category of each seller. To the extent that the Commission finds that a seller is in the other category, the Commission will order the appropriate tariff revisions.

393. Any seller whose category has been determined in a Commission proceeding between the effective date of Order No. 697 and the issuance of this order and which has not included a Seller Category provision in its tariff should update its tariff with such a provision the next time that it files revised tariff sheets, a triennial review, or a change in status report.

F. Legal Authority

1. Whether Market-Based Rates Can Satisfy the Just and Reasonable Standard Under the FPA

Final Rule

394. In the Final Rule, the Commission rejected arguments that it has no authority to adopt market-based rates or that the market-based rate program adopted in the Final Rule does not comply with the FPA. The Commission explained that it is settled law that market-based rates can satisfy the just and reasonable standard of the FPA, as most recently affirmed by the Ninth Circuit in *Lockyer* and *Snohomish*.[527] The Commission explained that in *Lockyer,* the Ninth Circuit cited with approval the Commission's dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirements, finding that the Commission did not rely on market forces alone in approving market-based rate tariffs.[528] The Final Rule also rejected arguments that the proposed rule impermissibly relied solely on the market to determine just and reasonable rates, explaining that in the market-based rate program adopted in the Final Rule and through other Commission actions, the Commission is not relying solely on the market, without adequate regulatory oversight, to set rates.[529] Rather, it has adopted filing requirements, new market manipulation rules, and a significantly enhanced market oversight and enforcement division to help oversee potential increases in market power and potential market manipulation.[530]

395. The Commission retained its policy of granting market-based rate authority to sellers without market power under the terms and conditions set forth in the Final Rule.[531] The Final Rule explained that the Commission has a long-established approach when a seller applies for market-based rate authority of focusing on whether the seller lacks market power. The Commission explained that this approach, combined with the Commission's filing requirements (EQRs, change in status filings, and regularly scheduled updated market power analyses for Category 2 sellers) and ongoing monitoring through the Commission's Office of Enforcement and complaints filed pursuant to FPA section 206, allows the Commission to ensure that market-based rates remain just and reasonable. Moreover, for sellers in RTO/ISO organized markets, the Commission has in place market rules to help mitigate the exercise of market power, price caps where appropriate, and RTO/ISO market monitors to help oversee market behavior and conditions.[532]

396. The Final Rule rejected arguments that the market-based rate program does not comply with the FPA, stating that ''[t]he Supreme Court has held that '[f]ar from binding the Commission, the FPA's just and reasonable requirement accords it broad ratemaking authority * * *. The Court has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula in general * * *.'''[533] The Commission also pointed out that in the *Lockyer* court's analysis of the Commission's market-based rate authority, the Ninth Circuit cited the Supreme Court's determination in *Mobil Oil Exploration* and also noted that the use of market-based rate tariffs was first approved by the courts as to sellers of natural gas in *Elizabethtown Gas,* then as to wholesale sellers of electricity in *Louisiana Energy and Power Authority* v. *FERC.*[534]

397. The Commission rejected arguments that the Final Rule impermissibly relies solely on the market to determine just and reasonable rates.[535] The Final Rule explained that in *Texaco,*[536] the Supreme Court noted that it had sustained rate regulation based on setting area rates that were based on composite cost considerations, citing its decision in *FPC* v. *Hope Natural Gas Co.,*[537] and added that ratemaking agencies are not bound to the service of any single regulatory formula.[538] The Final Rule further explained that in *Texaco,* the Supreme Court found that the NGA permits the indirect regulation of small-producer rates, and noted that cases under the NGA and the FPA are typically read *in pari materia*.[539] The Commission stated that in the market-based rate program adopted in the Final Rule and through other Commission actions, unlike the situation in *Texaco,* the Commission is not relying solely on the market without adequate regulatory oversight to set rates.

398. The Final Rule also explained that in *Elizabethtown Gas,* a decision relying on *Texaco,* the D.C. Circuit addressed a Commission order approving a restructuring settlement under which Transcontinental Gas Pipeline Corporation (Transco) would no longer sell gas bundled with transportation, but would sell gas at the wellhead or pipeline receipt point, to be transported as the buyer sees fit, and the sales would be market-based while the rates for transportation on Transco's system would be cost-of-service

[526] Sellers that have received an exemption from Category 2, as described in Order No. 697 at P 868, should identify themselves as Category 1 sellers.

[527] Order No. 697 at P 943 (citing *State of California, ex rel. Bill Lockyer* v. *FERC*), 383 F.3d 1006 (9th Cir. 2004), *cert. denied* (S. Ct. Nos. 06–888 and 06–1100 (June 18, 2007) (*Lockyer*); *Public Utility District No. 1 of Snohomish County, Washington* v. *FERC,* 471 F.3d 1053 (9th Cir. 2006), cert. granted, 128 S. Ct. 31 (Sept. 25, 2007) (Nos. 06–1457, 06–1462) (*Snohomish*)).

[528] *Id.* P 953–954.

[529] *Id.* P 952.

[530] *Id.*

[531] *Id.* P 954–955.

[532] *Id.* P 955.

[533] *Id.* P 943 (quoting *Mobil Oil Exploration* v. *United Distribution Co.,* 498 U.S. 211, 224 (1991) (*Mobil Oil Exploration*), citing *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944); *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942); *Permian Basin Area Rate Cases,* 390 U.S. 747, 776–77 (1968) (*Permian*); *FPC* v. *Texaco,* 417 U.S. 380 (1974) (*Texaco*)).

[534] *Elizabethtown Gas Co.* v. *FERC,* 10 F.3d 866 (D.C. Cir. 1993) (*Elizabethtown Gas*); *Louisiana Energy and Power Authority* v. *FERC,* 141 F.3d 364 (D.C. Cir. 1998) (*LEPA*). *See also* Order No. 697 at P 944.

[535] Order No. 697 at P 945–947.

[536] *Id.* P 946 (citing *FPC* v. *Texaco, Inc.,* 417 U.S. 380 (1974) (*Texaco*)).

[537] *Id.* (citing 320 U.S. 602).

[538] *Id.* (quoting *Permian,* 390 U.S. at 776–77).

[539] *Id.* P 946 n.1070 (citing *FPC* v. *Sierra Pacific Power Co.,* 350 U.S. 348, 353 (1956) (*Sierra*); *Arkansas-Louisiana Gas Company* v. *Hall,* 453 U.S. 571 n.7 (1981)).

based.[540] In rejecting arguments that the proposed rule impermissibly relied solely on the market to determine just and reasonable rates, the Final Rule explained that in *Elizabethtown Gas* the D.C. Circuit upheld the Commission's approval of market-based pricing.[541] The Final Rule explained that the D.C. Circuit had also affirmed the Commission's approval of an application by Central Louisiana Electric Company (CLECO) to sell electric energy at market-based rates.[542]

Requests for Rehearing

399. Consumer Advocates argue that the Final Rule erred in claiming that the Commission can legally rely on the market (*viz.* wholesale buyers/re-sellers) to determine lawful rates. They contend that the Final Rule errs in relying on wholesale buyers/re-sellers to determine lawful rates by ''negotiation,'' particularly where the buyers generally bear no risk of loss in passing along such prices.[543] They argue that such reliance constitutes an unlawful delegation of the Commission's statutory obligations to wholesale buyers insofar as (1) the Commission overlooked the economic fact that such wholesale buyers/re-sellers generally bear no risk of loss because their negotiated prices must be passed through to retail ratepayers; [544] and (2) the Final Rule may not rely on the markets to determine rates because the Commission may not delegate to others its FPA responsibilities to ensure that rates are lawful.[545]

400. Consumer Advocates contend that the Final Rule failed to provide a standard whereby the Commission can determine whether actual market rate increases fall within a ''zone of reasonableness'' not just in theory, but ''in fact.'' According to Consumer Advocates, the Final Rule only addressed whether the ''market'' is competitive [546] and sellers are manipulative, not whether wholesale rates are not excessive, as the FPA requires.[547] Consumer Advocates argue that the Final Rule attempted to distinguish Supreme Court and other judicial precedent that requires the Commission to determine whether ''market'' rates in fact fall within a ''zone of reasonableness,'' but fails to do so.[548] They also contend that the Final Rule failed to explain how the Commission, which is not an antitrust agency, acting under the FPA, which is not an antitrust statute but a rate filing regulatory statute, can rely entirely on its oft-changing antitrust analyses regarding market power to determine whether market-based rates are within a zone of reasonableness.[549] NASUCA also asserts that the Final Rule failed to identify an objective standard by which to ascertain, after rates have been changed, charged and eventually reported, whether a market rate is or is not in the zone of reasonableness.[550]

401. Consumer Advocates contend that the Final Rule erred in relying heavily on Natural Gas Act (NGA) cases and Interstate Commerce Act oil pipeline cases as judicial support for the Commission's authority to allow market-based rates.[551] Consumer Advocates assert that there are substantive differences among electricity and natural gas statutes, the physical operations of the industries, and the costs of providing service.[552] They argue that in addition to the fact that Congress has deregulated most natural gas wellhead sales, but has never deregulated wholesale electric sales, the FPA and NGA have always differed in certain respects, namely that NGA section 7 confers authority on the Commission to certify and condition natural gas service, whereas no such authority is given to the Commission under the FPA.[553] Consumer Advocates argue that the regulation of generation and distribution was specifically reserved to the states [554] and contend that the costs of production of natural gas and electricity differ markedly.[555] They state that highly depreciated power plants have very different costs from new ones, and they note that in the Connecticut complaint against ISO New England, the complaint showed that excessive rates of return were being made, but the Commission found this '' 'not relevant.' '' [556]

402. Consumer Advocates conclude that these differences result in very different bidding strategies by market participants, yet the Final Rule relied primarily on natural gas and oil cases in defense of the Commission's market-based rate regime.[557] In particular, they contend that the claim in the Final Rule that ''costs of all natural gas companies need not be ascertained separately,'' incorrectly cites to the fact that the courts treat virtually identically parts of the statute '' '*in pari materia.*' '' [558] They argue that because this language refers to the filing and rate review provisions of the two statutes, it does not contend that the cost elements or physical operations of these two distinct industries are the same.[559]

403. Consumer Advocates argue that the incentive provided by the market-based rate regime is for plant owners to keep power supplies tight, thus raising their profits from remaining power plants or contracts.[560] They state that because wholesale sellers have no obligation to serve, the Commission's market-based rate regime requires the Commission to give incentives, like locational pricing, to essentially '' 'bribe' '' suppliers to build power plants.[561] Consumer Advocates contend that the Final Rule failed to explain why this '' 'perverse incentive' '' is in either the public or the national interest. They also note that the court in *Elizabethtown Gas* did not address these ''perverse economic incentives.'' [562]

404. Industrial Customers argue that a finding that competitive markets exist is a prerequisite to relying upon market-

[540] *Id.* P 948.

[541] *Id.* P 949–950.

[542] *Id.* P 951 (citing *LEPA,* 141 F.3d at 365).

[543] Consumer Advocates Rehearing Request at 10. Richard Blumenthal, Attorney General for the State of Connecticut and the People of the State of Illinois, by and through the Illinois Attorney General, Lisa Madigan (Attorneys General of Connecticut and Illinois) submitted a request for rehearing on July 19, 2007 that adopts and incorporates by reference all of the arguments presented by the Consumer Advocates in their request for rehearing filed in this proceeding.

[544] *Id.* at 10 (citing *Tejas Power Corp* v. *FERC,* 908 F.2d 998 (D.C. Cir. 1990); *Nantahala Power & Light Co.* v. *Thornburg,* 476 U.S. 953, 970 (1986); *Elizabethtown Gas*).

[545] *Id.* at 10, 12. Consumer Advocates note that in a recent order the Commission correctly held that it could not delegate to state commissions its ''ratemaking obligations under the FPA.'' *Id.* at 12 (citing *Entergy Services, Inc.,* 120 FERC ¶ 61,020 (2007), citing *Louisiana, Inc.* v. *Louisiana Public Service Comm.,* 539 U.S. 39, 43 n.1; *City of New Orleans* v. *Entergy Corp.,* 55 FERC ¶ 61,211, at 61,729 (1991)).

[546] As discussed at P 409 below, the Industrial Customers argue that the Final Rule erred insofar as it failed to make the finding that a competitive market exists. *See* Industrial Customers Rehearing Request at 6–7.

[547] Consumer Advocates Rehearing Request at 12–13.

[548] *Id.* (citing *Farmers Union Cent. Exch.* v. *FERC,* 734 F.2d 1486 (D.C. Cir. 1984) (*Farmers Union*)).

[549] *Id.* at 13–14 (citing *MCI Telecommunications Corp.* v. *AT&T Co.,* 512 U.S. 218 (1994) (*MCI*); *Southwestern Bell Corp.* v. *FCC,* 43 F.3d 1515 (D.C. Cir. 1995) (*Southwestern Bell*)).

[550] NASUCA Rehearing Request at 18.

[551] Consumer Advocates Rehearing Request at 19 (citing Order No. 697 at P 943, n. 1068 (citing *Mobil Oil Exploration,* 498 U.S. at 224, citing *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944); *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942); *Permian,* 390 U.S. at 776–77; *Texaco,* 417 U.S. at 308)).

[552] *Id.* at 17–18.

[553] *Id.* at 18.

[554] *Id.* (citing FPA section 201(e)).

[555] *Id.*

[556] *Id.* at 19 (citing *Richard Blumenthal* v. *ISO New England, Inc.,* 117 FERC ¶ 61,038 (2006), *reh'g denied,* 118 FERC ¶ 61,205 (2007) (*Blumenthal*)).

[557] *Id.* (citing Order No. 697 at P 943, n. 1068).

[558] *Id.* (citing Order No. 697 at P 946, n. 1070).

[559] *Id.*

[560] *Id.* at 20.

[561] *Id.*

[562] *Id.* at 21.

based rate authority to satisfy the mandates of the FPA. In particular, Industrial Customers contend that the Final Rule does not reflect reasoned decisionmaking because it fails to address their argument stating that the Commission must find the existence of a competitive market before it can rely on market-based rate authority.[563] Additionally, Industrial Customers contend that the Final Rule is arbitrary, capricious and insufficiently supported in presuming that existing price setting mechanisms are competitive markets that will enable the use of market-based rate authority to ensure just and reasonable rates.[564] Industrial Customers argue that their NOPR comments relied on significant precedent for their argument that the Commission must point to ''empirical proof'' that competitive markets exist.[565] Industrial Customers state that although the Commission provides settled law supporting its conclusion that market-based rates can satisfy the just and reasonable standard of the FPA,[566] the issue posed by Industrial Customers was whether the Commission has made the necessary findings that a competitive market exists—and it has not.[567] Industrial Customers therefore assert that the Commission failed its responsibility to respond to their arguments,[568] and must either (1) explain why the case law underlying market-based rate authority no longer requires the prerequisite showing of competitive markets based on empirical proof, or (2) undertake the task of analyzing whether current wholesale electricity pricing mechanisms amount to a competitive market.[569] Industrial Customers argue that the key question the Commission failed to answer in the Final Rule is what constitutes a truly competitive market and whether there are any in the country sufficient to enable use of market-based rate authority.

405. Industrial Customers argue that as the Commission acknowledged in its approval of the Southwest Power Pool's Energy Imbalance Service Market, the process for assessing market-based rate authority is a two-part analysis: (1) Determining whether a competitive market exists and (2) ensuring that the seller-applicant cannot exercise market power, based either on a finding that no market power exists or based on a finding that mitigation is sufficient to protect against market power.[570] Industrial Customers contend that if this two-part analysis is not undertaken, the Commission cannot demonstrate that reliance on market-based rate authority is just and reasonable.[571]

406. Industrial Customers state that there are definite criteria such as barriers to entry or exit, demand elasticity, ease of product deliverability, transparent market information, unconcentrated generation asset ownership, correct market design, and absence of market power that would help determine whether a competitive market exists.[572] They present information about existing markets that they allege calls into question whether the Commission is capable of finding the presence of dynamically competitive markets. Industrial Customers argue that the widespread lack of demand elasticity and the equally pervasive presence of generation ownership concentration and high market shares within submarkets are the types of issues that the Final Rule erroneously overlooked by presuming the existence of competitive markets.[573] Industrial Customers contend that market power issues are prevalent in PJM,[574] Midwest ISO,[575] Southwest Power Pool,[576] and ISO New England.[577]

Commission Determination

407. In the Final Rule, the Commission fully addressed the arguments raised by commenters challenging the Commission's market-based rate program. Consumer Advocates and Industrial Customers repeat on rehearing many of the arguments that they raised in their comments. While these entities re-state their arguments in a variety of ways, their arguments basically fall into two categories: (1) That the Commission has no authority at all under the FPA to rely on the market to ensure just and reasonable rates, in lieu of cost-based ratemaking; and (2) that the standard adopted by the Commission in this rule for allowing market-based rates—a demonstration by the individual seller that it lacks or has mitigated both horizontal and vertical market power—does not comply with the FPA requirement that rates be just, reasonable, and not unduly discriminatory or preferential. As we set forth below, we find all the iterations of these basic arguments to be without merit because court precedent for the past 60 years validates the Commission's discretion not to be bound to any particular ratemaking method and indeed in more recent years has sanctioned market-based rates under both the NGA and the FPA, and because the market-based rate analysis in this rule will result in rates that fall within a zone of reasonableness. Section 205 of the FPA requires that ''[a]ll rates and charges made * * * shall be just and reasonable.'' [578] The FPA does not prescribe any particular ratemaking methodology to be followed in setting rates so long as rates fall within a zone of reasonableness,[579] i.e., the rates are neither less than compensatory to the seller nor excessive to the consumer.[580]

[563] Industrial Customers Rehearing Request at 6 (citing *Electricity Consumers Res. Council* v. *FERC,* 747 F.2d 1511, 1513; *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962); *W. Mass Elec. Co.* v. *FERC,* 165 F.3d 922, 927 (D.C. Cir. 1997); *Victor Broad, Inc.* v. *FCC,* 722 F.2d 756, 760 (D.C. Cir. 1983); *Transcontinental Gas Pipe Line Corp.* v. *FERC,* 922 F.2d 865, 869 (D.C. Cir. 1991); *KN Energy, Inc.* v. *FERC,* 968 F.2d 1295, 1303 (D.C. Cir. 1992); *PPL Wallingford,* 419 F.3d at 1198; *Canadian Petroleum Producers,* 254 F.3d at 299; *Tesoro Alaska Petroleum Co.* v. *FERC,* 234 F.3d 1286, 1294 (D.C. Cir. 2000)). Montana Counsel similarly argues that the Commission erred in assuming that long-term markets are inherently competitive. Montana Counsel Rehearing Request at 4–6.

[564] *Id.* at 8 (citing *LEPA,* 141 F.3d at 365; *Elizabethtown Gas,* 10 F.3d at 870).

[565] *Id.* at 7 (citing Industrial Customers' August 7 Comments at 6–7; *Farmers Union,* 734 F.2d at 1510).

[566] *Id.* (citing Order No. 697 at P 943–955).

[567] *Id.*

[568] *Id.* (citing *NorAm Gas,* 148 F.3d at 1165; *Brusco Tug & Barge Co.* v. *NLRB,* 247 F.3d 273, 278 (D.C. Cir. 2001); *Missouri PSC* v. *FERC,* 234 F.3d 36, 41 (D.C. Cir. 2001)).

[569] *Id.* at 7–8 (citing *Tripoli Rocketry* v. *Bureau of Alcohol, Tobacco,* 437 F.3d 75, 81 (D.C. Cir. 2006)).

[570] *Id.* at 9 (citing *Southwest Power Pool, Inc.,* 116 FERC ¶ 61,289, at P 30 (2006)).

[571] *Id.*

[572] *Id.*

[573] *Id.* at 10.

[574] *Id.* at 10–13 (citing PJM 2006 State of the Market Report at 89, 210 (Mar. 8, 2007), *http://www.pjm.org*; PJM Preliminary Market Structure Screen for 2007–2008; PJM Preliminary Market Structure Screen for 2008–2009; PJM Preliminary Market Structure Screen for 2000–2010; Letter from PJM to Maryland Public Service Commission, dated June 8, 2007 at 8, Maryland PSC Administrative Docket No. PC 8; PJM 2008/2009 RPM Base Residual Auction Results at 1, (July 13, 2007); Statement of Joseph E. Bowring In Response to the Federal Energy Regulatory Commission's Order of May 18, 2007 at 3, (filed June 12, 2007)).

[575] *Id.* at 14 (citing 2006 Midwest ISO State of Market Report).

[576] *Id.* at 15 (citing Monthly Metrics Report for SPP Energy Imbalance Services Market at 3, prepared by the SPP Market Monitoring Unit (Apr. 2007)).

[577] *Id.* (citing ISO New England Report).

[578] 16 U.S.C. 824d(a).

[579] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 602 (''[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling''); *Permian*, 390 U.S. at 776–77 (''rate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, 'to make the pragmatic adjustments which may be called for by particular circumstances,' '' citing *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. at 586).

[580] *Bluefield Water Works and Improvement Co.* v. *Public Service Commission*, 262 U.S. 679, 692–

Further, the fixing of ''just and reasonable'' rates involves a balancing of investor and consumer interests [581] and the ''zone of reasonableness'' may take into account all relevant public interests, both existing and foreseeable.[582] These public interests may appropriately include non-cost factors, such as the need to stimulate additional investment.[583] As we explained in the Final Rule and reiterate here, the Supreme Court has held that ''[f]ar from binding the Commission, the 'just and reasonable' requirement accords it broad ratemaking authority * * *. The Court has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula in general * * *.'' [584] Accordingly, the FPA grants the Commission broad discretion as to how the statute's ratemaking mandate will be satisfied.[585] The market-based rate program represents a reasonable exercise of that discretion.[586]

408. It is settled law that market-based rates can satisfy the just and reasonable standard of the FPA and cognate statutes. For example, as the D.C. Circuit has held, ''when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result.'' [587] Thus, the Commission may rely on markets for a just and reasonable rate provided that it has made the appropriate findings regarding whether sellers lack market power.

409. The Commission exercises its statutory responsibility under the FPA to ensure that market-based rates are just and reasonable through the dual requirement of an *ex ante* finding that the seller lacks or has mitigated both horizontal and vertical market power and post-approval oversight through reporting requirements and ongoing monitoring.[588] In granting market-based rate authorization, the Commission thoroughly examines an applicant's market power in the relevant geographic markets. An examination of both horizontal (generation market share) and vertical (transmission and other barriers to entry) market power in the relevant markets gives the Commission assurance that the seller cannot increase price by restricting supply or denying customers access to alternative suppliers. When the Commission determines that a seller lacks or has mitigated market power, it is making a determination that the resulting rates will be established through competitive forces, not the exercise of market power, and thus will fall within a zone of reasonableness which protects customers against excessive rates, on the one hand, but allows the seller the opportunity to recover costs and earn a reasonable rate of return, on the other hand. This is fully consistent with the fundamental rate principles set forth in *Hope* and *Bluefield*, supra, and their progeny. In addition, in developing its market-based rate regime, the Commission has taken into account non-cost factors, recognized as appropriate by the courts, associated with greater reliance on competition; specifically, where sellers do not have market power, the Commission believes it can encourage greater market entry, greater efficiency and greater innovation in meeting the nation's power needs through allowing such sellers a competitively set rate.

410. Further, the Commission has in place multiple layers of protection for customers to ensure that market-based rates are just and reasonable and that they remain so. For public utilities selling in real-time and/or day-ahead markets administered by Commission-approved ISOs and RTOs (which cover five regions of the country), in addition to the market power analysis individual sellers must satisfy under this rule, sellers must comply with market rules contained in RTO/ISO tariffs approved by the Commission. These single price auction markets set clearing prices based on economic dispatch principles to which various safeguards have been added, as appropriate, including rules against improper bidding and, in some cases, bid price caps including conduct and impact tests. In addition, to ensure that market-based rates, once granted, remain just and reasonable and not unduly discriminatory or preferential, the Commission has incorporated filing and reporting requirements into the market-based rate program (EQRs, change in status filings, regularly-scheduled updated market power analyses). These filing requirements help the Commission to monitor potential gains in market power and to take remedial steps as appropriate, including revocation of market-based rate authority and civil penalties. The Commission has also required each of the RTO/ISOs to have market monitors to help oversee their wholesale markets and report to the Commission any concerns that market rules have been violated or concerns regarding seller behavior. This provides an added level of monitoring against the potential exercise of market power in the regional markets administered by the jurisdictional RTO/ISOs.

411. That market-based rates are permissible under FPA was recently affirmed by the Ninth Circuit in *Lockyer* and *Snohomish*. In *Lockyer*, the Ninth Circuit cited with approval the Commission's dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirements and found that the Commission did not rely on market forces alone in approving market-based rate tariffs. The Ninth Circuit held that this dual requirement was ''the crucial difference'' between the Commission's regulatory scheme and the FCC's regulatory scheme, remanded in *MCI*, which had relied on market forces alone in approving market-based rate tariffs.[589] The Ninth Circuit thus held that ''California's facial challenge to market-based tariffs fails'' and ''agree[d] with FERC that both the Congressionally enacted statutory scheme, and the pertinent case law, indicate that market-based tariffs do not per se violate the FPA.'' [590] The Ninth Circuit determined that initial grant of market-based rate authority, together with ongoing oversight and timely reconsideration of market-based rate authorization under

93 (1923) (Bluefield) (''[a] public utility is entitled to such rates as will permit it to earn a return * * * equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties'').

[581] *FPC* v. *Hope Natural Gas Co., 320 U.S. at 603*.

[582] *See Farmers Union*, 734 F.2d at 1501.

[583] *See id.* at 1502.

[584] *Id.* P 943 (quoting *Mobil Oil Exploration* v. *United Distribution Co.*, 498 U.S. 211, 224 (1991) (*Mobil Oil Exploration*), citing *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *Permian Basin Area Rate Cases*, 390 U.S. 747, 776–77 (1968) (*Permian*); *FPC* v. *Texaco*, 417 U.S. 380 (1974) (*Texaco*)).

[585] *Mobil Oil Exploration*, 498 U.S. at 224, citing *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 602; *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. at 586; *Permian*, 390 U.S. at 776–77; *Texaco*, 417 U.S. at 386–89; *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 308 (1974).

[586] *Lockyer*, 383 F.3d at 1013; *Snohomish*, 471 F.3d at 1080.

[587] *Elizabethtown Gas*, 10 F.3d at 870. *See also Tejas Power*, 908 F.2d at 1004; *LEPA*, 141 F.3d at 365.

[588] *Lockyer*, 383 F.3d at 1013; *Snohomish*, 471 F.3d at 1080; *see also LEPA*, 141 F.3d at 370.

[589] *Lockyer*, 383 F.3d at 1013.

[590] *Id.* at 1013 & n.5; *id.* at 1014 (''The structure of the tariff complied with the FPA, so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were 'just and reasonable' and whether market forces were truly determining the price.'').

section 206 of the FPA, enables the Commission to meet its statutory duty to ensure that all rates are just and reasonable.[591] While the court in *Lockyer* found that the Commission's market-based rate reporting requirements were not followed in that particular case, it did not find those reporting requirements invalid and, in fact, upheld the Commission's market program as complying with the FPA. The market-based rate requirements and oversight adopted in this rule are more rigorous than those reviewed by the *Lockyer* court.

412. Accordingly, we find to be without merit the arguments raised on rehearing that the Commission lacks authority to continue to permit market-based rates for wholesale sales of electric energy. The courts have sustained the Commission's finding that market-based rates are one method of setting just and reasonable rates under the FPA. As supplemented by the Final Rule, the Commission finds that the market-based rate program complies with the statutory and judicial standards for acceptable market-based rates. We address below the specific arguments raised on rehearing.

413. We reject Consumer Advocates' argument that the Commission's market-based rate program delegates to others the determination of lawful rates because it allows buyers and sellers to negotiate rates. The Commission, and no one else, undertakes the up-front analysis described above that a seller lacks or has mitigated market power and thus pre-determines that future rates charged by the seller will be just and reasonable. It is the Commission, not buyers and sellers, that makes the determination of whether and when negotiated rates will be lawful. It is also the Commission, not others, that makes a final determination with respect to any market rules or restrictions that must be put in place with respect to market-based rate sellers in RTO/ISO markets.

414. Thus, contrary to Consumer Advocates' claim, the Commission has not ''delegat[ed] to wholesale buyers'' its ratemaking obligations under the FPA.[592] Consumer Advocates contend that the Commission held that it could not delegate to state commissions its ''ratemaking obligations under the FPA,'' and that it could not delegate such rate determinations to ''jurisdictional utilities.'' [593] However, the case relied on by Consumer Advocates is distinguishable from the issue here. In *Entergy*, the Commission denied Entergy's petition for a declaratory order requesting that the Commission find that, where a resource to be acquired or constructed by one or more of the Entergy Operating Companies has met certain approval requirements, including a public interest finding by such retail regulators as may have jurisdiction, the resource shall be a system resource and all costs of such facility may be reflected in the applicable formula rates. The Commission concluded that there was no local interest comparable to that present in the cases relied on by Entergy, and therefore denied Entergy's request to delegate to state commissions, and to Entergy itself, the determination of the reasonableness of Entergy's Commission jurisdictional rates.[594] By contrast, in the instant rulemaking proceeding, the Commission is not delegating to a state commission or to a utility the determination of the reasonableness of Commission jurisdictional rates. Rather, as explained above, in granting market-based rate authority, the Commission exercises its statutory responsibility under the FPA to ensure that market-based rates are just and reasonable through the dual requirement of an *ex ante* finding of the absence of market power and post-approval oversight through reporting requirements and ongoing monitoring.

415. Additionally, with respect to Consumer Advocates' argument that the Commission has overlooked the economic fact that wholesale buyers/re-sellers do not bear the risk of loss because the prices paid by wholesale buyers/re-sellers ''must be passed through to retail ratepayers,'' not only is this argument irrelevant to whether the Commission has legal authority to permit market-based rates as just and reasonable under the FPA, the argument also is not accurate.[595] It is true that only the Commission has the authority to determine the justness and reasonableness of a public utility's wholesale rates and that a state cannot disallow pass-through in retail rates on the basis that it disagrees with the Commission's just and reasonable determination. However, the Commission has consistently recognized that wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen among available supply options.[596]

416. In most circumstances ''a state commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source.'' [597] It is in the narrow situation where the Commission, in setting a wholesale rate, leaves the purchaser no legal choice but to purchase a specified amount of power that such determinations would be precluded.[598] Thus, we reject Consumer Advocates' arguments that these cases are relevant to the issue at hand.

417. We also reject Consumer Advocates' and NASUCA's arguments that the Final Rule failed to provide an objective standard under which the Commission can determine whether rate increases fall within a ''zone of reasonableness.'' [599] As part of their argument on rehearing, they again contend that markets alone cannot be relied on to set just and reasonable rates. As we explained in the Final Rule and reiterated above, the courts have sustained the Commission's finding that

[591] *See Snohomish*, 471 F.3d at 1080 (in which the Ninth Circuit discusses its decision in *Lockyer*). In *Snohomish*, the Ninth Circuit explained, ''As in *Lockyer*, we do not dispute that FERC may adopt a regulatory regime that differs from the historical cost-based regime of the energy market, or that market-based rate authorization may be a tenable choice if sufficient safeguards are taken to provide for sufficient oversight.'' *Id.* at 1086.

[592] Consumer Advocates Rehearing Request at 10, 12 (citing *Entergy Services, Inc.*, 120 FERC ¶ 61,020 (2007) (*Entergy*), citing *Louisiana, Inc.* v. *Louisiana Public Service Comm.*, 539 U.S. 39, 43 n.1; *City of New Orleans* v. *Entergy Corp.*, 55 FERC ¶ 61,211, at 61,729 (1991)).

[593] Consumer Advocates Rehearing Request at 12.

[594] *Entergy Services, Inc.*, 120 FERC ¶ 61,020 (2007).

[595] *Id.* at 10.

[596] *See Philadelphia Electric Co.*, 15 FERC ¶ 61,264, at 61,601 (1981); *Pennsylvania Power & Light Co.*, 23 FERC ¶ 61,006, *order on reh'g*, 23 FERC ¶ 61,325, at 61,716 (1983) (''We do not view our responsibilities under the Federal Power Act as including a determination that the purchaser has purchased wisely or has made the best deal available.''); *Southern Company Service*, 26 FERC ¶ 61,360, at 61,795 (1984); *Pacific Power & Light Co.*, 27 FERC ¶ 61,080, at 61,148 (1984); *Minnesota Power & Light Co.*, 43 FERC ¶ 61,104, at 61,342–43, *reh'g denied*, 43 FERC ¶ 61,502, *order denying reconsideration*, 44 FERC ¶ 61,302 (1988); *Palisades Generating Co.*, 48 FERC ¶ 61,144, at 61,574 and n.10 (1989).

[597] *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 465 A.2d 735, 738 (1983) (Pike County) (finding that while the state cannot review the reasonableness of the wholesale rate set by the Commission, it may determine whether it is in the public interest for the wholesale purchaser whose retail rates it regulates to pay a particular price in light of its alternatives). The Supreme Court's decisions in *Nantahala*, 476 U.S. 953 and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) do not preclude, in every circumstance, state regulators from reviewing the prudence of a utility's purchasing decisions. *See*, e.g., *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 837 F.2d 600, 609 (3d Cir.) *cert. denied*, 488 U.S. 941 (1988) (*Kentucky West Virginia*); *Doswell Limited Partnership*, 50 FERC ¶ 61,251, at 61,758 n.18 (1990).

[598] *Nantahala*, 476 U.S. 953; *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (*Mississippi Power*).

[599] Consumer Advocates cite several court cases in support of their argument in this regard. We address these cases in detail below.

market-based rates are one method of setting just and reasonable rates under the FPA.[600] Before granting a seller market-based rate authority, the Commission requires the seller to demonstrate that it and its affiliates lack or have adequately mitigated market power in relevant markets. The Commission undertakes a complete analysis of the seller's horizontal and vertical market power in the relevant markets and permits negotiated rates only if the seller demonstrates that it lacks or has mitigated market power. While this is not the same ''objective standard'' as cost-of-service ratemaking, which calculates the seller's costs and determines a specific rate of return, it nevertheless provides an objective standard for analyzing a seller's ability to exercise market power and thus determine whether rates will fall within a zone which is not excessive to customers and which allows the seller a reasonable opportunity to recover costs and earn a reasonable rate of return. In addition, the Commission does not rely on the market without adequate oversight. It has adopted filing requirements (EQRs and change in status filings for all market-based rate sellers and regularly scheduled updated market power analyses for all Category 2 market-based rate sellers), market manipulation rules, and enhanced market oversight through its enforcement division to help oversee potential market manipulation.[601] This approach, combined with the opportunity for interested parties to file complaints pursuant to FPA section 206, allows us to ensure that market-based rates remain just and reasonable. On this basis, we conclude that the rates charged pursuant to the Commission's market-based rate program fall within the ''zone of reasonableness.'' [602]

418. Further, as explained in the Final Rule, we believe that the market-based rate program fully complies with judicial precedent.[603] In *Lockyer*, the Ninth Circuit cited with approval the Commission's dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirements and found that the Commission did not rely on market forces alone in approving market-based rate tariffs.[604] In *Snohomish*, the Ninth Circuit again determined that the initial grant of market-based rate authority, together with ongoing oversight and timely reconsideration of market-based rate authorization under section 206 of the FPA, enables the Commission to meet its statutory duty to ensure that all rates are just and reasonable.[605]

419. We disagree with Consumer Advocates' argument that the ''Final Rule also fails to explain how FERC, which is not an antitrust agency, acting under the FPA, which is not an antitrust statute but a rate filing regulatory statute, can rely entirely on FERC's oft-changing antitrust analyses regarding 'market power' to determine whether 'market-based rates' are within a zone of reasonableness.'' [606] As explained in the section of the Final Rule addressing the Commission's horizontal market power analyses,[607] when the Commission determines whether an applicant may sell wholesale electric power at market-based rates, it evaluates whether a seller lacks, or has adequately mitigated, market power in a particular market. When the Commission determines that a seller lacks both horizontal and vertical market power, it is making a determination that the resulting rates will be established through competitive forces, not the exercise of market power. Thus, rates resulting from competitive forces will not be excessive to customers and will allow the seller the opportunity to earn a fair return. As we explained in the Final Rule and reiterate above, the courts have sustained the Commission's finding that market-based rates are one method of setting just and reasonable rates under the FPA. Further, market monitoring by both the RTO/ISO market monitors and by the Commission help ensure that rates remain within a zone of reasonableness. Thus, we reject Consumer Advocates' argument that the Commission has failed to explain how it ''determine[s] whether 'market-based rates' are within a zone of reasonableness.''

420. We also reject Consumer Advocates' contention that the Final Rule erroneously relied on NGA cases and Interstate Commerce Act oil pipeline cases. The most recent court cases affirming the Commission's market-based rate authority under the FPA cite to the very same NGA and Interstate Commerce Act oil pipeline cases that the Commission discusses in the Final Rule.[608] It is settled law that market-based rates can satisfy the just and reasonable standard of the FPA, as most recently affirmed by the Ninth Circuit in *Lockyer* and *Snohomish*.[609] The court in *Lockyer* expressly denied a ''facial challenge to market-based [rate] tariffs.'' [610] Further, the *Lockyer* court's analysis of the Commission's market-based rate authority acknowledged that the use of market-based tariffs was first approved by the courts as to sellers of natural gas in *Elizabethtown Gas*, then as to wholesale sellers of electric energy in LEPA.[611] The *Lockyer* court also cited the Supreme Court's determination in *Mobil Oil Exploration* that ''the just and reasonable standard does not compel the Commission to use any single pricing formula * * *.'' [612] Additionally, *Elizabethtown Gas*, a decision wherein the D.C. Circuit determined that markets were sufficiently competitive to preclude a pipeline from exercising market power to assure that prices were just and reasonable within the meaning of NGA section 4, was relied on by the D.C. Circuit in *LEPA*, a case in which the court affirmed the Commission's approval of an application by CLECO to sell electric energy at market-based rates under the FPA.[613] Accordingly, we find that the Commission did not err in citing NGA and Interstate Commerce Act oil pipeline cases in the Final Rule.

421. We also reject Consumer Advocates' argument that the Final Rule incorrectly cites cases supporting the proposition that ''[c]ases under the NGA and FPA are typically read *in pari materia*'' because this language refers to the filing and rate review provisions of the two statutes, not the different cost elements of the electric and natural gas industries.[614] *Sierra* and *Arkansas-Louisiana Gas Co.* v. *Hall*,[615] are correctly cited by the Final Rule for the proposition that cases under the NGA and FPA are typically read *in pari materia*. The Final Rule noted this proposition in its discussion of *Texaco*, a case in which the Supreme Court held that the NGA permits the indirect regulation of small-producer rates; however, in citing this proposition, the

[600] *Lockyer*, 383 F.3d at 1013; *Snohomish*, 471 F.3d at 1080; *see also LEPA*, 131 F.3d at 370.

[601] Order No. 697 at P 952, 967.

[602] *See Public Service Company of Indiana*, Opinion No. 349, 51 FERC ¶ 61,367 at 62,226 (determining that market-based rate pricing resulted in rates that were within the zone of reasonableness and concluding that such pricing resulted in just and reasonable rates), *order on reh'g*, Opinion No. 349–A, 52 FERC ¶ 61,260, *clarified*, 53 FERC ¶ 61,131 (1990), *dismissed, Northern Indiana Public Service Company* v. *FERC*, 954 F.2d 736 (D.C. Cir. 1992).

[603] *Id.* P 943–955.

[604] *Lockyer*, 383 F.3d at 1013.

[605] *Snohomish*, 471 F.3d at 1080.

[606] Consumer Advocates Rehearing Request at 13.

[607] *See*, e.g., Order No. 697 at P 62–79.

[608] Order No. 697 at P 953; *see Lockyer*, 383 F.3d at 1011–1014.

[609] *Lockyer*, 383 F.3d at 1013; *Snohomish*, 471 F.3d at 1080.

[610] *Lockyer*, 383 F.3d at 1013.

[611] *Id.* at 1012 (citing *Elizabethtown Gas*, 10 F.3d at 870; *LEPA*, 141 F.3d at 365).

[612] *Id.* (citing *Mobil Oil Exploration*, 498 U.S. at 224).

[613] *LEPA*, 141 F.3d at 365 (citing *Elizabethown Gas*, 10 F.3d at 870).

[614] Consumer Advocates Rehearing Request at 19 (citing Order No. 697 at P 946, n.1070).

[615] 453 U.S. 571, 578 n.7 (1981).

Final Rule did *not* claim that the cost elements of the electric and natural gas industries are the same. Further, the Final Rule clearly explained that *Texaco* may be distinguished from the market-based rate regime set forth in the Final Rule, stating ''[i]n the market-based rate program adopted in this rule and through other Commission actions, unlike the situation in *Texaco*, the Commission is not relying solely on the market, without adequate regulatory oversight, to set rates.'' [616] Accordingly, Consumer Advocates' argument that the citation in the Final Rule to *Sierra* and *Arkansas-Louisiana Gas Co.* v. *Hall* is incorrect disregards the context in which these cases were cited.

422. We find Consumer Advocates' argument that the market-based rate regime gives plant owners an incentive to keep power supplies tight to raise their profits to be without merit. The two indicative horizontal market power screens, each of which serves as a cross-check on the other to determine whether sellers possess market power, take into account the availability of generating capacity. In particular, the first screen, the wholesale market share screen, measures for each of the four seasons whether a seller has a dominant position in the market based on the number of megawatts of uncommitted (available generation) capacity owned or controlled by the seller as compared to the uncommitted capacity of the entire relevant market.[617] The second screen is the pivotal supplier screen, which evaluates the potential of a seller to exercise market power based on uncommitted capacity at the time of the balancing authority area's annual peak demand. This screen focuses on the seller's ability to exercise market power unilaterally and examines whether the market demand can be met absent the seller during peak times.[618]

423. If there is not sufficient competing uncommitted capacity, a seller fails the pivotal supplier analysis, which creates a rebuttable presumption of market power.[619] Thus, through the use of the indicative horizontal market power screens, the Commission ensures that market-based rate sellers are not able to exercise market power and thereby should ensure that there is no incentive for plant owners to keep power supplies tight.[620]

424. Additionally, as a condition of obtaining and retaining market-based rate authority, a seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. Thus, if a market-based rate seller acquires ownership or control of generation capacity that results in a net increase of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission facilities, or affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, the seller must report the change to the Commission so that the Commission may re-evaluate whether the seller is able to exercise market power.[621]

425. We reject Industrial Customers' argument that the Final Rule does not reflect reasoned decision-making because the Commission did not find the existence of a competitive market before relying on market-based rate authority. Under the FPA, the Commission is not bound to a particular ratemaking methodology in setting rates as long as rates fall within a zone of reasonableness,[622] *i.e.*, the rates are neither less than compensatory to the seller nor excessive to the consumer.[623] In addition, the ''zone of reasonableness'' may take into account all relevant public interests, both existing and foreseeable.[624] These public interests may appropriately include non-cost factors, such as the need to stimulate additional investment.[625] In permitting market-based rates in its regulation of electric markets, there are two approaches the Commission has used to ensure that rates are just and reasonable: Either a finding that an individual seller and its affiliates lack or have mitigated market power in a particular market; or a finding that a particular market is competitive or yields competitive results. Since the mid-1980's, the Commission's approach in the electric area has been primarily to rely on an analysis of individual seller market power, as was recently affirmed in the Final Rule. In addition, with regard to rates for sales within RTO/ISOs, even if sellers have been found to lack market power on an individual seller basis, the Commission has relied on a blend of market and cost-based elements, e.g., some form of cost cap or mitigated bids, to ensure just and reasonable rates.[626]

426. The Commission has previously considered a similar argument (that the Commission must find that a market is competitive before it can permit market-based rates) with regard to the Midwest ISO (MISO), and rejected it. We stated:

> The Commission rejects MISO Industrial Customers' argument that, as a prerequisite to reliance upon market-based rate pricing to produce just and reasonable rates, the

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[616] Order No. 697 at P 952.

[617] *Id.* P 34 (citing April 14 Order, 107 FERC ¶ 61,018 at P 100).

[618] *Id.* P 35.

[619] *Id.* P 65.

[620] Consumer Advocates cite the Commission's decision in *Richard Blumenthal* v. *ISO New England, Inc.*, 117 FERC ¶ 61,038 (2006), *reh'g denied*, 118 FERC ¶ 61,205 (2007) (*Blumenthal*) to support their statement that ''in the Connecticut complaint against the ISO New England, the Complaint showed that excessive rates of return were being made, but the Commission found this 'not relevant.' '' Consumer Advocates Rehearing Request at 19. Consumer Advocates' argument in this regard is not clear because they do not explain how the fact-specific determinations made by the Commission in addressing the section 206 complaint at issue in *Blumenthal* relate to the Commission's policy of granting market-based rate authority to sellers without market power under the terms and conditions set forth in the Final Rule. In *Blumenthal*, the Commission denied a complaint filed against the ISO New England upon concluding that the complainants had not met their burden under section 206 to establish that the current provisions of the ISO New England's Market Rule 1 were unjust and unreasonable.

[621] 18 CFR 35.42.

[622] *FPC* v. *Hope Natural Gas*, 320 U.S. 591, 602 (1944) (''[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling''); *Permian*, 390 U.S at 776–777 (''rate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, 'to make the pragmatic adjustments which may be called for by particular circumstances,' '' citing *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)).

[623] *Bluefield*, 262 U.S. at 692–93 (1923).

[624] *Farmers Union*, 734 F.2d at 1501 (citing *Permian*, 390 U.S. at 790 (''Congress delegated ratemaking authority to FERC in broad terms. Accordingly, 'the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties' '')).

[625] While the court in *Farmers Union* found that the Commission had failed to demonstrate that its ruling in the underlying orders would, in fact, stimulate new investment, the court acknowledged that such ''non-cost factors may legitimate a departure from a rigid cost-based approach.'' *Farmers Union*, 734 F.2d at 1502 (citing *FERC* v. *Pennzoil Producing Co.*, 439 U.S. at 518; *Mobil Oil Corp.* v. *FPC*, 417 U.S. at 308).

[626] *See* Order No. 697 at P 952. At the time the Commission approved the tariffs for ISO New England, the New York Independent System Operator, and PJM, it applied mitigation procedures in markets administered by those organizations, and incorporated those procedures in the RTO/ISO tariffs so as to apply to all sellers in the RTO/ISO administered markets. *See New England Power Pool*, 85 FERC ¶ 61,379 (1998); *Central Hudson Electric & Gas Corp.*, 86 FERC ¶ 61,062 (1999); *Atlantic City Electric Co.*, 86 FERC ¶ 61,248 (1999). *See also AEP Power Marketing, Inc.*, 109 FERC ¶ 61,276 (2004), *reh'g denied*, 112 FERC ¶ 61,320, at P 23 (2005) (after finding that AEP passed the generation market power screening test in PJM, the Commission also noted that ''RTOs such as PJM with Commission-approved market monitoring and mitigation provide a check on the exercise of generation market power''), *aff'd sub nom. Industrial Energy Users-Ohio* v. *FERC*, No. 05–1435, 2007 U.S. App. LEXIS 3661, at *2 (D.C. Cir. Feb. 16, 2007) (noting that ''the Commission adequately considered and responded to petitioner's arguments'') (unpublished).

Commission must, in addition to finding that applicants lack or have adequately mitigated market power, make a separate and independent finding that a competitive market exists. * * * We * * * incorporate by reference the Commission's discussion in its final rule on market-based rates (Order No. 697 [at P 943–71]) of the legality of its approach to market-based rates. The Commission's long-established approach involves assessing whether a seller lacks market power, which includes an assessment of seller-specific market power. This approach, combined with the Commission's filing requirements and ongoing monitoring, allows the Commission to ensure that market-based rates remain just and reasonable. Additionally, for sellers in RTO/ISO organized markets, the Commission has in place market monitoring and mitigation rules to mitigate the exercise of market power, including price caps where appropriate, and the Commission also uses RTO/ISO market monitors to help oversee market behavior and market conditions. * * *[627]

427. As we explained in the Final Rule, we retained our approach to determining whether a seller should receive authorization to charge market-based rates, as modified by the Final Rule, by analyzing seller-specific market power. We have a long-established approach when a seller applies for market-based rate authority of focusing on whether the seller lacks market power.[628]

428. We reject Industrial Customers' argument that the Final Rule is inconsistent with *Farmers Union* because that case requires the Commission to point to ''empirical proof'' that competitive markets exist.[629] The regulatory scheme at issue in *Farmers Union* is distinguishable from the Commission's market-based rate program. In *Farmers Union*, a case concerning rates for oil pipelines, the court found that the Commission ''sought to establish maximum rate ceilings at a level far above the 'zone of reasonableness' required by the statute.'' [630] The court found that the Commission departed from established ratemaking principles when the Commission determined that oil pipeline rate regulation should ''protect against only '*egregious* price exploitation and *gross* abuse' '' by the regulated pipelines,[631] since ''the cost of pipeline transportation, relative to the price of oil, had become so insignificant that close regulation was not required.'' [632] The court found error in the Commission's approach, finding that there was ''only anecdotal evidence of intermodal competition on certain pipeline routes[,]'' [633] and noted that the Commission's ''evaluation of competition in the oil pipeline industry is not entirely clear.'' [634] The court concluded that ''the fundamental flaw in the Commission's scheme'' was that ''nothing in the regulatory scheme itself acts as a monitor to see if [actual prices are driven back down into the zone of reasonableness] or to check rates if [prices are not driven down].[635] In this regard, the court also explained that:

> In setting extraordinarily high price ceilings as a substitute for close regulation, FERC assumed that, with the wide exposed zone between the ceiling and the 'true' market rate, existing competition would ensure that the actual price is just and reasonable. Without empirical proof that it would, this regulatory scheme, however, runs counter to the basic assumption of statutory regulation, that 'Congress rejected the identity between the 'true' and the 'actual' market price.' [636]

Thus, the court found that the fundamental flaw in the Commission's regulatory scheme in *Farmers Union* was that there was no monitoring.

429. The *Farmers Union* court found that the Commission's ''largely undocumented reliance on market forces as the principal means of rate regulation'' was misplaced.[637] In this regard, it noted that ''when Congress amended the Interstate Commerce Act to account for competition in the rail carrier industry, the amendment required the ICC to make a specific finding that a particular rail carrier did not have 'market dominance' before deregulating the carrier. * * * We do not believe that the unamended oil pipeline rate provisions of the Interstate Commerce Act, which do not make any provision for deregulation, would require any less of a particularized showing before competition might be properly taken into account.'' [638] The court nonetheless concluded that '' 'non-cost' factors may play a legitimate role in the setting of just and reasonable rates.'' [639] It also found that ''[m]oving from heavy to lighthanded regulation within the boundaries set by an unchanged statute can, of course, be justified by a showing that under current circumstances the goals and purposes of the statute will be accomplished through substantially less regulatory oversight.'' [640]

430. The defects that the court found to be present in the regulatory scheme under review in *Farmers Union* are not present in the Commission's market-based rate program. As an initial matter, in the case under review in *Farmers Union*, the Commission had not undertaken any analysis of the sellers participating in the oil pipeline industry as part of its decision to adopt a generic ratemaking methodology to be applied to all oil pipelines. Unlike *Farmers Union*, before granting a seller market-based rate authority, the Commission performs an initial evaluation to determine whether the seller or any of its affiliates has horizontal or vertical market power and, if so, whether such market power has been mitigated. The Commission only permits a seller to use market-based rate pricing if the Commission finds that the seller lacks, or has adequately mitigated, market power in the relevant market.

431. Similarly, unlike *Farmers Union*, where the court identified as a ''fundamental flaw'' the absence of any monitoring to ensure that rates remain within a zone of reasonableness, the market-based rate program does not rely solely on the market, without adequate regulatory oversight, to determine rates. Rather, the market-based rate program includes post-approval oversight through reporting requirements and ongoing monitoring. In addition, market monitoring by the Commission helps ensure that rates remain within a zone of reasonableness.[641] Thus, the Commission's market-based rate program does not contain the defects that the court found to be present in *Farmers Union*,[642] and is not arbitrary

[627] *Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,202 at P 9, 12 (2007).

[628] Order No. 697 at P 955 (citing *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,060–61 (1994); *Louisville Gas and Electric Co.*, 62 FERC ¶ 61,016, at 61,143 n.16 (1993) (and the cases cited therein); *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210, at 61,776 & n.11 (1989); *Pacific Gas and Electric Co. (Turlock)*, 42 FERC ¶ 61,406, at 62,194–98, *order on reh'g*, 43 FERC ¶ 61,403 (1988); *Pacific Gas and Electric Co.* (Modesto), 44 FERC ¶ 61,010, at 61,048–49, *order on reh'g*, 45 FERC ¶ 61,061 (1988). *See also*, e.g., *LEPA*, 141 F.3d at 365; *Consumers Energy Co.*, 367 F.3d 915, 922–23 (D.C. Cir. 2004) (upholding Commission orders granting market-based rate authority, noting that the Commission's longstanding approach is to assess whether applicants for market-based rate authority do not have, or have adequately mitigated, market power); *Lockyer*, 383 F.3d at 1012–1013.

[629] Industrial Customers Rehearing Request at 7.

[630] *Farmers Union*, 734 F.2d at 1501.

[631] *Id.* at 1502 (citation omitted; emphasis supplied by court).

[632] *Id.* at 1507.

[633] *Id.* at 1509.

[634] *Id.* n.50.

[635] *Id.* at 1509 (citation omitted).

[636] *Id.* at 1510.

[637] *Id.* at 1508 (footnote omitted).

[638] *Id.* at n. 50.

[639] *Id.* at 1503.

[640] *Id.* at 1510.

[641] On this basis, we find State AGs and Advocates' reliance on *Farmers Union* to support their argument that the Final Rule failed to provide a standard under which the Commission can determine whether rate increases fall within a ''zone of reasonableness'' to be misplaced.

[642] *See Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,202, at P 9, 12 (2007); *PJM Interconnection, L.L.C.*, 121 FERC ¶ 61,173, at P 22 (2007).

and capricious because, contrary to Industrial Customers' assertions, under the market-based rate program the Commission performs an initial evaluation of all sellers before granting market-based rate authority, and because the market-based rate program includes adequate oversight and monitoring.

432. Industrial Customers contend that the Final Rule is inconsistent with the Commission's decision in *Southwest Power Pool, Inc.* (*SPP*) where the Commission made a finding that the market was competitive before approving market-based rates for an energy imbalance service.[643] In *SPP*, the Commission found that the SPP imbalance market is competitive in the absence of transmission constraints, and that SPP's mitigation measures and monitoring plan are sufficient to protect customers from the exercise of market power that might occur in the energy imbalance market when transmission constraints bind.[644] We reject Industrial Customers' contention that the Commission may only grant market-based rate authorization if it first analyzes whether a competitive market exists. As explained above, the Commission has discretion [645] to rely on an analysis of individual seller market power, as was affirmed in the Final Rule, and the courts have upheld this approach.[646] Our use of this approach for SPP does not require its use elsewhere. At the same time, the Commission will allow RTO/ISOs to conduct market power studies that the RTO/ISO members can rely on in their market power filings, which will help ensure the accuracy and consistency of data.

433. With regard to Industrial Customers' contention that there are market power issues prevalent in the PJM, Midwest ISO, Southwest Power Pool, and ISO New England markets, we find that such issues are beyond the scope of this proceeding. The instant rulemaking proceeding codifies and revises the Commission's standards for market-based rates and streamlines the administration of the market-based rate program; however, this rulemaking is not intended to evaluate market power issues with regard to particular markets throughout the United States.

2. Consistency of Market-Based Rate Program With FPA Filing Requirements

a. Whether the Multiple Layers of Filing and Reporting Requirements Incorporated into the Market-Based Rate Program Provide Adequate Protection from Excessive Rates

Final Rule

434. In rejecting Consumer Advocates' arguments that the Commission's market-based rate program fails to comply with the FPA,[647] the Commission pointed out in the Final Rule that the FPA requires that every public utility file with the Commission ''schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission,'' but it explicitly leaves the timing and form of those filings to the Commission's discretion.[648] The Commission noted that the courts have recognized the Commission's discretion in establishing its procedures to carry out its statutory functions.[649] The Commission explained that the market-based rate tariff, with its appurtenant conditions and requirement for filing transaction-specific data in EQRs, is the filed rate.[650]

435. The Commission also disagreed with Consumer Advocates' arguments that the Commission failed to show how competitive market-based rates are just and reasonable and not unduly discriminatory or preferential, stating ''the standard for judging undue discrimination or preference remains what it has always been: Disparate rates or service for similarly situated customers.'' [651] The Commission explained that rates do not have to be set by reference to an accounting cost of service to be just, reasonable and not unduly discriminatory, stating that when the Commission determines that a seller lacks market power, it is making a determination that the resulting rates will be established through competition, not the exercise of market power. The Commission also explained that courts have upheld the Commission's determinations that rates that are established in a competitive market can be just, reasonable and not unduly discriminatory.[652]

436. In the Final Rule, the Commission disagreed with Consumer Advocates' argument that the market-based rate program eliminates the statutory mandate that all rate increases be noticed by filing 60 days in advance and, if warranted, suspended for up to five months, set for hearing with the burden of proof on the seller, and made subject to refund pending the outcome of the hearing.[653] The Commission explained that it has developed a thorough process to evaluate the sellers that it authorizes to enter into transactions at market-based rates.[654] Under the market-based rate program, the rate change is initiated when a seller applies for authorization of market-based rate pricing. All applications are publicly noticed, entitling parties to challenge a seller's claims. At that time, there is an opportunity for a hearing, with the burden of proof on the seller to show that it lacks, or has adequately mitigated, market power, and for the imposition of a refund obligation.[655] Additionally, if a seller is granted market-based rate authority, it must comply with post-approval reporting requirements, including the quarterly filing of transaction-specific data in EQRs, change in status filings for all sellers, and regularly-scheduled updated market power analyses for Category 2 sellers.[656] In the Final Rule the Commission explained that it may, based on its review of EQR filings or daily market price information, investigate a specific utility or anomalous market circumstances to determine whether there has been any conduct in violation of RTO/ISO market rules or Commission orders or tariffs, or any prohibited market manipulation, and take steps to remedy any violations. These steps could include, among other things, disgorgement of profits and refunds to customers if a seller is found to have violated Commission orders, tariffs or rules, or a civil penalty.[657]

Requests for Rehearing

437. Consumer Advocates contend in their request for rehearing that the Final

[643] 116 FERC ¶ 61,289, at P 30 (2006), *appeal pending sub nom.*, *Southwest Indus. Customer Coalition* v. *FERC*, No. 06–1390, *et al.* (D.C. Cir. Nov. 27, 2006).

[644] *Id.*

[645] *See* e.g., *Exxon Co., USA* v. *FERC*, 182 F.3d 30, 37–38 (D.C. Cir. 1999) (stating that where ''the analysis to be preformed 'requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.' '') (internal citation omitted); *Oxy USA, Inc.* v. *FERC*, 64 F.3d 679, 690–91 (D.C. Cir. 1995).

[646] *Lockyer*, 383 F.3d at 1013; *Snohomish*, 471 F.3d at 1080; *LEPA*, 141 F.3d at 370.

[647] Order No. 697 at P 959.

[648] *Id.* (quoting 16 U.S.C. 824d(c)).

[649] *Id.* P 960 (citing *Lockyer*, 383 F.3d at 1013; *Wabash Valley Power Association* v. *FERC*, 268 F.3d 1105, 1115 (D.C. Cir. 2001), *Environmental Action* v. *FERC*, 996 F.2d 401, 407–08 (D.C. Cir. 1993)).

[650] *Id.* P 961. The Commission further noted that it has held that if every service agreement under a previously-granted market-based rate authorization had to be filed prior to approval, then the original market-based rate authorization would be a pointless exercise. *Id.* (citing *GWF Energy LLC*, 98 FERC ¶ 61,330, at 62,390 (2002)).

[651] *Id.* P 963 (citing *Southwestern Electric Cooperative, Inc.* v. *FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003)).

[652] *Id.* (citing *Lockyer*, 383 F.3d at 1012–13; *Tejas Power Corp.* v. *FERC*, 980 F.2d 998, 1004 (D.C. Cir. 1990)).

[653] *Id.* P 962.

[654] *Id.*

[655] *Id.*

[656] *Id.*

[657] *Id.* P 964.

Rule failed to provide a standard for determining prohibited undue preference or discrimination under the Commission's market-based rate regime.[658] In particular, Consumer Advocates argue that the traditional FPA section 205(b) standard has no apparent application to market-based rates because such rates, by definition, are allowed to be any rate for any service on which the seller and buyer agree, regardless of the relation of such prices or services to any other market-based rate or service.[659] Consumer Advocates assert that the Final Rule relies on buyers to negotiate non-excessive rates, and if the buyer is an affiliate or a competitor, the rationale supporting the idea that disinterested sellers and buyers will negotiate non-discriminatory rates, disappears altogether.[660] They also argue that the Final Rule does not provide a reason for why long-term affiliate sales service agreements should not be filed.[661] Consumer Advocates further argue that the Final Rule erred in assuming that the Commission's statutory role is to protect electricity markets, regardless of the impact on consumers.[662] They argue that the FPA was enacted to protect consumers from the market,[663] and that mere market incentives alone cannot be relied upon to protect the public interest.

438. Consumer Advocates contend that the Final Rule erred in finding that the Commission has legal authority to eliminate the Congressionally-mandated consumer protections of FPA section 205(e).[664] Specifically, they argue that the Final Rule continues to effectively define rate increases out of existence by claiming that none occur, and in so doing, eliminates the FPA-mandated prior rate filings and review of rate increases required by section 205(d).[665] Consumer Advocates argue that this definitional ploy eliminates both the Commission's and the consumers' ability to exercise their statutory rights under section 205(e) applying to rate increases, including the opportunity for suspension of excessive rates, hearings with the burden of proof on sellers to justify rate increases and with immediately effective refund with interest obligations for consumers who are found to have paid excessive rates.[666] Consumer Advocates contend that neither the Commission nor any court has the legal authority to gut these statutory protections for consumers against excessive rates, and the Final Rule erred in claiming such authority for either court or agency.[667]

439. Consumer Advocates argue that because rate increase filings are controlled by a different FPA provision, the Final Rule erred in relying on the Commission's discretion as to the form and timing of filings of initial rates as legal justification for eliminating prior filings of rate increases under market-based rate tariffs. They assert that the Final Rule relied on the Commission's discretion under section 205(c) as to the form and timing of rate schedule filings to legally justify eliminating the FPA-mandated filing of specific rates and rate increases, yet insisted that the filing of market-based rate tariff authorizations is a ''change'' in rate, and the filing of subsequent actual charges are merely filings in satisfaction of Commission-created '' 'reporting requirements.' ''[668] Consumer Advocates also contend that one serious flaw in this argument is that section 205(d), not section 205(c), controls ''changes'' in rates, and section 205(d) does not offer the same discretion as to the form and timing of rate increase filings.[669]

440. Consumer Advocates contend that the market-based rate tariff authorization application would be, as a change in rate, subject to section 205(d), not section 205(c). They argue that the relied-upon discretion provided does not apply to any market-based rate, because under the legal logic of the Final Rule there never are any initial market-based rates filed.[670] According to Consumer Advocates, the Lockyer decision also relied erroneously on the Commission's discretion under section 205(c) as authority to approve the Commission's elimination of section 205(d) prior filings of rate changes.[671] Consumer Advocates conclude that the Final Rule erred insofar as: (1) It failed to explain how the Commission's market-based rate authorization orders satisfy these plain requirements of section 205(d), which must apply to market-based rate tariff authorizations, as ''changes'' in rates; (2) market-based rate authorizations fail to specify either a change in the amounts to be charged or the time when such new charges will go into effect; and (3) all subsequent actual increases in charges under the market-based rate tariff, according to the Final Rule's logic, are not changes in the rate, but merely reports, or EQRs, no matter how dramatically actual prices increase.[672]

441. Consumer Advocates contend that the Final Rule claimed that the Commission can suspend the use of market-based rate tariffs when they are first filed, but does not try to justify either the consumer-protection rationale or the legal authority for its attempted elimination of the Commission's ability to suspend all subsequent excessive rate increases under market-based ''rates.''[673] Consumer Advocates contend that *Lockyer* acknowledges that the Commission's ability to suspend excessive rate increases is lost under the market-based rate regime, but appears to believe that the Commission can eliminate such protections if it so chooses.[674] Consumer Advocates state that *Lockyer* does not acknowledge the other consumer protections that are eliminated by the Commission's definition of ''change'' as including none of the specific rate charges filed as ''reports.'' They contend that loss of rate suspensions alone eliminates 8 months of potential consumer protection from excessive rates: 5 months of the Commission's lost ability to suspend rate increases and 3 months before the rates are even seen in reports and can be set for hearing under section 206.[675] Consumer Advocates assert that this result is directly contrary to Congress' intent in the Energy Policy Act of 2005[676] to extend the filing provisions of sections 205(c) and (d) to non-public transmitting utilities, and to reduce the time before section 206 rates can be made subject to refund.[677]

442. NASUCA argues that the Commission did not articulate an adequate legal basis to support the Final Rule's reduced market power review and filing requirements.[678] While

[658] Consumer Advocates Rehearing Request at 14 (citing 16 U.S.C. 824d(b)).

[659] *Id.*

[660] *Id.* at 15.

[661] *Id.*

[662] *Id.* at 21–22.

[663] *Id.* at 22 (citing *Atlantic Ref. Co.* v. *Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 388 (1959); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 352 U.S. 332 (1956) (*United Gas Pipe Line*); *Sierra*; *Electrical District No. 1* v. *FERC*, 774 F.2d 490 (D.C. Cir. 1985) (*Electrical District*).

[664] *Id.*

[665] *Id.*

[666] *Id.*

[667] *Id.*

[668] *Id.* at 23 (citing Order No. 697 at P 960; 962–63).

[669] *Id.*

[670] *Id.* at 23–24.

[671] *Id.* at 24 (citing *Lockyer,* 383 F.3d at 1013; Order No. 697 at P 960). Consumer Advocates state that section 205(d) requires that all rate increases and other changes in rates or charges must be filed 60 days in advance of being charged, unless the Commission for good cause issues an order ''specifying the changes'' to be made to the rates and charges, and specifying ''the time when the change or changes will go into effect.'' *Id.*

[672] *Id.* at 24–25.

[673] Consumer Advocates Rehearing Request at 31.

[674] *Id.* at 30.

[675] *Id.* at 31.

[676] Pub. L. No. 109–58, 119 Stat. 594 (2005).

[677] Consumer Advocates Rehearing Request at 31 (citing 119 Stat. 594 sections 1285 and 1290(a)(2)).

[678] NASUCA Rehearing Request at 17.

NASUCA notes that the Final Rule responded to its concerns, citing the decision of the Ninth Circuit in *Lockyer* and relying on FPA section 205(c) as authority to adjust the timing of rate filing, [679] NASUCA contends that the adjacent statutory language of section FPA 205(d) limits that power.[680] NASUCA argues that ''[t]he 'crucial difference' between impermissible exclusive reliance on market rates found in the *Lockyer* decision * * * is absent in the revisions made in the Final Rule.'' [681] NASUCA also contends that the Ninth Circuit mistakenly believed that the Commission looks at a seller's market power reviews in triannual reviews, *i.e.,* conducted once every four months, rather than triennial reviews, *i.e.,* once every three years.[682] NASUCA concludes that the actions being taken to streamline filing requirements eliminate market power reviews for many sellers, and that to rely mainly on a *post hoc* monitoring process does not constitute the ''bond'' of protection required for consumers.[683]

443. Consumer Advocates argue that the Final Rule erred in failing to explain what authority the Commission has to eliminate the statutory remedy of refunds of excessive charges, with interest, under section 205(e), and replace it with only disgorgement of excess profits or civil penalties whenever market manipulators are caught.[684] They contend that the Final Rule erred in relying on the Lockyer decision's erroneous finding that, because the market-based rate regime eliminates section 205(e) refunds for excessive charges paid, the Commission must create and substitute a new refund remedy to replace them.[685] Consumer Advocates assert that courts may not rewrite statutes or direct agencies to do so.[686] They argue that the Final Rule failed to explain (1) how *Lockyer's* curious ''two wrongs make a right'' approach is within the Ninth Circuit's authority, since only Congress can change a statute, (2) how *Lockyer's* new remedy helps consumers, who are supposed to receive refunds from excessive charges paid, not administrative penalties for reports that have been omitted; and (3) how the *Lockyer* decision's remedy replaces section 205(e)'s other eliminated consumer protections—prior review, suspension, and hearings with burden of proof on the seller.[687]

444. Consumer Advocates also contend that punishing manipulators, as the Final Rule proposed to do, is fine, but it does not make whole customers who have paid excessive rates set in part by those who manipulated the market.[688] They note that the Colorado Consumers Counsel section 206 proceeding is a case in which the Commission made the rates subject to refund under section 206 and subsequently found that all market-based rate tariffs which didn't have behavior rules attached were unjust and unreasonable and that the Commission ordered no refunds, but merely added behavior conditions to the market-based rate tariffs prospectively.[689]

445. Consumer Advocates also argue that the Final Rule erred in assuming that the Ninth Circuit and the D.C. Circuit are authorized to eliminate or affirm agency elimination of statutory consumer protections that Congress has enacted into law.[690] They state that agencies are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate and prescribed for the pursuit of those purposes.[691] They argue that in sections 205(d) and (e) of the FPA, Congress chose not only the goal of consumer protection from excessive rate increases, but also the means—advance rate filing and review, suspension, hearings with burden of proof on the seller, and immediate refund insurance—by which such protections would be afforded.[692] Consumer Advocates contend that the Final Rule ignored the clear mandates of the statute, and allows rate increases to be filed three months after they are charged, when the Commission has lost the power to initiate section 205(e) consumer protections.[693]

446. Consumer Advocates contend that the Final Rule's discussion of whether the Commission can simply eliminate any review of rate increases under the statutory protections of FPA section 205(e) appears to assume that the D.C. Circuit has authorized such elimination of section 205(e), and that the Court has the power to do so.[694] Consumer Advocates argue that the Supreme Court found that a wholesale seller's major duty under the FPA is to file its rates for review by the Commission and the public to determine whether hearings should be instigated under section 206, for initial rates, or section 205, for changes in rates.[695] They assert that the Final Rule ignored the lead cases on the FPA filing requirement, except to quote them for the proposition that the filing and hearing requirements are typically read *in pari materia*.[696] Consumer Advocates agree with that citation, however they argue that the purpose of the advance rate filings is for the Commission and the public to review rates before they are charged.[697]

447. Consumer Advocates argue that even if the Commission had authority to redefine rate increases as being mere rate ''reports,'' or EQRs, the Final Rule erred by failing to explain why the Commission would wish to eliminate all section 205(e) consumer protections by adopting this definition, and how such elimination satisfies the Commission's consumer protection responsibilities under the FPA.[698] They contend that the Commission's definition of rate increases as never occurring under the market-based rate regime, once a market-based rate tariff authorization is granted, allows the Commission to avoid prior review of all market-based rate increases and deprives consumers of all the protections provided by section 205(e).[699] Consumer Advocates note that the Final Rule's definitional elimination of rate ''increase'' protections is of particular importance to consumers in Maryland, Delaware, Illinois, Montana, Connecticut, and Ohio, among many other states, where retail ratepayers have been charged huge retail rate increases resulting solely from the pass-through of huge wholesale rate ''increases.''[700] They also contend that under the market-based rate regime as continued in the Final Rule, such wholesale increases have never been and never will be reviewed by the Commission under section 205(e) of the FPA.[701]

448. Consumer Advocates also argue that the Final Rule erred by failing to adequately distinguish the Supreme Court and Circuit court decisions outlawing attempts by other regulatory agencies to replace statutorily-mandated specific rates with a range of rates, when

[679] *Id.* (citing Order No. 697 at P 953–954).

[680] *Id.* at n.16.

[681] *Id.* at 17.

[682] *Id.* at 18.

[683] *Id.* (citing Order No. 697 at P 958–59).

[684] *Id.* at 32–33.

[685] *Id.* at 32.

[686] *Id.* (citing *MCI*; *Southwestern Bell*).

[687] *Id.* at 33–34.

[688] *Id.* at 33.

[689] *Id.* (citing 97 FERC ¶ 61,220 (2001); 105 FERC ¶ 61,218 (2003); 107 FERC ¶ 61,175 (2004)).

[690] *Id.* at 34.

[691] *Id.* at 36 (citing *MCI,* 512 U.S. at 231 n.4).

[692] *Id.*

[693] *Id.* at 35.

[694] *Id.* at 34 (citing Order No. 697 at P 948).

[695] *Id.* at 34–35 (citing *United Gas Pipe Line,* 350 U.S. at 341–42; *Sierra*).

[696] *Id.* at 35 (citing Order No. 697 at P 946, n.1070).

[697] *Id.*

[698] *Id.* at 36–37 (citing 774 F.2d 490, 493).

[699] *Id.* (citing *Atlantic Richfield; Electrical District; Lockyer,* 383 F.3d at 1017).

[700] *Id.* at 37.

[701] *Id.*

the market-based rate tariffs allow a range of rates so broad as to include any rate the parties agree to. Consumer Advocates contend that ''FERC's claim that the MBR's unlimited range of rates adequately substitutes for the 'specific' charges required under 205(d)'' is not sustainable under court precedent applying to the FPA and to other similar rate filing statutes.[702] They argue that the market-based rate, a statement that the rate will be anything the parties agree to, is even less specific than the ''legal and accounting principles,'' which the D.C. Circuit rejected in Electrical District [703] and state that it is instead, ''no more than an invitation to negotiate,'' an invitation that the same court rejected as a rate in Southwestern Bell.[704]

449. Consumer Advocates contend that in unlawfully replacing the requirement of section 205(d) for filing specific rate changes with a range of rates,[705] the Final Rule erred in relying on *Lockyer's* attempt to distinguish certain cases by claiming they were remanded by the Supreme Court because the agency had ''relied on market forces alone.''[706] According to Consumer Advocates, the *Lockyer* decision erred in failing to recognize that *Electrical District* and *Southwestern Bell* found unlawful the agencies' attempts to replace statutory requirements to file specific rates with ''ranges of rates'' for ''non-dominating'' entities.[707] Consumer Advocates also argue that rate ranges only apply to ''non-dominating'' wholesale sellers without market power, and that the courts have held that it is the Congress, not the agency, that determines what entities must continue to be regulated.[708]

450. Consumer Advocates contend that in *Regular Common Carrier Conference* v. *United States,* the importance of actual rates contained in tariffs was found to be ''utterly central'' to a rate filing statute.[709] They note that the Final Rule relied repeatedly on *LEPA,* which relies on *Elizabethtown Gas,* yet neither court decided the issue of whether the market-based rate filings or the overall market-based rate regime complies with the FPA.[710] Consumer Advocates also assert that the D.C. Circuit has repeatedly refused on procedural grounds to review the market-based rate regime's elimination of rate filings and its disregard for other section 205 mandates.[711] Consumer Advocates therefore conclude that the law of the D.C. Circuit on rate filings under section 206 of the FPA thus remains the decision in *Electrical District*.

451. Consumer Advocates argue that the Final Rule erred in relying chiefly on *Lockyer* for legal support for replacing advance rate increase filings with after-the-fact ''reporting requirements'' and that the Ninth Circuit panel, in turn, erroneously relied on Commission counsel's argument that the market-based rate tariffs plus the specific information on actual charges filed pursuant to the ''reporting requirements'' together comply with the FPA's requirement for filing specific rates.[712] Consumer Advocates state that if the reporting requirement filings contain a necessary component of the rate, that is, the component that renders the market-based rate specific enough to comply with the statute, then such reports must be filed 60 days in advance under section 205(d), otherwise, the rate reports must be filed as specifically directed by a section 205(d) order so as to allow for the full section 205(e) review, procedures and remedies.[713] They contend that the *United Gas Pipe Line/Sierra* cases and *City of Piqua* support this interpretation.[714] Consumer Advocates argue that under the Commission's ''reporting requirements'' scheme, only prospective section 206 review, hearings or refunds are possible and that under the market-based rate regime, rates may be increased exponentially, yet there are never any section 205(e) procedural protections or remedies available to consumers regarding whether actual rate levels fall within a ''zone of reasonableness.'' [715]

452. NASUCA contends that under the Final Rule, market power review is to be eliminated altogether for many sellers in the Category 1 classification, with no specific review of those sellers' potential to exercise power.[716] NASUCA argues that there is no record in this case to support a generic finding that a seller with 499 MW capacity needs no market power review and a seller of 501 MW does.[717] NASUCA concludes that, in light of the Final Rule's reduced requirements for market power review, the *post hoc* reporting requirement is not sufficient to protect customers.[718]

Commission Determination

453. As we stated in the Final Rule, we disagree with Consumer Advocates' arguments that the Commission failed to show how market-based rates are just and reasonable and not unduly discriminatory or preferential. We reject Consumer Advocates' argument that the Final Rule failed to provide a standard for determining prohibited undue preference or discrimination under the Commission's market-based rate regime. The standard for judging undue discrimination remains what it always has been: disparate rates or service for similarly situated customers.[719] The Commission has held in prior cases, and the courts have upheld, that rates that are established in a market where a seller cannot exercise market power can be just, reasonable and not unduly discriminatory.[720]

454. The Final Rule does not violate the FPA's filing requirements. The FPA requires that every public utility file with the Commission ''schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission,'' but it explicitly leaves the timing and form of those filings to the Commission's discretion.[721] Public utilities must file ''schedules showing all rates and charges'' under ''such rules and regulations as the Commission may prescribe,'' and ''within such time and form as the Commission may designate.'' [722] Accordingly, ''so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective

[702] *Id.* at 27 (citing *Electrical District*; 16 U.S.C. 824e(a)).

[703] *Id.*

[704] *Id.* (quoting *Southwestern Bell,* 43 F.3d at 1521).

[705] *Id.* at 28.

[706] *Id.* (citing *Lockyer*, 353 F.3d at 1013; Order No. 697 at P 953).

[707] *Id.* at 29.

[708] *Id.* at 28–29 (citing *Maislin Indus. U.S.* v. *Primary Steel Inc.*, 497 U.S. 116 (1990) (*Maislin*); *MCI*; *Southwestern Bell*)

[709] *Id.* at 29 (citing *Regular Common Carrier Conference* v. *United States,* 793 F.2d 376, 379 (D.C. Cir. 1986) (*Regular Common Carrier*)).

[710] *Id.* (citing Order No. 697 at P 949–951). Consumer Advocates contend that *LEPA* and *Elizabethtown Gas* both explicitly state that they are not deciding the question of whether the market-based rate filing requirements or overall market-based rate regime comply with the FPA. *Id.* at 29–30 (citing *LEPA,* 141 F.3d at 366 n.2; *Elizabethtown Gas*, 10 F.3d at 871).

[711] *Id.* at 30 (citing *Elizabethtown Gas*; *LEPA*; *Power Company of America*, 245 F.3d 839 (D.C. Cir. 2001); *Colorado Office of Consumer Counsel* v. *FERC*, 490 F.3d 954 (D.C. Cir. 2007)).

[712] *Id.* at 25 (citing *Lockyer*, 383 F.3d 1015).

[713] *Id.*

[714] *Id.* at 25–26 (citing *City of Piqua* v. *FERC,* 610 F.2d 950 (1979), quoting *City of Kaukauna*, 458 F.2d 731 (1971)) (*City of Piqua*)).

[715] *Id.* at 26.

[716] NASUCA Rehearing Request at 18.

[717] *Id.*

[718] *Id.*

[719] *See* e.g., *Southwestern Electric Cooperative, Inc.* v. *FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003).

[720] *See,* e.g., *Lockyer,* 383 F.3d at 1012–13; *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

[721] 16 U.S.C. 824d(c).

[722] 16 U.S.C. 824d. The FPA does not define ''schedules,'' leaving that to the Commission's discretion as well. The Commission has defined ''rate schedule'' in its regulations at 18 CFR 35.2(b).

reporting requirements for administration of the tariff.'' [723] As the Commission explained in the Final Rule, if a seller is granted market-based rate authority, it must comply with post-approval reporting requirements, including the quarterly filing of transaction-specific data in EQRs, change in status filings for all sellers, and regularly-scheduled updated market power analyses for Category 2 sellers.[724] The Commission may, based on its review of EQR filings or daily market price information, investigate a specific utility or anomalous market circumstances to determine whether there has been any conduct in violation of RTO/ISO market rules or Commission orders or tariffs, or any prohibited market manipulation, and take steps to remedy any violations. These steps could include, among other things, disgorgement of profits and refunds to customers if a seller is found to have violated Commission orders, tariffs or rules, or a civil penalty.[725]

455. Additionally, in response to arguments that the Commission cannot or should not eliminate the triennial filing requirement for Category 1 sellers, as discussed above in the section on implementation, to the extent that any Category 1 sellers are located in a Commission-identified submarket, we will consider whether there is an indication that they have market power as we analyze the indicative screens submitted by other sellers. If any market power concerns arise with respect to any such Category 1 sellers, we may exercise our right to require the filing of an updated market power analysis and direct them at that time to submit one.

456. We also disagree with Consumer Advocates' argument that the market-based rate program eliminates the requirement in section 205(d) of the FPA that, absent waiver by the Commission, all rate increases be noticed by filing 60 days in advance, and the provision in section 205(e) which permits that, if warranted, rates be suspended for up to five months, set for hearing with the burden of proof on the seller, and made subject to refund pending the outcome of the hearing. Under the market-based rate program, a rate change is initiated when a seller applies for authorization of market-based rate pricing, not when it subsequently enters into negotiated rates as interpreted by Consumer Advocates. A seller must give the requisite 60 days' notice required by section 205(d) before it may charge any market-based rates. All applications are publicly noticed, entitling affected persons to intervene and challenge a seller's proposed market-based rates. At that time, there is an opportunity for a hearing, with the burden of proof on the seller to show that it lacks, or has adequately mitigated, market power, and for the imposition of a refund obligation.[726] The Commission has authority to suspend a request for market-based rates, subject to refund. Thus, contrary to Consumer Advocates' claim, the Commission's market-based rate program fully complies with both section 205(d) and section 205(e). Indeed, under Consumer Advocates' interpretation of the law, if taken to its logical conclusion, the Commission would be precluded not only from authorizing market-based rates but also from authorizing flexible cost-based rates, e.g., ''up to'' rates in which sellers are pre-authorized to sell up to a specified cost-based rate cap. Under their theory, there would have to be 60 days' notice of each rate charged under the cap (even though there was prior notice that sales would be up to the cap) so long as it represented a change from the previous amount charged. And presumably this requirement would apply even for day-ahead or monthly short-term sales for which it would be impossible to give 60 days' notice. We simply do not read the FPA section 205(d) and (e) or the parallel NGA section 4 provisions to hamstring the Commission in this way. Not only does section 205(c) provide flexibility regarding the timing and form in which rates shall be filed, but 205(d) allows the Commission to waive the 60 days' notice by order specifying the changes to be made and the time when they shall take effect and the manner in which they shall be filed and published. The Commission's authorization of market-based rates (and flexible cost-based rates) is consistent with the flexibility allowed in section 205, and the public has notice of the types of rates that may be charged and the manner in which they will be filed and published.

457. We reject arguments that the Commission has eliminated consumer protections under the FPA. Not only may the public intervene in section 205 market-based rate proceedings and file complaints under section 206 to eliminate market-based rate authorizations (with refund protection up to 15 months), but the Commission has in place a multi-part system for monitoring rates. If a seller is granted market-based rate authority, it must comply with post-approval reporting requirements, transaction-specific data in EQRs, change in status filings for all sellers, and regularly-scheduled updated market power analyses for Category 2 sellers.[727] The quarterly reports (EQRs) that sellers are required to file, include, for each individual purchase and sale, the names of the parties, a description of the service, the delivery point of the service, the price charged and quantity provided, the contract duration, and any other attribute of the product being purchased or sold that contributed to its market value.[728] That reporting requirement provides a means for the Commission and the public to spot pricing trends or discriminatory patterns that might indicate the exercise of market power.

458. The Ninth Circuit has recognized that ''FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with a strict reporting requirement to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation.'' [729] The Ninth Circuit has explained that the reporting requirements are ''integral'' to the market-based rate tariff and that they, together with the Commission's initial approval of market-based rate authority, comply with the FPA's requirements.[730] Through the EQRs, the Commission has enhanced and updated the post-

[723] *Lockyer,* 383 F.3d at 1013.

[724] Order No. 697 at P 962. The Commission explained in the NOPR that preceded Order No. 2001 that it needed to make changes to keep abreast of developments in the industry, and therefore implemented the revised filing requirements in Order No. 2001. *Id.* P 965–966 (citing *Revised Public Utility Filing Requirements, Notice of Proposed Rulemaking*, FERC Stats. & Regs., Proposed Regulations 1999–2003, ¶ 32,554, at 34,062 (2001); *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, at P 31 (Order No. 2001), *reh'g denied*, Order No. 2001–A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001–C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001–D, 102 FERC ¶ 61,334 (2003)). The Commission has also issued Order No. 670, which adopted a new rule prohibiting the employment of manipulative or deceptive devices or contrivances in wholesale energy and natural gas markets. *Prohibition of Energy Market Manipulation*, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202 (2006), *reh'g denied*, 114 FERC ¶ 61,300 (2006).

[725] Order No. 697 at P 964. The Commission issued an Enforcement Policy Statement to provide guidance to the industry on how the Commission intends to determine remedies for violations, including applying its new and expanded civil penalty authority. *Enforcement of Statutes, Orders, Rules, and Regulations,* 113 FERC ¶ 61,068 (2005).

[726] *Id.*; *see also* 18 CFR Part 35 (filing requirements and procedures).

[727] *Id.* (citing *Lockyer*, 383 F.3d at 1016).

[728] *Id.* P 855. *See also* Order No. 2001, FERC Stats. & Regs. ¶ 31,127. Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001.

[729] *Lockyer*, 383 F.3d at 1013.

[730] *Id.* at 1015.

transaction quarterly reporting filing requirements that were in place during the time period at issue in *Lockyer*.[731]

459. We disagree with the Consumer Advocates' and NASUCA's argument that the Final Rule erred in relying on *Lockyer* for legal support. The Final Rule correctly relied on *Lockyer* because in *Lockyer*, the Ninth Circuit cited with approval the Commission's dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirements and found that the Commission did not rely on market forces alone in approving market-based rate tariffs.[732] Further, the market-based rate requirements and oversight adopted in the Final Rule are more rigorous than those reviewed by the *Lockyer* court.[733] We find Consumer Advocates' and NASUCA's argument that in *Lockyer* the Ninth Circuit erroneously relied on Commission counsel's argument that the market-based rate tariffs plus the specific information on actual charges filed pursuant to the reporting requirements together comply with the FPA's filing requirements to be without merit. *Lockyer* has not been reversed, and in fact, was followed by the Ninth Circuit in *Snohomish*.[734]

460. Consumer Advocates misapply *United Gas Pipe Line, Sierra* and *City of Piqua* in arguing that these cases require that specific sale prices must be filed *ex ante* under FPA section 205(d). In concluding that the NGA does not empower natural gas companies unilaterally to change their contracts in *United Gas Pipe Line*, the Supreme Court interpreted provisions of the NGA that parallel the FPA, and it stated that section 4(d) of the NGA says only that ''a change in the filed rate *cannot* be made without proper notice to the Commission.'' [735] That same day the Supreme Court held in *Sierra* that the FPA does not authorize unilateral contract changes [736] and determined that the Federal Power Commission could not declare a rate set by a contract to be ''unreasonable solely because it yields less than a fair return on the next invested capital.'' [737] In *City of Piqua*, the D.C. Circuit explained that the primary purpose of section 205(d) is to notify the Commission of changes in rates and schedules between parties to a contract, stating ''[a] change in rates cannot take place without first filing notice with the Commission.'' [738]

461. Consumer Advocates' argument that *United Gas Pipe Line, Sierra* and *City of Piqua* require that rate reports must be filed *ex ante* under FPA section 205(d) overlooks the fact that, under the market-based rate program, the rate change is initiated when a seller applies for authorization of market-based rate pricing. As we explained, all applications are publicly noticed and affected persons are entitled to challenge a seller's claims. There is an opportunity for a hearing at that time, with the burden of proof on the seller to show that it lacks, or has adequately mitigated, market power, and for the imposition of a refund obligation.[739] That investigation fully satisfies the requirements of FPA section 205(d) and (e).

462. With regard to Consumer Advocates' argument that the Final Rule erred by failing to adequately distinguish certain Supreme Court and Circuit case decisions, we find that Consumer Advocates misinterpret *Electrical District, Southwestern Bell, Maislin, MCI* and *Regular Common Carrier* in relying on these cases as support for their argument that the Commission's market-based rate regime is unlawful. *Electrical District* addressed the issue of whether to make a rate increase effective as of the date of its order directing a compliance filing, rather than upon the date of acceptance of the compliance filing and resolved a ''disagreement over what it means to 'fix' a rate within the meaning of [section 206(a)] 16 U.S.C. 824e(a)''—not section 205(c).[740] The D.C. Circuit rejected the Commission's ''policy of making rates effective as of the date of an order [under section 206] setting forth no more than the basic principles pursuant to which the new rates are to be calculated.'' [741] *Electrical District* holds only that the Commission cannot, in a proceeding under section 206, ''announce some formula and *later* reveal that formula was to govern from the date of announcement.'' [742] It says nothing about whether the Commission can establish rules under sections 205(c) and (d) that permit the filing and approval of market-based rate tariffs.

463. In *Southwestern Bell*, the FCC ''adopt[ed] a policy of permitting nondominant common carriers to file a range of rates as opposed to fixed rates showing a schedule of charges.'' [743] The court held that the FCC policy violated 47 U.S.C. section 203(a), which requires that every common carrier file ''schedules showing all charges.'' [744] That statute requires a specific list of discernible rates, rather than a filing of a range of possible rates.[745] The quarterly reports required under the Final Rule require each seller to list the terms of each transaction individually. The transaction-specific data required in the Commission's quarterly reports do not constitute a range of rates similar to that rejected in *Southwestern Bell*.

464. In *Regular Common Carrier*, the Interstate Commerce Commission (ICC) approved a tariff provision under which freight forwarders could provide services to shippers at unpublished rates determined by averaging prior charges to those shippers.[746] The court found that that provision violated 49 U.S.C. section 10761(a) (1982), which required that rates be ''contained in a tariff,'' because the agreed-upon average rates would never be published nor filed with the Commission.[747] The court noted that section 10761(a) expressly prohibited the charging of any rate different from the tariffed rate.[748] By contrast, FPA section 205(c) permits sellers to set rates either by tariff or by contract, and the Commission's market-based rate program requires quarterly filings providing details of all transactions.

465. *Maislin* involved an ICC policy that allowed carriers to charge privately negotiated contract rates that differed from the filed tariff rate, were never disclosed or reviewed by the ICC, and were not subject to challenge for discrimination.[749] The Supreme Court found that the policy violated the filed-rate doctrine.[750] Under the Final Rule, in contrast, market-based sales are made in accordance with a market-based rate umbrella tariff, approved only after the Commission determines, in a publicly-noticed proceeding with opportunity for interested parties to protest, that a seller lacks market power. Further, the Commission's system requires quarterly filing of the actual rates charged for individual transactions, allowing both the Commission and the public to view all rates all rates charged. After market-based rate authority is granted, affected persons can file complaints, or the

[731] Order No. 697 at n.1105.

[732] *Lockyer*, 383 F.3d at 1013.

[733] *See* Order No. 697 at P 953.

[734] *Snohomish*, 471 F.3d at 1080–81.

[735] *United Gas Pipe Line*, 350 U.S. at 339 (emphasis in original).

[736] *Sierra*, 350 U.S. at 353.

[737] *Id.* at 355.

[738] *City of Piqua*, 610 F.2d at 953.

[739] Order No. 697 at P 962; *see also* 18 CFR Part 35 (filing requirements and procedures).

[740] 774 F.2d at 492.

[741] *Id.* at 493.

[742] *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990) (emphasis added).

[743] 43 F.3d at 1517.

[744] *Id.*

[745] *Id.* at 1521.

[746] *Regular Common Carrier*, 793 F.2d at 377–78.

[747] *Id.* at 380.

[748] *See id.* at 379.

[749] 497 U.S. 116, 132–33 (1990).

[750] *Id.* at 127.

Commission can institute its own proceeding, to challenge market-based rates on the basis that the seller has gained the ability to exercise market power since the time the market-based rates were granted or that the market-based rates otherwise are unjust, unreasonable, or unduly discriminatory or preferential or to question whether a seller has market power.

466. Consumer Advocates' reliance on *MCI* is similarly misplaced. *MCI* rejected an FCC policy that relieved *all* non-dominant carriers of *any* requirement to file any of their rates with the agency. The Supreme Court found that such wholesale detariffing for nondominant carriers effectively removed all rate regulation where the FCC found competition to exist.[751] By contrast, the market-based rate program implemented in Order No. 697 requires every seller with market-based rate authority to have on file an umbrella market-based rate tariff and to file quarterly reports detailing the specific rates charged for each sale. No detariffing occurs in these circumstances. As the *MCI* court held, it would not violate the filed-rate doctrine for the FCC to ''modify the form, contents, and location of required filings, and [to] defer filing or perhaps even waive it altogether in limited circumstances.'' [752]

467. Consumer Advocates' argument that the Commission relied repeatedly on *Elizabethtown Gas* and *LEPA*, yet neither court decided the issue whether the market-based rate filings or the overall market-based rate regime complies with the FPA, misses the point that the Commission cited these cases in providing an overview of the cases relied on in the most recent court cases affirming the Commission's market-based rate authority under the FPA.[753] Further, the Commission properly cited *Elizabethtown Gas* for the proposition that the use of market-based rate tariffs was first approved by the courts as to sellers of natural gas,[754] and properly cited *LEPA* for the proposition that use of market-based rate tariffs was first approved by the courts as to wholesale sellers of electricity.[755] In any event, as the Commission explained in the Final Rule, the more recent precedent in *Lockyer* and *Snohomish* has upheld the Commission's dual requirement of an *ex ante* finding of the absence of market-power and sufficient post-approval reporting requirements as complying with the requirements of the FPA.[756]

468. With respect to Consumer Advocates' concern about long-term affiliate sales contracts not being filed, the Commission pointed out in the Final Rule that since 2002, its regulations have provided that long-term market-based rate power sales service agreements, with affiliates or otherwise, are not to be filed with the Commission.[757] However, the affiliate restrictions require that no wholesale sales of electric energy may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization (separate from the general market-based rate authorization at issue in this docket) for the transaction under section 205 of the FPA. As a result, a franchised public utility with captive customers cannot enter into a long-term contract with an affiliate without the seller under the contract (whether the franchised public utility or the affiliate) first receiving Commission authorization to engage in the affiliate sale.[758] To the extent that a particular affiliate relationship presents issues of concern, it will be considered in the context of our determination whether to authorize any affiliate sales. Further, our market-based rate program incorporates numerous protections against excessive rates, regardless of the identities of the parties to a transaction. Finally, although long-term contracts generally are not filed at the Commission, all relevant contract information is contained in the EQRs and thus the same information is available to the public and the Commission. Thus, we will continue to direct sellers not to file long-term market-based rate sales contracts, unless otherwise permitted by Commission rule or order.[759]

469. For the reasons stated in the section of this order addressing Implementation Process, we reject NASUCA's argument that there is no record to support the finding that a seller with 499 MW capacity needs no triennial power review and a seller of 501 MW does need market power review.[760]

b. Whether the Final Rule Shifts the Burden of Proof Under Section 205 of the FPA

Final Rule

470. In the Final Rule, the Commission noted that it had previously addressed and rejected the argument that the legal presumptions that follow from the Commission's market power screens would unduly shift the burden of demonstrating the existence of market power to intervenors. On rehearing of the April 14 Order, the Commission explained that nothing in that order shifts the burden of proof that section 205 imposes on the filing utility. Passing both screens or failing one merely establishes a rebuttable presumption. To challenge a seller who passes both screens, the intervenor need not conclusively prove that the seller possesses market power. Rather, the intervenor need only meet a burden of going forward with evidence that rebuts the results of the screens. At that point, the burden of going forward would revert back to the seller to prove that it lacks market power. Thus, the burden of proof under section 205 ultimately belongs to the seller.[761]

Requests for Rehearing

471. Consumer Advocates argue that the Final Rule unlawfully shifts the statutory burden of proof from the electricity seller under section 205(e), to justify increased rates, to the electricity

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[751] 512 U.S. 218, 231–32 (1994).

[752] *Id.* at 234.

[753] Order No. 697 at P 944; *see also, id.* at 945–953; *Lockyer*, 383 F.3d at 1011–1014.

[754] *Elizabethtown Gas*, 10 F.3d at 869; *see also* Order No. 697 at P 948.

[755] *LEPA*, 141 F.3d at 365, 370; *see also* Order No. 697 at P 951. Consumer Advocates' reliance on *Power Company of America*, 245 F.3d 839 (D.C. Cir. 2001) and *Colorado Office of Consumer Counsel* v. *FERC*, 490 F.3d 954 (D.C. Cir. 2007) does not support their argument that the Final Rule violates the FPA's filing requirement. In *Power Company of America* the court declined to address Power Company of America's (PCA) argument that umbrella agreements of power marketers were required to be on file because this argument was not raised in PCA's opening brief. *See Power Company of America*, 245 F.3d at 845. In *Colorado Office of Consumer Counsel*, the court denied the Colorado Office of Consumer Counsel's petition for review of a Commission order approving market behavior rules because FPA section 206's plain language does not require the Commission, having found only one aspect of the market-based rate tariffs to be unjust and unreasonable, to revisit all elements of its market-based rate tariffs. Thus, the D.C. Circuit did not review the market-based rate regime's filing requirements in these two cases because the filing requirement issue was not before the court. Consumer Advocates' argument in this regard fails because it disregards the precedent upholding the Commission's dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirements. *Lockyer*, 383 F.3d 1006; *Snohomish*, 471 F.3d 1053.

[756] *Lockyer*, 383 F.3d 1006; *Snohomish*, 471 F.3d 1053. Consumer Advocates also argue that the Final Rule ignored the lead cases on the FPA filing requirement, except to quote them for the proposition that the filing and hearing requirements of the NGA and FPA are typically read *in pari materia*. Consumer Advocates Rehearing Request at 34–35 (citing *United Gas Pipe Line; Sierra*; Order No. 697 at P 946, n.1070). We address Consumer Advocates' argument in this regard at *supra* P 412, 461–64.

[757] Order No. 697 at P 969 (citing 18 CFR 35.1(g)).

[758] *Id.* P 969–970.

[759] *Id.* P 970.

[760] *See supra* P 344–47.

[761] Order No. 697 at P 968. The Commission also concluded that it will continue to direct sellers not to file long-term market-based rate sales contracts, unless otherwise permitted by Commission rule or order. *Id.* P 969–70.

consumer under section 206(a), to prove both that such increased rates are excessive and to justify different rates.[762] They also contend that the Final Rule claims to justify this shift of burden of proof by stating that the burden is still on the seller to show it has no market power, even though sellers are no longer required to justify rate increases.[763] Consumer Advocates assert that FPA section 205, under which market-based rate tariff authorizations are approved, does not mention '''market power,''' but requires that sellers have the burden of justifying proposed rate increases.[764] Consumer Advocates state that the results on consumers can be seen in the Commission's recent denial of a complaint by the Connecticut Attorney General because Connecticut failed to carry its burden of proof under section 206(a).[765]

472. Southern contends that the Final Rule violates the requirement in FPA section 206 that the Commission bear the burden of proof in section 206 proceedings and that the Commission's determinations be based on substantial evidence.[766] According to Southern, this shifting of the burden of proof occurs through the use of indicative screens, which Southern contends are inherently flawed. Southern states that once a screen failure occurs and a presumption of market power arises, sellers only have two options: Either accept a determination that it has market power and adopt cost-based mitigation measures, or provide the Commission with a DPT analysis.[767] Southern concludes that by applying the indicative screens codified in the Final Rule the Commission will effectively shift to sellers the evidentiary burden in a section 206 proceeding.[768]

473. Southern also argues that the screens are inherently flawed in their ability to definitively assess market power when none is actually present, noting that the Final Rule ''acknowledges that the screens are 'conservative' in nature and will undoubtedly result in 'false positives' indicating market power.'' [769] Southern argues that because of their conservative nature and propensity to result in false positives, such screens cannot properly provide a basis for shifting the burden of proof to sellers, and are incapable of providing substantial evidence of market power.

474. Southern contends that by shifting the section 206 burden of proof to sellers, the Final Rule shifted to sellers the burden of rebutting the presumption of generation market power. Southern states that the unlawfulness of shifting this burden is exacerbated by the restriction placed on the type of evidence that sellers may present to rebut the market power presumption. Specifically, Southern asserts that the Final Rule only allows sellers to submit (1) historical sales and transmission data and (2) an analysis using the DPT (using only historical data) to demonstrate that they do not have market power, and that these limitations on sellers' ability to rebut the false presumption of generation market power are inconsistent with the FPA since they arise in the context of a section 206 proceeding, in which the Commission is required to bear the burden of proof.[770]

475. Southern argues that the Commission should reconsider its determination in the Final Rule that a failure of an indicative screen results in a presumption of market power, and should instead determine that the indicative screens are only intended to identify sellers that appear to raise no horizontal market power concerns and thus can be considered for market-based rate authority without the necessity of further analysis.[771] In other words, passing the screens should raise a favorable presumption that a seller does not have market power, and a seller would never be ''presumed'' to have generation market power.[772]

Commission Determination

476. With regard to Consumer Advocates' assertion that the Final Rule shifts the burden of proof from the electricity seller under section 205(e) to the electricity consumer under section 206(a), we reiterate that the Commission has not shifted the burden of proof that section 205 imposes on the filing utility. A utility seeking to make sales at market-based rates has the burden of proof under section 205 to show that it does not have, or has adequately mitigated, market power. Because passing both indicative horizontal market power screens establishes a rebuttable presumption that the seller lacks market power, the burden is then on the intervenor to provide evidence to rebut the presumption of no market power.[773] To challenge a seller who passes both screens, the intervenor need not conclusively prove that the seller possesses market power. Rather, the intervenor need only meet a burden of going forward with evidence that rebuts the results of the screens. At that point, the burden of going forward would revert back to the seller to prove it lacks market power. Ultimately, however, the burden of proof under section 205 belongs to the seller.[774]

477. We reject Consumer Advocates' argument that the Final Rule shifts the FPA section 205 burden of proof to justify rate increases from the electricity seller to the electricity consumer under section 206(a) to prove both that such increased rates are excessive and to justify different rates, and that this can be seen in the Commission's denial of the Connecticut Attorney General's complaint in *Blumenthal* because Connecticut failed to carry its burden of proof under FPA section 206(a). *Blumenthal* was an FPA section 206 complaint proceeding in which the complainants challenged ISO–NE's current Market Rule 1 as unjust and unreasonable with regard to the compensation of generation facilities needed for reliability in Connecticut. Because that case was brought under section 206 of the FPA, the burden properly was on complainants to establish that the current provisions of Market Rule 1 are unjust and unreasonable. However, that case is distinguishable from the circumstance where a seller seeks authorization to make sales at market-based rates. As

[762] Consumer Advocates Rehearing Request at 31–32.

[763] *Id.* at 32 (citing *MCI; Southwestern Bell*).

[764] *Id.*

[765] *Id.* (citing *Blumenthal*, 117 FERC ¶ 61,038 at P 57).

[766] Southern Rehearing Request at 7–8 (citing 16 U.S.C. 824e(a); *Sierra*, 350 U.S. at 353; *Public Service Commission of New York* v. *FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980); *Public Service Co. of New Mexico*, 115 FERC ¶ 61,090, at P 33 (2006)).

[767] *Id.* at 7 (citing Order No. 697 at P 63).

[768] *Id.* at 8.

[769] *Id.* at 8 (citing Order No. 697 at P 62, 71, 74, 89).

[770] *Id.* at 10–11 (citing Order No. 697 at P 33, 75).

[771] *Id.* at 11.

[772] *Id.*

[773] *See* Order No. 697 at P 968 (citing July 8 Order, 108 FERC ¶ 61,026, at P 29).

[774] *See July 8 Order at* P 29 (stating that passing both screens or failing one merely establishes a rebuttable presumption, and explaining that in the case of an intervenor in a section 205 proceeding that seeks to prove that the applicant possesses market power, ''the intervenor need only meet a 'burden of going forward' with evidence that rebuts the results of the screens. At that point, the burden of going forward would revert back to the applicant to prove that it lacks market power.'') (citing *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 392 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982); *accord Transcontinental Gas Pipe Line Corp.*, Opinion No. 135, 17 FERC ¶ 61,232, at 61,450 (1981) (''The presumption * * * is the same as that which arises from a prima facie case: it imposes on the party against whom it is directed the burden of going forward with substantial evidence to rebut or meet the presumption, but does not shift the burden of persuasion.''); *Generic Determination of Rate of Return on Common Equity for Electric Utilities*, Order No. 389–A, 29 FERC ¶ 61,223 (1984) (concluding that the rebuttable presumption that a rate of return based on a benchmark is just and reasonable does not shift the ultimate burden of proof imposed by the FPA).

discussed above, in the case of a seller seeking market-based rate authority from the Commission under section 205, the burden of proof is on the seller to prove that it lacks market power. However, in a section 206 complaint proceeding, the burden is on the complainant to show that the current rates are unjust and unreasonable. Thus, State AGs and Advocates' argument that *Blumenthal* supports their assertion that the Final Rule shifts the FPA section 205 burden of proof to justify rate increases from the electricity seller to the electricity consumer under section 206(a) is without merit.

478. For the reasons stated in the section of this order addressing horizontal market power, we reject Southern's argument that the burden of proof in a section 206 proceeding is shifted to entities that fail one of the indicative screens.

c. Whether Elimination of the Requirement To File Market-Based Rate Contracts in a Prior Rulemaking Proceeding May Be Challenged in the Instant Rulemaking

Final Rule

479. The Final Rule concluded that the multiple layers of filing and reporting requirements incorporated into the market-based rate program, the Commission's enhanced market oversight and enforcement functions, and the ability of the public to file section 206 complaints meet the filing requirements of the FPA and provide adequate protection from excessive rates. In reaching this determination, the Commission noted that the decision to eliminate the filing of market-based rate contracts was made almost five years ago in a generic rulemaking proceeding that was open to participation by all interested parties.[775] The Commission explained that commenters' failure to raise this concern in that proceeding precludes them from attacking the Commission's well-settled practice in the instant rulemaking.[776]

Requests for Rehearing

480. Consumer Advocates argue that the Final Rule erred in asserting that challengers to the Commission's market-based rate regime are precluded by the passage of time and by earlier rulemaking proceedings from now raising their challenges to the Commission's authority to issue its market-based rate regulations, including their arguments that the regulations are contrary to the filing and other requirements of FPA sections 205 and 206.[777] Consumer Advocates state that the Final Rule noted that the failure of commenters to object to an earlier rulemaking that eliminated the filing of market-based rate contracts almost five years ago now precludes them from asserting that the Commission's actions in the instant rulemaking violate the FPA's filing requirements.[778] Consumer Advocates contend that the Commission's view that commenters are precluded from attacking the rules promulgated in this proceeding is incorrect insofar as the D.C. Circuit has made clear that where an agency itself reopens an issue by initiating a new rulemaking procedure, participants in the rulemaking are not barred from challenging the new rule by their failure to challenge prior agency actions.[779] Consumer Advocates argue that members of the public may raise issues notwithstanding failure to participate in an earlier rulemaking '' 'when the agency in question by some new promulgation creates the opportunity for renewed comment and objection.' '' [780]

481. Consumer Advocates argue that where the challenge is that the agency lacks statutory authority to take an action, a commenter's earlier failure to challenge another regulation cannot bar consideration of the agency's statutory authority for the action it now proposes to take. They conclude that where the petitioner challenges the substantive validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review.[781] Consumer Advocates assert that the D.C. Circuit has held that the rule barring collateral attacks on regulations does not apply to claims that ''an agency lacked the statutory authority to adopt the rule.''[782]

482. Consumer Advocates also state that they filed a petition for review in the D.C. Circuit over three years ago raising these issues in the context of a challenge to the Commission's actions in its Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, an FPA section 206 proceeding in which Consumer Advocates participated and presented their challenges to the market-based rate regime to the Commission in great detail.[783] They state that the Commission has argued in the D.C. Circuit, successfully so far, that Consumer Advocates' challenge to the market-based rate regime was not properly presented in that matter and should be addressed in some other appropriate proceeding.[784] Consumer Advocates conclude that the Commission may not now assert that Consumer Advocates have slept on their rights and cannot present their arguments in a rulemaking that raises the issue of the lawfulness of the Commission's market-based rate regime.[785]

Commission Determination

483. Consumer Advocates' attack on a sentence in a footnote stating that ''Commenters' failure to raise this concern [regarding the filing of market-based rate contracts] in that proceeding precludes them from attacking the Commission's well-settled practice here'' [786] makes more of this footnote than it was intended to convey. This sentence was intended to clarify that the Commission had previously determined to eliminate the filing of market-based rate contracts in Order No. 2001,[787] and to clarify that the Commission is not reconsidering this issue as part of this rulemaking proceeding. This sentence does not stand for the broad proposition, as suggested by Consumer Advocates, that ''challengers to the Commission's market-based rate regime are precluded by the passage of time and by earlier rulemaking proceedings from now raising their challenges to the Commission's authority to issue its market-based rate regulations, including their arguments that the regulations are contrary to the filing and other requirements of FPA sections 205 and 206.'' Indeed, in the Final Rule, the Commission fully responded to the arguments raised by Consumer Advocates in their NOPR comments, in which they challenged the Commission's authority to issue its market-based rate regulations and argued, among other things, that the regulations are contrary to the filing and other requirements of FPA sections 205

[775] Order No. 697 at P 967, n.1112.

[776] *Id.*

[777] Consumer Advocates Rehearing Request at 37–38.

[778] *Id.* at 38 (citing Order No. 697 at P 967, n.1112).

[779] *Id.* (citing *Montana* v. *Clark,* 749 F.2d 740, 744 (D.C. Cir. 1984), *cert. denied,* 474 U.S. 919 (1985)).

[780] *Id.* at 38 (quoting *Ohio* v. *EPA,* 838 F.2d 1325, 1328 (D.C. Cir. 1988); *accord Ass'n of Am. R.Rs.* v. *ICC,* 846 F.2d 1465, 1473 (D.C. Cir. 1988); *Public Citizen* v. *NRC,* 901 F.2d 147, 150 (D.C. Cir. 1990), *cert. denied,* 498 U.S. 992 (1990)).

[781] *Id.* at 39 (citing *Montana* v. *Clark,* 749 F.2d at 744 n.8).

[782] *Id.* (quoting *Indep. Community Bankers of Am.* v. *Bd. of Governors of Fed. Reserve Sys.,* 195 F.3d 28, 34 (D.C. Cir. 1999); *NRDC* v. *NRC,* 666 F.2d 595, 602 (D.C. Cir. 1981)).

[783] *Id.* at 40.

[784] *Id.* (citing *Colorado Office of Consumer Counsel* v. *FERC,* 490 F.3d 954 (D.C. Cir. 2007)).

[785] *Id.*

[786] Order No. 697 at n.1112.

[787] Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 31.

and 206.[788] Moreover, the Commission is responding to their arguments on rehearing in the instant order. Thus, the Commission has thoroughly addressed Consumer Advocates' arguments regarding the instant market-based rate rulemaking proceeding in both the Final Rule and in this order.

d. Whether the Commission Should Clarify That Sellers With Market Power Must File Their Actual Rates and Contracts Before the Charges Are Implemented

Final Rule

484. The Final Rule concluded that, with regard to NASUCA's assertion that the rule would allow mitigated sellers with cost-based rates to declare their own rates without filing them, all mitigation proposals, whether based on the default cost-based rates or some other cost-based rates, must be filed with the Commission for review. The Commission stated that, as explained in the Mitigation section of the Final Rule, any such filings are noticed, and interested parties are given an opportunity to intervene, comment on, or protest the submittal.[789]

Requests for Rehearing

485. NASUCA raises a similar argument on rehearing, claiming that sellers *with* market power should not be allowed to determine and change their rates without complying with FPA filing requirements.[790] NASUCA states that sellers with market power, have, until now, been required to file cost-based rates, and argues that the Final Rule allows sellers with market power to dispense with the filing of contracts and changes in rates for sales of less than one year under the default mitigation rates.[791] NASUCA states that only contracts for sales greater than one year would be filed under section 205.[792] According to NASUCA, a consequence is that there is no possibility of public notice, protest, Commission review prior to imposition of unreasonable new charges, and no opportunity for refund of unreasonable rates charged by sellers with market power for sales of up to one year's duration.[793]

486. NASUCA contends that allowing sellers with market power to dispense with the filing of contracts and changes in rates for sales of less than one year under the default mitigation rates, and ''to set rates at will between marginal cost and embedded cost may not be reasonable and could allow discrimination.'' [794] NASUCA argues that even though looked at separately, the incremental cost rate base and the embedded cost rate could be within the zone of reasonableness, giving the utility the option to pick its rates and its customers in bilateral transactions, which could give the utility with wholesale market power the opportunity to extend it into retail markets, favoring its retail affiliate.[795] NASUCA notes that in *FPC* v. *Conway Corp.,* the Supreme Court held that a utility could not set low retail rates to attract retail industrial customers from other utilities and set wholesale rates at prices higher than the retail rate so that its wholesale competitors could not compete in the retail market. Thus, NASUCA concludes that the Commission should not allow this potentially discriminatory and predatory conduct in the name of granting '' 'flexibility' '' to utilities.[796]

487. NASUCA also argues that allowing sellers with market power to make sales for less than one year without filing them is a subdelegation to private parties of basic duties conferred upon the Commission by Congress.[797] In support of this point, NASUCA states that in *ISO New England, Inc.,* Chairman Kelliher disagreed with the Commission's decision to deny rehearing of an earlier order that accepted for filing three mitigation agreements and granted waiver of the 60 day prior notice requirement.[798] NASUCA concludes that the Final Rule has the same defect identified by Chairman Kelliher: Rates of sellers with market power, when they involve sales for less than one year, are allowed to take effect without observing prior filing requirements, with the Commission relying on private parties to negotiate and charge reasonable rates.[799] NASUCA asserts that there is no provision in the FPA granting the Commission the power to direct utilities not to file their rates for sales of less than one year, and no evidence that such rates are reasonable.[800] NASUCA states that the D.C. Circuit rejected rates that had been charged by utility negotiation at marginal cost plus 10 percent without being timely filed for possible review and revision by the Commission for lack of evidence, and argues that the same flaw applies here to the generic rate ranges approved for sellers with market power. According to NASUCA, there is no evidence that such rates are reasonable.[801]

488. NASUCA states the Final Rule responded to NASUCA's concerns by saying that rate '' 'proposals' '' of mitigated sellers would be filed, but the Final Rule does not say rates, rate schedules, and contracts will be filed.[802] NASUCA contends that the Final Rule adopted a rule which clearly states that only new contracts of a duration longer than one year are to be filed under section 205. NASUCA argues that in analogous circumstances where actual changes in rates and charges had not been filed, the D.C. Circuit stated that '' 'making rates effective as of the date of an order setting forth no more than the basic principles pursuant to which the new rates are to be calculated would make unforeseeable liabilities a regular consequence of rate adjustments.' '' [803] NASUCA therefore requests that the Commission clarify that sellers with market power must file not only '' 'proposals,' '' but also schedules containing their actual rates and contracts, before the charges are implemented, in accordance with FPA section 205.[804]

Commission Determination

489. With regard to NASUCA's arguments concerning filing requirements for sellers with market power, to the extent a seller proposes a cost-based rate that is based on a formula, it is our practice to require that the rate formula used be provided for Commission review and such formula included in the cost-based rate tariff, including formulas used in calculating incremental cost for purposes of the Commission's default cost-based rates.[805] As the Commission explained in the Final Rule, all mitigation proposals by a seller found, or presumed, to have market power must be filed with the Commission for review. These filings are noticed and interested parties are provided the opportunity to intervene, comment or

[788] Order No. 697 at P 943–955, 959–968.

[789] *Id.* P 971.

[790] NASUCA Rehearing Request at 8.

[791] *Id.* at 9 (citing Order No. 697 at 18 CFR 35.38).

[792] Although NASUCA refers to contracts for ''sales greater than one year,'' the Commission's default rates for long-term sales cover sales of ''one year or more.'' Order No. 697 at P 659.

[793] NASUCA Rehearing Request at 9.

[794] *Id.*

[795] *Id.*

[796] *Id.* at 10 (citing 426 U.S. 271 (1976)).

[797] *Id.* (citing *U.S. Telecom Ass'n* v. *FCC,* 359 F.3d 554, 567–78 (D.C. Cir. 2004)).

[798] *Id.* (citing *ISO New England, Inc.,* 112 FERC ¶ 61,057 (2005), *reversed on other grounds, NSTAR Electric & Gas Corp.* v. *FERC,* 481 F.3d 794 (D.C. Cir. 2007) (*NSTAR*)).

[799] *Id.* at 11.

[800] *Id.* (citing *MCI,* 512 U.S. at 229–30; *American Telephone & Telegraph Co.* v. *Central Office Telephone Inc.,* 524 U.S. 214 (1998)).

[801] *Id.* (citing *NSTAR,* 481 F.3d 794).

[802] *Id.* at 12 (citing Order No. 697 at section 35.38).

[803] *Id.* (quoting *Electrical District,* 774 F.2d at 492–93).

[804] *Id.*

[805] Order No. 697 at P 630.

protest the submittal.[806] In response to NASUCA's concern regarding the Commission's use of the word ''proposals,'' we clarify that by ''mitigation proposals'' we were referring to cost-based rate tariffs that incorporate the seller's proposal for mitigation. As the Commission stated in the April 14 Order, where a seller proposes to adopt the default cost-based rates (or where it proposes other cost-based rates), it must provide cost support for such rates. The Commission will examine the proposed rates on a case-by-case basis.[807] With regard to sales of one week or less, where the seller fails to provide sufficient cost-support, the Commission will direct the seller to submit a compliance filing to provide the formulas and methodology according to which it intends to calculate incremental costs.[808]

490. With regard to sales of greater than one week but less than one year, the Commission similarly requires that the seller submit a cost-based rate tariff for filing that identifies the methodology to be used to calculate the rate. When a seller adopts the default cost-based rate for mid-term sales (which is based on the unit or units expected to run), or otherwise proposes a cost-based rate designed on the unit or units expected to run, the Commission stated that it will continue to allow the seller flexibility in selecting the particular units that form the basis of the ''up to'' rate. However, as the Commission also stated in the Final Rule, it considers all evidence when reviewing a cost-based rate proposal and, if a company has not justified selection of certain generation units, the Commission will not accept the proposed rate.[809] Nevertheless, as with all cost-based mitigation proposals, the seller must file a cost-based rate tariff with the Commission and must provide cost support for such rates.[810] Accordingly, we clarify in response to NASUCA's request that when a mitigated seller files a cost-based mitigation proposal with the Commission, the seller must file an accompanying tariff.

491. We reject NASUCA's argument that there is no opportunity for public notice, or protest and Commission review of rates for mitigated sellers, and no opportunity for refund of unreasonable rates charged by sellers with market power for sales of up to one year's duration. As noted above and as discussed in the Final Rule, all mitigation proposals must be filed with the Commission for review.[811] These filings are noticed and interested parties are given an opportunity to intervene, comment or protest the submittal.[812] As the Commission stated in the Final Rule, it will continue to conduct its own analysis of whether a proposed cost-based rate is just and reasonable and, if warranted, will set such a proposed rate for evidentiary hearing where there are issues of material fact.[813] Under the FPA, the Commission has the authority to accept, reject, or modify a proposed rate based on the analysis of the specific facts and circumstances.[814] Contrary to NASUCA's contention that the Commission provides no opportunity for review of, and for refund of, rates charged by mitigated sellers for sales of up to one year's duration, the Commission has accepted, subject to refund, suspended and set for hearing cost-based mitigation proposals.[815]

492. We find NASUCA's reliance on *FPC* v. *Conway* to support its argument that the Commission should not grant mitigated sellers the flexibility to propose rates between marginal cost and embedded cost to be misplaced. In *FPC* v. *Conway*, the Supreme Court held that a utility could not set low retail rates to attract retail industrial customers from other utilities and set wholesale rates at prices higher than the retail rate so that its wholesale competitors could not compete in the retail market. The Court also held that, although the FPC lacked the authority to fix retail rates, it may take those rates into account when it fixes the rates for interstate wholesale sales that are subject to its jurisdiction.[816] As explained above, the Final Rule requires that the seller submit a cost-based rate tariff for filing that identifies the methodology to be used to calculate the rate for mid-term sales. Further, the Final Rule requires that, to the extent a seller proposes a cost-based rate formula, the rate formula to be used must be provided for Commission review and such formula must be included in the cost-based rate tariff, including formulas used in calculating incremental cost.[817] As the Final Rule explains, the Commission examines the proposed rate formulas of mitigated sellers on a case-by-case basis, and in doing so, fulfills its FPA mandate to ensure that rates are just and reasonable and not unduly discriminatory. Because the Final Rule requires sellers to submit a cost-based rate tariff for filing that identifies the methodology to be used to calculate the rate, and thereby does not permit sellers with market power to ''set rates at will,'' NASUCA's contention that allowing sellers with market power ''to set rates at will between marginal cost and embedded cost * * * could give the utility with wholesale market power the opportunity to extend it into retail markets'' is without merit. Thus, NASUCA's claim that a scenario resulting in potentially discriminatory or predatory conduct could occur is speculative and unsupported by the facts in the record.

493. We reject NASUCA's argument that allowing mitigated sellers to make sales for less than one year without filing them is a subdelegation to private parties of the duties conferred upon the Commission by Congress. NASUCA relies on *ISO New England, Inc.*[818] to support its argument in this regard. In *ISO New England, Inc.*, the Commission preauthorized ISO New England to enter into mitigation agreements intended to mitigate generation resources that ran out-of-economic merit order during periods of transmission constraints, and concluded that all such agreements were just and reasonable. On appeal, the D.C. Circuit remanded to the Commission the issue concerning whether the rates adopted in mitigation agreements were just and reasonable because the Commission had not reviewed data concerning generator costs for the rates in the mitigation agreements.[819] Contrary to NASUCA's argument, and unlike the situation in *ISO New England, Inc.*, the Final Rule states that ''where a seller proposes to adopt the default cost-based rates (or where it proposes other cost-based rates), it must provide cost support for such rates. The Commission will

[806] *Id.* P 629.

[807] *Id.* P 630 (citing April 14 Order, 107 FERC ¶ 61,018 at P 208; *Entergy Services, Inc.*, 115 FERC 61,260 at P 49 (2006) (accepting cost-based rates based on incremental cost plus 10 percent, noting that filing included the formula and methodology according to which seller intends to calculate incremental costs)).

[808] *Id.* P 630 (citing *Aquila, Inc.*, 112 FERC ¶ 61,307, at P 26 (2005); *Oklahoma Gas and Electric Co.*, 114 FERC ¶ 61,297, at P 19 (2006)).

[809] *Id.* P 649, 651.

[810] As explained in the Final Rule, upon loss or surrender of market-based rate authority a seller has a number of options of how to make wholesale power sales. It can revert to a cost-based rate tariff on file with the Commission, file a new proposed cost-based rate tariff, or propose other mitigation. *See* Order No. 697 at n.699.

[811] Order No. 697 at P 629.

[812] *Id.*

[813] *Id.* P 650.

[814] *Id.* P 651.

[815] *See Id.* P 631 (citing *AEP Power Marketing, Inc.*, 112 FERC ¶ 61,047, at P 28 (2005) (accepting, subject to refund, and setting for hearing, AEP's proposed rate for sales of power of more than one week but less than one year upon finding that AEP did not provide sufficient cost support for the rate levels proposed). *See also, Duke Power*, 113 FERC ¶ 61,192, at P 38 (2005).

[816] 426 U.S. 271, 279–80 (1976).

[817] Order No. 697 at P 630.

[818] 818 112 FERC ¶ 61,057 (2005), *reversed in part*, *NSTAR*, 481 F.3d 794.

[819] *NSTAR*, 481 F.3d 794.

examine the proposed rates on a case-by-case basis.'' [820] Here, the Commission has *not* neglected to review a mitigation proposal, or the cost support for such a proposal. Rather, it is promulgating a rule which provides for Commission examination of rates proposed by mitigated sellers, and that requires cost support for such rates. Thus, NASUCA's argument in this regard is without merit.

494. Further, as explained above, the Final Rule retained the Commission's current policy of pricing sales of more than one week but less than one year at an embedded cost ''up to'' rate reflecting the costs of the generating unit(s) expected to provide the service.[821] Although this approach allows sellers flexibility in designing ''up to'' rates for purposes of mitigation for sales of more than one week but less than one year, such rates are still subject to Commission review and approval.[822] The Commission considers all evidence when reviewing a cost-based rate proposal and, if a company has not justified selection of certain generating units, we will not accept the proposed rate. Under the FPA, we have the authority to accept, reject, or modify a proposed rate based on an analysis of the specific facts and circumstances.[823] NASUCA relies on *U.S. Telecomm. Ass'n* v. *FCC*,[824] and Chairman Kelliher's dissent in *ISO New England Inc.* to support its contention that the Commission may not delegate its authority to private parties. As we explain above, however, because the Final Rule provides for Commission review of a seller's proposed rates, and because the Commission will not accept the proposed rate if a company has not justified selection of certain generating units, the Final Rule is not subdelegating the Commission's duties.[825]

495. We also reject NASUCA's argument that under the Final Rule, rates of mitigated sellers rely on private parties to negotiate and charge reasonable rates and thereby are in contravention of the holdings of *MCI* and *Electrical District*. In *MCI*, the Supreme Court rejected an FCC policy that relieved all non-dominant carriers of any requirement to file any of their rates with the agency. *Electrical District* holds that the Commission cannot, in a proceeding under section 206, ''announce some formula and *later* reveal that formula was to govern from the date of announcement.''[826] Both of these cases are distinguishable from the mitigation scheme set forth in the Final Rule. Because the Final Rule explains that ''all mitigation proposals must be filed with the Commission for review'' and states that ''[t]hese filings will be noticed and interested parties will be given an opportunity to intervene, comment, or protest the submittal'' [827] the Final Rule does not rely on private parties to negotiate and charge reasonable rates and does not contravene the holdings in *MCI* and *Electrical District*.

3. Whether Existing Tariffs Must Be Found To Be Unjust and Unreasonable, and Whether the Commission Must Establish a Refund Effective Date

Final Rule

496. The Final Rule determined that the Commission was not required to establish a refund effective date and concluded that continuing to allow basic inconsistencies in the market-based rate tariffs on file with the Commission is unjust and unreasonable.[828] The Commission found that even if section 206 were read to require the establishment of a refund effective date in rulemakings initiated under section 206, rather than only in case-specific section 206 investigations initiated by complaints or *sua sponte* by the Commission, the Commission has broad discretion to adopt a generic policy or make generic findings through either rulemaking or adjudication.[829] The Commission concluded that ''[t]his proceeding is not an adjudicatory investigation of public utilities' existing market-based rate tariffs for which refunds will be required. Rather, we are modifying existing market-based rate tariffs *prospectively only* through this rulemaking. Accordingly, the establishment of a refund effective date in this rulemaking would be meaningless.'' [830]

Requests for Rehearing

497. Consumer Advocates contend that the Final Rule points to no specific legal authority under either section 205 or 206 that supports the Commission's action. They state that the Commission claims it is not ''adjudicating'' in the Final Rule, but fails to recognize that the Commission's authority to issue rules under sections 205 and 206 is narrowly constrained because the Commission has no independent ratemaking power under the FPA.[831] Consumer Advocates state that pursuant to *United Gas Pipe Line* and *Sierra*, the Commission has authority under section 206(a) to review initial rates and contracts filed by utility sellers, or ongoing, previously effective rates. Consumer Advocates contend that before the Commission can act under section 206(a), it must find existing rates to be unlawful, and also must find market-based rates as modified by the rulemaking to be just and reasonable and not unduly preferential or discriminatory going forward. They submit that although the Final Rule purports to make the first finding that existing rates without the new rules are unjust and unreasonable, it fails to make the second finding that market-based rates that adhere to the Final Rule are just and reasonable.[832] Consumer Advocates contend that the Final Rule pointed to no legal authority under section 205 or 206 that supports the actions taken, but instead points only to policy choices regarding the market-based rate regime. Consumer Advocates assert that the Commission has no authority, even to implement policy, unless the statute confers it.[833]

Commission Determination

498. We disagree with Consumer Advocates' contentions that the Commission must find existing market-based rates to be unlawful and must set new lawful rates going forward and that the Commission has no authority to implement the policies in this rulemaking. We have broad discretion to adopt generic policy or make generic findings through either rulemaking or adjudication,[834] and we have discretion over whether to order refunds.[835] We

[820] Order No. 697 at P 630.

[821] Order No. 697 at P 648.

[822] *Id.* P 652.

[823] *Id.* P 651.

[824] 359 F.3d 554 (D.C. Cir. 2004) (finding that a federal agency may not delegate its authority to outside entities).

[825] *See* Order No. 697 at P 629, 651.

[826] *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990). *See supra* P 453.

[827] Order No. 697 at P 629.

[828] *Id.* P 974.

[829] *Id.* P 975 (citing *Lockyer*).

[830] *Id.* (citing *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144, 1166 (D.C. Cir. 1985); *SEC* v. *Chenery*, 332 U.S. 194, 202–03, *reh'g denied*, 332 U.S. 747 (1947) (emphasis in original).

[831] *Id.* at 16 (citing *United Gas Pipe Line*; *Sierra*).

[832] *Id.* (citing *United Gas Pipe Line*; *Sierra*).

[833] *Id.* at 17 (citing *Atlantic City Electric Co.* v. *FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (*Atlantic City*)).

[834] An agency enjoys broad discretion to determine its own procedures, including whether to act by a generic rulemaking or by case-by-case adjudication. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 230 (1991); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *Interstate Natural Gas Association of America* v. *FERC*, 285 F.3d 18, 57–58 (D.C. Cir. 2001).

[835] *See* e.g., *Lockyer*, 383 F.3d at 1016. Consumer Advocates rely on *Atlantic City* for support for their argument that the Commission has no authority to implement policy unless a statute confers it. In *Atlantic City*, the court held that the Commission did not have authority to require utilities to give up their right to file rate changes or authority to mandate that withdrawal from an ISO could only become effective upon Commission approval. However, because the courts have repeatedly

Continued

reiterate that this proceeding is not an adjudicatory investigation of public utilities' existing market-based rate tariffs for which refunds will be required.[836]

499. We also reject Consumer Advocates' assertion that the instant rulemaking is in contravention of *United Gas Pipe Line* and *Sierra* because the Final Rule did not make the finding that market-based rates that adhere to the Final Rule are just and reasonable. In *United Gas Pipe Line*, the Supreme Court interpreted provisions of the NGA that parallel the FPA, and it stated that section 4(d) of the NGA says only that ''a change in the filed rate *cannot* be made without proper notice to the Commission.'' [837] The Supreme Court held in *Sierra* that the FPA does not authorize unilateral contract changes and held that the Federal Power Commission could not declare a rate set by a contract to be ''unreasonable solely because it yields less than a fair return on the next invested capital.'' [838] Unlike *United Gas Pipe Line* and *Sierra*, this rulemaking proceeding is not an adjudicatory investigation of a public utility's existing rates for which refunds will be required. Rather, in the Final Rule the Commission revised and codified its market-based rate policy for public utilities on a generic basis. Contrary to Consumer Advocates' argument that the Commission did not specify ''exactly what it is doing in the Final Rule,'' the Commission clearly stated that it is ''modifying existing market-based rate tariffs *prospectively only* through this rulemaking.'' [839]

G. Miscellaneous

1. Change in Status

a. Reporting

Final Rule

500. In Order No. 697, the Commission continued its requirement for sellers to report any change in status that departs from the characteristics relied upon by the Commission in authorizing sales at market-based rates.[840] Events that constitute a change in status include, among other things, ownership or control of generation capacity that result in net increases of 100 MW or more, and change in upstream ownership. Notification of any such changes in status must be filed no later than 30 days after the change occurs.

501. Also in Order No. 697, the Commission created a category of market-based rate sellers that are exempt from the requirement to submit regularly scheduled updated market power analyses. These Category 1 sellers have been carefully defined by the Commission to have attributes that are not likely to present market power concerns.[841] Market power concerns for Category 1 sellers are monitored by the Commission through the change in status reporting requirement and through ongoing monitoring by the Commission's Office of Enforcement. All other sellers, Category 2 sellers, are, in addition, required to continue to file regularly scheduled updated market power analyses.[842]

Requests for Rehearing

502. TDU Systems assert that to protect consumers more adequately, the Commission should require a Category 2 seller to submit an updated market power analysis in each instance in which a seller's generation increases by a predetermined percentage or an absolute amount.[843] TDU Systems state that under the Commission's present rules, a public utility that builds or acquires new generation capacity or merges with another company is not required to submit a new horizontal market power analysis. It is required only to file a change in status report for any net increase of 100 MW or more. TDU Systems references a proposal made by another commenter in response to the NOPR asking the Commission to require an updated market power analysis in each instance in which a seller's generation increases by a predetermined percentage or absolute amount. According to TDU Systems, the Commission did not directly address this proposal in the Final Rule,[844] but indirectly touched on the issue by stating that an updated market power analysis may be required from any sellers, Category 1 or 2, at any time.

503. TDU Systems assert that the Commission erred in failing to address the merits of this proposal in the Final Rule.[845] They contend that the Commission should not burden itself with deciding when major additions to generation, revealed in a change in status report, are likely to alter the results of its market power tests. They submit that it would not be an unreasonable burden on Category 2 sellers to prepare updated analyses within a reasonable time from the acquisition of additional generation.

Commission Determination

504. In the Final Rule, the Commission stated that it retains the tools necessary to ensure that all rates are just and reasonable, with initial market power evaluations, ongoing monitoring by the Commission, change in status reporting requirements, and scheduled updated market power analyses for Category 2 sellers.[846] We continue to believe that these requirements provide the Commission with the tools it needs to ensure that rates remain just and reasonable.

In Order No. 652, the Commission clarified and standardized market-based rate sellers' reporting requirement for changes in status and the Commission considered and rejected the idea that change in status filings include an updated market power analysis. The Commission explained that it is incumbent on an applicant to decide whether a change in status is a material change and that an applicant should provide adequate support and analysis, including an updated market power analysis if it chooses.[847] Thus, if a market-based rate seller believes that a change in status does not affect the continuing basis of the Commission's grant of market-based rate authority, it should clearly state the reasons on which it bases this conclusion, including an updated market power analysis if it so chooses.

505. While we appreciate TDU Systems' proposal and agree that it would not necessarily be an unreasonable burden to require Category 2 sellers to prepare updated analyses within a reasonable time from the acquisition of additional generation, we are not persuaded that our current approach is not adequate. The existing reporting requirement provides the

upheld the Commission's authority to adopt market-based rates, Consumer Advocates' reliance on *Atlantic City* for support for their argument in this regard is misplaced. *See*, e.g., *LEPA*, 141 F.3d 364; *Lockyer*, 383 F.3d 1006; *Snohomish*, 471 F.3d 1053.

[836] Order No. 697 at P 975.

[837] *United Gas Pipe Line*, 350 U.S. at 339 (emphasis in original).

[838] *Sierra*, 350 U.S. at 355.

[839] Order No. 697 at P 975 (citing *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144, 1166 (D.C. Cir. 1985); *SEC* v. *Chenery*, 332 U.S. 194, 202–03, *reh'g denied*, 332 U.S. 747 (1947) (emphasis in original)).

[840] Order No. 697 at P 1009–1045 (codifying the requirement, as amended, at 18 CFR 35.42).

[841] *Id.* at P 853.

[842] Previously, updated market power analyses were submitted within three years of any order granting a seller market-based rate authority, and every three years thereafter.

[843] TDU Systems at 28 (citing NRECA NOPR comments at 24. NRECA gives examples of predetermined thresholds as a certain percentage increase over the current amount, or any increase over some absolute amount).

[844] TDU Systems indicate that NRECA suggested this proposal. TDU Systems at 27–28 (citing NRECA NOPR comments at 23–25).

[845] *Id.* at 4–5 (citing *K N Energy, Inc.* v. *FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1991)).

[846] Order No. 697 at P 853–854.

[847] Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 94–95.

Commission a sufficient tool to allow it to assess whether there is a potential market power concern and, if so, the Commission reserves the right to require the seller to submit a market power study. In addition, the seller is required to provide an affirmative statement as to what effect, if any, the added generation has on its market power. For a seller to make such an affirmative statement, it must determine what effect the added generation has on the market power analysis. To the extent the seller makes an affirmative statement that there is no effect on its market power, it is bound to that statement and faces remedial action, including civil penalties, if it has misrepresented the effect.

506. Therefore, we will not require entities to automatically file an updated market power analysis with their change in status filings, such as that required by a triennial review. However, an entity may provide such an analysis if it chooses. Furthermore, regardless of the seller's representation, if the Commission has concerns with a change in status filing (for example, market shares are below 20 percent, but are relatively high nonetheless), the Commission retains the right to require an updated market power analysis at any time.[848]

b. Transmission Outages

Final Rule

507. The Final Rule adopted the NOPR proposal not to require the reporting of transmission outages per se as a change in status. The Commission explained that the reporting of all transmission outages, including the most routine, would be an excessive burden on sellers with no apparent countervailing benefit. However, the Final Rule stated that, consistent with Order No. 652, to the extent that a long-term transmission outage affects one or more of the factors of the Commission's market-based rate analysis (e.g., if it reduces imports of capacity by competitors that, if reflected in the generation market power screens, would change the results of the screens from a ''pass'' to a ''fail''), a change in status filing is required.[849]

Requests for Rehearing

508. Wisconsin Electric requests that the Commission clarify which entity is responsible for reporting long-term transmission outages as a change in status. Wisconsin Electric explains that companies such as itself that do not own transmission may not be in the position of knowing the details of transmission outages and the effects of an outage on their market power analyses. Therefore, Wisconsin Electric requests that the Commission clarify that non-transmission owning entities such as itself need not report long-term outages.[850]

Commission Determination

509. The Final Rule did not expand the events that trigger a change in status filing to include actions taken by a competitor (such as a decision to take transmission capacity out of service), beyond those adopted in Order No. 652. Furthermore, the Commission found that it is not reasonable to routinely require sellers to make a showing regarding potential barriers to entry that others might erect or are beyond the seller's control.[851] Thus, as a general matter, a transmission outage that occurs beyond a seller's control does not necessarily trigger a change in status filing.[852] In certain circumstances, however, a seller, including a non-transmission owning entity, will be required to submit a change in status filing, as stated above,[853] when it or its affiliate know that a long-term transmission outage has an effect on its market power analysis (e.g., the long-term transmission outage causes the seller to fail one or more of the indicative screens).

c. Other Clarifications

510. Below we provide a number of other clarifications regarding the change in status reporting requirement. Although no clarifications or rehearing requests were submitted on these particular issues, the Commission is aware of some confusion in the industry and accordingly provides clarification.

Change in Status Reporting by Market

511. As codified in § 35.42 of the Commission's regulations, events that constitute a change in status include, among other things, changes in ownership or control of generation capacity that result in net increases of 100 MW or more.[854]

512. We clarify that a change in status should be filed to reflect a change in the ownership or control of generation capacity that results in a net increase of 100 MW or more in the geographic market that was the subject of the horizontal market power analysis on which the Commission relied in granting the seller market-based rate authority. For example, if the Commission relied on a seller's default geographic market in granting the seller market-based rate authority, the seller would be required to submit a change in status filing for a net increase of 100 MW or more of generation capacity in that geographic market. Similarly, if the Commission relied upon an alternative geographic market in granting a seller market-based rate authority, any net increase of 100 MW or more of generation capacity in the alternative geographic market would require the seller to submit a change in status filing. On the other hand, if a seller has a net increase of 50 MW in the geographic market on which the Commission relied in granting the seller market-based rate authority and a 50 MW increase in a different geographic market that is in the same region as defined by Appendix D of Order No 697, the 100 MW or more threshold would not be met because the increase in generation capacity is less than 50 MW in each generation market and, accordingly, a change in status filing would not be required.

Change in Status Reporting Cumulatively

513. A seller must submit an initial application to receive market-based rate authority and file change in status filings in compliance with its market-based rate authority, such as an increase of 100 MW or more in a geographic market. However, in the course of processing change in status filings made by sellers, the Commission believes that it has not been clear to some sellers that increases in generation should be reported cumulatively. For example, some sellers have submitted a series of change in status reports that consider only the additional capacity on a standalone basis rather than considering the total effect of each generation capacity increase since the seller's last market power analysis. When a seller submits a change in status filing to report an increase of 100 MW or more of generation capacity in a geographic market, rather than treating each increase in generation capacity on a standalone basis, the seller should consider the cumulative effect of all increases in generation capacity since its most recently approved market power analysis.

514. For example, if a seller acquires generation capacity resulting in a net increase of 100 MW in a market in January, it is required to submit a change in status filing reflecting this net

[848] Order No. 697 at P 856–857.

[849] Order No. 697 at P 1025.

[850] Wisconsin Electric at 4–5.

[851] Order No. 697 at P 1035.

[852] We clarify that, to the extent the Commission becomes aware of a possible barrier to entry such as a long-term transmission outage, the Commission reserves the right to require any market-based rate seller to demonstrate what effect, if any, that barrier to entry has on its ability to exercise market power.

[853] Order No. 652, FERC Stats. & Regs. ¶ 31,175 at P 75.

[854] *Id.* at P 68.

increase. However, if the seller adds an additional 100 MW of generation in the same market in February, the seller must account for a cumulative total of 200 MW in that market when submitting its change in status filing for the February addition of generation capacity. This cumulative net increase since a seller's most recently approved market power analysis must be the basis of the seller's change in status to reflect that it does or does not depart from the characteristics the Commission relied on in authorizing sales at market-based rates.

2. Third Party Providers of Ancillary Services

Final Rule

515. In the Final Rule, the Commission modified its approach for third-party sellers of ancillary services at market-based rates as announced in *Avista*.[855] The Commission noted that the posting and reporting requirements imposed in *Avista* may be hindering the development of ancillary services markets, particularly by third-party providers. Thus, the Commission concluded that the EQR filing requirement provides an adequate means to monitor ancillary services sales by third parties such that the posting and reporting requirements established in *Avista* are no longer necessary.[856]

516. In the Final Rule, the Commission stated that all sellers that seek authority to sell ancillary services at market-based rates pursuant to *Avista*[857] must make a filing with the Commission to request that authority and must include language in their market-based rate tariffs identifying the ancillary services that they offer.[858] Moreover, the Final Rule retained the Commission's current policy of not allowing sales of ancillary services by a third-party supplier in the following situations: (1) Sales to an RTO or an ISO, *i.e.*, where that entity has no ability to self-supply ancillary services but instead depends on third parties; (2) sales to a traditional, franchised public utility affiliated with the third-party supplier, or sales where the underlying transmission service is on the system of the public utility affiliated with the third-party supplier; and (3) sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers.[859] Standard applicable tariff provisions to this affect appear in Appendix C of the Final Rule and must be included in the tariffs of any entities that sell ancillary services at market-based rates. The Commission reiterated that it is open to considering requests for market-based rate authorization to make such sales on a case-by-case basis.[860]

Requests for Rehearing

517. Wisconsin Electric requests that the Commission clarify that its decision to eliminate the posting and reporting requirements of *Avista* extends to providers of ancillary services that provide ancillary services other than the four services addressed in *Avista*.[861] Wisconsin Electric states that it is a third-party provider of ancillary services and received Commission authorization to offer the four services addressed in *Avista*, but it also received the authorization to offer Dynamic Capacity and Energy Service as an ancillary service, conditioned upon the requirements in *Avista* to establish and maintain an Internet-based site and to file periodic reports describing the company's activities in the ancillary services markets.[862] Wisconsin Electric requests that the Commission clarify that the decision to remove the *Avista* posting and reporting requirements pertains not only to the four ancillary services specifically mentioned in *Avista,* but also to the other ancillary services to which the Commission subsequently applied the *Avista* requirements.[863]

518. Morgan Stanley seeks to clarify its own request to the Commission to identify ways to encourage more robust ancillary services markets outside of RTO/ISO control areas. Morgan Stanley states that its request was intended to support the creation of physically-settled bilateral ancillary services markets, not a market for financially-settled products that are beyond the Commission's jurisdiction.[864]

519. Furthermore, Morgan Stanley clarifies that it continues to regard the creation of a robust bilateral market for physically-settled ancillary services, particularly outside of ISOs and RTOs, as the next step to facilitating greater competition in the wholesale energy markets overall. It did not, however, provide details for specific ancillary services proposals, other than the elimination of the *Avista* posting requirement, because its comments were intended solely to show support for a policy position. Thus, Morgan Stanley reaffirms its prior request that the Commission continue to look for opportunities to jump-start competition in the physical ancillary services markets throughout the United States.[865]

Commission Determination

520. We will grant Wisconsin Electric's request for clarification. As the Commission stated in the Final Rule, the ancillary services addressed in *Avista* are Regulation Service, Energy Imbalance Service, Spinning Reserves, and Supplemental Reserves. In *Avista* however, the Commission also characterized Dynamic Capacity and Energy Service as an ancillary service stating it is a combination of two ancillary services, Regulation Service and Energy Imbalance Service, and is intended to satisfy the transmission provider's option to allow customers to supply ancillary services to the system directly. As such, Dynamic Capacity and Energy Service is an approved ancillary service conditioned upon the requirements and limitations of *Avista*.[866] Similarly, in *Wisconsin Electric Power Co.,* the Commission authorized Wisconsin Electric to provide Dynamic Capacity and Energy Service as an ancillary service conditioned upon *Avista*.[867]

521. Therefore, because Dynamic Energy and Capacity Service, as

[855] Order No. 697 at P 1058. *See Avista Corporation,* 87 FERC ¶ 61,223 (*Avista*), *order on reh'g,* 89 FERC ¶ 61,136 (*Avista II*) (1999).

[856] With this modification adopted in the Final Rule of eliminating the specific posting and reporting requirements established in *Avista* for third-party sellers of ancillary services, the Commission expects to monitor ancillary services sales by third parties through the EQR. In a notice seeking comments on proposed revisions to the EQR Data Dictionary, *Revised Public Utility Filing Requirements for Electric Quarterly Reports,* 122 FERC ¶ 61,194 (2008), the Commission is seeking comment on proposed changes that would clarify that the ancillary services discussed in Avista must be reported whenever those services are provided. Under the proposed revisions, when a seller makes third-party sales of ancillary services, that seller would be required to file, in its EQR, transaction information including (but not limited to) the purchaser, the ancillary service provided, and the price of the service. (*See http://www.ferc.gov/docs-filing/eqr.asp* for more information on EQR filings).

[857] The *Avista* policy applies to the following four ancillary services: Regulation Service, Energy Imbalance Service, Spinning Reserves, and Supplemental Reserves.

[858] Order No. 697 at P 1060. Sellers that have been granted authority to provide third-party ancillary services need not reapply because their authority continues.

[859] Order No. 697 at P 1061 (citing *Avista*, 87 FERC ¶ 61,223 at 61,883, n. 12).

[860] *Id.*

[861] Wisconsin Electric Rehearing Request at 3.

[862] *Id.* at 4 (citing *Wisconsin Electric Power Co.*, 93 FERC ¶ 61,302 (2000)).

[863] *Id.*

[864] Morgan Stanley Rehearing Request at 1, 4.

[865] *Id.* at 5.

[866] *Avista II*, 89 FERC ¶ 61,136 at 61,392.

[867] *Wisconsin Electric Power Co.*, 93 FERC ¶ 61,302 (2000).

described in *Avista,* was authorized by the Commission as an ancillary service pursuant to the *Avista* policy, consistent with the Final Rule, such sellers may continue to sell this ancillary service at market-based rates and are no longer required to meet the *Avista* posting and reporting requirements with regard to this service. The current EQR Data Dictionary does not include Dynamic Energy and Capacity Service in the standard list of products because this service is only offered by a few companies. However, the Commission invited comments on adding new ancillary service names in Docket No. RM01–8–009.[868] Absent the addition of a specific EQR Product Name, sellers offering this service must report it as an ''Other'' product in both the contract and transaction sections of their EQR.

522. We appreciate Morgan Stanley's clarification of its intent to support the creation of physically-settled bilateral ancillary services markets but the formation of such markets is beyond the scope of this proceeding.

3. Requesting Market-Based Rate Authority for QFs

523. The Final Rule amended the Commission's regulations governing market-based rate authorizations for wholesale sales of electric energy, capacity and ancillary services by public utilities. Although the Final Rule did not address the specific applicability of market-based rate authority to QFs, below we address sales by QFs at market-based rates that are subject to the Commission's jurisdiction.

524. QFs making certain sales of energy,[869] as defined below, are exempt from sections 205 and 206 of the FPA. These QF exemptions are applicable to some sales at market-based rates.[870] Therefore, sales of a QF that meet specific criteria are exempt from section 205 and a QF is authorized to make those sales at market-based rates without making a section 205 filing.

525. All sales of energy or capacity made by QFs 20 MW or smaller are exempt from section 205. Sales from a QF larger than 20 MW are exempt from section 205 only if those sales are made pursuant to a state regulatory authority's implementation of PURPA, or if those sales are made pursuant to a contract executed on or before March 17, 2006 [871] (unless the sale is from a qualifying small power production facility with a power production capacity which exceeds 30 MW, if such facility uses any primary energy source other than geothermal resources, in which case the sale is not exempt).[872] If a QF's sales are not exempt from section 205, but the QF would like to make sales at market-based rates, the QF is required to request market-based rate authority.[873]

526. When a QF submits an application for market-based rate authority, its application must fulfill the requirements in Order No. 697, as required by all applicants. A QF, however, must also inform the Commission in its market-based rate application of its QF status and explain its request to transact under market-based rates. For example, a QF must explain whether any of its sales meet the requirements for the exemption from section 205 contained in 18 CFR 292.601(c)(1). Furthermore, if a QF desires to make certain energy sales at market-based rates, while making other sales exempt from section 205, the QF must list its limitations on sales at market-based rates in its market-based rate tariff (*i.e.,* sales under Seller's contract (Contract X), which was executed on March 17, 2006, are exempt from section 205 and sales outside of Contract X would be under market-based rates) and cite to the Commission orders certifying or recertifying its QF status, and/or to the docket numbers in which it self-certified or self-recertified its QF status, as explained in Order No. 697.[874]

H. Clarifications of the Commission's Regulations

527. The Commission finds, based on its further consideration of the regulations, that several provisions should be changed to provide additional clarity.

528. First, one of the affiliate restrictions codified in the Final Rule contained some minor omissions. Section 35.39(b) restricts sales between a franchised public utility with captive customers and a market-regulated power sales affiliate unless the seller first receives Commission authorization for the transaction under section 205 of the FPA. Upon further review, the Commission notes that the phrase ''or capacity'' should be added to the term ''wholesale sales of electric energy'' to ensure that the provision covers the appropriate scope of affiliate sales. Therefore, we will amend § 35.39(b) accordingly.

529. Second, in the Final Rule, the Commission adopted a regulation requiring sellers to timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. In particular, § 35.42 specifies that a change in status includes, but is not limited to, ownership or control of generation capacity that results in net increases of 100 MW or more.

530. Upon further consideration, the Commission recognizes that this provision deserves additional clarity. We take this opportunity to clarify that a change in status also includes long-term firm capacity purchases that result in net increases of 100 MW or more. This is consistent with a seller's obligation to include long-term firm capacity purchases in determining uncommitted capacity, which is used in the indicative screens.[875] We believe that revision to the regulation is appropriate because the Commission's April 14 Order, reaffirmed in Order No. 697, stated that uncommitted capacity is determined ''by adding the total nameplate or seasonal capacity of generation owned or controlled through contract and firm purchases, less operating reserves, native load commitments and long-term firm sales.'' [876]

531. Thus, long-term firm capacity purchases that result in net increases of 100 MW or more are a ''departure from the characteristics the Commission relied upon in granting market-based rate authority.'' Accordingly, § 35.42(a)(1) is revised so that a change in status includes, but is not limited to, ownership or control of generation capacity and long-term firm purchases of generation capacity that result in net increases of 100 MW or more. Because sellers may not have been on notice that this was the Commission's intent, we will not hold any sellers responsible for failure to report such changes in status prior to the effective date of this order,

[868] *Revised Public Utility Filing Requirements for Electric Quarterly Reports,* 73 FR 12983 (Mar. 11, 2008), FERC Stats. & Regs. ¶ 35,557 (Mar. 3, 2008) (seeking comments on proposed revisions to EQR Data Dictionary).

[869] In the context of PURPA, the term energy includes capacity, energy and ancillary services.

[870] *See* 18 CFR 292.601(c)(1).

[871] *Id.*

[872] 18 CFR 292.601(b). However, a qualifying facility that is an eligible solar, wind, waste, or geothermal facility, as defined by section 3(17)(E) of the Federal Power Act, is not subject to the 30 MW size limitation imposed by 18 CFR 292.601(b). *See Cambria Cogen Company,* 53 FERC ¶ 61,459 (1990).

[873] We note that the Commission has previously granted market-based rate authority to QFs that are larger than 20 MW for sales of excess power. The Commission has also rejected requests for market-based rate authority from QFs that are exempt from section 205. *See,* e.g., *SP Newsprint,* 103 FERC ¶ 61,186 (2003).

[874] Order No. 697 at P 916–17.

[875] *See* April 14 Order, 107 FERC ¶ 61,018 at P 95, 100.

[876] *See* Order No. 697 at P 38 (emphasis added; footnote omitted).

which will be 30 days after issuance in the **Federal Register**.

532. Third, as explained earlier in the affiliate abuse section of this order, we are revising the definition of captive customers and adding a definition for affiliate. We will revise the definition of captive customers in § 35.36(a)(6) to mean any wholesale or retail electric energy customers served *by a franchised public utility* under cost-based regulation, to be consistent with the discussion in the Affiliate Transactions Final Rule and the definition of captive customers adopted in that rule at 18 CFR 35.42(a)(2). The definition of affiliate as that term is used in the Affiliate Transactions Final Rule will be codified at paragraph 35.36(a)(9).

533. Fourth, we are revising § 35.39(d)(1) to reflect the determination to adopt a one-way information sharing restriction. Finally, as discussed in the vertical market power section of this order, we are revising the definition of inputs to electric power production to clarify the types of coal supply that are intended to be included in the definition.

III. Information Collection Statement

534. The Office of Management and Budget (OMB) regulations require that OMB approve certain information collection requirements imposed by an agency.[877] The Final Rule's revisions to the information collection requirements for market-based rate sellers were approved under OMB Control Nos. 1902–0234. While this order clarifies aspects of the existing information collection requirements for the market-based rate program, it does not add to these requirements. Accordingly, a copy of this order will be sent to OMB for informational purposes only.

IV. Document Availability

535. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

536. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

537. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

V. Effective Date

538. Changes to Order No. 697 adopted in this order on rehearing will become effective June 6, 2008.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By the Commission. Commissioner Kelly concurring with a separate statement attached.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends part 35, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7152.

■ 2. In § 35.36, paragraphs (a)(4) and (a)(6) are revised and paragraph (a)(9) is added to read as follows:

§ 35.36 Generally.

(a) * * *

(4) *Inputs to electric power production* means intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; physical coal supply sources and ownership of or control over who may access transportation of coal supplies.

* * * * *

(6) *Captive customers* means any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

* * * * *

(9) *Affiliate* of a specified company means:

(i) For any person other than an exempt wholesale generator:

(A) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(B) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(C) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(D) Any person that is under common control with the specified company.

(E) For purposes of paragraph (a)(9)(i), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

(ii) For any exempt wholesale generator (as defined under § 366.1 of this chapter):

(A) Any person that directly or indirectly owns, controls, or holds with power to vote, 5 percent or more of the outstanding voting securities of the specified company;

(B) Any company 5 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(C) Any individual who is an officer or director of the specified company, or of any company which is an affiliate thereof under paragraph (a)(9)(ii)(A); and

(D) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate.

* * * * *

■ 3. In § 35.39, paragraphs (b) and (d)(1) are revised to read as follows:

§ 35.39 Affiliate restrictions.

* * * * *

(b) *Restriction on affiliate sales of electric energy or capacity.* As a condition of obtaining and retaining market-based rate authority, no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving

[877] 5 CFR 1320.11.

Commission authorization for the transaction under section 205 of the Federal Power Act. All authorizations to engage in affiliate wholesale sales of electric energy or capacity must be listed in a Seller's market-based rate tariff.

* * * * *

(d) *Information sharing.*

(1) A franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public.

* * * * *

■ 4. In § 35.42, paragraph (a)(1) is revised to read as follows:

§ 35.42 Change in status reporting requirement.

(a) * * *

(1) Ownership or control of generation capacity and long-term firm purchases of generation capacity that result in net increases of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission facilities, or

* * * * *

■ 5. Appendix A of subpart H is revised to read as follows:

Appendix A to Subpart H

Appendix A

Standard Screen Format

(Data provided for Illustrative Purposes only)

PART I.—PIVOTAL SUPPLIER ANALYSIS

Row	Generation	MW	Reference
Seller and Affiliate Capacity			
A	Installed Capacity	19,500	Workpaper.
B	Long-Term Firm Purchases	500	Workpaper.
C	Long-Term Firm Sales	−1,000	Workpaper.
D	Imported Power	0	Workpaper.
Non-Affiliate Capacity			
E	Installed Capacity	8,000	Workpaper.
F	Long-Term Firm Purchases	500	Workpaper.
G	Long-Term Firm Sales	−2,500	Workpaper.
H	Imported Power	3,500	Workpaper.
I	Balancing Authority Area Reserve Requirement	−2,160	Workpaper.
J	Amount of Line I Attributable to Seller, if any	−2,160	Workpaper.
K	Total Uncommitted Supply (SUM A,B,C,D,E,F,G,H,I,M)	9,840	
Load			
L	Balancing Authority Area Annual Peak Load	18,000	Workpaper.
M	Average Daily Peak Native Load in Peak Month	−16,500	Workpaper.
N	Amount of Line M Attributable to Seller, if any	−16,500	Workpaper.
O	Wholesale Load (SUM L,M)	1,500	
P	Net Uncommitted Supply (K–O)	8,340	
Q	Seller's Uncommitted Capacity (SUM A,B,C,D,J,N)	340	
	Result of Pivotal Supplier Screen (Pass if Line Q < Line P), (Fail if Line Q > Line P)		PASS.

Note: The following appendices will not be published in the *Code of Federal Regulations.*

Appendix C to Order No. 697–A

Required Provisions of the Market-Based Rate Tariff

Compliance With Commission Regulations

Seller shall comply with the provisions of 18 CFR part 35, Subpart H, as applicable, and with any conditions the Commission imposes in its orders concerning seller's market-based rate authority, including orders in which the Commission authorizes seller to engage in affiliate sales under this tariff or otherwise restricts or limits the seller's market-based rate authority. Failure to comply with the applicable provisions of 18 CFR part 35, Subpart H, and with any orders of the Commission concerning seller's market-based rate authority, will constitute a violation of this tariff.

Limitations and Exemptions Regarding Market-Based Rate Authority

[Seller should list all limitations (including markets where seller does not have market-based rate authority) on its market-based rate authority and any exemptions from or waivers granted of Commission regulations and include relevant cites to Commission orders].

Seller Category

Seller Category: Seller is a [insert Category 1 or Category 2] seller, as defined in 18 CFR 35.36(a).

Include All of the Following Provisions That Are Applicable

Mitigated Sales

Sales of energy and capacity are permissible under this tariff in all balancing authority areas where the Seller has been granted market-based rate authority. Sales of energy and capacity under this tariff are also permissible at the metered boundary between the Seller's mitigated balancing authority area and a balancing authority area where the Seller has been granted market-based rate authority provided: (i) Legal title of the power sold transfers at the metered boundary of the balancing authority area; (ii) the mitigated seller and its affiliates do not sell the same power back into the balancing authority area where the seller is mitigated. Seller must retain, for a period of five years from the date of the sale, all data and information related to the sale that demonstrates compliance with items (i) and (ii) above.

Ancillary Services

RTO/ISO Specific—Include All Services the Seller Is Offering

PJM: Seller offers regulation and frequency response service, energy imbalance service, and operating reserve service (which includes spinning, 10-minute, and 30-minute reserves) for sale into the market administered by PJM Interconnection, L.L.C. (''PJM'') and, where the PJM Open Access Transmission Tariff permits, the self-supply of these services to purchasers for a bilateral sale that is used to satisfy the ancillary services requirements of the PJM Office of Interconnection.

New York: Seller offers regulation and frequency response service, and operating reserve service (which include 10-minute non-synchronous, 30-minute operating reserves, 10-minute spinning reserves, and 10-minute non-spinning reserves) for sale to

purchasers in the market administered by the New York Independent System Operator, Inc.

New England: Seller offers regulation and frequency response service (automatic generator control), operating reserve service (which includes 10-minute spinning reserve, 10-minute non-spinning reserve, and 30-minute operating reserve service) to purchasers within the markets administered by the ISO New England, Inc.

California: Seller offers regulation service, spinning reserve service, and non-spinning reserve service to the California Independent System Operator Corporation (''CAISO'') and to others that are self-supplying ancillary services to the CAISO.

Third Party Provider

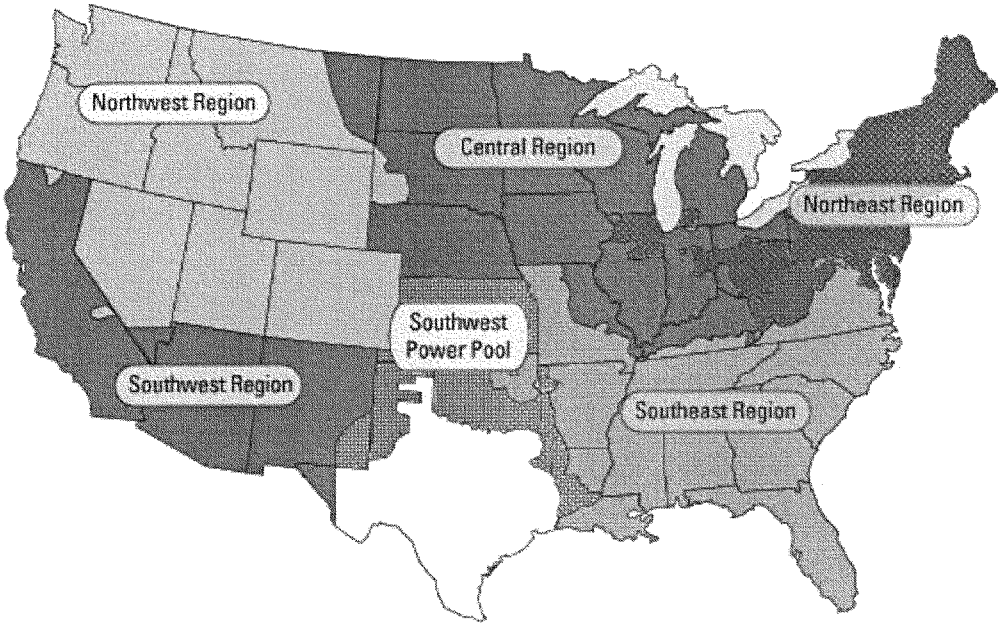
Third-party ancillary services: Seller offers [include all of the following that the seller is offering: Regulation Service, Energy Imbalance Service, Spinning Reserves, and Supplemental Reserves]. Sales will not include the following: (1) Sales to an RTO or an ISO, *i.e.*, where that entity has no ability to self-supply ancillary services but instead depends on third parties; (2) sales to a traditional, franchised public utility affiliated with the third-party supplier, or sales where the underlying transmission service is on the system of the public utility affiliated with the third-party supplier; and (3) sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers.

Appendix D to Order No. 697–A

Regions and Schedule for Regional Market Power Update Process

The six regions are combinations of NERC regions; RTOs and ISOs and are depicted in the map that follows.

Map of Geographic Regions



Northeast (ISO-NE, NYISO, PJM)

Southeast (NERC Regions SERC and FRCC (not including PJM or Midwest ISO))

Central (Midwest ISO, NERC Regions MRO and RFC (not including PJM))

Southwest Power Pool (NERC region SPP)

Southwest (California, NERC region WECC-AZNMSNV)

Northwest (NERC Regions WECC-NWPP and WECC-RMPA)

SCHEDULE FOR TRANSMISSION OWNING UTILITIES WITH MARKET-BASED RATE AUTHORITY AND THEIR AFFILIATES IN THE SAME REGION

Entities required to file	Filing period (anytime during the month)	Study period
Northeast Transmission Owners	December, 2007	Dec. 1, 2005–Nov. 30, 2006.
Southeast Transmission Owners	June, 2008	Dec. 1, 2005–Nov. 30, 2006.
Central Transmission Owners	December, 2008	Dec. 1, 2006–Nov. 30, 2007.
SPP Transmission Owners	June, 2009	Dec. 1, 2006–Nov. 30, 2007.
Southwest Transmission Owners	December, 2009	Dec. 1, 2007–Nov. 30, 2008.
Northwest Transmission Owners	June, 2010	Dec. 1, 2007–Nov. 30, 2008.
Northeast Transmission Owners	December, 2010	Dec. 1, 2008–Nov. 30, 2009.
Southeast Transmission Owners	June, 2011	Dec. 1, 2008–Nov. 30, 2009.
Central Transmission Owners	December, 2011	Dec. 1, 2009–Nov. 30, 2010.
SPP Transmission Owners	June, 2012	Dec. 1, 2009–Nov. 30, 2010.
Southwest Transmission Owners	December, 2012	Dec. 1, 2010–Nov. 30, 2011.
Northwest Transmission Owners	June, 2013	Dec. 1, 2010–Nov. 30, 2011.

Appendix D–2

SCHEDULE FOR ALL OTHER ENTITIES

Entities required to file	Filing period (anytime during the month)	Study period
All others in Northeast that did not file in December including all power marketers that sold in the Northeast.	June, 2008	Dec. 1, 2005–Nov. 30, 2006.
All others in Southeast that did not file in June including all power marketers that sold in the Southeast and have not already been found to be Category 1 sellers.	December, 2008	Dec. 1, 2005–Nov. 30, 2006.
All others in Central that did not file in December including all power marketers that sold in the Central and have not already been found to be Category 1 sellers.	June, 2009	Dec. 1, 2006–Nov. 30, 2007.
All others in SPP that did not file in June including all power marketers that sold in SPP and have not already been found to be Category 1 sellers.	December, 2009	Dec. 1, 2006–Nov. 30, 2007.
Others in Northeast that did not file in December and have not been found to be Category 1 sellers.	June, 2011	Dec. 1, 2008–Nov. 30, 2009.
Others in Southeast that did not file in June and have not been found to be Category 1 sellers.	December, 2011	Dec. 1, 2008–Nov. 30, 2009.
Others in Central that did not file in December and have not been found to be Category 1 sellers.	June, 2012	Dec. 1, 2009–Nov. 30, 2010.
Others in SPP that did not file in June and have not been found to be Category 1 sellers.	December, 2012	Dec. 1, 2009–Nov. 30, 2010.
Others in Southwest that did not file in December and have not been found to be Category 1 sellers.	June, 2013	Dec. 1, 2010–Nov. 30, 2011.
Others in Northwest that did not file in June and have not been found to be Category 1 sellers.	December, 2013	Dec. 1, 2010–Nov. 30, 2011.

Appendix E to Order No. 697–A

PETITIONER ACRONYMS

Abbreviation	Petitioner names
Ameren	Ameren Services Company.
APPA/TAPS	American Public Power Association/Transmission Access Policy Study Group.
Attorneys General of Connecticut and Illinois.	Richard Blumenthal, Attorney General for the State of Connecticut and the People of the State of Illinois, by and through the Illinois Attorney General Lisa Madigan.
Consumer Advocates	Attorneys General of New Mexico and Rhode Island, Colorado Office of Consumer Counsel, Utah Committee of Consumer Services, Public Utility Law Project of NY, and Public Citizen, Inc.
EEI	Edison Electric Institute.
El Paso E&P	El Paso E&P Company, L.P.
FirstEnergy	FirstEnergy Service Company.
FP&L	Florida Power & Light Company and FPL Energy, LLC.
Industrial Customers	Coalition of Midwest Transmission Customers, PJM Industrial Customer Coalition, NEPOOL Industrial Customer Coalition, Industrial Energy Users of Ohio, Industrial Energy Consumers of PA, Southeast Electricity Consumers Association, West Virginia Energy Users Group, and Southwest Industrial Customer Coalition.
LT Sellers	Long-Term Sellers.
MidAmerican	MidAmerican Energy Company and Cordova Energy Company LLC.
Montana Counsel	Montana Consumer Counsel.
Morgan Stanley	Morgan Stanley Capital Group Inc.
NASUCA	National Association of State Utility Consumer Advocates.

PETITIONER ACRONYMS—Continued

Abbreviation	Petitioner names
NRECA	National Rural Electric Cooperative Association.
NYISO	New York Independent System Operator, Inc.
NRG	NRG Energy, Inc.
Occidental	Occidental Power Marketing, L.P.
OG&E	Oklahoma Gas and Electric Company and OGE Energy Resources, Inc.
Pinnacle	Pinnacle West Companies.
PPM	PPM Energy, Inc.
PSEG Companies	Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.
Reliant	Reliant Energy, Inc.
Southern	Southern Company Services, Inc.
TDU Systems	Transmission Dependent Utilities Systems.
Wisconsin Electric	Wisconsin Electric Power Company.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM04–7–001; Order No. 697–A]

Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities

(Issued April 21, 2008)

KELLY, Commissioner, concurring:

Among other decisions in Order No. 697–A, the Commission has, on rehearing, determined that it will entertain applications that permit a mitigated seller to sell under a long-term contract at market-based rates. Specifically, we will allow a mitigated seller to demonstrate, on a case-by-case basis, that it does not have market power with respect to a specific long-term contract. I believe that if executed properly, allowing a mitigated seller the opportunity to demonstrate that, with respect to a specific contract, it does not have market power could be a useful and productive means for spurring competition and long-term contracting.

Ideally, I believe the Commission should apply an ordered, transparent and predictable test to each mitigated seller's application. Such a test should include an examination of barriers to entry, structural or otherwise. New entrants bring new capacity that, in theory at least, should exert downward pressure on prices. Our decision here hinges on the hypothesis that, absent barriers to new entrants, long-term markets may be presumed to be competitive. Ultimately, I would like to see the Commission confirm that hypothesis using the aforementioned test on a case-by-case basis.

Until such time as we have developed such a test, however, we have decided that the case-by-case approach described in this order allows the Commission to examine these applications with the appropriate rigor. The mitigated seller will have to show that a buyer under a long-term contract has viable alternatives, including the entry of third-party newly-constructed resources during the relevant future period as an alternative to purchasing under the contract at issue. I would prefer that mitigated sellers, in their applications, include an identified buyer. I believe the presence of an identified buyer will ensure that any assessment of the application is confined to a set of circumstances specific to the transaction, thereby avoiding the potential for granting a more general market-based rate authority to a mitigated seller for a particular area and period of time. I do not believe that such an outcome would be helpful to or consistent with our goals of promoting competition.

As the Commission moves forward, I anticipate relying on the views and expertise of interested parties in developing a specific test to apply to each case.

For these reasons, I respectfully concur with this order.

Suedeen G. Kelly.

[FR Doc. E8–9073 Filed 5–6–08; 8:45 am]

BILLING CODE 6717–01–C

Federal Register

Wednesday,
May 7, 2008

Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 413

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2009; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 413

[CMS–1534–P]

RIN 0938–AP11

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2009

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would update the payment rates used under the prospective payment system (PPS) for skilled nursing facilities (SNFs), for fiscal year (FY) 2009. In addition, it would recalibrate the case-mix indexes so that they more accurately reflect parity in expenditures related to the implementation of case-mix refinements in January 2006. It also discusses our ongoing analysis of nursing home staff time measurement data collected in the Staff Time and Resource Intensity Verification (STRIVE) project. Finally, the proposed rule would make technical corrections in the regulations text with respect to Medicare bad debt payments to SNFs and the reference to the definition of urban and rural as applied to SNFs.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 30, 2008.

ADDRESSES: In commenting, please refer to file code CMS–1534–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. *Electronically.* You may submit electronic comments on specific issues in this regulation to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' and enter the file code to find the document accepting comments.

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1534–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1534–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to one of the following addresses.

a. Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

b. 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the address indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Ellen Berry, (410) 786–4528 (for information related to clinical issues). Jeanette Kranacs, (410) 786–9385 (for information related to the development of the payment rates and case-mix indexes). Bill Ullman, (410) 786–5667 (for information related to level of care determinations, consolidated billing, and general information).

SUPPLEMENTARY INFORMATION:

Submitting Comments: We welcome comments from the public on all issues set forth in this rule to assist us in fully considering issues and developing policies. You can assist us by referencing the file code CMS–1534–P and the specific ''issue identifier'' that precedes the section on which you choose to comment.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.cms.hhs.gov/eRulemaking.* Click on the link ''Electronic Comments on CMS Regulations'' on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

To assist readers in referencing sections contained in this document, we are providing the following Table of Contents.

Table of Contents

Abbreviations

In addition, because of the many terms to which we refer by abbreviation in this proposed rule, we are listing these abbreviations and their corresponding terms in alphabetical order below:

AIDS Acquired Immune Deficiency Syndrome
ARD Assessment Reference Date
BBA Balanced Budget Act of 1997, Pub. L. 105–33
BBRA Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999, Pub. L. 106–113
BIPA Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub. L. 106–554
CAH Critical Access Hospital
CARE Continuity Assessment Record and Evaluation
CBSA Core-Based Statistical Area
CFR Code of Federal Regulations
CMI Case-Mix Index
CMS Centers for Medicare & Medicaid Services
DRA Deficit Reduction Act of 2005, Pub. L. 109–171
FQHC Federally Qualified Health Center
FR Federal Register
FY Fiscal Year
GAO Government Accountability Office
HAC Hospital-Acquired Condition
HCPCS Healthcare Common Procedure Coding System
HIPPS Health Insurance Prospective Payment System
HIT Health Information Technology
IFC Interim Final Rule with Comment Period
IPPS Hospital Inpatient Prospective Payment System
MDS Minimum Data Set
MMA Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub.L. 108–173
MSA Metropolitan Statistical Area
MS–DRG Medicare Severity Diagnosis-Related Group
NRST Non-Resident Specific Time
NTA Non-Therapy Ancillary
OIG Office of the Inspector General
OMB Office of Management and Budget
OMRA Other Medicare Required Assessment
PAC–PRD Post-Acute Care Payment Reform Demonstration
PPS Prospective Payment System
RAI Resident Assessment Instrument
RAP Resident Assessment Protocol
RAVEN Resident Assessment Validation Entry
RFA Regulatory Flexibility Act, Pub. L. 96–354
RHC Rural Health Clinic
RIA Regulatory Impact Analysis
RUG–III Resource Utilization Groups, Version III
RUG–53 Refined 53–Group RUG–III Case-Mix Classification System
RST Resident Specific Time
SCHIP State Children's Health Insurance Program
SNF Skilled Nursing Facility
STM Staff Time Measurement
STRIVE Staff Time and Resource Intensity Verification
UMRA Unfunded Mandates Reform Act, Pub. L. 104–4
VBP Value-Based Purchasing

I. Background

[If you choose to comment on issues in this section, please include the caption ''BACKGROUND'' at the beginning of your comments.]

Annual updates to the prospective payment system (PPS) rates for skilled nursing facilities (SNFs) are required by section 1888(e) of the Social Security Act (the Act), as added by section 4432 of the Balanced Budget Act of 1997 (BBA), and amended by the Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (BBRA), the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA), and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). Our most recent annual update occurred in a final rule (72 FR 43412, August 3, 2007) that set forth updates to the SNF PPS payment rates for fiscal year (FY) 2008. We subsequently published two correction notices (72 FR 55085, September 28, 2007, and 72 FR 67652, November 30, 2007) with respect to those payment rate updates.

A. Current System for Payment of Skilled Nursing Facility Services Under Part A of the Medicare Program

Section 4432 of the BBA amended section 1888 of the Act to provide for the implementation of a per diem PPS for SNFs, covering all costs (routine, ancillary, and capital-related) of covered SNF services furnished to beneficiaries under Part A of the Medicare program, effective for cost reporting periods beginning on or after July 1, 1998. In this proposed rule, we propose to update the per diem payment rates for SNFs for FY 2009. Major elements of the SNF PPS include:

• *Rates.* As discussed in section I.F.1. of this proposed rule, we established per diem Federal rates for urban and rural areas using allowable costs from FY 1995 cost reports. These rates also included an estimate of the cost of services that, before July 1, 1998, had been paid under Part B but were furnished to Medicare beneficiaries in a SNF during a Part A covered stay. We adjust the rates annually using a SNF market basket index, and we adjust them by the hospital inpatient wage index to account for geographic variation in wages. We also apply a case-mix adjustment to account for the relative resource utilization of different patient types. This adjustment utilizes a refined, 53-group version of the Resource Utilization Groups, version III (RUG–III) case-mix classification system, based on information obtained from the required resident assessments using the Minimum Data Set (MDS) 2.0. Additionally, as noted in the August 4, 2005 final rule (70 FR 45028), the payment rates at various times have also reflected specific legislative provisions, including section 101 of the BBRA, sections 311, 312, and 314 of the BIPA, and section 511 of the MMA.

• *Transition.* Under sections 1888(e)(1)(A) and (e)(11) of the Act, the SNF PPS included an initial, three-phase transition that blended a facility-specific rate (reflecting the individual facility's historical cost experience) with the Federal case-mix adjusted rate. The transition extended through the facility's first three cost reporting periods under the PPS, up to and including the one that began in FY 2001. Thus, the SNF PPS is no longer operating under the transition, as all facilities have been paid at the full Federal rate effective with cost reporting periods beginning in FY 2002. As we now base payments entirely on the adjusted Federal per diem rates, we no longer include adjustment factors related to facility-specific rates for the coming FY.

• *Coverage.* The establishment of the SNF PPS did not change Medicare's fundamental requirements for SNF coverage. However, because the RUG–III classification is based, in part, on the beneficiary's need for skilled nursing

care and therapy, we have attempted, where possible, to coordinate claims review procedures with the output of beneficiary assessment and RUG–III classifying activities. This approach includes an administrative presumption that utilizes a beneficiary's initial classification in one of the upper 35 RUGs of the refined 53-group system to assist in making certain SNF level of care determinations, as discussed in greater detail in section II.E. of this proposed rule.

• *Consolidated Billing.* The SNF PPS includes a consolidated billing provision that requires a SNF to submit consolidated Medicare bills to its fiscal intermediary or Medicare Administrative Contractor for almost all of the services that its residents receive during the course of a covered Part A stay. In addition, this provision places with the SNF the Medicare billing responsibility for physical, occupational, and speech-language therapy that the resident receives during a noncovered stay. The statute excludes a small list of services from the consolidated billing provision (primarily those of physicians and certain other types of practitioners), which remain separately billable under Part B when furnished to a SNF's Part A resident. A more detailed discussion of this provision appears in section IV. of this proposed rule.

• *Application of the SNF PPS to SNF services furnished by swing-bed hospitals.* Section 1883 of the Act permits certain small, rural hospitals to enter into a Medicare swing-bed agreement, under which the hospital can use its beds to provide either acute or SNF care, as needed. For critical access hospitals (CAHs), Part A pays on a reasonable cost basis for SNF services furnished under a swing-bed agreement. However, in accordance with section 1888(e)(7) of the Act, these services furnished by non-CAH rural hospitals are paid under the SNF PPS, effective with cost reporting periods beginning on or after July 1, 2002. A more detailed discussion of this provision appears in section V. of this proposed rule.

B. Requirements of the Balanced Budget Act of 1997 (BBA) for Updating the Prospective Payment System for Skilled Nursing Facilities

Section 1888(e)(4)(H) of the Act requires that we publish annually in the **Federal Register:**

1. The unadjusted Federal per diem rates to be applied to days of covered SNF services furnished during the FY.

2. The case-mix classification system to be applied with respect to these services during the FY.

3. The factors to be applied in making the area wage adjustment with respect to these services.

In the July 30, 1999 final rule (64 FR 41670), we indicated that we would announce any changes to the guidelines for Medicare level of care determinations related to modifications in the RUG–III classification structure (see section II.E. of this proposed rule for a discussion of the relationship between the case-mix classification system and SNF level of care determinations).

Along with other revisions proposed later in this preamble, this proposed rule provides the annual updates to the Federal rates as mandated by the Act.

C. The Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (BBRA)

There were several provisions in the BBRA that resulted in adjustments to the SNF PPS. We described these provisions in detail in the final rule that we published in the **Federal Register** on July 31, 2000 (65 FR 46770). In particular, section 101(a) of the BBRA provided for a temporary 20 percent increase in the per diem adjusted payment rates for 15 specified RUG–III groups. In accordance with section 101(c)(2) of the BBRA, this temporary payment adjustment expired on January 1, 2006, upon the implementation of case-mix refinements (see section I.F.1. of this proposed rule). We included further information on BBRA provisions that affected the SNF PPS in Program Memorandums A–99–53 and A–99–61 (December 1999).

Also, section 103 of the BBRA designated certain additional services for exclusion from the consolidated billing requirement, as discussed in section IV. of this proposed rule. Further, for swing-bed hospitals with more than 49 (but less than 100) beds, section 408 of the BBRA provided for the repeal of certain statutory restrictions on length of stay and aggregate payment for patient days, effective with the end of the SNF PPS transition period described in section 1888(e)(2)(E) of the Act. In the July 31, 2001 final rule (66 FR 39562), we made conforming changes to the regulations at § 413.114(d), effective for services furnished in cost reporting periods beginning on or after July 1, 2002, to reflect section 408 of the BBRA.

D. The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA)

The BIPA also included several provisions that resulted in adjustments to the SNF PPS. We described these provisions in detail in the final rule that we published in the **Federal Register** on July 31, 2001 (66 FR 39562). In particular:

• Section 203 of the BIPA exempted CAH swing-beds from the SNF PPS. We included further information on this provision in Program Memorandum A–01–09 (Change Request #1509), issued January 16, 2001, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/a0109.pdf.*

• Section 311 of the BIPA revised the statutory update formula for the SNF market basket, and also directed us to conduct a study of alternative case-mix classification systems for the SNF PPS. In 2006, we submitted a report to the Congress on this study, which is available online at *http://www.cms.hhs.gov/SNFPPS/Downloads/RC__2006_PC__PPSSNF.pdf.*

• Section 312 of the BIPA provided for a temporary increase of 16.66 percent in the nursing component of the case-mix adjusted Federal rate for services furnished on or after April 1, 2001, and before October 1, 2002. The add-on is no longer in effect. This section also directed the Government Accountability Office (GAO) to conduct an audit of SNF nursing staff ratios and submit a report to the Congress on whether the temporary increase in the nursing component should be continued. The report (GAO–03–176), which GAO issued in November 2002, is available online at *http://www.gao.gov/new.items/d03176.pdf.*

• Section 313 of the BIPA repealed the consolidated billing requirement for services (other than physical, occupational, and speech-language therapy) furnished to SNF residents during noncovered stays, effective January 1, 2001. (A more detailed discussion of this provision appears in section IV. of this proposed rule.)

• Section 314 of the BIPA corrected an anomaly involving three of the RUGs that the BBRA had designated to receive the temporary payment adjustment discussed above in section I.C. of this proposed rule. (As noted previously, in accordance with section 101(c)(2) of the BBRA, this temporary payment adjustment expired upon the implementation of case-mix refinements on January 1, 2006.)

• Section 315 of the BIPA authorized us to establish a geographic reclassification procedure that is specific to SNFs, but only after collecting the data necessary to establish a SNF wage index that is based on wage data from nursing homes. To date, this has proven to be infeasible due to the volatility of existing SNF wage data and the significant amount of resources that

would be required to improve the quality of that data.

We included further information on several of the BIPA provisions in Program Memorandum A–01–08 (Change Request #1510), issued January 16, 2001, which is available online at *www.cms.hhs.gov/transmittals/downloads/a0108.pdf.*

E. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA)

The MMA included a provision that results in a further adjustment to the SNF PPS. Specifically, section 511 of the MMA amended section 1888(e)(12) of the Act, to provide for a temporary increase of 128 percent in the PPS per diem payment for any SNF resident with Acquired Immune Deficiency Syndrome (AIDS), effective with services furnished on or after October 1, 2004. This special AIDS add-on was to remain in effect until ''* * * such date as the Secretary certifies that there is an appropriate adjustment in the case mix. * * *'' The AIDS add-on is also discussed in Program Transmittal #160 (Change Request #3291), issued on April 30, 2004, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/r160cp.pdf.* As discussed in the SNF PPS final rule for FY 2006 (70 FR 45028, August 4, 2005), we did not address the certification of the AIDS add-on with the implementation of the case-mix refinements, thus allowing the temporary add-on payment created by section 511 of the MMA to continue in effect.

For the limited number of SNF residents that qualify for the AIDS add-on, implementation of this provision results in a significant increase in payment. For example, using FY 2006 data, we identified less than 2,700 SNF residents with a diagnosis code of 042 (Human Immunodeficiency Virus (HIV) Infection). For FY 2009, an urban facility with a resident with AIDS in RUG group ''SSA'' would have a case-mix adjusted payment of almost $246.55 (see Table 4) before the application of the MMA adjustment. After an increase of 128 percent, this urban facility would receive a case-mix adjusted payment of approximately $562.13.

In addition, section 410 of the MMA contained a provision that excluded from consolidated billing certain practitioner and other services furnished to SNF residents by rural health clinics (RHCs) and Federally Qualified Health Centers (FQHCs). (Further information on this provision appears in section IV. of this proposed rule.)

F. Skilled Nursing Facility Prospective Payment—General Overview

We implemented the Medicare SNF PPS effective with cost reporting periods beginning on or after July 1, 1998. This PPS pays SNFs through prospective, case-mix adjusted per diem payment rates applicable to all covered SNF services. These payment rates cover all costs of furnishing covered skilled nursing services (routine, ancillary, and capital-related costs) other than costs associated with approved educational activities. Covered SNF services include post-hospital services for which benefits are provided under Part A and all items and services that, before July 1, 1998 had been paid under Part B (other than physician and certain other services specifically excluded under the BBA) but furnished to Medicare beneficiaries in a SNF during a covered Part A stay. A comprehensive discussion of these provisions appears in the May 12, 1998 interim final rule (63 FR 26252).

1. Payment Provisions—Federal Rate

The PPS uses per diem Federal payment rates based on mean SNF costs in a base year updated for inflation to the first effective period of the PPS. We developed the Federal payment rates using allowable costs from hospital-based and freestanding SNF cost reports for reporting periods beginning in FY 1995. The data used in developing the Federal rates also incorporated an estimate of the amounts that would be payable under Part B for covered SNF services furnished to individuals during the course of a covered Part A stay in a SNF.

In developing the rates for the initial period, we updated costs to the first effective year of the PPS (the 15-month period beginning July 1, 1998) using a SNF market basket index, and then standardized for the costs of facility differences in case-mix and for geographic variations in wages. In compiling the database used to compute the Federal payment rates, we excluded those providers that received new provider exemptions from the routine cost limits, as well as costs related to payments for exceptions to the routine cost limits. Using the formula that the BBA prescribed, we set the Federal rates at a level equal to the weighted mean of freestanding costs plus 50 percent of the difference between the freestanding mean and weighted mean of all SNF costs (hospital-based and freestanding) combined. We computed and applied separately the payment rates for facilities located in urban and rural areas. In addition, we adjusted the portion of the Federal rate attributable to wage-related costs by a wage index.

The Federal rate also incorporates adjustments to account for facility case-mix, using a classification system that accounts for the relative resource utilization of different patient types. The RUG–III classification system uses beneficiary assessment data from the Minimum Data Set (MDS) completed by SNFs to assign beneficiaries to one of 53 RUG–III groups. The original RUG–III case-mix classification system included 44 groups. However, under refinements that became effective on January 1, 2006, we added nine new groups—comprising a new Rehabilitation plus Extensive Services category—at the top of the RUG hierarchy. The May 12, 1998 interim final rule (63 FR 26252) included a detailed description of the original 44-group RUG–III case-mix classification system. A comprehensive description of the refined 53-group RUG–III case-mix classification system (RUG–53) appeared in the proposed and final rules for FY 2006 (70 FR 29070, May 19, 2005, and 70 FR 45026, August 4, 2005).

Further, in accordance with section 1888(e)(4)(E)(ii)(IV) of the Act, the Federal rates in this proposed rule reflect an update to the rates that we published in the August 3, 2007 final rule for FY 2008 (72 FR 43412) and the associated correction notices (on September 28, 2007, 72 FR 55085, and November 30, 2007, 72 FR 67652), equal to the full change in the SNF market basket index. A more detailed discussion of the SNF market basket index and related issues appears in sections I.F.2. and III. of this proposed rule.

2. Rate Updates Using the Skilled Nursing Facility Market Basket Index

Section 1888(e)(5) of the Act requires us to establish a SNF market basket index that reflects changes over time in the prices of an appropriate mix of goods and services included in covered SNF services. We use the SNF market basket index to update the Federal rates on an annual basis. In the August 3, 2007, FY 2008 SNF PPS final rule (72 FR 43425 through 43430), we revised and rebased the market basket, which included updating the base year from FY 1997 to FY 2004. The proposed FY 2009 market basket increase is 3.1 percent.

In addition, as explained in the August 4, 2003, final rule for FY 2004 (66 FR 46058) and in section III.B. of this proposed rule, the annual update of the payment rates includes, as appropriate, an adjustment to account for market basket forecast error. As described in the final rule for FY 2008,

the threshold percentage that serves to trigger an adjustment to account for market basket forecast error is 0.5 percentage point effective for FY 2008 and subsequent years. This adjustment takes into account the forecast error from the most recently available FY for which there is final data, and applies whenever the difference between the forecasted and actual change in the market basket exceeds a 0.5 percentage point threshold. For FY 2007 (the most recently available FY for which there is final data), the estimated increase in the market basket index was 3.1 percentage points, while the actual increase was 3.1 percentage points, resulting in no difference. Accordingly, as the difference between the estimated and actual amount of change does not exceed the 0.5 percentage point threshold, the payment rates for FY 2009 do not include a forecast error adjustment. Table 1 below shows the forecasted and actual market basket amounts for FY 2007.

TABLE 1.—DIFFERENCE BETWEEN THE FORECASTED AND ACTUAL MARKET BASKET INCREASES FOR FY 2007

Index	Forecasted FY 2007 Increase*	Actual FY 2007 Increase**	FY 2007 Difference***
SNF	3.1	3.1	0.0

*Published in *Federal Register*, based on second quarter 2006 Global Insight Inc. forecast (97 index).
**Based on the first quarter 2008 Global Insight Inc.forecast (97 index).
***The FY 2007 forecast error correction for the PPS Operating portion will be applied to the FY 2009 PPS update recommendations. Any forecast error less than 0.5 percentage points will not be reflected in the update recommendation.

II. Annual Update of Payment Rates Under the Prospective Payment System for Skilled Nursing Facilities

[If you choose to comment on issues in this section, please include the caption ''Annual Update'' at the beginning of your comments.]

A. Federal Prospective Payment System

This proposed rule sets forth a schedule of Federal prospective payment rates applicable to Medicare Part A SNF services beginning October 1, 2008. The schedule incorporates per diem Federal rates that provide Part A payment for all costs of services furnished to a beneficiary in a SNF during a Medicare-covered stay.

1. Costs and Services Covered by the Federal Rates

In accordance with section 1888(e)(2)(B) of the Act, the Federal rates apply to all costs (routine, ancillary, and capital-related) of covered SNF services other than costs associated with approved educational activities as defined in § 413.85. Under section 1888(e)(2)(A)(i) of the Act, covered SNF services include post-hospital SNF services for which benefits are provided under Part A (the hospital insurance program), as well as all items and services (other than those services excluded by statute) that, before July 1, 1998, were paid under Part B (the supplementary medical insurance program) but furnished to Medicare beneficiaries in a SNF during a Part A covered stay. (These excluded service categories are discussed in greater detail in section V.B.2. of the May 12, 1998 interim final rule (63 FR 26295 through 26297)).

2. Methodology Used for the Calculation of the Federal Rates

The proposed FY 2009 rates would reflect an update using the full amount of the latest market basket index. The proposed FY 2009 market basket increase factor is 3.1 percent. A complete description of the multi-step process used to calculate Federal rates initially appeared in the May 12, 1998 interim final rule (63 FR 26252), as further revised in subsequent rules. We note that in accordance with section 101(c)(2) of the BBRA, the previous temporary increases in the per diem adjusted payment rates for certain designated RUGs, as specified in section 101(a) of the BBRA and section 314 of the BIPA, are no longer in effect due to the implementation of case-mix refinements as of January 1, 2006. However, the temporary increase of 128 percent in the per diem adjusted payment rates for SNF residents with AIDS, enacted by section 511 of the MMA, remains in effect.

We used the SNF market basket to adjust each per diem component of the Federal rates forward to reflect cost increases occurring between the midpoint of the Federal FY beginning October 1, 2007, and ending September 30, 2008, and the midpoint of the Federal FY beginning October 1, 2008, and ending September 30, 2009, to which the payment rates apply. In accordance with section 1888(e)(4)(E)(ii)(IV) of the Act, we update the payment rates for FY 2009 by a factor equal to the full market basket index percentage increase. (We note, however, that the President's budget currently includes a provision that would establish a zero percent market basket update for FYs 2009 through 2011, and that the provisions outlined in this proposed rule would need to reflect any legislation that the Congress may enact to adopt that proposal.) We further adjust the rates by a wage index budget neutrality factor, described later in this section. Tables 2 and 3 reflect the updated components of the unadjusted Federal rates for FY 2009.

TABLE 2.—FY 2009 UNADJUSTED FEDERAL RATE PER DIEM—URBAN

Rate component	Nursing—Case-mix	Therapy—Case-mix	Therapy—Non-case-mix	Non-case-mix
Per Diem Amount	$151.30	$113.97	$15.00	$77.22

TABLE 3.—FY 2009 UNADJUSTED FEDERAL RATE PER DIEM—RURAL

Rate component	Nursing—Case-mix	Therapy—Case-mix	Therapy—Non-case-mix	Non-case-mix
Per Diem Amount	$144.55	$131.42	$16.04	$78.64

B. Case-Mix Adjustments

1. Background

Section 1888(e)(4)(G)(i) of the Act requires the Secretary to make an adjustment to account for case-mix. The statute specifies that the adjustment is to reflect both a resident classification system that the Secretary establishes to account for the relative resource use of different patient types, as well as resident assessment and other data that the Secretary considers appropriate. In first implementing the SNF PPS (63 FR 26252, May 12, 1998), we developed the Resource Utilization Groups, version III (RUG–III) case-mix classification system, which tied the amount of payment to resident resource use in combination with resident characteristic information. Staff time measurement (STM) studies conducted in 1990, 1995, and 1997 provided information on resource use (time spent by staff members on residents) and resident characteristics that enabled us not only to establish RUG–III, but also to create case-mix indexes.

Under the BBA, each update of the SNF PPS payment rates must include the case-mix classification methodology applicable for the coming Federal FY. As indicated in section I.F.1 of this proposed rule, the payment rates set forth herein reflect the use of the refined RUG–53 system that we discussed in detail in the proposed and final rules for FY 2006.

When we developed the refined RUG–53 system, we constructed new case-mix indexes, using the Staff Time Measurement (STM) study data that was collected during the 1990s and originally used in creating the SNF PPS case-mix classification system and case-mix indexes. In section II.B.2 of this proposed rule, we discuss further adjustments to those new case-mix indexes.

2. Development of the Case-Mix Indexes

In the SNF PPS final rule for FY 2006 (70 FR 45032, August 4, 2005), we introduced two refinements to the SNF PPS: nine new case-mix groups to account for the care needs of beneficiaries requiring both extensive medical and rehabilitation services, and an adjustment to reflect the variability in the use of non-therapy ancillaries (NTAs). We made these refinements by using the resource minute data from the original 44-group RUG–III model to create a new set of relative weights, or case-mix indexes (CMIs), for the 53-group RUG–III model. We then compared the CMIs for the two models to ensure that estimated total payments under the 53-group model would maintain parity to those that would have been made under the 44-group model.

In conducting this analysis, we used FY 2001 claims data (the most current data available at the time) to compare the distribution of payment days by RUG category in the original, 44-group model with anticipated payments by RUG category in the refined 53-group model. Based on the results of this analysis, we adjusted the new CMIs upward by applying a parity adjustment factor, in order to ensure that the RUG–III model was expanded in a budget-neutral manner. We then applied a second adjustment to the CMIs to account for the variability in the use of NTA services. These two adjustments resulted in a combined 17.9 percent increase in the CMIs that went into effect on January 1, 2006, as part of the case-mix refinement implementation. A detailed description of the methods used to make these two adjustments to the CMIs appears in the SNF PPS proposed rule for FY 2006 (70 FR 29077 through 29078, May 19, 2005). However, we recognized that utilization patterns change over time, and in the FY 2006 final rule (70 FR 45031, August 4, 2005), we committed to monitoring the accuracy and effectiveness of the CMIs used in the 53-group model.

In monitoring recent claims data, we observed that actual utilization patterns differed significantly from those we had projected using the 2001 data. In particular, the proportion of patients grouped in the highest paying RUG categories—combining high therapy with extensive services—greatly exceeded our projections. We have, therefore, used actual claims data to recalibrate both of the adjustments to the CMIs: the parity adjustment designed to make the change from the 44-group model to the 53-group model in a budget-neutral manner, and the factor used to recognize the variability in NTA utilization.

To determine the parity adjustment factor needed to re-establish budget neutrality, we compared simulated CY 2006 payments (using the most recent data available) for the 44-group and 53-group RUG–III models using the same methodology that we described in the SNF PPS proposed rule for FY 2006 (70 FR 29077 through 29078, May 19, 2005). Once we had identified the recalibrated parity adjustment factor necessary to re-establish budget neutrality, we then determined the recalibrated percentage adjustment that would be needed to reset the NTA component of the CMIs at the appropriate level specified in the SNF PPS final rule for FY 2006 (70 FR 45031, August 4, 2005). Under our proposed recalibration, these two adjustments, which had initially produced a combined increase of 17.9 percent in the FY 2006 refinement, would instead result in an overall 9.68 percent increase for FY 2009. Thus, for FY 2009, the aggregate impact of this proposed recalibration would be the difference between the original, FY 2006 total increase of 17.9 percent and the recalibrated total increase of 9.68 percent, or a negative $770 million.

It is extremely important to note that this adjustment, as proposed, would be made prospectively. However, we are responsible for maintaining the fiscal integrity of the SNF PPS, and by using the actual claims data, the SNF PPS would better reflect the resources used, resulting in more accurate payment. To that end, we have developed our proposed recalibration of the parity and NTA adjustments to the CMIs using actual claims distribution data. Although the 2001 data were the best source available at the time the FY 2006 refinements were introduced, the 2006 data provide the most recent and a more accurate source of RUG–53 utilization. (We also note that pursuant to our ongoing commitment to monitoring the accuracy and effectiveness of the CMIs under the refined case-mix system, there may be further revisions to the recalibration as we develop the FY 2009 final rule, based on the data available at that time.)

We note that the negative $770 million adjustment described above would be largely offset by the FY 2009 market basket adjustment factor of 3.1 percent, or $710 million, with a net result of a negative annual update of approximately $60 million. We are, nevertheless, confident that this proposed recalibration would achieve the goals of the refinement provision implemented in January 2006, and that, as a result, payments would better reflect those policies. We also wish to note that after it conducted a thorough review of SNF profit margins, MedPAC concluded that, in the aggregate, SNFs are operating on a sound financial basis. As evidenced by MedPAC's recent recommendation for a zero percent update for SNFs in FY 2009, we believe that this recalibration could be made without creating undue hardship on providers.

We list the case-mix adjusted payment rates separately for urban and rural SNFs in Tables 4 and 5, with the corresponding case-mix values. These tables do not reflect the AIDS add-on enacted by section 511 of the MMA, which we apply only after making all other adjustments (wage and case-mix).

TABLE 4.—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES—URBAN

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
RUX	1.77	2.25	267.80	256.43	.....	77.22	601.45
RUL	1.31	2.25	198.20	256.43	.....	77.22	531.85
RVX	1.44	1.41	217.87	160.70	.....	77.22	455.79
RVL	1.24	1.41	187.61	160.70	.....	77.22	425.53
RHX	1.33	0.94	201.23	107.13	.....	77.22	385.58
RHL	1.27	0.94	192.15	107.13	.....	77.22	376.50
RMX	1.80	0.77	272.34	87.76	.....	77.22	437.32
RML	1.57	0.77	237.54	87.76	.....	77.22	402.52
RLX	1.22	0.43	184.59	49.01	.....	77.22	310.82
RUC	1.20	2.25	181.56	256.43	.....	77.22	515.21
RUB	0.92	2.25	139.20	256.43	.....	77.22	472.85
RUA	0.78	2.25	118.01	256.43	.....	77.22	451.66
RVC	1.14	1.41	172.48	160.70	.....	77.22	410.40
RVB	1.01	1.41	152.81	160.70	.....	77.22	390.73
RVA	0.77	1.41	116.50	160.70	.....	77.22	354.42
RHC	1.13	0.94	170.97	107.13	.....	77.22	355.32
RHB	1.03	0.94	155.84	107.13	.....	77.22	340.19
RHA	0.88	0.94	133.14	107.13	.....	77.22	317.49
RMC	1.07	0.77	161.89	87.76	.....	77.22	326.87
RMB	1.01	0.77	152.81	87.76	.....	77.22	317.79
RMA	0.97	0.77	146.76	87.76	.....	77.22	311.74
RLB	1.06	0.43	160.38	49.01	.....	77.22	286.61
RLA	0.79	0.43	119.53	49.01	.....	77.22	245.76
SE3	1.72	.....	260.24	.....	15.00	77.22	352.46
SE2	1.38	.....	208.79	.....	15.00	77.22	301.01
SE1	1.17	.....	177.02	.....	15.00	77.22	269.24
SSC	1.14	.....	172.48	.....	15.00	77.22	264.70
SSB	1.05	.....	158.87	.....	15.00	77.22	251.09
SSA	1.02	.....	154.33	.....	15.00	77.22	246.55
CC2	1.13	.....	170.97	.....	15.00	77.22	263.19
CC1	0.99	.....	149.79	.....	15.00	77.22	242.01
CB2	0.91	.....	137.68	.....	15.00	77.22	229.90
CB1	0.84	.....	127.09	.....	15.00	77.22	219.31
CA2	0.83	.....	125.58	.....	15.00	77.22	217.80
CA1	0.75	.....	113.48	.....	15.00	77.22	205.70
IB2	0.69	.....	104.40	.....	15.00	77.22	196.62
IB1	0.67	.....	101.37	.....	15.00	77.22	193.59
IA2	0.57	.....	86.24	.....	15.00	77.22	178.46
IA1	0.53	.....	80.19	.....	15.00	77.22	172.41
BB2	0.68	.....	102.88	.....	15.00	77.22	195.10
BB1	0.65	.....	98.35	.....	15.00	77.22	190.57
BA2	0.56	.....	84.73	.....	15.00	77.22	176.95
BA1	0.48	.....	72.62	.....	15.00	77.22	164.84
PE2	0.79	.....	119.53	.....	15.00	77.22	211.75
PE1	0.77	.....	116.50	.....	15.00	77.22	208.72
PD2	0.72	.....	108.94	.....	15.00	77.22	201.16
PD1	0.70	.....	105.91	.....	15.00	77.22	198.13
PC2	0.66	.....	99.86	.....	15.00	77.22	192.08
PC1	0.65	.....	98.35	.....	15.00	77.22	190.57
PB2	0.52	.....	78.68	.....	15.00	77.22	170.90
PB1	0.50	.....	75.65	.....	15.00	77.22	167.87
PA2	0.49	.....	74.14	.....	15.00	77.22	166.36
PA1	0.46	.....	69.60	.....	15.00	77.22	161.82

TABLE 5.—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES—RURAL

RUG–III category	Nursing Index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
RUX	1.77	2.25	255.85	295.70	.....	78.64	630.19
RUL	1.31	2.25	189.36	295.70	.....	78.64	563.70
RVX	1.44	1.41	208.15	185.30	.....	78.64	472.09
RVL	1.24	1.41	179.24	185.30	.....	78.64	443.18
RHX	1.33	0.94	192.25	123.53	.....	78.64	394.42
RHL	1.27	0.94	183.58	123.53	.....	78.64	385.75
RMX	1.80	0.77	260.19	101.19	.....	78.64	440.02
RML	1.57	0.77	226.94	101.19	.....	78.64	406.77
RLX	1.22	0.43	176.35	56.51	.....	78.64	311.50

TABLE 5.—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES—RURAL—Continued

RUG–III category	Nursing Index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
RUC	1.20	2.25	173.46	295.70	.....	78.64	547.80
RUB	0.92	2.25	132.99	295.70	.....	78.64	507.33
RUA	0.78	2.25	112.75	295.70	.....	78.64	487.09
RVC	1.14	1.41	164.79	185.30	.....	78.64	428.73
RVB	1.01	1.41	146.00	185.30	.....	78.64	409.94
RVA	0.77	1.41	111.30	185.30	.....	78.64	375.24
RHC	1.13	0.94	163.34	123.53	.....	78.64	365.51
RHB	1.03	0.94	148.89	123.53	.....	78.64	351.06
RHA	0.88	0.94	127.20	123.53	.....	78.64	329.37
RMC	1.07	0.77	154.67	101.19	.....	78.64	334.50
RMB	1.01	0.77	146.00	101.19	.....	78.64	325.83
RMA	0.97	0.77	140.21	101.19	.....	78.64	320.04
RLB	1.06	0.43	153.22	56.51	.....	78.64	288.37
RLA	0.79	0.43	114.19	56.51	.....	78.64	249.34
SE3	1.72	.....	248.63	.....	16.04	78.64	343.31
SE2	1.38	.....	199.48	.....	16.04	78.64	294.16
SE1	1.17	.....	169.12	.....	16.04	78.64	263.80
SSC	1.14	.....	164.79	.....	16.04	78.64	259.47
SSB	1.05	.....	151.78	.....	16.04	78.64	246.46
SSA	1.02	.....	147.44	.....	16.04	78.64	242.12
CC2	1.13	.....	163.34	.....	16.04	78.64	258.02
CC1	0.99	.....	143.10	.....	16.04	78.64	237.78
CB2	0.91	.....	131.54	.....	16.04	78.64	226.22
CB1	0.84	.....	121.42	.....	16.04	78.64	216.10
CA2	0.83	.....	119.98	.....	16.04	78.64	214.66
CA1	0.75	.....	108.41	.....	16.04	78.64	203.09
IB2	0.69	.....	99.74	.....	16.04	78.64	194.42
IB1	0.67	.....	96.85	.....	16.04	78.64	191.53
IA2	0.57	.....	82.39	.....	16.04	78.64	177.07
IA1	0.53	.....	76.61	.....	16.04	78.64	171.29
BB2	0.68	.....	98.29	.....	16.04	78.64	192.97
BB1	0.65	.....	93.96	.....	16.04	78.64	188.64
BA2	0.56	.....	80.95	.....	16.04	78.64	175.63
BA1	0.48	.....	69.38	.....	16.04	78.64	164.06
PE2	0.79	.....	114.19	.....	16.04	78.64	208.87
PE1	0.77	.....	111.30	.....	16.04	78.64	205.98
PD2	0.72	.....	104.08	.....	16.04	78.64	198.76
PD1	0.70	.....	101.19	.....	16.04	78.64	195.87
PC2	0.66	.....	95.40	.....	16.04	78.64	190.08
PC1	0.65	.....	93.96	.....	16.04	78.64	188.64
PB2	0.52	.....	75.17	.....	16.04	78.64	169.85
PB1	0.50	.....	72.28	.....	16.04	78.64	166.96
PA2	0.49	.....	70.83	.....	16.04	78.64	165.51
PA1	0.46	.....	66.49	.....	16.04	78.64	161.17

C. Wage Index Adjustment to Federal Rates

Section 1888(e)(4)(G)(ii) of the Act requires that we adjust the Federal rates to account for differences in area wage levels, using a wage index that we find appropriate. Since the inception of a PPS for SNFs, we have used hospital wage data in developing a wage index to be applied to SNFs. We propose to continue that practice for FY 2009, as we continue to believe that in the absence of SNF-specific wage data, using the hospital inpatient wage index is appropriate and reasonable for the SNF PPS. As explained in the update notice for FY 2005 (69 FR 45786, July 30, 2004), the SNF PPS does not use the hospital area wage index's occupational mix adjustment, as this adjustment serves specifically to define the occupational categories more clearly in a hospital setting; moreover, the collection of the occupational wage data also excludes any wage data related to SNFs. Therefore, we believe that using the updated wage data exclusive of the occupational mix adjustment continues to be appropriate for SNF payments.

Since the implementation of the SNF PPS, as set forth in § 413.337(a)(1)(ii), a SNF's wage index is determined based on the location of the SNF in an urban or rural area as defined in § 413.333 and further defined in § 412.62(f)(1)(ii) and § 412.62(f)(1)(iii) as urban and rural areas, respectively. In the FY 2006 SNF PPS final rule (70 FR 45041, August 4, 2005), we adopted revised labor market area definitions based on CBSAs. At the time, we noted that these were the same labor market area definitions (based on OMB's new CBSA designations) implemented under the Hospital Inpatient Prospective Payment System (IPPS) at § 412.64(b), which were effective for those hospitals beginning October 1, 2004, as discussed in the IPPS final rule for FY 2005 (69 FR at 49026 through 49034, August 11, 2004). In the FY 2006 SNF PPS final rule, we inadvertently omitted making a conforming regulation text change for § 413.333. However, no change was made to our decision to follow the IPPS definition of urban and rural. We are proposing to make that conforming regulation text change to revise the definitions for rural and urban areas

effective for services provided on or after October 1, 2005, to reference the regulations at § 412.64(b)(1)(ii)(A) through (C), consistent with the revision under the IPPS.

1. Clarification of New England Deemed Counties

We are taking this opportunity to address the change in the treatment of ''New England deemed counties'' (that is, those counties in New England listed in § 412.64(b)(1)(ii)(B) that were deemed to be part of urban areas under section 601(g) of the Social Security Amendments of 1983) that was made in the FY 2008 IPPS final rule with comment period (72 FR 47337 through 47338, August 22, 2007). These counties include the following: Litchfield County, Connecticut; York County, Maine; Sagadahoc County, Maine; Merrimack County, New Hampshire; and Newport County, Rhode Island. Of these five ''New England deemed counties,'' three (York County, Sagadahoc County, and Newport County) are also included in metropolitan statistical areas defined by OMB and are considered urban under both the current IPPS and SNF PPS labor market area definitions in § 412.64(b)(1)(ii)(A). The remaining two, Litchfield County and Merrimack County, are geographically located in areas that are considered rural under the current IPPS (and SNF PPS) labor market area definitions, but have been previously deemed urban under the IPPS in certain circumstances, as discussed below.

In the FY 2008 IPPS final rule with comment period, § 412.64(b)(1)(ii)(B) was revised such that the two ''New England deemed counties'' that are still considered rural under the OMB definitions (Litchfield County, CT and Merrimack County, NH), are no longer considered urban effective for discharges occurring on or after October 1, 2007, and therefore, are considered rural in accordance with § 412.64(b)(1)(ii)(C). However, for purposes of payment under the IPPS, acute-care hospitals located within those areas are treated as being reclassified to their deemed urban area effective for discharges occurring on or after October 1, 2007 (see 72 FR 47337 through 47338). We note that the SNF PPS does not provide for such geographic reclassification. Also, in the FY 2008 IPPS final rule with comment period (72 FR 47338), we explained that we have limited this policy change for the ''New England deemed counties'' only to IPPS hospitals, and any change to non-IPPS provider wage indexes would be addressed in the respective payment system rules. Accordingly, we are taking this opportunity to clarify the treatment of ''New England deemed counties'' under the SNF PPS in this proposed rule.

As discussed above, the SNF PPS has consistently used the IPPS definition of ''urban'' and ''rural'' with regard to the wage index used in the SNF PPS. Historical changes to the labor market area/geographic classifications and annual updates to the wage index values under the SNF PPS are made effective October 1 each year. When we established the most recent SNF PPS payment rate update, effective for SNF services provided on or after October 1, 2007 through September 30, 2008, we considered the ''New England deemed counties'' (including Litchfield County, CT and Merrimack County, NH) as urban for FY 2008, as evidenced by the inclusion of Litchfield County as one of the constituent counties of urban CBSA 25540 (Hartford-West Hartford-East Hartford, CT), and the inclusion of Merrimack County as one of the constituent counties of urban CBSA 31700 (Manchester-Nashua, NH)).

As noted above, § 413.333 indicates that the terms ''rural'' and ''urban'' are defined according to the definitions of those terms as used in the IPPS. Applying the IPPS definitions, Litchfield County, CT and Merrimack County, NH are not considered ''urban'' under § 412.64(b)(1)(ii)(A) through (B) as revised under the FY 2008 IPPS final rule and, therefore, are considered ''rural'' under § 412.64(b)(1)(ii)(C). Accordingly, reflecting our policy to use the IPPS definitions of ''urban'' and ''rural,'' these two counties will be considered ''rural'' under the SNF PPS effective with the next update of the SNF PPS payment rates on October 1, 2008, and will no longer be included in urban CBSA 25540 (Hartford-West Hartford-East Hartford, CT) and urban CBSA 31700 (Manchester-Nashua, NH), respectively. We note that this policy is consistent with our policy of not taking into account IPPS geographic reclassifications in determining payments under the SNF PPS. As indicated above, we are proposing to make a technical change to the regulations at § 413.333 to reflect the updated IPPS regulation reference.

2. Multi-Campus Hospital Wage Index Data

In the FY 2008 SNF PPS final rule (72 FR 43412, August 3, 2007), we established SNF PPS wage index values for FY 2008 calculated from the same data (collected from cost reports submitted by hospitals for cost reporting periods beginning during FY 2004) used to compute the FY 2008 acute care hospital inpatient wage index, without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. However, the IPPS policy that apportions the wage data for multi-campus hospitals was not finalized before the SNF PPS final rule. The SNF PPS wage index values applicable for services provided on or after October 1, 2007 through September 30, 2008 are shown in Table 8 (for urban areas) and Table 9 (for rural areas) and in the Addendum to the FY 2008 SNF PPS final rule (72 FR 43437 through 43463).

We are continuing to use IPPS wage data for FY 2009 because we believe that in the absence of SNF-specific wage data, using the hospital inpatient wage data is appropriate and reasonable for the SNF PPS. We note that the IPPS wage data used to determine the proposed FY 2009 SNF wage index values reflect our policy that was adopted under the IPPS beginning in FY 2008, which apportions the wage data for multi-campus hospitals located in different labor market areas, or Core-Based Statistical Areas (CBSAs), to each CBSA where the campuses are located (see the FY 2008 IPPS final rule with comment period (72 FR 47317 through 47320)). Specifically, for the proposed FY 2009 SNF PPS, the wage index was computed using IPPS wage data (published by hospitals for cost reporting periods beginning in 2005, as with the FY 2009 IPPS wage index), which allocated salaries and hours to the campuses of two multi-campus hospitals with campuses that are located in different labor areas; one is Massachusetts and the other is Illinois. The wage index values for the proposed FY 2009 SNF PPS in the following CBSAs are affected by this policy: Boston-Quincy, MA (CBSA 14484), Providence-New Bedford-Falls River, RI–MA (CBSA 39300), Chicago-Naperville-Joliet, IL (CBSA 16974) and Lake County-Kenosha County, IL–WI (CBSA 29404) (please refer to Table 8 in the Addendum of this proposed rule).

In summary, for FY 2009, we propose to use the FY 2009 wage index data (collected from cost reports submitted by hospitals for cost reporting periods beginning during FY 2005) to adjust SNF PPS payments beginning October 1, 2008. These data reflect the multi-campus and New England deemed counties policies discussed above.

Finally, we propose to continue using the same methodology discussed in the SNF PPS final rule for FY 2008 (72 FR 43423) to address those geographic areas in which there are no hospitals and, thus, no hospital wage index data on

which to base the calculation of the FY 2009 SNF PPS wage index. For rural geographic areas that do not have hospitals and, therefore, lack hospital wage data on which to base an area wage adjustment, we would use the average wage index from all contiguous CBSAs as a reasonable proxy. This methodology is used to construct the wage index for rural Massachusetts. However, we would not apply this methodology to rural Puerto Rico due to the distinct economic circumstances that exist there, but instead would continue using the most recent wage index previously available for that area. For urban areas without specific hospital wage index data, we would use the average wage indexes of all of the urban areas within the State to serve as a reasonable proxy for the wage index of that urban CBSA. The only urban area without wage index data available is CBSA (25980) Hinesville-Fort Stewart, GA.

To calculate the SNF PPS wage index adjustment, we would apply the wage index adjustment to the labor-related portion of the Federal rate, which is 69.994 percent of the total rate. This percentage reflects the labor-related relative importance for FY 2009, using the revised and rebased FY 2004-based market basket. The labor-related relative importance for FY 2008 was 70.249, as shown in Table 11. We calculate the labor-related relative importance from the SNF market basket, and it approximates the labor-related portion of the total costs after taking into account historical and projected price changes between the base year and FY 2009. The price proxies that move the different cost categories in the market basket do not necessarily change at the same rate, and the relative importance captures these changes. Accordingly, the relative importance figure more closely reflects the cost share weights for FY 2009 than the base year weights from the SNF market basket.

We calculate the labor-related relative importance for FY 2009 in four steps. First, we compute the FY 2009 price index level for the total market basket and each cost category of the market basket. Second, we calculate a ratio for each cost category by dividing the FY 2009 price index level for that cost category by the total market basket price index level. Third, we determine the FY 2009 relative importance for each cost category by multiplying this ratio by the base year (FY 2004) weight. Finally, we add the FY 2009 relative importance for each of the labor-related cost categories (wages and salaries, employee benefits, non-medical professional fees, labor-intensive services, and a portion of capital-related expenses) to produce the FY 2009 labor-related relative importance. Tables 6 and 7 below show the Federal rates by labor-related and non-labor-related components.

TABLE 6.—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT

RUG-III category	Total rate	Labor portion	Non-labor portion
RUX	601.45	420.98	180.47
RUL	531.85	372.26	159.59
RVX	455.79	319.03	136.76
RVL	425.53	297.85	127.68
RHX	385.58	269.88	115.70
RHL	376.50	263.53	112.97
RMX	437.32	306.10	131.22
RML	402.52	281.74	120.78
RLX	310.82	217.56	93.26
RUC	515.21	360.62	154.59
RUB	472.85	330.97	141.88
RUA	451.66	316.13	135.53
RVC	410.40	287.26	123.14
RVB	390.73	273.49	117.24
RVA	354.42	248.07	106.35
RHC	355.32	248.70	106.62
RHB	340.19	238.11	102.08
RHA	317.49	222.22	95.27
RMC	326.87	228.79	98.08
RMB	317.79	222.43	95.36
RMA	311.74	218.20	93.54
RLB	286.61	200.61	86.00
RLA	245.76	172.02	73.74
SE3	352.46	246.70	105.76
SE2	301.01	210.69	90.32
SE1	269.24	188.45	80.79
SSC	264.70	185.27	79.43
SSB	251.09	175.75	75.34
SSA	246.55	172.57	73.98
CC2	263.19	184.22	78.97
CC1	242.01	169.39	72.62
CB2	229.90	160.92	68.98
CB1	219.31	153.50	65.81
CA2	217.80	152.45	65.35
CA1	205.70	143.98	61.72
IB2	196.62	137.62	59.00
IB1	193.59	135.50	58.09
IA2	178.46	124.91	53.55
IA1	172.41	120.68	51.73
BB2	195.10	136.56	58.54
BB1	190.57	133.39	57.18
BA2	176.95	123.85	53.10
BA1	164.84	115.38	49.46

TABLE 6.—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG-III category	Total rate	Labor portion	Non-labor portion
PE2	211.75	148.21	63.54
PE1	208.72	146.09	62.63
PD2	201.16	140.80	60.36
PD1	198.13	138.68	59.45
PC2	192.08	134.44	57.64
PC1	190.57	133.39	57.18
PB2	170.90	119.62	51.28
PB1	167.87	117.50	50.37
PA2	166.36	116.44	49.92
PA1	161.82	113.26	48.56

TABLE 7.—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT

RUG-III category	Total rate	Labor portion	Non-labor portion
RUX	630.19	441.10	189.09
RUL	563.70	394.56	169.14
RVX	472.09	330.43	141.66
RVL	443.18	310.20	132.98
RHX	394.42	276.07	118.35
RHL	385.75	270.00	115.75
RMX	440.02	307.99	132.03
RML	406.77	284.71	122.06
RLX	311.50	218.03	93.47
RUC	547.80	383.43	164.37
RUB	507.33	355.10	152.23
RUA	487.09	340.93	146.16
RVC	428.73	300.09	128.64
RVB	409.94	286.93	123.01
RVA	375.24	262.65	112.59
RHC	365.51	255.84	109.67
RHB	351.06	245.72	105.34
RHA	329.37	230.54	98.83
RMC	334.50	234.13	100.37
RMB	325.83	228.06	97.77
RMA	320.04	224.01	96.03
RLB	288.37	201.84	86.53
RLA	249.34	174.52	74.82
SE3	343.31	240.30	103.01
SE2	294.16	205.89	88.27
SE1	263.80	184.64	79.16
SSC	259.47	181.61	77.86
SSB	246.46	172.51	73.95
SSA	242.12	169.47	72.65
CC2	258.02	180.60	77.42
CC1	237.78	166.43	71.35
CB2	226.22	158.34	67.88
CB1	216.10	151.26	64.84
CA2	214.66	150.25	64.41
CA1	203.09	142.15	60.94
IB2	194.42	136.08	58.34
IB1	191.53	134.06	57.47
IA2	177.07	123.94	53.13
IA1	171.29	119.89	51.40
BB2	192.97	135.07	57.90
BB1	188.64	132.04	56.60
BA2	175.63	122.93	52.70
BA1	164.06	114.83	49.23
PE2	208.87	146.20	62.67
PE1	205.98	144.17	61.81
PD2	198.76	139.12	59.64
PD1	195.87	137.10	58.77
PC2	190.08	133.04	57.04
PC1	188.64	132.04	56.60
PB2	169.85	118.88	50.97
PB1	166.96	116.86	50.10
PA2	165.51	115.85	49.66
PA1	161.17	112.81	48.36

Section 1888(e)(4)(G)(ii) of the Act also requires that we apply this wage index in a manner that does not result in aggregate payments that are greater or less than would otherwise be made in the absence of the wage adjustment. For FY 2009 (Federal rates effective October 1, 2008), we would apply an adjustment to fulfill the budget neutrality requirement. We would meet this requirement by multiplying each of the components of the unadjusted Federal rates by a budget neutrality factor equal to the ratio of the weighted average wage adjustment factor for FY 2008 to the weighted average wage adjustment factor for FY 2009. For this calculation, we use the same 2006 claims utilization data for both the numerator and denominator of this ratio. We define the wage adjustment factor used in this calculation as the labor share of the rate component multiplied by the wage index plus the non-labor share of the rate component. The proposed budget neutrality factor for this year is 1.0009. The wage index applicable to FY 2009 is set forth in Tables 8 and 9, which appear in the Addendum of this proposed rule.

In the SNF PPS final rule for FY 2006 (70 FR 45026, August 4, 2005), we adopted the changes discussed in the Office of Management and Budget (OMB) Bulletin No. 03–04 (June 6, 2003), available online at *www.whitehouse.gov/omb/bulletins/b03–04.html,* which announced revised definitions for Metropolitan Statistical Areas (MSAs), and the creation of Micropolitan Statistical Areas and Combined Statistical Areas. In addition, OMB published subsequent bulletins regarding CBSA changes, including changes in CBSA numbers and titles. As indicated in the FY 2008 SNF PPS final rule (72 FR 43423, August 3, 2007), this and all subsequent SNF PPS rules and notices are considered to incorporate the CBSA changes published in the most recent OMB bulletin that applies to the hospital wage data used to determine the current SNF PPS wage index. The OMB bulletins may be accessed online at *http://www.whitehouse.gov/omb/bulletins/index.html.*

In adopting the OMB Core-Based Statistical Area (CBSA) geographic designations, we provided for a 1-year transition with a blended wage index for all providers. For FY 2006, the wage index for each provider consisted of a blend of 50 percent of the FY 2006 MSA-based wage index and 50 percent of the FY 2006 CBSA-based wage index (both using FY 2002 hospital data). We referred to the blended wage index as the FY 2006 SNF PPS transition wage index. As discussed in the SNF PPS final rule for FY 2006 (70 FR 45041), subsequent to the expiration of this 1-year transition on September 30, 2006, we used the full CBSA-based wage index values, as now presented in Tables 8 and 9 of this proposed rule.

D. Updates to the Federal Rates

In accordance with section 1888(e)(4)(E) of the Act, as amended by section 311 of the BIPA, the proposed payment rates in this proposed rule reflect an update equal to the full SNF market basket, estimated at 3.1 percentage points. We would continue to disseminate the rates, wage index, and case-mix classification methodology through the **Federal Register** before the August 1 that precedes the start of each succeeding FY.

E. Relationship of RUG–III Classification System to Existing Skilled Nursing Facility Level-of-Care Criteria

As discussed in § 413.345, we include in each update of the Federal payment rates in the **Federal Register** the designation of those specific RUGs under the classification system that represent the required SNF level of care, as provided in § 409.30. This designation reflects an administrative presumption under the refined RUG–53 that beneficiaries who are correctly assigned to one of the upper 35 of the RUG–53 groups on the initial 5-day, Medicare-required assessment are automatically classified as meeting the SNF level of care definition up to and including the assessment reference date on the 5-day Medicare required assessment.

A beneficiary assigned to any of the lower 18 groups is not automatically classified as either meeting or not meeting the definition, but instead receives an individual level of care determination using the existing administrative criteria. This presumption recognizes the strong likelihood that beneficiaries assigned to one of the upper 35 groups during the immediate post-hospital period require a covered level of care, which would be significantly less likely for those beneficiaries assigned to one of the lower 18 groups.

In this proposed rule, we are continuing the designation of the upper 35 groups for purposes of this administrative presumption, consisting of the following RUG–53 classifications: All groups within the Rehabilitation plus Extensive Services category; All groups within the Ultra High Rehabilitation category; all groups within the Very High Rehabilitation category; all groups within the High Rehabilitation category; all groups within the Medium Rehabilitation category; all groups within the Low Rehabilitation category; all groups within the Extensive Services category; all groups within the Special Care category; and, all groups within the Clinically Complex category.

F. Example of Computation of Adjusted PPS Rates and SNF Payment

Using the hypothetical SNF XYZ described in Table 10 below, the following shows the adjustments made to the Federal per diem rate to compute the provider's actual per diem PPS payment. SNF XYZ's 12-month cost reporting period begins October 1, 2008. SNF XYZ's total PPS payment would equal $29,719. We derive the Labor and Non-labor columns from Table 6 of this proposed rule.

TABLE 10.—RUG–53 SNF XYZ: LOCATED IN CEDAR RAPIDS, IA (URBAN CBSA 16300)

[Wage Index: 0.8924]

RUG Group	Labor	Wage index	Adj. labor	Non-labor	Adj. rate	Percent adj	Medicare days	payment
RVX	$319.03	0.8924	$284.70	$136.76	$421.46	$421.46	14	$5,900.00
RLX	217.56	0.8924	194.15	93.26	287.41	287.41	30	8,622.00
RHA	222.22	0.8924	198.31	95.27	293.58	293.58	16	4,697.00
CC2	184.22	0.8924	164.40	78.97	243.37	554.88*	10	5,549.00
IA2	124.91	0.8924	111.47	53.55	165.02	165.02	30	4,951.00
Total							100	29,719.00

* Reflects a 128 percent adjustment from section 511 of the MMA.

G. Other Issues

1. Staff Time and Resource Intensity Verification (STRIVE) Project

[If you choose to comment on issues in this section, please include the caption ''STRIVE Project'' at the beginning of your comments.]

As noted previously in section II.B.1 of this proposed rule, section 1888(e)(4)(G)(i) of the Act requires the Secretary to make an adjustment to account for case-mix. The statute specifies that the adjustment is to reflect both a resident classification system that the Secretary establishes to account for the relative resource use of different patient types, as well as resident assessment and other data that the Secretary considers appropriate. In first implementing the SNF PPS (63 FR 26252, May 12, 1998), we developed the RUG-III case-mix classification system, which tied the amount of payment to resident resource use in combination with resident characteristic information. Staff time measurement (STM) studies conducted in 1990, 1995, and 1997 provided information on resource use (time spent by staff members on residents) and resident characteristics that enabled us not only to establish RUG–III, but also to create case-mix indexes.

Since that time, we have become concerned that incentives of the SNF PPS and the public reporting of nursing home quality measures likely have altered industry practices, and have affected the nursing resources required to treat different types of patients. Changes to technology might also have affected care methods, while more choices in housing alternatives (such as assisted living and community housing) may have altered the population mix served by nursing homes.

To help ensure that the SNF PPS payment rates reflect current practices and resource needs, CMS sponsored a national nursing home time study, STRIVE, which began in the Fall of 2005. Information collected in STRIVE includes the amount of time that staff members spend on residents and information on residents'' physical and clinical status derived from MDS assessment data.

Two hundred and five nursing homes from the following fifteen States and jurisdictions volunteered to participate in STRIVE: The District of Columbia, Nevada, Florida, Illinois, Iowa, Kentucky, Louisiana, Michigan, Montana, New York, Ohio, South Dakota, Texas, Virginia, and Washington. We are currently analyzing staff time and MDS assessment data for approximately 9,700 residents.

Nursing homes with poor survey histories or pending enforcement actions were excluded from the sample. In addition, nursing homes with poor quality measure (QM) scores, low occupancy rates, or large proportions of private pay or pediatric patients were also excluded.

Nursing homes were randomly recruited within five strata. The five strata follow: Hospital-based facilities; facilities with high concentrations of residents on ventilators; facilities with high concentrations of residents with Human Immunodeficiency Virus (HIV); facilities with high concentrations of residents on Medicare Part A stays; and all other facilities. Facilities with large concentrations of residents on ventilators, residents with HIV, or residents on Part A stays were over-sampled in order to assure sufficient numbers of residents in those populations. Nursing homes were voluntarily recruited in random order until enough facilities in each targeted category agreed to participate.

Participating facilities included both not-for-profit entities and corporations; chains and independent operators; nursing homes with populations small to large in size; and facilities situated in urban and rural locations.

STRIVE began on-site data collection at both SNFs and Medicaid Nursing Facilities (NFs) in the Spring of 2006. STRIVE collected data from both types of facilities because almost half of the States use a version of the RUG-III system for their Medicaid reimbursement systems.

Participating facilities submitted both time and MDS assessment data. Nursing staff recorded their time over 48 hours. Nursing staff included registered nurses, licensed practical nurses, and nursing aides. Therapy staff recorded their time over 7 consecutive days. Therapy staff included physical therapists and aides; occupational therapists and aides; and speech-language pathologists. Each nursing home staff member recorded his or her time at the facility in different categories (for example, resident-specific time (RST), non-resident-specific time (NRST), unpaid time, and non-study time).

As our analysis continues, we expect to introduce changes to the RUG-III grouper methodology and clinical assessment instrument. Further exploration of STRIVE data and possible refinements to the SNF PPS may ultimately culminate in a new RUG model, version IV.

To date, STRIVE has benefited from stakeholder input, starting with the December 2005 Open Door Forum to which the public was invited. The educators, researchers, beneficiary advocates, clinicians, consultants, government experts, and representatives from health care, nursing home, and other related industry associations serving on the STRIVE technical expert panel (TEP) have provided valuable insights on topics such as sample populations. Beginning in 2005 until its most recent February 2008 meeting, the TEP has met twice and held two teleconferences. Additionally, our contractor recently established a smaller Analytic Panel consisting of various stakeholders who meet regularly with our researchers to discuss the analysis of the STRIVE data.

Our preliminary analyses of RUG III-related resource times and payment rates indicated that, as mentioned previously, SNF care patterns have changed significantly over the decade since we last conducted STMs. We note that calculating CMIs based upon STRIVE data for use within a RUG-III model constructed over a decade ago would create methodological challenges and, therefore, could only be considered an interim step, as we would have to reexamine the CMIs after changes to the structural model are finalized. We will continue to analyze STRIVE data and intend to create an updated RUG classification structure that would more accurately reflect current care practices and resource use. Our contractors also plan to receive input from the TEP and the Analytic Panel to guide the STRIVE analysis. We may also use the results of the contractors' analyses to make changes to the RUG classification structure. It is our intention to introduce new case-mix weights in FY 2010 that reflect the results of the STRIVE analysis and any changes to the RUG classification structure.

More information on STRIVE appears at the following Web site: *https://www.qtso.com/strive.html.* Items posted there include: Assessment forms distributed by STRIVE; ''train the trainer'' materials used to teach the data monitors who, in turn, instructed nursing home staff members on how to record their time; materials from State teleconferences; and slides presented at STRIVE TEPs. We plan to post preliminary results of the STRIVE analyses, when available, on the following Web site: *http://www.cms.hhs.gov/SNFPPS/10_TimeStudy.asp.*

2. Minimum Data Set (MDS) 3.0

[If you choose to comment on issues in this section, please include the caption ''MDS 3.0'' at the beginning of your comments.]

Sections 1819(f)(6)(A)–(B) and 1919(f)(6)(A)–(B) of the Social Security

Act, as amended by the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987), require the Secretary of the Department of Health and Human Services (the Secretary) to specify a minimum data set of core elements for use in conducting comprehensive assessments. As stated in § 483.20, Medicare- and Medicaid-participating nursing homes must conduct ''a comprehensive, accurate, standardized, reproducible assessment'' of each nursing home resident's functional capacity.

CMS is developing a new version of the MDS, MDS 3.0, to reflect more accurately each resident's clinical, cognitive, and functional status as well as the care that nursing homes provide residents. The regulations at § 483.20(b)(1)(i) through (xviii) list the clinical domains that must be included in the Resident Assessment Instrument (RAI). These domains have been incorporated into the MDS 2.0 and would also be included in MDS 3.0. We anticipate that in FY 2010, MDS 3.0 would become the current version of the MDS. MDS 3.0, like MDS 2.0, would focus on the clinical assessment of each nursing home resident to screen for common, often unrecognized or unevaluated, conditions and syndromes. We made clinical revisions to the instrument based on input from subject-area experts, feedback from MDS users, resident advocates and families, and new knowledge and evidence about resident assessment. With the implementation of MDS 3.0, we aim to increase the clinical relevance, accuracy, and efficiency of assessments; require assessors to record direct resident responses on some items; include assessment items used in other care settings; and move items toward future electronic health record formats. On January 24, 2008, CMS hosted a special Open Door Forum to provide details about MDS 3.0.

We now plan to evaluate the impact of the MDS 3.0 changes on the RUG–III resident classification system used in the Medicare payment structure. We intend to develop ways to adapt the RUG system to the MDS 3.0 assessment instrument as part of the STRIVE study. We would then finalize changes to the MDS 3.0 and any necessary adaptations to the RUG classification system. Our intent would be to implement the updated system nationally in FY 2010.

We are very much aware that the transition to a new MDS instrument in conjunction with the possible release of a new RUG grouper requires careful planning and extensive provider training. CMS staff are already working on training plans that would include a new MDS 3.0 manual, documentation explaining the updated RUG grouper methodology, data specifications for providers and vendors, training videos, a help desk call and e-mail center, and a train-the-trainer conference tentatively scheduled for Spring 2009. However, we realize that the most effective training would require coordination between CMS and its key stakeholders, including provider and professional associations, Fiscal Intermediaries and Part A and Part B Medicare Administrative Contractors (MACs), and State agencies. We want to encourage stakeholders to work with CMS staff to provide additional training opportunities on the local level to ensure a smooth transition. We plan to publish a transition plan in 2008 that should highlight opportunities for joint action. In 2009, we intend to make draft MDS 3.0 specifications available to providers and vendors. We also tentatively plan to include in the update to the FY 2010 SNF PPS rates (which we intend to introduce in Spring 2009 and finalize by the end of July, 2009) definitive information on the final MDS 3.0 and RUG grouper specifications. Additional information is available online at *http://www.cms.hhs.gov* via the following links:

- MDS 3.0 information: *http://www.cms.hhs.gov/NursingHomeQualityInits/25_NHQIMDS30.asp.*
- January 15, 2008 version of the MDS 3.0 instrument: *http://www.cms.hhs.gov/NursingHomeQualityInits/Downloads/MDS30DraftVersion.pdf.*
- MDS 3.0 timeline: *http://www.cms.hhs.gov/NursingHomeQualityInits/Downloads/MDS30Timeline.pdf.*

3. Integrated Post Acute Care Payment

[If you choose to comment on issues in this section, please include the caption ''Integrated Post Acute Care Payment'' at the beginning of your comments.]

Under current law, Medicare covers post-acute care (PAC) services in various care settings, including SNFs, home health agencies (HHAs), long-term care hospitals (LTCHs), and inpatient rehabilitation facilities (IRFs). Each of the PAC sites has a separate payment system that relies on different patient assessment instruments, although there is no mandated assessment instrument for LTCHs. The current model is based on provider-oriented ''silos'' with significant payment differentials existing between provider types that treat similar patients and provide similar services.

In the SNF PPS update notice for FY 2007 (71 FR 43172 through 43173, July 31, 2006), we described our plans to explore refinements to the existing PAC payment methodologies to create a more seamless system for payment and delivery of PAC under Medicare. The new model will focus on beneficiary needs rather than provider type and will be characterized by more consistent payments for the same type of care across different sites of service, quality-driven pay-for-performance incentives, and collection of uniform clinical assessment information to support quality and discharge planning functions.

We also noted in the FY 2007 SNF PPS update notice (71 FR 43172) that section 5008 of the Deficit Reduction Act (DRA) of 2005 mandates a PAC payment reform demonstration for purposes of understanding costs and outcomes across different PAC sites. To meet this mandate, CMS implemented the PAC Payment Reform Demonstration (PAC–PRD) to examine differences in costs and outcomes for PAC patients of similar case-mix who use different types of PAC providers and to develop a standardized patient assessment tool for use at hospital discharge and at PAC admission and discharge. This tool, the Continuity Assessment Record and Evaluation (CARE) tool, will measure the health and functional status of Medicare acute discharges. During the demonstration, CARE will be used at hospital discharge and upon admission and discharge from PAC settings. The CARE instrument consists of a core set of assessment items that are common to all patients and care settings and are organized under several major domains: Medical, Functional, Cognitive, Social, and Continuity of Care, in addition to supplemental items for specific conditions and care settings. Additional information on the PAC–PRD is available at: *http://www.cms.hhs.gov/DemoProjectsEvalRpts/MD/itemdetail.asp?filterType=dual,%20keyword&filterValue=post%20acute%20care&filterByDID=0&sortByDID=3&sortOrder=descending&itemID=CMS1201325&intNumPerPage=10.*

We are interested in receiving public comments on the CARE instrument, and specifically invite comments on how CARE might advance the use of Health Information Technology (HIT) in automating the process for collecting and submitting quality data. The CARE tool is available at *http://www.cms.hhs.gov/paperworkreductionactof1995/pral/list.asp.* Viewers should scroll down to the entry for CMS–10243, ''Data

Collection for Administering the Medicare Continuity Assessment Record and Evaluation (CARE) Instrument.'' Viewers can then click on the link to CMS–10243, click on the link to ''Downloads,'' and open Appendix A (''CARE Tool Item Matrix,'' a .pdf file) and Appendix B (''CARE Tool Master Document,'' in Microsoft Word).

In addition, we wish to take this opportunity to discuss recent developments in the related area of value-based purchasing (VBP). VBP ties payment to performance through the use of incentives based on measures of quality and cost of care. The implementation of VBP is rapidly transforming CMS from being a passive payer of claims to an active purchaser of higher quality, more efficient health care for Medicare beneficiaries. Our VBP initiatives include hospital pay for reporting (the Reporting Hospital Quality Data for the Annual Payment Update Program), physician pay for reporting (the Physician Quality Reporting Initiative), home health pay for reporting, the Hospital VBP Plan Report to Congress, and various VBP demonstration programs across payment settings, including the Premier Hospital Quality Incentive Demonstration and the Physician Group Practice Demonstration.

The preventable hospital-acquired conditions (HAC) payment provision for IPPS hospitals is another of CMS'' value-based purchasing initiatives. The principal behind the HAC payment provision (Medicare not paying more for healthcare-associated conditions) could be applied to the Medicare payment systems for other settings of care. Section 1886(d)(4)(D) of the Act required the Secretary to select for the HAC IPPS payment provision conditions that: (a) are high cost, high volume, or both; (b) are assigned to a higher-paying Medicare severity diagnosis-related group (MS–DRG) when present as a secondary diagnosis; and (c) could reasonably have been prevented through the application of evidence-based guidelines. Beginning October 1, 2008, Medicare can no longer assign an inpatient hospital discharge to a higher-paying MS–DRG if a selected HAC condition was not present on admission. That is, the case will be paid as though the secondary diagnosis were not present. (Medicare will continue to assign a discharge to a higher-paying MS–DRG in those instances where the selected condition was, in fact, present on admission).

The broad principle articulated in the HAC payment provision for IPPS hospitals—of Medicare not paying for these types of preventable conditions—could potentially be applied to other Medicare payment systems for similar conditions that occur in settings other than IPPS hospitals. Other possible settings of care might include hospital outpatient departments, SNFs, HHAs, end-stage renal disease facilities, and physician practices. The implementation would be different for each setting, as each payment system is different and the reasonable preventability through the application of evidence-based guidelines could vary for candidate conditions over the different settings. However, alignment of incentives across settings of care is an important goal for all of CMS'' VBP initiatives, including the HAC provision.

A related application of the broad principle behind the HAC payment provision for IPPS hospitals could be considered through Medicare secondary payer policy by requiring the provider that failed to prevent the occurrence of a preventable condition in one setting to pay for all or part of the necessary follow-up care in a second setting. This would help shield the Medicare program from inappropriately paying for the downstream effects of a preventable condition acquired in the first setting but treated in the second setting.

We note that we are not proposing new Medicare policy in this discussion of the possible application of HACs payment policy for IPPS hospitals to other settings, as some of these approaches may require new statutory authority. Rather, we are seeking public comment on the application of the preventable HACs payment provision for IPPS hospitals to other Medicare payment systems and settings. We look forward to working with stakeholders in the fight against these preventable conditions.

H. Miscellaneous Technical Corrections and Clarifications

We are also taking the opportunity to set forth certain technical corrections and clarifications in this proposed rule, as discussed below.

1. Bad Debt Payments

We are proposing to make a technical revision in the SNF PPS regulations at § 413.335(b) to reflect Medicare bad debt payments to SNFs. Under section 1861(v)(1) of the Act and § 413.89 of the regulations, Medicare may pay some or all of the uncollectible deductible and coinsurance amounts to those entities paid under a reasonable cost payment methodology that are eligible to receive payment for ''bad debt'' as defined in § 413.89(b)(1). Under the original reasonable cost SNF payment methodology that preceded the introduction of the SNF PPS, SNFs did, in fact, receive bad debt payments for uncollectible SNF coinsurance amounts (the SNF benefit has no deductible). As we noted in the preamble to the July 30, 1999 SNF PPS final rule (64 FR 41656), while the SNF PPS has maintained this longstanding practice of recognizing SNF bad debt payments ever since its inception, these payments are not included within the SNF PPS per diem itself, but rather, are claimed on the SNF's Medicare cost report. However, in drafting the regulations text in § 413.335(b) on the scope of the SNF PPS per diem payment, we inadvertently omitted a reference to this practice.

Accordingly, in this proposed rule, we now propose to rectify that inadvertent omission by adding a new clause to § 413.335(b), to clarify that in addition to the Federal per diem payment amounts, SNFs receive payment for bad debts of Medicare beneficiaries, as specified in the provisions of the regulations at § 413.89. We note that those provisions include the 30 percent reduction in applicable SNF bad debt payments made in accordance with section 5004 of the DRA, as specified in § 413.89(h)(2). Further, we note that the President's budget currently includes a provision that would eliminate Medicare bad debt payments altogether, and that the provisions outlined in this proposed rule would need to reflect any legislation that the Congress may enact to adopt that proposal. Finally, we note that our proposed revision is similar to language that already appears in the regulations text for the inpatient psychiatric facility PPS, at § 412.422(b)(2).

2. Additional Clarifications

We are also proposing to make clarifications in two other areas: When a SNF may bill at the default payment rate, and the role of rehabilitation services evaluations in SNFs.

A recent analysis of claims data has confirmed confusion among providers as to when it is permissible to submit a claim using the Health Insurance Prospective Payment System (HIPPS) rate code of AAA00, which is the default code. Under the SNF PPS, SNFs are required to submit resident assessment data according to an assessment schedule. When the resident assessment is prepared timely, the provider should bill the RUG payment group that is assigned to the assessment. When the SNF fails to comply with the assessment schedule, it must file a late assessment in order to be paid. In this

situation, CMS pays a ''default rate''—a reduced payment made in lieu of the full SNF PPS rate that would have been paid had the resident been assessed in a timely manner. Noncompliance with the schedule is determined by the assessment reference date (ARD) on the resident assessment.

Program instructions also allow for payment at the default rate in the following limited circumstances where the SNF has failed to assess the beneficiary: When the stay is less than 8 days within a spell of illness; the SNF is notified on an untimely basis or is unaware of a Medicare Secondary Payer denial; the SNF is notified on an untimely basis of the revocation of a payment ban; the beneficiary requests a demand bill; or, the SNF is notified on an untimely basis or is unaware of a beneficiary's disenrollment from a Medicare Advantage plan. Further information regarding these limited circumstances can be found in the Provider Reimbursement Manual, Part I (CMS Pub. 15–1), Chapter 28.

In circumstances other than those described above, no payment is available to the SNF where the SNF fails to assess the resident. However, even when no payment will be made, we wish to clarify that the SNF must nonetheless submit a claim using the HIPPS default rate code and an occurrence code 77 indicating provider liability in order to ensure that the beneficiary's spell of illness (benefit period) is updated.

We have also recently received questions concerning Change Request (CR) 5532 (Transmittal no. 73, dated June 29, 2007), regarding coverage of rehabilitation services in a SNF (see CMS Pub. 100–2, Chapter 8, § 30.4.1.1). As a result, we wish to clarify the requirement that an initial evaluation must be completed and the plan of treatment developed before recording the number of minutes of rehabilitation services provided or estimated for each discipline on the Resident Assessment Instrument (RAI).

For Medicare to cover rehabilitation services in a SNF, the services must be directly and specifically related to an active written treatment plan that is developed before the start of rehabilitation services. The plan must be based upon an initial evaluation performed by a qualified therapist (after SNF admission and before the start of rehabilitation services in the SNF) and must be approved by the physician after any needed consultation with the qualified therapist. This means that the evaluation must have been performed for each discipline and the plan of treatment developed in order to include minutes for each discipline under Section P (''Special Treatments and Procedures'') of the Resident Assessment Instrument, and also to project minutes under Section T (''Therapy Supplement for Medicare PPS'') of the Resident Assessment Instrument. Section T of the MDS is completed for Medicare 5-day assessments and in certain cases, when a beneficiary is readmitted to the SNF, whereas Section P is completed for each Medicare-required assessment. In those cases where a beneficiary is discharged during the SNF stay and later readmitted, an initial evaluation must be performed upon readmission to the SNF, prior to the start of rehabilitation services in the SNF.

III. The Skilled Nursing Facility Market Basket Index

[If you choose to comment on issues in this section, please include the caption ''Market Basket Index'' at the beginning of your comments.]

Section 1888(e)(5)(A) of the Act requires us to establish a SNF market basket index (input price index), that reflects changes over time in the prices of an appropriate mix of goods and services included in the SNF PPS. This proposed rule incorporates the latest available projections of the SNF market basket index. We will incorporate updated projections based on the latest available projections when we publish the SNF final rule. Accordingly, we have developed a SNF market basket index that encompasses the most commonly used cost categories for SNF routine services, ancillary services, and capital-related expenses.

Each year, we calculate a revised labor-related share based on the relative importance of labor-related cost categories in the input price index. Table 11 below summarizes the proposed updated labor-related share for FY 2009.

TABLE 11.—LABOR-RELATED RELATIVE IMPORTANCE, FY 2008 AND FY 2009

	Relative importance, labor-related, FY 2008 07:2 forecast	Relative importance, labor-related, FY 2009 08:1 forecast
Wages and salaries	51.218	51.139
Employee benefits	11.720	11.595
Nonmedical professional fees	1.333	1.331
Labor-intensive services	3.456	3.454
Capital-related (.391)	2.522	2.475
Total	70.249	69.994

Source: Global Insight, Inc., formerly DRI-WEFA.

A. Use of the Skilled Nursing Facility Market Basket Percentage

Section 1888(e)(5)(B) of the Act defines the SNF market basket percentage as the percentage change in the SNF market basket index from the average of the previous FY to the average of the current FY. For the Federal rates established in this proposed rule, we use the percentage increase in the SNF market basket index to compute the update factor for FY 2009. We use the Global Insight, Inc. (formerly DRI–WEFA), first quarter 2008 forecasted percentage increase in the FY 2004-based SNF market basket index for routine, ancillary, and capital-related expenses, described in the previous section, to compute the update factor in this proposed rule. Finally, as discussed in section I.A. of this proposed rule, we no longer compute update factors to adjust a facility-specific portion of the SNF PPS rates because the initial three-phase transition period from facility-specific to full Federal rates that started with cost reporting periods beginning in July 1998 has expired.

B. Market Basket Forecast Error Adjustment

As discussed in the June 10, 2003, supplemental proposed rule (68 FR 34768) and finalized in the August 4,

2003, final rule (68 FR 46067), the regulations at § 413.337(d)(2) provide for an adjustment to account for market basket forecast error. The initial adjustment applied to the update of the FY 2003 rate for FY 2004, and took into account the cumulative forecast error for the period from FY 2000 through FY 2002. Subsequent adjustments in succeeding FYs take into account the forecast error from the most recently available FY for which there is final data, and apply whenever the difference between the forecasted and actual change in the market basket exceeds a specified threshold. We originally used a 0.25 percentage point threshold for this purpose; however, for the reasons specified in the FY 2008 SNF PPS final rule (72 FR 43425, August 3, 2007), we adopted a 0.5 percentage point threshold effective with FY 2008. As discussed previously in section I.F.2. of this proposed rule, as the difference between the estimated and actual amounts of increase in the market basket index for FY 2007 (the most recently available FY for which there is final data) does not exceed the 0.5 percentage point threshold, the proposed payment rates for FY 2009 do not include a forecast error adjustment.

C. Federal Rate Update Factor

Section 1888(e)(4)(E)(ii)(IV) of the Act requires that the update factor used to establish the FY 2009 Federal rates be at a level equal to the full market basket percentage change. Accordingly, to establish the update factor, we determined the total growth from the average market basket level for the period of October 1, 2007 through September 30, 2008 to the average market basket level for the period of October 1, 2008 through September 30, 2009. Using this process, the proposed market basket update factor for FY 2009 SNF Federal rates is 3.1 percent. We used this revised proposed update factor to compute the Federal portion of the SNF PPS rate shown in Tables 2 and 3.

IV. Consolidated Billing

[If you choose to comment on issues in this section, please include the caption ''Consolidated Billing'' at the beginning of your comments.]

Section 4432(b) of the BBA established a consolidated billing requirement that places the Medicare billing responsibility for virtually all of the services that the SNF's residents receive on the SNF, except for a small number of services that the statute specifically identifies as being excluded from this provision. As noted previously in section I. of this proposed rule, subsequent legislation enacted a number of modifications in the consolidated billing provision.

Specifically, section 103 of the BBRA amended this provision by further excluding a number of individual ''high-cost, low-probability'' services, identified by the Healthcare Common Procedure Coding System (HCPCS) codes, within several broader categories (chemotherapy and its administration, radioisotope services, and customized prosthetic devices) that otherwise remained subject to the provision. We discuss this BBRA amendment in greater detail in the proposed and final rules for FY 2001 (65 FR 19231 through 19232, April 10, 2000, and 65 FR 46790 through 46795, July 31, 2000), as well as in Program Memorandum AB–00–18 (Change Request #1070), issued March 2000, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/ab001860.pdf.*

Section 313 of the BIPA further amended this provision by repealing its Part B aspect; that is, its applicability to services furnished to a resident during a SNF stay that Medicare does not cover. (However, physical, occupational, and speech-language therapy remain subject to consolidated billing, regardless of whether the resident who receives these services is in a covered Part A stay.) We discuss this BIPA amendment in greater detail in the proposed and final rules for FY 2002 (66 FR 24020 through 24021, May 10, 2001, and 66 FR 39587 through 39588, July 31, 2001).

In addition, section 410 of the MMA amended this provision by excluding certain practitioner and other services furnished to SNF residents by RHCs and FQHCs. We discuss this MMA amendment in greater detail in the update notice for FY 2005 (69 FR 45818–45819, July 30, 2004), as well as in Program Transmittal #390 (Change Request #3575), issued December 10, 2004, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/r390cp.pdf.*

To date, the Congress has enacted no further legislation affecting the consolidated billing provision. However, as noted above and explained in the proposed rule for FY 2001 (65 FR 19232, April 10, 2000), the amendments enacted in section 103 of the BBRA not only identified for exclusion from this provision a number of particular service codes within four specified categories (that is, chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices), but also gave the Secretary ''* * * the authority to designate additional, individual services for exclusion within each of the specified service categories.'' In the proposed rule for FY 2001, we also noted that the BBRA Conference report (H.R. Rep. No.

106–479 at 854 (1999) (Conf. Rep.)) characterizes the individual services that this legislation targets for exclusion as, ''* * * high-cost, low probability events that could have devastating financial impacts because their costs far exceed the payment [SNFs] receive under the prospective payment system * * *''. According to the conferees, section 103(a), ''is an attempt to exclude from the PPS certain services and costly items that are provided infrequently in SNFs * * *''. By contrast, we noted that the Congress declined to designate for exclusion any of the remaining services within those four categories (thus leaving all of those services subject to SNF consolidated billing), because they are relatively inexpensive and are furnished routinely in SNFs.

As we further explained in the final rule for FY 2001 (65 FR 46790, July 31, 2000), and as our longstanding policy, any additional service codes that we might designate for exclusion under our discretionary authority must meet the same criteria that the Congress used in identifying the original codes excluded from consolidated billing under section 103(a) of the BBRA: they must fall within one of the four service categories specified in the BBRA, and they also must meet the same standards of high cost and low probability in the SNF setting. Accordingly, we characterized this statutory authority to identify additional service codes for exclusion ''* * * as essentially affording the flexibility to revise the list of excluded codes in response to changes of major significance that may occur over time (for example, the development of new medical technologies or other advances in the state of medical practice)'' (65 FR 46791). In this proposed rule, we specifically invite public comments identifying codes in any of these four service categories (chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices) representing recent medical advances that might meet our criteria for exclusion from SNF consolidated billing.

We note that the original BBRA legislation (as well as the implementing regulations) identified a set of excluded services by means of specifying HCPCS codes that were in effect as of a particular date (in that case, as of July 1, 1999). Identifying the excluded services in this manner made it possible for us to utilize program issuances as the vehicle for accomplishing routine updates of the excluded codes, in order

to reflect any minor revisions that might subsequently occur in the coding system itself (for example, the assignment of a different code number to the same service). Accordingly, in the event that we identify through the current rulemaking cycle any new services that would actually represent a substantive change in the scope of the exclusions from SNF consolidated billing, we would identify these additional excluded services by means of the HCPCS codes that are in effect as of a specific date (in this case, as of October 1, 2008). By making any new exclusions in this manner, we could similarly accomplish routine future updates of these additional codes through the issuance of program instructions.

V. Application of the SNF PPS to SNF Services Furnished by Swing-Bed Hospitals

[If you choose to comment on issues in this section, please include the caption ''Swing-Bed Hospitals'' at the beginning of your comments.]

In accordance with section 1888(e)(7) of the Act, as amended by section 203 of the BIPA, Part A pays CAHs on a reasonable cost basis for SNF services furnished under a swing-bed agreement. However, effective with cost reporting periods beginning on or after July 1, 2002, the swing-bed services of non-CAH rural hospitals are paid under the SNF PPS. As explained in the final rule for FY 2002 (66 FR 39562, July 31, 2001), we selected this effective date consistent with the statutory provision to integrate swing-bed rural hospitals into the SNF PPS by the end of the SNF transition period, June 30, 2002.

Accordingly, all non-CAH swing-bed rural hospitals have come under the SNF PPS as of June 30, 2003. Therefore, all rates and wage indexes outlined in earlier sections of this proposed rule for the SNF PPS also apply to all non-CAH swing-bed rural hospitals. A complete discussion of assessment schedules, the MDS and the transmission software (RAVEN–SB for Swing Beds) appears in the final rule for FY 2002 (66 FR 39562, July 31, 2001). The latest changes in the MDS for swing-bed rural hospitals appear on our SNF PPS Web site, *www.cms.hhs.gov/snfpps*.

VI. Provisions of the Proposed Rule

[If you choose to comment on issues in this section, please include the caption ''Provisions of the Proposed Rule'' at the beginning of your comments.]

In this proposed rule, in addition to accomplishing the required annual update of the SNF PPS payment rates, we also propose making the following revisions in the regulations text:

- Revise the existing SNF PPS definitions of ''urban'' and ''rural'' areas that appear in § 413.333 to include updated cross-references to the corresponding IPPS definitions in Part 412, subpart D.
- Make a technical revision at § 413.335(b) to reflect Medicare bad debt payments to SNFs.

VII. Collection of Information Requirements

[If you choose to comment on issues in this section, please include the caption ''Collection of Information'' at the beginning of your comments.]

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

VIII. Regulatory Impact Analysis

[If you choose to comment on issues in this section, please include the caption ''Impact Analysis'' at the beginning of your comments.]

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (September 19, 1980, RFA, Pub. L. 96–354), section 1102(b) of the Social Security Act (the Act), the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866, as amended, directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This proposed rule is a major rule, as defined in Title 5, United States Code, section 804(2), because we estimate the FY 2009 impact reflects a $710 million increase from the update to the payment rates and a $770 million reduction from the recalibration of the case-mix adjustment, thereby yielding a net decrease of $60 million on payments to SNFs.

The proposed update set forth in this proposed rule would apply to payments in FY 2009. Accordingly, the analysis that follows only describes the impact of this single year. In accordance with the requirements of the Act, we will publish a notice for each subsequent FY that will provide for an update to the payment rates and include an associated impact analysis.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small government jurisdictions. Most SNFs and most other providers and suppliers are small entities, either by their nonprofit status or by having revenues of $11.5 million or less in any 1 year. For purposes of the RFA, approximately 53 percent of SNFs are considered small businesses according to the Small Business Administration's latest size standards, with total revenues of $11.5 million or less in any 1 year (for further information, see 65 FR 69432, November 17, 2000). Individuals and States are not included in the definition of a small entity. In addition, approximately 29 percent of SNFs are nonprofit organizations.

This proposed rule would update the SNF PPS rates published in the final rule for FY 2008 (72 FR 43412, August 3, 2007) and the associated correction notices (72 FR 55085, September 28, 2007, and 72 FR 67652, November 30, 2007), thereby decreasing net payments by an estimated $60 million. As indicated in Table 12, the effect on facilities will be a net negative impact of 0.3 percent. The total impact reflects a $770 million reduction from the recalibration of the case-mix adjustment, offset by a $710 million increase from the update to the payment rates. We note that some individual providers may experience a net increase in payments while most others experience a decrease. This is due to the distributional impact of the FY 2009 wage indexes and the degree of Medicare utilization. While this proposed rule is considered major, its relative impact on SNFs overall is extremely small; that is, less than 3 percent of total SNF revenues from all payor sources. Therefore, the Secretary has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to

the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. The proposed rule will affect small rural hospitals that (a) furnish SNF services under a swing-bed agreement or (b) have a hospital-based SNF. We anticipate that the impact on small rural hospitals will be similar to the impact on SNF providers overall.

Section 202 of UMRA also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2008, that threshold is approximately $130 million. This proposed rule would not have a substantial effect on the governments mentioned, or on private sector costs.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates regulations that impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. As stated above, this proposed rule would have no substantial effect on State and local governments.

B. Anticipated Effects

This proposed rule sets forth proposed updates of the SNF PPS rates contained in the final rule for FY 2008 (72 FR 43412, August 3, 2007) and the associated correction notices (72 FR 55085, September 28, 2007, and 72 FR 67652, November 30, 2007). Based on the above, we estimate the FY 2009 impact would be a net decrease of $60 million on payments to SNFs (this reflects a $770 million reduction from the recalibration of the case-mix adjustment, offset by a $710 million increase from the update to the payment rates. The impact analysis of this proposed rule represents the projected effects of the changes in the SNF PPS from FY 2008 to FY 2009. We estimate the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these changes, and we do not make adjustments for future changes in such variables as days or case-mix.

We note that certain events may combine to limit the scope or accuracy of our impact analysis, because an analysis is future-oriented and, thus, very susceptible to forecasting errors due to other changes in the forecasted impact time period. Some examples of possible events are newly-legislated general Medicare program funding changes by the Congress, or changes specifically related to SNFs. In addition, changes to the Medicare program may continue to be made as a result of previously-enacted legislation, or new statutory provisions. Although these changes may not be specific to the SNF PPS, the nature of the Medicare program is that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon SNFs.

In accordance with section 1888(e)(4)(E) of the Act, we update the payment rates for FY 2008 by a factor equal to the full market basket index percentage increase plus the FY 2007 forecast error adjustment to determine the payment rates for FY 2009. The special AIDS add-on established by section 511 of the MMA remains in effect until ''* * *such date as the Secretary certifies that there is an appropriate adjustment in the case mix. * * *'' We have not provided a separate impact analysis for the MMA provision. Our latest estimates indicate that there are less than 2,700 beneficiaries who qualify for the AIDS add-on payment. The impact to Medicare is included in the ''total'' column of Table 12. In proposing to update the rates for FY 2009, standard annual revisions and clarifications mentioned elsewhere in this proposed rule (for example, the update to the wage and market basket indexes used for adjusting the Federal rates). These revisions would increase payments to SNFs by approximately $710 million.

The net decrease in payments associated with this proposed rule is estimated to be $60 million for FY 2009. The decrease of $770 million due to the recalibration of the case-mix adjustment, together with the market basket increase of $710 million, results in a net decrease of $60 million.

The impacts are shown in Table 12. The breakdown of the various categories of data in the table follows.

The first column shows the breakdown of all SNFs by urban or rural status, hospital-based or freestanding status, and census region.

The first row of figures in the first column describes the estimated effects of the various changes on all facilities. The next six rows show the effects on facilities split by hospital-based, freestanding, urban, and rural categories. The urban and rural designations are based on the location of the facility under the CBSA designation. The next twenty-two rows show the effects on urban versus rural status by census region.

The second column in the table shows the number of facilities in the impact database.

The third column of the table shows the effect of the annual update to the wage index. This represents the effect of using the most recent wage data available. The total impact of this change is zero percent; however, there are distributional effects of the change.

The fourth column shows the effect of recalibrating the two adjustments (parity and NTA) to the CMIs. As explained previously in section II.B.2 of this proposed rule, we are proposing this recalibration so that the CMIs more accurately reflect parity in expenditures under the refined, 53-group RUG system introduced in 2006 relative to payments made under the original, 44-group RUG system, and in order to keep the NTA component at the appropriate level specified in the FY 2006 SNF PPS final rule. The total impact of this change is a decrease of 3.3 percent. We note that some individual providers may experience larger decreases in payments than others due to case-mix utilization.

The fifth column shows the effect of all of the changes on the FY 2009 payments. The market basket increase of 3.1 percentage points is constant for all providers and, though not shown individually, is included in the total column. It is projected that aggregate payments will decrease by 0.3 percent, assuming facilities do not change their care delivery and billing practices in response.

As can be seen from this table, the combined effects of all of the changes vary by specific types of providers and by location. For example, though most facilities experience payment decreases, some providers (for example, those in the urban Pacific region) show an increase of 1.0 percent. Payment increases for facilities in the urban and rural Pacific areas of the country are the highest for any of the provider categories.

Table 12
Projected Impact to the SNF PPS for FY 2009

	Number of facilities	Update wage data	Revised CMIs	Total FY 2009 change
Total	**15,346**	0.0%	-3.3%	-0.3%
Urban	10,485	0.0%	-3.3%	-0.3%
Rural	4,861	0.0%	-3.1%	-0.2%
Hospital based urban	1,520	-0.1%	-3.4%	-0.5%
Freestanding urban	8,965	0.0%	-3.3%	-0.3%
Hospital based rural	1,140	0.0%	-3.3%	-0.3%
Freestanding rural	3,721	0.0%	-3.1%	-0.1%
Urban by region				
New England	838	0.2%	-3.4%	-0.2%
Middle Atlantic	1,486	-0.4%	-3.5%	-0.9%
South Atlantic	1,733	-0.3%	-3.2%	-0.5%
East North Central	2,009	-0.5%	-3.2%	-0.7%
East South Central	529	0.0%	-3.3%	-0.3%
West North Central	826	0.6%	-3.3%	0.3%
West South Central	1,165	0.2%	-3.2%	0.0%
Mountain	471	0.0%	-3.2%	-0.2%
Pacific	1,420	1.3%	-3.3%	1.0%
Outlying	8	0.3%	-3.6%	-0.3%
Rural by region				
New England	149	-1.5%	-3.1%	-1.6%
Middle Atlantic	257	-0.1%	-3.3%	-0.4%
South Atlantic	601	0.0%	-3.1%	-0.2%
East North Central	934	-0.6%	-3.1%	-0.7%
East South Central	551	0.2%	-3.1%	0.1%
West North Central	1,144	0.5%	-3.3%	0.2%
West South Central	819	0.5%	-3.1%	0.4%
Mountain	256	-0.2%	-3.2%	-0.3%
Pacific	148	1.1%	-3.2%	0.9%
Outlying	2	0.1%	-3.9%	-0.8%
Ownership				
Government	663	-0.1%	-3.5%	-0.6%
Proprietary	11,265	0.0%	-3.2%	-0.2%
Voluntary	3,418	-0.1%	-3.4%	-0.5%

C. Alternatives Considered

Section 1888(e) of the Act establishes the SNF PPS for the payment of Medicare SNF services for cost reporting periods beginning on or after July 1, 1998. This section of the statute prescribes a detailed formula for calculating payment rates under the SNF PPS, and does not provide for the use of any alternative methodology. It specifies that the base year cost data to be used for computing the SNF PPS payment rates must be from FY 1995 (October 1, 1994, through September 30, 1995.) In accordance with the statute, we also incorporated a number of elements into the SNF PPS (for example, case-mix classification methodology, the MDS assessment schedule, a market basket index, a wage index, and the urban and rural distinction used in the development or adjustment of the Federal rates). Further, section 1888(e)(4)(H) of the Act specifically requires us to disseminate the payment rates for each new FY through the **Federal Register**, and to do so before the August 1 that precedes the start of the new FY. Accordingly, we are not pursuing alternatives with respect to the payment methodology as discussed above.

The proposed rule would recalibrate the case-mix adjustment to the case-mix indexes based on actual CY 2006 data instead of continuing to use FY 2001 data, in order to make the change from the 44-group RUG model to the refined 53-group model in a budget-neutral manner, as described in section II.B.2. In the FY 2006 SNF PPS final rule (70 FR 45031, August 4, 2005), we committed to monitoring the accuracy and effectiveness of the case-mix indexes used in the 53-group model. We believe that using actual data instead of superseded historical data better meets our objective of paying SNFs more accurately.

We considered various options for implementing the revised case-mix adjustment. For example, we considered implementing partial adjustments to the case-mix indexes over multiple years until parity was achieved. However, we believe that these options would further delay moving to the most appropriate payment amounts. Moreover, in anticipation of the possible changes resulting from STRIVE in the RUG–III structural model and the CMIs used in payment, we believe it is important for the recalibration to be entirely completed beforehand, in order to ensure stability in the base as we move forward with these other changes.

We also considered introducing new case-mix weights derived from the STRIVE time study data. However, our initial analyses show that it would be more efficient and less burdensome to providers to introduce any new case-mix weights as part of an overall restructuring of the RUG–III model that is currently scheduled for October 2009.

D. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf)*, in Table 13 below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this proposed rule. This table provides our best estimate of the change in Medicare payments under the SNF PPS as a result of the policies in this proposed rule based on the data for 15,346 SNFs in our database. All expenditures are classified as transfers to Medicare providers (that is, SNFs).

TABLE 13.—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE 2008 SNF PPS FISCAL YEAR TO THE 2009 SNF PPS FISCAL YEAR

[In Millions]

Category	Transfers
Annualized Monetized Transfers.	$60 million*
From Whom To Whom?.	SNF Medicare Providers to Federal Government

*The net decrease of $60 million in transfer payments is a result of the decrease of $770 million due to the proposed recalibration of the case-mix adjustment, together with the proposed market basket increase of $710 million.

E. Conclusion

Overall estimated payments for SNFs in FY 2009 are projected to decrease by 0.3 percent compared with those in FY 2008. We estimate that SNFs in urban areas would experience a 0.3 percent decrease in estimated payments compared with FY 2008. We estimate that SNFs in rural areas would experience a 0.2 percent decrease in estimated payments compared with FY 2008. Providers in the urban Pacific region and the rural Pacific region show increases in payments of 1.0 and 0.9 percent, respectively.

Finally, in accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as follows:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES; PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES

1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i), and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww); and sec. 124 of Public Law 106–133 (113 Stat. 1501A–332).

Subpart J—Prospective Payment for Skilled Nursing Facilities

2. In § 413.333, the definitions of the terms ''rural area'' and ''urban area'' are revised to read as follows:

§ 413.333 Definitions.

* * * * *

Rural area means, for services provided on or after July 1, 1998, but before October 1, 2005, an area as defined in § 412.62(f)(1)(iii) of this chapter. For services provided on or after October 1, 2005, *rural area* means an area as defined in § 412.64(b)(1)(ii)(C) of this chapter.

Urban area means, for services provided on or after July 1, 1998, but before October 1, 2005, an area as defined in § 412.62(f)(1)(ii) of this chapter. For services provided on or after October 1, 2005, *urban area* means an area as defined in § 412.64(b)(1)(ii)(A) and § 412.64(b)(1)(ii)(B) of this chapter.

§ 413.335 [Amended]

3. Section 413.335 is amended by revising paragraph (b) to read as follows:

§ 413.335 Basis of payment.

* * * * *

(b) *Payment in full.* (1) The payment rates represent payment in full (subject to applicable coinsurance as described in subpart G of part 409 of this chapter) for all costs (routine, ancillary, and capital-related) associated with furnishing inpatient SNF services to Medicare beneficiaries other than costs associated with approved educational activities as described in § 413.85.

(2) In addition to the Federal per diem payment amounts, SNFs receive payment for bad debts of Medicare

beneficiaries, as specified in § 413.89 of this part.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare-Hospital Insurance Program; and No. 93.774, Medicare-Supplementary Medical Insurance Program)

Dated: March 14, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: April 24, 2008.

Michael O. Leavitt,

Secretary.

BILLING CODE 4120–01–P

[Note: The following Addendum will not appear in the Code of Federal Regulations]

Addendum - FY 2009 CBSA Wage Index Tables

In this addendum, we provide the wage index tables referred to in the preamble to this proposed rule. Tables 8 and 9 display the CBSA-based wage index values for urban and rural providers.

Table 8 FY 2009 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS

CBSA Code	Urban Area (Constituent Counties)	Wage Index
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.8102
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3401
10420	Akron, OH Portage County, OH Summit County, OH	0.8858
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.8708
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8713
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9293
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.8128
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	0.9513
11020	Altoona, PA Blair County, PA	0.8527
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.8933
11180	Ames, IA Story County, IA	0.9493
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.1939
11300	Anderson, IN Madison County, IN	0.8765
11340	Anderson, SC Anderson County, SC	0.9576
11460	Ann Arbor, MI Washtenaw County, MI	1.0451
11500	Anniston-Oxford, AL Calhoun County, AL	0.7931
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9446
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9148

12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	0.9582
12060	Atlanta-Sandy Springs-Marietta, GA Barrow County, GA Bartow County, GA Butts County, GA Carroll County, GA Cherokee County, GA Clayton County, GA Cobb County, GA Coweta County, GA Dawson County, GA DeKalb County, GA Douglas County, GA Fayette County, GA Forsyth County, GA Fulton County, GA Gwinnett County, GA Haralson County, GA Heard County, GA Henry County, GA Jasper County, GA Lamar County, GA Meriwether County, GA Newton County, GA Paulding County, GA Pickens County, GA Pike County, GA Rockdale County, GA Spalding County, GA Walton County, GA	0.9744
12100	Atlantic City-Hammonton, NJ Atlantic County, NJ	1.1909
12220	Auburn-Opelika, AL Lee County, AL	0.7549
12260	Augusta-Richmond County, GA-SC Burke County, GA Columbia County, GA McDuffie County, GA Richmond County, GA Aiken County, SC Edgefield County, SC	0.9619
12420	Austin-Round Rock, TX Bastrop County, TX Caldwell County, TX Hays County, TX Travis County, TX Williamson County, TX	0.9542
12540	Bakersfield, CA Kern County, CA	1.1213
12580	Baltimore-Towson, MD Anne Arundel County, MD Baltimore County, MD Carroll County, MD Harford County, MD Howard County, MD Queen Anne's County, MD Baltimore City, MD	1.0056
12620	Bangor, ME Penobscot County, ME	1.0180
12700	Barnstable Town, MA Barnstable County, MA	1.2624
12940	Baton Rouge, LA Ascension Parish, LA East Baton Rouge Parish, LA East Feliciana Parish, LA Iberville Parish, LA Livingston Parish, LA Pointe Coupee Parish, LA St. Helena Parish, LA West Baton Rouge Parish, LA West Feliciana Parish, LA	0.8153
12980	Battle Creek, MI Calhoun County, MI	1.0127
13020	Bay City, MI Bay County, MI	0.9254
13140	Beaumont-Port Arthur, TX Hardin County, TX Jefferson County, TX Orange County, TX	0.8484
13380	Bellingham, WA Whatcom County, WA	1.1600
13460	Bend, OR Deschutes County, OR	1.1384

13644	Bethesda-Frederick-Gaithersburg, MD Frederick County, MD Montgomery County, MD	1.0555
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8811
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.8580
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8798
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.7153
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8160
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.8985
14060	Bloomington-Normal, IL McLean County, IL	0.9329
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9237
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.1905
14500	Boulder, CO Boulder County, CO	1.0309
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8394
14600	Bradenton-Sarasota-Venice, FL Manatee County, FL Sarasota County, FL	0.9907
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.0777
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2976
15180	Brownsville-Harlingen, TX Cameron County, TX	0.8922
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9807
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9543
15500	Burlington, NC Alamance County, NC	0.8742
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	0.9260
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1041
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0442
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.8846
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9402
16180	Carson City, NV Carson City, NV	1.0135
16220	Casper, WY Natrona County, WY	0.9585
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.8924

16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	0.9400
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.8280
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9240
16740	Charlotte-Gastonia-Concord, NC-SC Anson County, NC Cabarrus County, NC Gaston County, NC Mecklenburg County, NC Union County, NC York County, SC	0.9599
16820	Charlottesville, VA Albemarle County, VA Fluvanna County, VA Greene County, VA Nelson County, VA Charlottesville City, VA	0.9822
16860	Chattanooga, TN-GA Catoosa County, GA Dade County, GA Walker County, GA Hamilton County, TN Marion County, TN Sequatchie County, TN	0.8884
16940	Cheyenne, WY Laramie County, WY	0.9282
16974	Chicago-Naperville-Joliet, IL Cook County, IL DeKalb County, IL DuPage County, IL Grundy County, IL Kane County, IL Kendall County, IL McHenry County, IL Will County, IL	1.0426
17020	Chico, CA Butte County, CA	1.0904
17140	Cincinnati-Middletown, OH-KY-IN Dearborn County, IN Franklin County, IN Ohio County, IN Boone County, KY Bracken County, KY Campbell County, KY Gallatin County, KY Grant County, KY Kenton County, KY Pendleton County, KY Brown County, OH Butler County, OH Clermont County, OH Hamilton County, OH Warren County, OH	0.9686
17300	Clarksville, TN-KY Christian County, KY Trigg County, KY Montgomery County, TN Stewart County, TN	0.8303
17420	Cleveland, TN Bradley County, TN Polk County, TN	0.8015
17460	Cleveland-Elyria-Mentor, OH Cuyahoga County, OH Geauga County, OH Lake County, OH Lorain County, OH Medina County, OH	0.9239
17660	Coeur d'Alene, ID Kootenai County, ID	0.9328
17780	College Station-Bryan, TX Brazos County, TX Burleson County, TX Robertson County, TX	0.9352
17820	Colorado Springs, CO El Paso County, CO Teller County, CO	0.9997
17860	Columbia, MO Boone County, MO Howard County, MO	0.8545

17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.8939
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.8745
18020	Columbus, IN Bartholomew County, IN	0.9738
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	0.9907
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8604
18700	Corvallis, OR Benton County, OR	1.1311
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.7821
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	0.9952
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8647
19180	Danville, IL Vermilion County, IL	0.9380
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8400
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8441
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9209
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.7808
19500	Decatur, IL Macon County, IL	0.8106
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.8892
19740	Denver-Aurora, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.0825
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9541
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	0.9959

20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.7565
20100	Dover, DE Kent County, DE	1.0332
20220	Dubuque, IA Dubuque County, IA	0.8385
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0370
20500	Durham, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	0.9738
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9654
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1291
20940	El Centro, CA Imperial County, CA	0.8752
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8531
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9566
21300	Elmira, NY Chemung County, NY	0.8252
21340	El Paso, TX El Paso County, TX	0.8700
21500	Erie, PA Erie County, PA	0.8678
21660	Eugene-Springfield, OR Lane County, OR	1.1055
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8695
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1305
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.4063
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8171
22140	Farmington, NM San Juan County, NM	0.8056
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9346
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8976
22380	Flagstaff, AZ Coconino County, AZ	1.1751
22420	Flint, MI Genesee County, MI	1.1432
22500	Florence, SC Darlington County, SC Florence County, SC	0.8178
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.7854
22540	Fond du Lac, WI Fond du Lac County, WI	0.9299
22660	Fort Collins-Loveland, CO Larimer County, CO	0.9873
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	0.9953

22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.7702
23020	Fort Walton Beach-Crestview-Destin, FL Okaloosa County, FL	0.8775
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9182
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9715
23420	Fresno, CA Fresno County, CA	1.1018
23460	Gadsden, AL Etowah County, AL	0.7988
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.9314
23580	Gainesville, GA Hall County, GA	0.9092
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9279
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8478
24140	Goldsboro, NC Wayne County, NC	0.9149
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.7570
24300	Grand Junction, CO Mesa County, CO	0.9818
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9190
24500	Great Falls, MT Cascade County, MT	0.8790
24540	Greeley, CO Weld County, CO	0.9690
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9739
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.9017
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9454
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9813
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3251
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.9035
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.9002
25260	Hanford-Corcoran, CA Kings County, CA	1.0877
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9158
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.8900

25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.1076
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.7341
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.8982
25980	Hinesville-Fort Stewart, GA1 Liberty County, GA Long County, GA	0.9123
26100	Holland-Grand Haven, MI Ottawa County, MI	0.9014
26180	Honolulu, HI Honolulu County, HI	1.1834
26300	Hot Springs, AR Garland County, AR	0.9118
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.7763
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	0.9844
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.9260
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9088
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9086
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	0.9928
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9490
27060	Ithaca, NY Tompkins County, NY	0.9620
27100	Jackson, MI Jackson County, MI	0.9315
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8073
27180	Jackson, TN Chester County, TN Madison County, TN	0.8529
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.9008
27340	Jacksonville, NC Onslow County, NC	0.8182
27500	Janesville, WI Rock County, WI	0.9667
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8781

27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.7968
27780	Johnstown, PA Cambria County, PA	0.7919
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.7922
27900	Joplin, MO Jasper County, MO Newton County, MO	0.9412
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0808
28100	Kankakee-Bradley, IL Kankakee County, IL	1.2092
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	0.9610
28420	Kennewick-Pasco-Richland, WA Benton County, WA Franklin County, WA	0.9917
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.8770
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.7748
28740	Kingston, NY Ulster County, NY	0.9381
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.7886
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9355
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	0.9764
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.9136
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8368
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.7561
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.0376
29420	Lake Havasu City-Kingman, AZ Mohave County, AZ	0.9784
29460	Lakeland-Winter Haven, FL Polk County, FL	0.8535
29540	Lancaster, PA Lancaster County, PA	0.9330
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	0.9937
29700	Laredo, TX Webb County, TX	0.8371
29740	Las Cruces, NM Dona Ana County, NM	0.8934
29820	Las Vegas-Paradise, NV Clark County, NV	1.1984

29940	Lawrence, KS Douglas County, KS	0.8348
30020	Lawton, OK Comanche County, OK	0.8216
30140	Lebanon, PA Lebanon County, PA	0.8960
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9471
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.9189
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY Jessamine County, KY Scott County, KY Woodford County, KY	0.9115
30620	Lima, OH Allen County, OH	0.9433
30700	Lincoln, NE Lancaster County, NE Seward County, NE	0.9765
30780	Little Rock-North Little Rock-Conway, AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8633
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.8771
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8376
31020	Longview, WA Cowlitz County, WA	1.1215
31084	Los Angeles-Long Beach-Santa Ana, CA Los Angeles County, CA	1.2184
31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.9255
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.8736
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.8722
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9576
31460	Madera, CA Madera County, CA	0.7944
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.0974
31700	Manchester-Nashua, NH Hillsborough County, NH	1.0366
31900	Mansfield, OH1 Richland County, OH	0.9336
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.3942
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.9047

32780	Medford, OR Jackson County, OR	1.0251
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9238
32900	Merced, CA Merced County, CA	1.2251
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	0.9836
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9150
33260	Midland, TX Midland County, TX	0.9833
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0086
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1158
33540	Missoula, MT Missoula County, MT	0.8979
33660	Mobile, AL Mobile County, AL	0.7864
33700	Modesto, CA Stanislaus County, CA	1.2137
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.7905
33780	Monroe, MI Monroe County, MI	0.8837
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8148
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8533
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.7258
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0299
34620	Muncie, IN Delaware County, IN	0.8494
34740	Muskegon-Norton Shores, MI Muskegon County, MI	1.0060
34820	Myrtle Beach-North Myrtle Beach-Conway, SC Horry County, SC	0.8649
34900	Napa, CA Napa County, CA	1.4530
34940	Naples-Marco Island, FL Collier County, FL	0.9679

34980	Nashville-Davidson--Murfreesboro--Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9510
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2457
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1737
35300	New Haven-Milford, CT New Haven County, CT	1.1749
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.9270
35644	New York-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	1.2891
35660	Niles-Benton Harbor, MI Berrien County, MI	0.9072
35980	Norwich-New London, CT New London County, CT	1.1356
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.5851
36100	Ocala, FL Marion County, FL	0.8517
36140	Ocean City, NJ Cape May County, NJ	1.1503
36220	Odessa, TX Ector County, TX	0.9480
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9159
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.8730
36500	Olympia, WA Thurston County, WA	1.1544
36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE Washington County, NE	0.9460
36740	Orlando-Kissimmee, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.9122
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9480

36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8690
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.1886
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9338
37380	Palm Coast, FL Flagler County, FL	0.8968
37460	Panama City-Lynn Haven, FL Bay County, FL	0.8366
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.7872
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8107
37764	Peabody, MA Essex County, MA	1.0754
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8247
37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL Tazewell County, IL Woodford County, IL	0.8933
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.1002
38060	Phoenix-Mesa-Scottsdale, AZ Maricopa County, AZ Pinal County, AZ	1.0394
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.7931
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.8626
38340	Pittsfield, MA Berkshire County, MA	1.0452
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9349
38660	Ponce, PR Juana Díaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4292
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	0.9948
38900	Portland-Vancouver-Beaverton, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR Yamhill County, OR Clark County, WA Skamania County, WA	1.1445
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	0.9874
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.0909
39140	Prescott, AZ Yavapai County, AZ	1.0227
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.0573

39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9133
39380	Pueblo, CO Pueblo County, CO	0.8718
39460	Punta Gorda, FL Charlotte County, FL	0.8982
39540	Racine, WI Racine County, WI	0.8858
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	0.9829
39660	Rapid City, SD Meade County, SD Pennington County, SD	0.9604
39740	Reading, PA Berks County, PA	0.9248
39820	Redding, CA Shasta County, CA	1.3619
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0313
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9369
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1418
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.8666
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.1221
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.8820
40420	Rockford, IL Boone County, IL Winnebago County, IL	0.9841
40484	Rockingham County, NH Rockingham County, NH Strafford County, NH	0.9933
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.9036
40660	Rome, GA Floyd County, GA	0.9140
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.3403
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.8708
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.0983
41100	St. George, UT Washington County, UT	0.9027

41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	1.0372
41180	St. Louis, MO-IL Bond County, IL Calhoun County, IL Clinton County, IL Jersey County, IL Macoupin County, IL Madison County, IL Monroe County, IL St. Clair County, IL Crawford County, MO Franklin County, MO Jefferson County, MO Lincoln County, MO St. Charles County, MO St. Louis County, MO Warren County, MO Washington County, MO St. Louis City, MO	0.9010
41420	Salem, OR Marion County, OR Polk County, OR	1.0801
41500	Salinas, CA Monterey County, CA	1.4976
41540	Salisbury, MD Somerset County, MD Wicomico County, MD	0.9252
41620	Salt Lake City, UT Salt Lake County, UT Summit County, UT Tooele County, UT	0.9164
41660	San Angelo, TX Irion County, TX Tom Green County, TX	0.8498
41700	San Antonio, TX Atascosa County, TX Bandera County, TX Bexar County, TX Comal County, TX Guadalupe County, TX Kendall County, TX Medina County, TX Wilson County, TX	0.8861
41740	San Diego-Carlsbad-San Marcos, CA San Diego County, CA	1.1509
41780	Sandusky, OH Erie County, OH	0.8876
41884	San Francisco-San Mateo-Redwood City, CA Marin County, CA San Francisco County, CA San Mateo County, CA	1.5428
41900	San Germán-Cabo Rojo, PR Cabo Rojo Municipio, PR Lajas Municipio, PR Sabana Grande Municipio, PR San Germán Municipio, PR	0.4759
41940	San Jose-Sunnyvale-Santa Clara, CA San Benito County, CA Santa Clara County, CA	1.6167

41980	San Juan-Caguas-Guaynabo, PR Aguas Buenas Municipio, PR Aibonito Municipio, PR Arecibo Municipio, PR Barceloneta Municipio, PR Barranquitas Municipio, PR Bayamón Municipio, PR Caguas Municipio, PR Camuy Municipio, PR Canóvanas Municipio, PR Carolina Municipio, PR Cataño Municipio, PR Cayey Municipio, PR Ciales Municipio, PR Cidra Municipio, PR Comerío Municipio, PR Corozal Municipio, PR Dorado Municipio, PR Florida Municipio, PR Guaynabo Municipio, PR Gurabo Municipio, PR Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	0.4396
42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.2462
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.1983
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.1927
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.6416
42140	Santa Fe, NM Santa Fe County, NM	1.0616
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.5471
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.9157
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8317
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.1763
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9223
43100	Sheboygan, WI Sheboygan County, WI	0.8926
43300	Sherman-Denison, TX Grayson County, TX	0.9030
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8447
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.8920
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.9360
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	0.9601

43900	Spartanburg, SC Spartanburg County, SC	0.9031
44060	Spokane, WA Spokane County, WA	1.0566
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9108
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0227
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8354
44220	Springfield, OH Clark County, OH	0.8765
44300	State College, PA Centre County, PA	0.8942
44700	Stockton, CA San Joaquin County, CA	1.1983
44940	Sumter, SC Sumter County, SC	0.8262
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	0.9792
45104	Tacoma, WA Pierce County, WA	1.1249
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.8970
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.8848
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.9089
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.8149
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9411
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.8761
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0611
46060	Tucson, AZ Pima County, AZ	0.9235
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8464
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8435
46340	Tyler, TX Smith County, TX	0.8810
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8409
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.8032

46700	Vallejo-Fairfield, CA Solano County, CA	1.4368
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8129
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0373
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA	0.8882
47300	Visalia-Porterville, CA Tulare County, CA	1.0151
47380	Waco, TX McLennan County, TX	0.8601
47580	Warner Robins, GA Houston County, GA	0.8982
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	0.9907
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA Manassas City, VA Manassas Park City, VA Jefferson County, WV	1.0813
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8495
48140	Wausau, WI Marathon County, WI	0.9622
48260	Weirton-Steubenville, WV-OH Jefferson County, OH Brooke County, WV Hancock County, WV	0.8040
48300	Wenatchee, WA Chelan County, WA Douglas County, WA	0.9550
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	0.9770
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.6960
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.9075

48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.8838
48700	Williamsport, PA Lycoming County, PA	0.8101
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0703
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.9095
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	0.9807
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.9022
49340	Worcester, MA Worcester County, MA	1.0842
49420	Yakima, WA Yakima County, WA	0.9955
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3434
49620	York-Hanover, PA York County, PA	0.9576
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.8921
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.0987
49740	Yuma, AZ Yuma County, AZ	0.9287

[1] At this time, there are no hospitals located in this urban area on which to base a wage index.

Table 9 FY 2008 WAGE INDEX BASED ON CBSA LABOR MARKET AREAS FOR RURAL AREAS

State Code	Nonurban Area	Wage Index
1	Alabama	0.7592
2	Alaska	1.1906
3	Arizona	0.8459
4	Arkansas	0.7478
5	California	1.2244
6	Colorado	0.9556
7	Connecticut	1.1147
8	Delaware	0.9969
10	Florida	0.8510
11	Georgia	0.7614
12	Hawaii	1.1003
13	Idaho	0.7655
14	Illinois	0.8391
15	Indiana	0.8466

16	Iowa	0.8810
17	Kansas	0.8057
18	Kentucky	0.7797
19	Louisiana	0.7451
20	Maine	0.8650
21	Maryland	0.8889
22	Massachusetts1	1.1599
23	Michigan	0.8880
24	Minnesota	0.9065
25	Mississippi	0.7588
26	Missouri	0.7984
27	Montana	0.8664
28	Nebraska	0.8736
29	Nevada	0.9366
30	New Hampshire	1.0224
31	New Jersey1	-----
32	New Mexico	0.8818
33	New York	0.8198
34	North Carolina	0.8582
35	North Dakota	0.7209
36	Ohio	0.8579
37	Oklahoma	0.7783
38	Oregon	1.0225
39	Pennsylvania	0.8371
40	Puerto Rico1	0.4047
41	Rhode Island1	-----
42	South Carolina	0.8544
43	South Dakota	0.8608
44	Tennessee	0.7794
45	Texas	0.7899
46	Utah	0.8272
47	Vermont	1.0086
48	Virgin Islands	0.6930
49	Virginia	0.7865
50	Washington	1.0188
51	West Virginia	0.7508

52	Wisconsin	0.9469
53	Wyoming	0.9321
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for FY 2009. The rural Massachusetts wage index is calculated as the average of all contiguous CBSAs. The Puerto Rico wage index is the same as FY 2008.

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H.R. 4286/P.L. 110–209

To award a congressional gold medal to Daw Aung San Suu Kyi in recognition of her courageous and unwavering commitment to peace, nonviolence, human rights, and democracy in Burma. (May 6, 2008; 122 Stat. 721)

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