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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 351

RIN 3206-AL19

Representative Rate; Order of Release From Competitive Level; Assignment Rights

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations clarifying how an agency determines employees' retention rights when the agency has positions in one or more pay bands. These regulations also clarify the order in which an agency releases employees from a competitive level. Finally, these regulations clarify how an agency determines employees' retention rights when a competitive area includes more than one local commuting area.

DATES: *Effective Date:* These regulations are effective June 20, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas A. Glennon by telephone on 202-606-0960, by FAX on 202-606-2329, by TDD on 202-418-3134, or by e-mail at employ@opm.gov.

SUPPLEMENTARY INFORMATION: On March 15, 2007, OPM published proposed reduction in force regulations in the **Federal Register** at 72 FR 12122. Interested parties could submit comments to OPM on the regulations through May 14, 2007. OPM received comments from two agencies and one individual on these proposed regulations. Although OPM received comments from one agency and the individual shortly after the May 14, 2007, closing date, we considered these comments in publishing final regulations. We discuss all the comments below.

The individual asked OPM to clarify that the pay band provisions in the proposed regulations apply only to reduction in force actions under part 351 of title 5, Code of Federal Regulations (CFR), but do not apply to actions under demonstration projects. We found that no revision is necessary. If an alternative retention system (such as a retention system under a demonstration project) is not subject to part 351 of title 5, that system must clearly state the legal basis for exclusion from 5 CFR part 351.

The individual also asked OPM to clarify the definition of "representative rate" in section 351.203 for a General Schedule (GS) employee stationed outside the contiguous states (e.g., stationed in Alaska, Hawaii or overseas). We have not revised the regulations to address this suggestion. The definition of representative rate for any employee stationed outside the contiguous states remains unchanged and continues as the fourth step of the grade for a position covered by the GS using the base rate for GS positions. Employees in Alaska and Hawaii may receive nonforeign area cost-of-living allowance payments under 5 U.S.C. 5941. Employees in overseas locations may receive cost-of-living allowances under 5 U.S.C. 5924. Such allowances are not basic pay nor are they treated in a manner similar to locality pay for GS employees. Accordingly, such allowances are not included in a representative rate for reduction in force purposes.

One agency asked OPM to clarify the definition of "representative rate" in section 351.203 for a Federal Wage System (FWS) position. We are adopting this suggestion by adding a reference in section 351.203 to the definition of "representative rate" in 5 CFR 532.401 for FWS positions. Section 532.401 provides that the representative rate for an FWS position is the second rate on a five-rate regular wage schedule.

One agency suggested that OPM delete the definition of "representative rate" for pay band positions in paragraph (3) of proposed section 351.203. For an alternative, the agency suggested that, in reduction in force competition, it would instead use the pay-setting procedures that apply when one of its employees moves internally (e.g., via actions such as reassignment or voluntary demotion) from a pay band

position to a position not covered by a pay band. We did not adopt this suggestion. The Supplementary Information section of the proposed regulations explained that comparing representative rates is an impartial procedure to determine employees' potential "bump" or "retreat" right to a position on a different retention register when the positions are under different pay schedules (e.g., to determine the assignment rights of employees to and from positions covered by the GS system, FWS, and pay bands). In contrast, an agency-specific procedure to set pay based upon a voluntary or management-initiated movement from a pay band position to a position not covered by a pay band may include variables not covered by the proposed definition of "representative rate" for pay band positions in section 351.203. As a result, an agency-specific pay-setting procedure would not necessarily ensure that all competing employees have equivalent retention rights to and from positions under different pay schedules.

The two agencies suggested that section 351.403(a)(5) include all the criteria that an agency uses to determine whether two or more positions are interchangeable for purposes of establishing reduction in force competitive levels. Another comment asked for clarification when pay band positions are not interchangeable. We found that no revision is needed because section 351.403(a)(5) as written explains that the agency applies section 351.403(a)(1) through (4) to determine whether positions are interchangeable and must be placed in the same competitive level.

One agency asked whether section 351.403(a)(5) requires an agency to establish separate competitive levels for pay band positions with different representative rates. The agency also asked whether all positions in a pay band must have different representative rates if the pay band includes more than one competitive level. As written, section 351.403(a)(5) provides that the agency establishes each pay band competitive level to include interchangeable positions. Only then does the agency determine which representative rate is applicable to that competitive level.

One agency and the individual asked that OPM provide criteria for the agency

to consider under section 351.701(g) when determining which representative rate to use for reduction in force competition when a competitive area includes more than one local commuting area. We are not adopting this suggestion because we believe that the agency should have full discretion to determine which local commuting area is used as the basis for reduction in force representative rates under section 351.701(g). This is consistent with the agency's responsibility to make decisions under section 351.204.

The individual commenter noted that employees' potential assignment rights may differ, depending upon which local commuting area the agency designates under section 351.701(g) as the basis for representative rates when a competitive area includes more than one local commuting area. We explained in the Supplementary Information section of the proposed regulations that agencies will, for the first time, determine employees' reduction in force representative rates using a locality component for both GS and FWS positions. This is more equitable in determining employees' assignment rights than the current procedure in which the representative rate of FWS employees is based on a local prevailing rate, but the representative rate of GS employees does not include a locality component.

One agency asked OPM to clarify the range of potential assignment rights under section 351.708(h) when the competitive area includes only pay band positions. We found that no revision is needed. The language of the proposed regulation, which is further explained in the **SUPPLEMENTARY INFORMATION**, provides that a competitive service employee has a potential assignment right to a position in the same pay band or one pay band lower than the pay band from which released. In addition, a competitive service preference eligible employee with a service-connected disability of 30 percent or more has a potential assignment right to a position in the same pay band or up to two pay bands lower than the pay band from which released. These grade limits defining the range of potential assignment rights are consistent with the grade limits for a pay band environment that OPM approved and tested for demonstration projects for more than two decades.

One agency asked OPM to provide criteria for the agency to consider when designating the representative rate for pay band positions under paragraph (3) of the definition in section 351.203 when, under section 351.701(i), the competitive area includes pay band

positions and other positions not covered by a pay band. We are not adopting this suggestion because we believe that the agency should have full discretion to designate the representative rate for pay band positions, consistent with section 351.203 and the agency's responsibility to make decisions under section 351.204.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 351

Administrative practice and procedure, Government employees.

U.S. Office of Personnel Management.
Linda M. Springer,
Director.

■ Accordingly, OPM is amending part 351 of title 5, Code of Federal Regulations, as follows:

PART 351—REDUCTION IN FORCE

■ 1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 1302, 3502, 3503; sec. 351.801 also issued under E.O. 12828, 58 FR 2965.

■ 2. In § 351.203, the definition of "representative rate" is revised to read as follows:

§ 351.203 Definitions.

In this part:

* * * * *

Representative rate means:

(1) The fourth step of the grade for a position covered by the General Schedule, using the locality rate authorized by 5 U.S.C. 5304 and subpart F of part 531 of this chapter for General Schedule positions;

(2) The prevailing rate for a position covered by a wage-board or similar wage-determining procedure, such as provided in the definition of representative rate for Federal Wage System positions in 5 CFR 532.401 of this chapter;

(3) For positions in a pay band, the rate (or rates) the agency designates as representative of that pay band or competitive levels within the pay band, including (as appropriate) any applicable locality payment authorized

by 5 U.S.C. 5304 and subpart F of part 531 of this chapter (or equivalent payment under other legal authority); and

(4) For other positions (e.g., positions in an unclassified pay system), the rate the agency designates as representative of the position, including (as appropriate) any applicable locality payment authorized by subpart F of part 531 (or equivalent payment under other legal authority).

* * * * *

■ 3. In § 351.403, paragraph (c)(4) is revised, and paragraphs (a)(5), (c)(5), and (c)(6) are added, to read as follows:

§ 351.403 Competitive level.

(a) * * *

(5) If a competitive area includes positions in one or more pay bands, each set of interchangeable positions in the pay band under paragraphs (a)(1) through (4) of this section is a separate competitive level (e.g., with interchangeable positions under paragraphs (a)(1) through (4) of this section, each pay band is one competitive level; if the positions are not interchangeable under paragraphs (a)(1) through (4) of this section, the pay band may include multiple competitive levels).

* * * * *

(c) * * *

(4) A difference in the local wage areas when a competitive area includes positions covered by more than one wage-board or similar wage-determining procedure;

(5) A difference in locality payments under 5 U.S.C. 5304 and subpart F of part 531 of this chapter when a competitive level includes more than one locality pay area listed in § 531.603 of this chapter; or

(6) Representative rates in different local commuting areas when a competitive area includes General Schedule (GS) and Federal Wage System (FWS) positions in multiple GS locality pay areas, and/or FWS local wage areas.

■ 4. Section 351.601 is revised to read as follows:

§ 351.601 Order of release from competitive level.

(a) Each agency must select competing employees for release from a competitive level (including release from a competitive level involving a pay band) under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. An agency may not release a competing employee from a competitive level while retaining in that level an

employee with lower retention standing except:

(1) As required under § 351.606 when an employee is retained under a mandatory exception or under § 351.806 when an employee is entitled to a new written notice of reduction in force; or

(2) As permitted under § 351.607 when an employee is retained under a permissive continuing exception or under § 351.608 when an employee is retained under a permissive temporary exception.

(b) At its option an agency may provide for intervening displacement within the competitive level before final release of the employee with the lowest-retention standing from the competitive level.

(c) When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

■ 5. In § 351.701, paragraphs (g), (h), and (i) are added, to read as follows:

§ 351.701 Assignment involving displacement.

* * * * *

(g) If a competitive area includes more than one local commuting area, the agency determines assignment rights under this part on the basis of the representative rates for one local commuting area within the competitive area (i.e., the same local commuting area used to establish competitive levels under § 351.403(c)(4), (5), and (6)).

(h) If a competitive area includes positions under one or more pay bands, a released employee shall be assigned in accordance with paragraphs (a) through (d) of this section to a position in an equivalent pay band or one pay band lower, as determined by the agency, than the pay band from which released. A preference eligible with a service-connected disability of 30 percent or more must be assigned in accordance with paragraphs (a) through (d) of this section to a position in an equivalent pay band or up to two pay bands lower, as determined by the agency, than the pay band from which released.

(i) If a competitive area includes positions under one or more pay bands, and other positions not covered by a pay band (e.g., GS and/or FWS positions), the agency provides assignment rights under this part by:

(1) Determining the representative rate of positions not covered by a pay band, consistent with § 351.203;

(2) Determining the representative rate of each pay band, or competitive level within the pay band(s), consistent with § 351.203;

(3) As determined by the agency, providing assignment rights under paragraph (b) of this section (bumping), or paragraphs (c) and (d) of this section (retreating), consistent with the grade intervals covered in paragraphs (b)(2) and (c)(2) of this section, and the pay band intervals in paragraph (h) of this section.

[FR Doc. E8-11283 Filed 5-20-08; 8:45 am]

BILLING CODE 6325-39-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1160

[Docket No. AMS-DA-07-0156; DA-07-05]

National Fluid Milk Processor Promotion Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the Fluid Milk Promotion Order (Order) by reducing the burden of late-payment charges applied to processors who mistakenly underreport the amount of assessments owed to the National Fluid Milk Processor Promotion Board (Board), provided that the processor has not made more than two reporting errors in the prior 12 months.

DATES: *Effective Date:* July 1, 2008.

FOR FURTHER INFORMATION CONTACT:

Whitney A. Rick, Chief, Promotion and Research Branch, Dairy Programs, AMS, USDA, 1400 Independence Ave., SW., Room 2958-S, Stop 0233, Washington, DC 20250-0233. Phone: (202) 720-6909. E-mail: Whitney.Rick@usda.gov.

SUPPLEMENTARY INFORMATION: This final rule adopts a proposal submitted by the Board to reduce the burden of late payment fees applied to processors who underreport the amount of assessments they owe due to unintentional errors or miscalculations. Specifically, the amendment reduces late-payment charges provided that the processor has not made more than two reporting errors in the prior 12 months.

The Fluid Milk Promotion Order is issued under the Fluid Milk Promotion Act as amended (Act) [7 U.S.C. 6401-6417].

Executive Order 12866

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 1999K of the Act, any person subject to the Order may file with the Secretary of Agriculture (Secretary) a petition stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not in accordance with the law and request a modification of the Order or to be exempted from the Order. Such person is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act

The Agricultural Marketing Service (AMS) has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601-612). The final rule imposes no new burden on the industry but will in fact reduce late-payment charges applied to processors who underreport the amount of assessments which they owe to the Board provided that the processors have not made more than two reporting errors in the prior 12 months.

Small businesses in the fluid milk processing industry have been defined by the Small Business Administration (13 CFR 121.201) as those processors employing not more than 500 employees. As of April 2008, there were approximately 100 fluid milk processors subject to the provisions of the Order. While some processors own multiple plants, the majority of processors own just one plant with fewer than 500 employees, and are, therefore, small entities.

Paperwork Reduction Act

Information collection requirements and recordkeeping provisions contained in 7 CFR Part 1250 have been previously approved by the Office of Management

and Budget and assigned OMB Control No. 0581-0093 under the Paperwork Reduction Act of 1980.

Prior Documents in This Proceeding

Proposed Rule: Issued January 18, 2008; published January 28, 2008 (73 FR 4762).

Statement of Consideration

This final rule amends the Fluid Milk Promotion order (Order) by reducing the burden of late payment fees on processors who mistakenly underreport their pounds of fluid milk processed and marketed commercially (excluding direct delivery to the residence of a consumer). Processors will not be required to pay late-fee charges on additional assessments owed the National Fluid Milk Processor board (Board) provided: (1) that no more than two erroneous reports have occurred in the preceding 12-month period and; (2) the processor pays its past due assessments not later than the last day of the month following notification by the Board that additional assessments are due. If more than two erroneous reports have occurred in the preceding 12-month period or the processor fails to submit a past due assessment when notified, late-payment charges will be assessed in accordance with § 1160.214 of the Order.

The Fluid Milk Promotion Order (7 CFR Part 1160) is authorized under the Fluid Milk Promotion Act of 1990 (Act) (7 U.S.C. 6401-6417). The Order, in § 1160.211(a)(1) provides that each fluid milk processor shall pay to the Board an assessment of \$0.20 per hundredweight on fluid milk products processed and marketed commercially in consumer-type packages in the United States by such fluid milk processors. The Order further provides in § 1160.213 that if the Board or the Secretary determines through an audit of a processor's reports, records, books or accounts or through some other means that additional money is due to the Board, the Board is to notify that processor of the amount due or overpaid. If the processor owes money to the Board, the processor is to remit the underpaid amount by the next due date as provided in § 1160.211 of the Order. If the processor has overpaid, that amount is credited to the processor's account and applied against amounts due in succeeding months.

At the request and on behalf of the Board, Milk Market Administrators verify the total pounds of fluid milk products processed and commercially marketed in consumer-type packages (excluding delivering directly to the residence of a consumer) that were

reported to the Board by the milk processors. Total fluid milk products are the sum of fluid milk product route sales and packaged fluid milk products sold to any other plant, less any fluid milk products purchased from other plants. The results of the Market Administrators' verification are forwarded to the Board, and, in accordance with § 1160.214(a), any unpaid assessments are increased by 1.5 percent each month beginning with the day following the date such assessments were due.

Interested parties were provided an opportunity to file comments on the proposed rule. One comment, filed on behalf of the Milk Processor Education Program (MilkPEP) supported the proposed changes to the Order. MilkPEP stated that the proposed changes would encourage and ensure the receipt of assessments owed to the Board.

List of Subjects in 7 CFR Part 1160

Fluid milk, Milk, Promotion.

■ For the reasons set forth in the preamble, 7 CFR part 1160 is amended as follows:

PART 1160—FLUID MILK PROMOTION PROGRAM

■ 1. The authority citation for 7 CFR Part 1160 continues to read as follows:

Authority: 7 U.S.C. 6401-6417.

■ 2. Section 1160.213 is revised to read as follows:

§ 1160.213 Adjustment of accounts.

Whenever the Board or the Secretary determines through an audit of a processor's reports, records, books or accounts or through some other means that additional money is due the Board or to such processor from the Board, the Board shall notify that person of the amount due or overpaid. If the processor owes money to the Board, it shall remit that amount by the next date for remitting assessments as provided in § 1160.211. For the first two erroneous reports submitted by a processor in the preceding 12-month period, late-payment charges assessed pursuant to § 1160.214 shall not begin to accrue until the day following such date. For all additional erroneous reports submitted by a processor during the 12-month period, late-payment charges shall accrue from the date the payment was due. If the processor has overpaid, that amount shall be credited to its account and applied against amounts due in succeeding months.

Dated: May 15, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8-11355 Filed 5-20-08; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1212 and 1240

[Docket No. AMS-FV-06-0176; FV-03-704-FR]

RIN 0581-AC37

Establishment of Honey Packers and Importers Research, Promotion, Consumer Education and Industry Information Order and Suspension of Assessments Under the Honey Research, Promotion, and Consumer Information Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes the Honey Packers and Importers Research, Promotion, Consumer Education and Industry Information Order (Packers Order). The Packers Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act). Under the Packers Order, first handlers and importers will pay an assessment of \$0.01 per pound on honey and honey products. First handlers and importers of less than 250,000 pounds of honey and honey products annually will be exempt from the assessment. The assessments will be remitted to the Honey Packers and Importers Board (Board) to conduct a generic program of promotion, research, consumer education, and industry information to maintain and expand markets for honey and honey products. A referendum was conducted among honey first handlers and importers between April 2 and April 16, 2008. Seventy-eight percent of those covered under the Packers Order—representing ninety-two percent of the volume of those voting in the referendum—favored implementation of the program. This rule also suspends the requirement of the existing Honey Research, Promotion, and Consumer Information Order (Current Order) and regulations authorized under the Honey Research, Promotion, and Consumer Information Act (Honey Act) that honey producers and importers pay to the National Honey Board (Current Board) an assessment in the amount of \$0.01 per pound on honey and honey

products. The provisions of the Current Order and regulations issued thereunder will be terminated at a later date.

DATES: *Effective Date:* May 22, 2008.

FOR FURTHER INFORMATION CONTACT:

Kathie Notoro, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, Stop 0244, Room 0632-S, 1400 Independence Ave, SW., Washington, DC 20250-0244; telephone (202) 720-9915 or (888) 720-9917 (toll free), Fax: (202) 205-2800 or e-mail kathie.notoro@usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411-7425) and under the Honey Research, Promotion, and Consumer Information Act (Honey Act) (7 U.S.C. 4601-4613). The Current Order appears at 7 CFR Part 1240.

A proposed rule with the Packers Order was published in the **Federal Register** on June 4, 2007 [72 FR 30924], with a 60-day comment period which ended on August 3, 2007. That rule also proposed termination of the Current Order and regulations in 7 CFR Part 1240. A second proposed rule and referendum order was published in the **Federal Register** on March 3, 2008 [73 FR 11474]. A final rule including the referendum procedures was published in the **Federal Register** the same day [73 FR 11470].

First handlers and importers who handled 250,000 pounds or more of honey or honey products, during the period from January 1, 2007, through December 31, 2007, were eligible to vote in the April 2-16, 2008, referendum. Seventy-eight percent of those voting in the referendum, representing ninety-two percent of the volume who voted in the referendum, approved the program. The referendum was conducted by mail ballot.

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

Section 524 of the 1996 Act provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act and section 10 of the Honey Act, a person subject to an order may file a petition with the U.S. Department of Agriculture (Department) stating that the order, any provision of the order, or any obligation imposed in connection with the order is not established in accordance with the law, and requesting a modification of the order or an exemption from the order. Any such petition must be filed within two years after the effective date of an order, provision or obligation subject to challenge. The petitioner would have the opportunity for a hearing on the petition. Thereafter, the Department would issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall be the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of entry of the Department's final ruling.

In deciding if the Packers Order was consistent with and would effectuate the purpose of the 1996 Act, the Secretary considered the existence of other federal research and promotion programs issued under other laws. The Current Order appears at 7 CFR Part 1240 and is issued under the Honey Act.

Similar to the Current Order, the goals of the Proposed Order are to: (1) Develop and finance an effective and coordinated research, promotion, industry information, and consumer education program for honey and honey products; (2) strengthen the position of the honey industry; and (3) develop, maintain, and expand existing markets for honey and honey products.

Taking into account the duplicative nature of the Packers Order with the Current Order, the Department proposed terminating the Current Order and its regulations. This rule suspends the requirements of the Current Order and regulation that honey producers and importers pay assessments on honey and honey products. The provisions of the Current Order and regulations issued thereunder will be terminated at a later date. The Department will then appoint not more than five trustees from the Current Board to liquidate the affairs of the Current Board.

Background

The 1996 Act, which became effective on April 4, 1996, authorizes the Department to establish a national research and promotion program covering domestic and imported honey and honey products. The National Honey Packers and Dealers Association (Association) submitted a proposal for a

national promotion, research and information order for honey and honey products on March 17, 2006. The Department published the Association's proposal, with modifications, for public comment in the June 4, 2007, **Federal Register** [72 FR 30924]. Seventy-six comments were received by the August 3, 2007, deadline. These comments, and related changes to the Packers Order, were discussed in the March 3, 2008, proposed rule published in the **Federal Register** [73 FR 11482] which included a Referendum Order. The representative period for establishing voter eligibility for the referendum was the period from January 1 to December 31, 2007. A referendum was conducted by mail ballot from April 2 to April 16, 2008. In the referendum, first handlers and importers of 250,000 pounds or more of honey and honey products voted to implement the program.

The program will be administered by the Board under USDA supervision. The Board will have ten members; including three first handler representatives, two importer representatives, one importer-handler representative, one national honey marketing cooperative representative, and three producer representatives and their alternates.

Under the Packers Order, "first handler" would be defined to mean the first person who handles honey or honey products, and would include a producer who handles his or her own production. In addition, "handle" would be defined to mean process, package, sell, transport, purchase or in any other way place honey or honey products, or cause them to be placed, in commerce. This term would include selling unprocessed honey that will be consumed without further processing or packaging, but would not include the transportation of unprocessed honey by the producer to a handler or transportation by a commercial carrier for the account of the first handler or producer.

The Packers Order provides that each first handler pay an assessment to the Board at the rate of \$0.01 per pound of domestically produced honey or honey products that the handler handles. The Packers Order establishes that each first handler responsible for remitting assessments shall pay the Board the amount due on a monthly basis no later than the fifteenth day of the month following the month in which the honey or honey products were marketed. The funds generated through the mandatory assessments on domestically handled and imported honey or honey products would be used to pay for promotion, research, and consumer and industry information as well as the

administration, maintenance, and functioning of the Board.

The Packers Order defines "importer" to mean any person who imports honey or honey products from outside the United States for sale in the United States as a principal or as an agent, broker, or consignee for any person. An importer is also listed in the import records as the importer of record for such honey or honey products with U.S. Customs and Border Protection (Customs).

Section 516(f) of the 1996 Act allows assessments on imports at a rate comparable to the rate for domestics. The Packers Order treats importers in the same manner as domestic handlers in terms of the assessment rate: Each importer would pay an assessment to the Board at the rate of \$0.01 per pound of honey or honey products the importer imports into the United States. An importer must pay the assessment to the Board through Customs when the honey or honey products being assessed enters the United States. If Customs does not collect an assessment from an importer, the importer would be responsible for paying the assessment directly to the Board.

The assessment levied on domestically handled and imported honey and honey products would be used to pay for promotion, research, and consumer education and industry information as well as the administration, maintenance, and functioning of the Board. Expenses incurred by the Department in implementing and administering the Packers Order, including referenda costs, also would be paid from assessments.

Persons failing to remit total assessments due in a timely manner may also be subject to actions under Federal debt collection procedures as set forth in 7 CFR 3.1 through 3.36 for all research and promotion programs administered by the Department [60 FR 12533, March 7, 1995]. Persons also would have to pay interest and late payment charges on late assessments as prescribed in the Packers Order.

Under the Packers Order, a first handler who handles less than 250,000 pounds of honey or honey products per year or an importer who imports less than 250,000 pounds of honey or honey products per year, would be exempt from paying assessments.

In addition, a first handler who operates under an approved NOP system plan, handles only products eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, is exempt from the paying assessments under the Packers

Order. An importer who imports only products eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, also is exempt from paying assessments.

The Packers Order allows the Board to recommend to the Secretary an increase or decrease to the assessment, as it deems appropriate by at least a two-thirds vote of members present at a meeting of the Board. The Board may not recommend an increase in the assessment of more than \$0.02 per pound of honey or honey products and assessments may not be increased by more than \$0.0025 in any single fiscal year.

Although the 1996 Act allows for credits of assessments for generic and branded activities, the Association who proposed the Packers Order did not elect to include it.

As the Packers Order establishes that first handlers and importers will be responsible for paying assessments, the Packers Order states that these two groups will also be responsible for filing specific reports and maintaining records regarding the amount of honey and honey products brought to the market.

First handlers will be required to file reports and maintain records on the total quantity of honey and honey products acquired during the reporting period, the quantity of honey processed for sale from the handler's own production, and the quantity of honey purchased from a handler or importer responsible for paying the assessment due. The Board will recommend to the Department specific reporting periods and dates when such reports are due to the Board.

Unless provided by Customs, importers will be required to report the total quantity of honey and honey products imported during each reporting period, and keep a record of each lot of honey and honey products imported during such period, including the quantity, date, country of origin, and port of entry. Under the Packers Order, Customs would collect assessments on imported honey and honey products and remit the funds to the Board.

Each first handler and importer, including those who would be exempt from paying assessments under the Packers Order, will be required to maintain any books and records necessary to carry out the provisions of the Packers Order for two years beyond the fiscal period to which they apply. This would include the books and records necessary to verify any required reports. These books and records would be made available to the Board's or Department's employees or agents

during normal business hours for inspection if necessary.

The Packers Order provides that all officers, employees, and agents of the Department and of the Board are required to keep confidential all information obtained from persons subject to the Order. This information will be disclosed only if the Department considers the information relevant, and the information is revealed in a judicial proceeding or administrative hearing brought at the direction or on the request of the Department or to which the Department or any officer of the Department is a party.

However, the issuance of general statements based on reports or on information relating to a number of persons subject to the Packers Order would be permitted, if the statements do not identify the information furnished by any person. Finally, the publication, by direction of the Department, of the name of any person violating the Packers Order and a statement of the particular provisions of the Packers Order violated by the person will be allowed.

It is estimated that revenue for the Packers Order will be around or slightly more than \$3 million. Of this amount, about 64 percent would be generated by assessments on imported honey and honey products.

The importer representatives must import at least 75 percent of the honey or honey products they market in the United States. The importer-handler representative must also import at least 75 percent of the honey or honey products they market in the United States and must handle at least 250,000 pounds annually. In addition, the producer representatives must produce a minimum of 150,000 pounds of honey in the United States annually based on the best three year average of the most recent five calendar years.

Each term of office on the Board would end on December 31, with new terms of office beginning on January 1, with the exception of the initial Board's term of office.

First handlers, producers, and a national honey marketing cooperative representative would represent those entities in the United States. The United States is defined to include collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States. Board members from each of these groups would be nominated by national organizations representing each of them respectively. Honey is produced in almost all of the 50 States. The top ten producing States in 2006 included North Dakota, South

Dakota, California, Florida, Minnesota, Montana, Texas, Wisconsin, Idaho, and New York.

Importers and the importer-handler on the Board will be nominated by national organizations representing importers. Such importers and the importer-handler will represent those individuals who import for sale honey or honey products into the United States as a principal or as an agent, broker, or consignee for any person who produces honey or honey products outside the United States. All qualified national organizations representing first handlers, producers, importers and honey-marketing cooperatives will have the opportunity to participate in a nomination caucus for the purposes of preparing a slate of candidates for the above positions submitted to the Department for consideration.

Eligible organizations must submit nominations to the Department six months before a new term of office begins, except for the initial appointments to the Board. To become a qualified national organization representing first handlers, importers, or producers under the Packers Order, each such organization will be required to meet the following criteria: (1) The majority of its voting membership must consist of first handlers or producers of honey, and in the case of an importing organization, the membership must represent at least a majority of the volume of honey or honey products imported into the United States; (2) it must have a history of stability and permanency and have been in existence for more than 1 year; (3) its primary purpose must be to promote honey first handlers', importers' or producers' welfare; (4) it must derive a portion of its operating funds from first handlers, importers, or producers; and (5) it must demonstrate it is willing and able to further the 1996 Act's purposes. Further, any organization representing first handlers or producers must represent a substantial number of first handlers or producers who market or produce a substantial volume of honey or honey products in at least 20 States.

To be eligible as a qualified national honey-marketing cooperative, the Department must certify that an entity qualifies under the definition in section 1212.42(d). Such an entity shall not be eligible for certification as a qualified national organization representing producer interests.

If the Department determines that there are no qualified national organizations representing first handlers, importers, producers, and honey-marketing cooperatives interests, individuals who have paid their

assessments to the Board in the most recent fiscal year could submit nominations for those positions specified.

The Packers Order indicates that the Board may recommend to the Department that a member be removed from office if the member consistently refuses to perform his or her duties or engages in dishonest acts or willful misconduct. The Department may remove the member if the Department finds that the Board's recommendation demonstrates cause.

The 1996 Act provides that to ensure fair and equitable representation, the composition of a Board shall reflect the geographic distribution of the production of the agriculture commodity in the United States and the quantity or value of the agriculture commodity imported into the United States.

Under the Packers Order at least once every five years, but not more frequently than once in each three year period, the Board would review the geographical distribution in the United States of the production of honey covered by the Packers Order and quantity or value of honey and honey products imported into the United States. The review, based on a three-year average, would enable the Board to evaluate whether the Board membership is reflective of the composition of the honey industry.

Board members could serve terms of three years and be able to serve a maximum of two consecutive terms under the Packers Order. When the Board is first established, one producer, one first handler, one importer, and the representative of a national honey cooperative would serve a two-year term. One producer, one first handler, and the importer-handler representative would serve a three-year term of office. One producer, one first handler, and one importer would serve a four-year term of office. This would allow the terms be staggered on the Board. No member or alternate may serve more than two consecutive terms, excluding any initial two-year term of office. Determination of which of the initial members and their alternates would serve two-year, three-year or four-year terms, would be designated by the Department.

In the event that any member or alternate of the Board ceases to be a member of the category of members from which the member was appointed to the Board, such position shall become vacant.

Under the Packers Order, a quorum is met if a majority of members are present and at least one first handler and one importer are present. Also, under the

Packers Order, there is a 2/3 vote requirement for recommendations to the Secretary of a change in assessment.

The Order provides that 5% of the Board's anticipated revenue must be set aside for production research.

The provisions regarding referendum procedures in the Packers Order provide for a referendum every seven years.

The Department also is suspending assessments under the Current Order and regulation. The Current Order provisions and regulations will be terminated at a later date. A separate rule will be published in the **Federal Register** terminating the Current Order provisions and regulations. The Department will then appoint not more than five trustees from the Current Board to liquidate the affairs of the Current Board.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) is required to examine the impact of the rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses would not be disproportionately burdened.

The 1996 Act authorizes generic promotion, research, and information programs for agricultural commodities. Development of such programs under this authority are in the national public interest and vital to the welfare of the agricultural economy of the United States and to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, government-supervised, generic commodity promotion programs.

The proponent Association submitted the Packers Order to: (1) Develop and finance an effective and coordinated program of research, promotion, industry information, and consumer education regarding honey and honey products; (2) strengthen the position of the honey industry; and (3) maintain, develop, and expand existing markets for honey and honey products.

The goals of the Current Order are similar. Therefore, taking into account the duplicative nature of the Packers Order with the Current Order, the Department is suspending in this rule assessment collection under the Current Order and its regulations and will terminate the provisions of the Current Order and regulations issued thereunder at a later date.

The Packers Order is authorized under the 1996 Act, while the Current Order is authorized under the Honey

Act. A major difference between the Current Order and the Packers Order is that the Packers Order provides for assessments to be paid by first handlers and importers that handled or imported 250,000 pounds or more of honey or honey products a year rather than producers and importers of less than 6,000 pounds per year under the Current Order.

Administrative expenses under the Packers Order will be reduced because the number of entities assessed under the Packers Order is reduced. Approximately 2,700 entities are assessed under the Current Order, while about 75 entities will be assessed under the Packers Order. Administrative costs will be reduced with fewer entities paying assessments and filing reports, and the assessment collection process will be simplified.

First handlers, importers, and producers will have the opportunity to serve on the 10 member Board. Each member will have an alternate. The Board will consist of three first handler representatives, three honey producers, two importer representatives, one importer-handler representative and one representative from a national honey marketing cooperative. The Secretary of Agriculture (Secretary) will appoint members to the Board from nominees submitted in accordance with the Order.

Section 518 of the 1996 Act provides for referendum to ascertain approval of an order to be conducted either prior to its going into effect or within 3 years after assessments first begin under the order. An initial referendum was conducted prior to putting the Packers Order in effect. Seventy-eight percent of first handlers and importers representing ninety-two percent of the volume voting in the referendum approved the program. Every seven years, the Department shall conduct a referendum to determine whether first handlers and importers of honey or honey products favor the continuation, suspension, or termination of the Packers Order. In addition, the Department could conduct a referendum at any time; at the request of 10 percent or more of the first handlers and importers required to pay assessments; or at the request of the Board.

There are approximately 45 first handlers and 30 importers of honey or honey products that will pay assessments under the Packers Order. The Current Honey Board consists of 12 members; seven producers, two handlers, two importers, and one marketing cooperative member. The Packers Board would consist of 10 members; three first handlers, two importers, one importer-handler, three

producers, and one marketing cooperative member. Under the Packers Order, entities in the board member nomination process will include qualified national organizations representing first handlers, importers, producers, and cooperative interests.

The Packers Order also provides for first handlers and importers to file reports to the Board. In addition, the Packers Order requires that qualified national organizations and nominated producers provide information for the nomination and appointment process to the Board. While the Packers Order will impose certain recordkeeping requirements on first handlers, importers, and any producers who seek nomination and appointment to the Board, information required under the Packers Order could be compiled from records currently maintained and will involve existing clerical or accounting skills. The forms require the minimum information necessary to effectively carry out the requirements of the Packers Order, and their use is necessary to fulfill the intent of the 1996 Act. An estimated 118 respondents would provide information to the Board. They will be: 45 first handlers, 30 importers, 6 producers (for nominations purposes), 10 certified organizations (for nomination purposes), 25 handlers/importers exempt under the program, and 2 organic handlers/importers (for exemption purposes). The estimated total cost of providing information to the Board by all respondents will be approximately \$11,550. This total has been estimated by multiplying 350 total hours required for reporting and recordkeeping by \$33, the average mean hourly earnings of various occupations involved in keeping this information. Data for computation of this hourly rate was obtained from the U.S. Department of Labor Statistics.

The Small Business Administration [13 CFR 121.201] defines small agricultural producers as those having annual receipts of \$750,000 or less annually and small agricultural service firms as those having annual receipts of \$6.5 million or less. Using these criteria under the Packers Order, most producers, and first handlers will be considered small businesses, while most importers will not. Further, the members of cooperative organizations and other nominating organizations would reflect this same size composition.

National Agricultural Statistic Service (NASS) data reports that U.S. production of honey, from producers with five or more colonies, totaled 155 million pounds in 2006. The top ten producing States in 2006 included

North Dakota, South Dakota, California, Florida, Minnesota, Montana, Texas, Wisconsin, Idaho, and New York. To avoid disclosing data for individual operations, NASS statistics do not include Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, Oklahoma, Rhode Island, and South Carolina. NASS reported the value of honey sold in 2006 was \$161,314,000. Honey prices increased during 2006 to 104.2 cents, up 14 percent from 91.8 cents in 2005.

Based on the assessment reports in connection with the Current Order and recorded by Customs, four countries account for 72 percent of the honey and honey products imported into the United States. These countries and their share of the imports are: China (28%); Argentina (21%); Vietnam (13%); and Canada (10%). Other countries combined totaled 28 percent of honey and honey products imported to the United States.

At the initial rate, revenue for the Packers Order will be approximately \$3 million. In 2006, \$3.6 million of assessment income was collected from the honey industry, of which 36 percent was from domestic production and 64 percent from imports. In 2006, 155 million pounds of honey or honey products were produced in the United States, 279.4 million pounds were imported and 7.6 million pounds were exported. The value of production in 2006 was \$161.3 million. The average price for honey in the U.S. in 2006 was 104.2 cents per pound. Therefore, the estimated assessment revenue as a percentage of total grower revenue (using 2006 as a model) could be estimated at 1.8 percent.

This final rule also suspends assessment collections under the Current Order representing \$3.6 million on an annual basis.

The honey industry and consumers would benefit from additional information that may be conveyed through the plans and projects regarding honey and honey products. Another benefit to first handlers and importers of honey or honey products would be that they would have more representation on the Board and have additional input into Board decisions regarding the plans and programs under the Packers Order.

Associations and related industry media received news releases and other information regarding the implementation of the Packers Order, termination of the Current Order, and the referendum process. Furthermore, all information is available electronically.

The Board could develop guidelines for compliance with the Packers Order.

The Board could recommend to the Secretary changes in programs, plans, projects, budgets, and any rules and regulations including the assessment rate, that might be necessary for the administration of the program. The administrative expenses of the Board are limited by the 1996 Act to no more than 15 percent of assessment income. This does not include USDA costs for program oversight.

With regard to alternatives, the 1996 Act itself provides for authority to tailor a program according to the individual needs of an industry. Provision is made for permissive terms in an order in § 516 of the 1996 Act, and other sections provide for alternatives.

The Packers Order is designed to: (1) Develop and finance an effective and coordinated research, promotion, industry information, and consumer education program for honey and honey products; (2) strengthen the position of the honey industry; and (3) maintain, develop, and expand existing markets for honey and honey products.

Additionally, the Packers Order will require first handlers of honey or honey products, instead of honey producers, to pay assessments to the Board that administers the program. While assessments will impose some additional costs on first handlers, the reporting requirements are minimal because handlers under the Current Order already report to the Current Board. Also, the costs are minimal and uniform on all first handlers. These costs should be offset by the benefits derived by the operation of the Packers Order. Under the Packers Order importers will continue to pay assessments and be responsible for reporting and recordkeeping.

Section 516 authorizes an order to provide for exemption of *de minimis* quantities (the proponent Association proposed 250,000 pounds or less as a *de minimis* quantity) of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports.

Also, under authority provided by 7 U.S.C. 7401, the Packers Order exempts first handlers who operate under an approved National Organic Program (NOP) (7 CFR part 205) system plan, handle only products that are eligible to be labeled as 100 percent organic under the NOP, and are not a split operation, from paying assessments. The Packers

Order also states that importers who import only products that are eligible to be labeled as 100 percent organic under the NOP, and are not a split operation, shall be exempt from paying assessments.

The Packers Order includes provisions for domestic market expansion and improvement, and reserve funds. There will be a decrease in the reporting and recordkeeping burden cost from \$129,459 under the Current Order to \$11,550 under the Packers Order. The reduced cost is due to a reduction in the total of individuals required to report.

Assessments under the Current Order and regulations are suspended in this rule. The provisions of the Current Order and its regulations will be terminated at a later date. With the exception of the Current Order, the Department has not identified any relevant Federal rules that duplicate, overlap or conflict with the Packers Order.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS has submitted to OMB a new information collection that has been assigned OMB control number 0581-NEW.

Title: Advisory Committee and Research and Promotion Board Background Information.

OMB Number for background form AD-755: (Approved under OMB No. 0505-0001).

Expiration Date of approval: March 31, 2009.

Title: National Research, Promotion, and Consumer Information Programs.

OMB Number: 0581-NEW.

Expiration Date of Approval: 3 years from approval date.

Type of Request: New information collection for research and promotion programs.

Abstract: The information collection requirements in the request are essential to carry out the intent of the 1996 Act.

Under the Packers Order, first handlers would be required to pay assessments to and file reports with the Board. While the Packers Order will impose certain recordkeeping requirements on first handlers, information required under the Packers Order could be compiled from records currently maintained by such handlers. Such records will be retained for at least two years beyond the marketing year of their applicability.

Under the Packers Order importers are responsible to pay assessments. Unless provided by Customs, importers must report the total quantity of product

imported during the reporting period and a record of each importation of such product during such period, giving quantity, date, and port of entry. Under the Packers Order, Customs would collect assessments on imported honey and honey products and remit the funds to the Board.

An estimated 118 respondents would provide information to the Board. They would be: 45 first handlers, 30 importers, 6 producers (for nominations purposes), 10 certified organizations (for nomination purposes), 25 handlers/importers exempt under the program, and 2 organic handlers/importers (for exemption purposes). The estimated total cost of providing information to the Board by all respondents would be \$11,550. This total has been estimated by multiplying 350 total hours required for reporting and recordkeeping by \$33, the average mean hourly earnings of various occupations involved in keeping this information. Data for computation of this hourly rate was obtained from the U.S. Department of Labor Statistics.

The Packers Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other honey programs administered by the Department.

The forms will require the minimum information necessary to effectively carry out the requirements of the Packers Order, and their use is necessary to fulfill the intent of the 1996 Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the Board. The forms would be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information monthly during the production season will coincide with normal industry business practices. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. The requirement to keep records for two years is consistent with normal industry practices. There is no practical method for collecting the required information without the use of these forms.

Information collection requirements that are included in this rule include:

(1) A Background Information Form AD-755 (Approved under OMB Form No. 0505-0001).

Estimate of Burden: Public reporting for this collection of information is estimated to average 0.5 hours per response for each Board nominee.

Respondents: First handlers, importers, producers and cooperative organizations.

Estimated number of Respondents: 40 for initial nominations, 13 in subsequent years.

Estimated number of Responses per Respondent: 1 every 3 years. (0.3)

Estimated Total Annual Burden on Respondents: 20 hours for the initial nominations and 6 hours annually thereafter.

(2) An Exemption Application for First Handlers and Importers Who Will Be Exempt From Assessments.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hours per response for each exempt first handler and importer.

Respondents: Exempt First handlers and importers.

Estimated Number of Respondents: 25.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 6.25 hours.

(3) Monthly Report by Each First Handler of Honey.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.5 hours per each first handler reporting on honey handled.

Respondents: First handlers.

Estimated number of Respondents: 45.

Estimated number of Responses per Respondent: 12.

Estimated Total Annual Burden on Respondents: 270 hours.

(4) A Requirement to Maintain Records Sufficient to Verify Reports Submitted Under the Order.

Estimate of Burden: Public recordkeeping burden for keeping this information is estimated to average 0.5 hours per recordkeeper maintaining such records.

Respondents: First handlers and importers.

Estimated Number of Respondents: 118.

Estimated Total Annual Burden of Respondents: 59 hours.

(5) Application for Reimbursement of Assessment.

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per request for reimbursement.

Respondents: First handler and importers.

Estimated Number of Respondents: 20.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 5 hours.

(6) Application for Certification of Organizations.

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.5 hours per application.

Respondents: First handlers, importers, producers and marketing cooperatives.

Estimated Number of Respondents: 10.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 5 hours.

(7) Nomination Appointment Form.

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.5 hours per application.

Respondents: First handlers, importers, producers and marketing cooperatives.

Estimated Number of Respondents: 10.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 5 hours.

(8) Organic Exemption Form.

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.5 hours per exemption form.

Respondents: First handlers and importers.

Estimated Number of Respondents: 2.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1 hour.

Comments were invited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the Order and the Department's oversight of the Order, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the collection of information, including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. No comments were received on the collection of information part of this rule.

The Packers Order is summarized as follows:

Section 1212.1 through Section 1212.32 of the Packers Order define certain terms, such as honey, first handler, and importer. Section 1212.30 is corrected to include the term "or part thereof."

Sections 1212.40 through 1212.48 of the Packers Order include provisions relating to the Honey Packers and Importers Board. These provisions cover establishment and membership; term of office; nominations and appointments; removal and vacancies; procedure, reimbursement and attendance; powers; duties; and reapportionment of the Board, which is the governing body authorized to administer the Order through the implementation of programs, plans, projects, budgets, contracts to promote and disseminate information about honey, subject to oversight by the Department. Section 1212.46(e) and 1212.47(e) are corrected in this rule to specify the authority of the Board to enter into contracts and agreements as provided for in the Act.

Sections 1212.50 through 1212.55 cover budget review and approval; financial statements; authorize the collection assessments; specify how assessments will be used; specify who pays the assessment and how; exemptions; and authorize the imposition of a late-payment charge on past-due assessments. Section 1212.52(g)(1) is corrected to change the word "establishes" to "recommends."

The proponent Association recommended an assessment rate of \$0.01 per pound for domestic honey and imported honey and honey products. The assessment rate will be reviewed and may be modified after the first referendum is conducted as stated in section 1212.81(a)(1).

Persons failing to remit total assessments due in a timely manner may also be subject to actions under federal debt collections procedures as set forth in 7 CFR 3.1 through 3.36 for all research and promotion programs administered by USDA [60 FR 12533, March 7, 1995].

Sections 1212.60 through 1212.62 address programs, plans, and projects; require the Board to periodically conduct an independent review of its overall program; and address patents, copyrights, trademarks, information, publications, and product formulations developed through the use of assessment funds.

Sections 1212.70 through 1212.72 concern reporting and recordkeeping requirements for persons subject to the Order and protect the confidentiality of

information from such books, records, or reports.

Sections 1212.80 through 1212.88 describe the rights of the Secretary; address referenda; authorize the Secretary to suspend or terminate the Packers Order when deemed appropriate; prescribe proceedings after suspension or termination; and address personal liability, separability, amendments, and the OMB control number.

The Department conducted a referendum among first handlers and importers of honey and honey products from April 2 through April 16, 2008, to determine whether the Packers Order would become effective. The representative period for establishing voter eligibility was from January 1 through December 31, 2007. First handlers and importers who handled or imported 250,000 pounds or more of honey and honey products during the representative period were eligible to vote. Seventy-eight percent of those voting, representing ninety-two percent of the volume voted in the referendum favored implementation of the program.

After consideration of all relevant material presented, including the initial proposal, comments received, and the referendum results, it is found that the Packers Order, authorized under the Commodity Promotion, Research, and Information Act of 1996, is consistent with and effectuates the declared policy and purpose of the 1996 Act. Further, after taking into account the duplicative nature of the Proposed Order with the Current Order, it is determined that the requirements of the Current Order and regulations issued thereunder that honey producers and importers pay assessments on honey and honey products no longer tends to effectuate the declared policy of the Honey Research, Promotion, and Consumer Information Act and are hereby suspended.

It is also found that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because: (1) In order to avoid duplication with the Packers Order, this action suspends the requirements of the Current Order and regulations that producers and importers remit assessments; and (2) implementation of the Packers Order is needed as soon as possible to begin assessments under that program and to initiate the process of establishing the Honey Packers and Importers Board.

List of Subjects in 7 CFR Parts 1212 and 1240

Administrative practice and procedure, Advertising, Consumer Education, Honey and Honey products, Marketing agreements, Promotion, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, Title 7, Chapter XI of the Code of Federal Regulations is amended as follows:

PART 1240—HONEY RESEARCH, PROMOTION, AND CONSUMER INFORMATION

■ 1. The authority citation for Part 1240 continues to read as follows:

Authority: 7 U.S.C. 4601–4613; 7 U.S.C. 7401.

■ 2. In § 1240.41, a note is added immediately following the section to read as follows:

§ 1240.41 Assessments.

* * * * *

Note To § 1240.41: The requirement to pay producer and importer assessments is suspended indefinitely as of May 22, 2008.

■ 3. In § 1240.115, a note is added immediately following the section to read as follows:

§ 1240.115 Levy of assessments.

* * * * *

Note To § 1240.115: The requirement to pay producer and importer assessments is suspended indefinitely as of May 22, 2008.

PART 1212—HONEY PACKERS AND IMPORTERS RESEARCH, PROMOTION, CONSUMER EDUCATION AND INDUSTRY INFORMATION ORDER

■ 4. The authority citation for Part 1212 is revised to read as follows:

Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

■ 5. Add subpart A to part 1212 to read as follows:

Subpart A—Honey Packers and Importers Research, Promotion, Consumer Education, and Industry Information Order

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Sec.

- 1212.1 Act.
- 1212.2 Board.
- 1212.3 Conflict of interest.
- 1212.4 Department.
- 1212.5 Exporter.
- 1212.6 First handler.
- 1212.7 Fiscal period for marketing year.

- 1212.8 Handle.
- 1212.9 Honey.
- 1212.10 Honey products.
- 1212.11 Importer.
- 1212.12 Importer-Handler Representative.
- 1212.13 Information.
- 1212.14 Market or marketing.
- 1212.15 Order.
- 1212.16 Part and subpart.
- 1212.17 Person.
- 1212.18 Plans and programs.
- 1212.19 Producer.
- 1212.20 Promotion.
- 1212.21 Qualified national organization representing handler interests.
- 1212.22 Qualified national organization representing importer interests.
- 1212.23 Qualified national organization representing producer interests.
- 1212.24 Qualified national organization representing cooperative interests.
- 1212.25 Referendum.
- 1212.26 Research.
- 1212.27 Secretary.
- 1212.28 Suspend.
- 1212.29 State.
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- 1212.31 United States.
- 1212.32 United States Customs Service.

Honey Packers and Importers Board

- 1212.40 Establishment and membership.
- 1212.41 Term of office.
- 1212.42 Nominations and appointments.
- 1212.43 Removal and vacancies.
- 1212.44 Procedure.
- 1212.45 Reimbursement and attendance.
- 1212.46 Powers.
- 1212.47 Duties.
- 1212.48 Reapportionment of Board membership.

Expenses and Assessments

- 1212.50 Budget and expenses.
- 1212.51 Financial statements.
- 1212.52 Assessments.
- 1212.53 Exemption from assessment.
- 1212.54 Operating reserve.
- 1212.55 Prohibition on use of funds.

Promotion, Research, and Information

- 1212.60 Programs, plans, and projects.
- 1212.61 Independent evaluation.
- 1212.62 Patents, copyrights, inventions, product formulations, and publications.

Reports, Books, and Records

- 1212.70 Reports.
- 1212.71 Books and records.
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Miscellaneous

- 1212.80 Right of the Secretary.
- 1212.81 Referenda.
- 1212.82 Suspension or termination.
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- 1212.84 Effect of termination or amendment.
- 1212.85 Personal liability.
- 1212.86 Separability.
- 1212.87 Amendments.
- 1212.88 OMB Control Numbers.

Subpart A—Honey Packers and Importers Research, Promotion, Consumer Education, and Industry Information Order**Definitions****§ 1212.1 Act.**

“Act” means the Commodity Promotion, Research, and Information Act of 1996, (7 U.S.C. 7411–7425), and any amendments to that Act.

§ 1212.2 Board.

“Board” or “Honey Packers and Importers Board” means the administrative body established pursuant to § 1212.40, or such other name as recommended by the Board and approved by the Department.

§ 1212.3 Conflict of interest.

“Conflict of interest” means a situation in which a member or employee of the Board has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Board for anything of economic value.

§ 1212.4 Department.

“Department” means the United States Department of Agriculture, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary’s stead.

§ 1212.5 Exporter.

“Exporter” means any person who exports honey or honey products from the United States.

§ 1212.6 First handler.

“First handler” means the first person who buys or takes possession of honey or honey products from a producer for marketing. If a producer markets honey or honey products directly to consumers, that producer shall be considered to be the first handler with respect to the honey produced by the producer.

§ 1212.7 Fiscal period.

“Fiscal period” means a calendar year from January 1 through December 31, or such other period as recommended by the Board and approved by the Secretary.

§ 1212.8 Handle.

“Handle” means to process, package, sell, transport, purchase or in any other way place honey or honey products, or causes them to be placed, in commerce. This term includes selling unprocessed honey that will be consumed without further processing or packaging. This term does not include the transportation

of unprocessed honey by the producer to a handler or transportation by a commercial carrier of honey, whether processed or unprocessed for the account of the first handler or producer.

§ 1212.9 Honey.

“Honey” means the nectar and saccharine exudations of plants that are gathered, modified, and stored in the comb by honeybees, including comb honey.

§ 1212.10 Honey products.

“Honey products” mean products where honey is a principal ingredient. For purposes of this subpart, a product shall be considered to have honey as a principal ingredient if the product contains at least 50% honey by weight.

§ 1212.11 Importer.

“Importer” means any person who imports for sale honey or honey products into the United States as a principal or as an agent, broker, or consignee of any person who produces honey or honey products outside the United States for sale in the United States, and who is listed in the import records as the importer of record for such honey or honey products.

§ 1212.12 Importer-Handler Representative.

“Importer-Handler Representative” means any person who is an importer and first handler, who must import at least 75 percent of the honey they market in the United States and must handle at least 250,000 pounds annually.

§ 1212.13 Information.

“Information” means activities or programs designed to develop new and existing markets, new and existing marketing strategies and increased efficiency and activities to enhance the image of honey and honey products. These include:

(a) Consumer education, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of honey and honey products; and

(b) Industry information, which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the honey industry, and activities to enhance the image of the honey industry.

§ 1212.14 Market or marketing.

(a) “Marketing” means the sale or other disposition of honey or honey products in any channel of commerce.

(b) “Market” means to sell or otherwise dispose of honey or honey products in interstate, foreign, or intrastate commerce.

§ 1212.15 Order.

“Order” means the Honey Packers and Importers Research, Promotion, Consumer Education and Industry Information Order.

§ 1212.16 Part and subpart.

“Part” means the Honey Packers and Importers Research, Promotion, Consumer Education, and Industry Information Order (Order) and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order shall be a “subpart” of such part.

§ 1212.17 Person.

“Person” means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.

§ 1212.18 Plans and programs.

“Plans and programs” mean those research, promotion and information programs, plans, or projects established pursuant to this Order.

§ 1212.19 Producer.

“Producer” means any person who is engaged in the production and sale of honey in any State and who owns, or shares the ownership and risk of loss of the production of honey or a person who is engaged in the business of producing, or causing to be produced, honey beyond personal use and having value at first point of sale.

§ 1212.20 Promotion.

“Promotion” means any action, including paid advertising and public relations that presents a favorable image for honey or honey products to the public and food industry with the intent of improving the perception and competitive position of honey and stimulating sales of honey or honey products.

§ 1212.21 Qualified national organization representing first handler interests.

“Qualified national organization representing first handler interests” means an organization that the Secretary certifies as being eligible to nominate first handler and alternate first handler members of the Board under § 1212.42.

§ 1212.22 Qualified national organization representing importer interests.

“Qualified national organization representing importer interests” means an organization that the Secretary certifies as being eligible to nominate

importer, importer-handler, and alternate importer and importer-handler members of the Board under § 1212.42.

§ 1212.23 Qualified national organization representing producer interests.

“Qualified national organization representing producer interests” means an organization that the Secretary certifies as being eligible to nominate producer and alternate producer members of the Board under § 1212.42.

§ 1212.24 Qualified national organization representing cooperative interests.

“Qualified national organization representing cooperative interests” means an organization that the Secretary certifies as being eligible to nominate cooperative and alternate cooperative members of the Board under § 1212.42.

§ 1212.25 Referendum.

“Referendum” means a referendum to be conducted by the Secretary pursuant to the Act whereby first handlers and importers shall be given the opportunity to vote to determine whether the implementation of or continuance of this part is favored by a majority of eligible persons voting in the referendum and a majority of volume voted in the referendum.

§ 1212.26 Research.

“Research” means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of honey and honey products, including research relating to nutritional value, cost of production, new product development, testing the effectiveness of market development and promotion efforts. Such term shall also include studies on bees to advance the cost effectiveness, competitiveness, efficiency, pest and disease control, and other management aspects of beekeeping, honey production, and honey bees.

§ 1212.27 Secretary.

“Secretary” means the Secretary of Agriculture of the United States, or any other officer or employee of the Department to whom authority the Secretary delegated the authority to act on his or her behalf.

§ 1212.28 Suspend.

“Suspend” means to issue a rule under 5 U.S.C. 553 to temporarily prevent the operation of an order or part thereof during a particular period of time specified in the rule.

§ 1212.29 State.

“State” means any of the fifty States of the United States of America, the

District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States.

§ 1212.30 Terminate.

“Terminate” means to issue a rule under 5 U.S.C. 553 to cancel permanently the operation of an order or part thereof beginning on a date certain specified in the rule.

§ 1212.31 United States.

“United States” means collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States.

§ 1212.32 United States Customs Service.

“United States Customs Service” or “Customs” means the United States Customs and Border Protection, an agency of the Department of Homeland Security.

Honey Packers and Importers Board

§ 1212.40 Establishment and membership.

The Honey Packers and Importers Board is established to administer the terms and provisions of this part. The Board shall have ten members, composed of three first handler representatives, two importer representatives, one importer-handler representative, three producer representatives, and one marketing cooperative representative. The importer-handler representative must import at least 75 percent of the honey or honey products they market in the United States and handle at least 250,000 pounds annually. In addition, the producer representatives must produce a minimum of 150,000 pounds of honey in the United States annually based on the best three-year average of the most recent five calendar years, as certified by producers. The Secretary will appoint members to the Board from nominees submitted in accordance with § 1212.42. The Secretary shall also appoint an alternate for each member.

§ 1212.41 Term of office.

With the exception of the initial Board, each Board member and alternate will serve a three-year term or until the Secretary selects his or her successor. No member or alternate may serve more than two consecutive terms, excluding any initial two-year term of office. The terms of the initial Board members shall be staggered for two-, three-, and four-year terms. For the initial Board, one producer, one first handler, one importer, and the representative of a national honey cooperative will serve a two-year term of office. One producer,

one first handler, and the importer-handler representative, will serve a three-year term of office. One producer, one first handler, and one importer will serve a four-year term of office. Determination of which of the initial members and their alternates shall serve two-year, three-year or four-year terms, shall be designated by the Secretary. Thereafter, each of these positions will carry a full three-year term. Members serving initial terms of two or four years will be eligible to serve a second term of three years. Each term of office will end on December 31, with new terms of office beginning on January 1. If this part becomes effective on a date such that the initial period is less than six months in duration, then the tolling of time for purposes of this subsection shall not begin until the beginning of the first 12-month fiscal period.

§ 1212.42 Nominations and appointments.

All nominations to the Board will be made as follows:

(a) All qualified national organizations representing first handler interests will have the opportunity to participate in a nomination caucus and will, to the extent practical, submit as a group a single slate of nominations to the Secretary for the first handler positions and the alternate positions on the Board. If the Secretary determines that there are no qualified national organizations representing first handler interests, individual first handlers who have paid assessments to the Board in the most recent fiscal period may submit nominations. For the initial Board, persons that meet the definition of first handlers as defined in this subpart will certify their qualification and upon certification, if qualified, may submit nominations.

(b) All qualified national organizations representing importer interests will have the opportunity to participate in a nomination caucus and will, to the extent practical, submit as a group a single slate of nominations to the Secretary for importer positions, for the importer-handler position and for the alternate positions on the Board. If the Secretary determines that there are no qualified national organizations representing importer interests, individual importers who have paid assessments to the Board in the most recent fiscal period may submit nominations. For the initial Board, persons that meet the definition of importer as defined in this subpart will certify such qualification and upon certification, if qualified, may submit nominations.

(c) All qualified national organizations representing producer

interests will have the opportunity to participate in a nomination caucus and will, to the extent practical, submit as a group a single slate of nominations to the Secretary for the producer positions and the producer alternate positions on the Board. If the Secretary determines that there are no qualified national organizations representing producer interests, individual producers may submit nominations to the Secretary. For the initial Board, persons that meet the definition of producer as defined in this subpart will certify such qualification and upon certification, if qualified, may submit nominations.

(d) For the purposes of this subpart, a national honey-marketing cooperative means any entity that is organized under the Capper-Volstead Act (7 U.S.C. 291) or state law as a cooperative and markets honey or honey products in at least 20 states. All national honey-marketing cooperatives that are first handlers will have the opportunity to participate in a nomination caucus and will, to the extent practical, submit as a group a single slate of nominations to the Secretary of persons who serve as an officer, director, or employee of a national honey marketing cooperative for the cooperative position and the alternate position on the Board.

(e) Eligible organizations, cooperatives, producers, first handlers or importers must submit nominations to the Secretary six months before the new Board term begins. At least two nominees for each position to be filled must be submitted.

(f) Qualified national organization representing first handler interests. To be certified by the Secretary as a qualified national organization representing first handler interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

(1) The organization's voting membership must be comprised primarily of first handlers of honey or honey products;

(2) The organization must represent a substantial number of first handlers who market a substantial volume of honey or honey products in at least 20 states;

(3) The organization has a history of stability and permanency and has been in existence for more than one year;

(4) The organization must have as a primary purpose promoting honey first handlers' economic welfare;

(5) The organization must derive a portion of its operating funds from first handlers; and

(6) The organization must demonstrate it is willing and able to further the Act's purposes.

(g) Qualified national organization representing importer interests. To be certified as a qualified national organization representing importer interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

(1) The organization's importer membership must represent at least a majority of the volume of honey or honey products imported into the United States;

(2) The organization has a history of stability and permanency and has been in existence for more than one year;

(3) The organization must have as a primary purpose promoting honey importers' economic welfare;

(4) The organization must derive a portion of its operating funds from importers; and

(5) The organization must demonstrate it is willing and able to further the Act's purposes.

(h) Qualified national organization representing producer interests. To be certified by the Secretary as a qualified national organization representing producer interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

(1) The organization's membership must be comprised primarily of honey producers;

(2) The organization must represent a substantial number of producers who produce a substantial volume of honey in at least 20 states;

(3) The organization has a history of stability and permanency and has been in existence for more than one year;

(4) The organization must have as one of its primary purposes promoting honey producers' economic welfare;

(5) The organization must derive a portion of its operating funds from producers; and

(6) The organization must demonstrate it is willing and able to further the Act's purposes.

(i) To be certified by the Secretary as a qualified national organization representing first handler, producer or importer interests, an organization must agree to:

(1) Take reasonable steps to publicize to non-members the availability of open Board first handler, producer or importer positions; and

(2) Consider nominating a non-member first handler, producer or importer, if he or she expresses an interest in serving on the Board.

(j) National honey-marketing cooperative. The Secretary can certify that an entity qualifies as a national honey-marketing cooperative, as defined

in § 1212.42(d). Such an entity shall not be eligible for certification as a qualified national organization representing producer interests.

§ 1212.43 Removal and vacancies.

(a) In the event that any member or alternate of the Board ceases to be a member of the category of members from which the member was appointed to the Board, such position shall become vacant.

(b) The Board may recommend to the Secretary that a member be removed from office if the member consistently refuses to perform his or her duties or engages in dishonest acts or willful misconduct. The Secretary may remove the member if he or she finds that the Board's recommendation shows adequate cause.

(c) A vacancy for any reason will be filled as follows:

(1) If a member position becomes vacant, the alternate for that position will serve the remainder of the member's term. In accordance with § 1212.42, the Secretary will request nominations for a replacement alternate and will appoint a nominee to serve the remainder of the term. The Secretary does not have to appoint a replacement if the unexpired term is less than six months.

(2) If both a member position and an alternate position become vacant, in accordance with § 1212.42, the Secretary will request nominations for replacements and appoint a member and alternate to serve the remainder of the term. The Secretary does not have to appoint a new member or alternate if the unexpired term for the position is less than six months.

(3) No successor appointed to a vacated term of office shall serve more than two successive three-year terms on the Board.

§ 1212.44 Procedure.

(a) A majority of the Board members will constitute a quorum so long as at least one of the members present is an importer member and one of the members present is a first handler member. An alternate will be counted for the purpose of determining a quorum only if a member from his or her membership class is absent or disqualified from participating. Any Board action will require the concurring votes of a majority of those present and voting; with the exception of the two-thirds vote requirement in § 1212.52(f). All votes at meetings will be cast in person. The Board must give timely notice of all Board and committee meetings to members and alternates.

(b) The Board may take action by any means of communication when, in the opinion of the Board chairperson, an emergency requires that action must be taken before a meeting can be called. Any action taken under this procedure is valid only if:

(1) All members and the Secretary are notified and the members are provided the opportunity to vote;

(2) Each proposition is explained accurately, fully, and substantially identically to each member;

(3) With the exception of the two-thirds vote requirement in § 1212.52(f), a majority of the members vote in favor of the action; and

(4) All votes are promptly confirmed in writing and recorded in the Board minutes.

§ 1212.45 Reimbursement and attendance.

Board members and alternates, when acting as members, will serve without compensation but will be reimbursed for reasonable travel expenses, as approved by the Board, that they incur when performing Board business. The Board may request that alternates attend any meeting even if their respective members are expected to attend or actually attend the meeting.

§ 1212.46 Powers.

The Board shall have the following powers subject to § 1212.80:

(a) Administer this subpart in accordance with its terms and provisions of the Act;

(b) Require its employees to receive, investigate, and report to the Secretary complaints of violations of this part;

(c) Recommend adjustments to the assessments as provided in this part;

(d) Recommend to the Secretary amendments to this part;

(e) Establish, issue, and administer appropriate programs and enter into contracts or agreements with the approval of the Secretary for promotion, research, and information programs and plans including consumer and industry information, and advertising designed to strengthen the honey industry's position in the marketplace and to maintain, develop, and expand domestic and foreign markets for honey and honey products; and

(f) Invest assessments collected and other funds received pursuant to the Order and use earnings from invested assessments to pay for activities carried out pursuant to the Order.

§ 1212.47 Duties.

The Board shall have, among other things, the following duties:

(a) To meet and organize, and to select from among its members a chairperson

and such other officers as may be necessary; to select committees and subcommittees from its membership and other industry representatives; and to develop and recommend such rules, regulations, and by-laws to the Secretary for approval to conduct its business as it may deem advisable;

(b) To employ or contract with such persons as it may deem necessary and to determine the compensation and define the duties of each; and to protect the handling of Board funds through fidelity bonds;

(c) To prepare and submit to the Secretary for approval 60 days in advance of the beginning of a fiscal period, a budget of anticipated expenses in the administration of this part including the probable costs of all programs and plans and to recommend a rate of assessment with respect thereto.

(d) To investigate violations of this part and report the results of such investigations to the Secretary for appropriate action to enforce the provisions of this part.

(e) To establish, issue, and administer appropriate programs and enter into contracts or agreements with the approval of the Secretary for promotion, research, and information including consumer and industry information, and advertising designed to strengthen the honey industry's position in the marketplace and to maintain, develop, and expand domestic and foreign markets for honey and honey products.

(f) To maintain minutes, books, and records and prepare and submit to the Secretary such reports from time to time as may be required for appropriate accounting with respect to the receipt and disbursement of funds entrusted to it.

(g) To periodically prepare and make public and to make available to first handlers, producers, and importers reports of its activities and, at least once each fiscal period, to make public an accounting of funds received and expended.

(h) To cause its books to be audited by a certified public accountant at the end of each fiscal period and to submit a copy of each audit to the Secretary.

(i) To submit to the Secretary such information pertaining to this part or subpart as he or she may request.

(j) To give the Secretary the same notice of Board meetings and committee meetings that is given to members in order that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting to the Secretary.

(k) To notify first handlers, importers, and producers of all Board meetings through press releases or other means.

(l) To appoint and convene, from time to time, working committees or subcommittees that may include first handlers, importers, exporters, producers, members of the wholesale or retail outlets for honey, or other members of the honey industry and the public to assist in the development of research, promotion, advertising, and information programs for honey and honey products.

(m) To develop and recommend such rules and regulations to the Secretary for approval as may be necessary for the development and execution of plans or activities to effectuate the declared purpose of the Act.

(n) To provide any patents, copyrights, inventions, product formulations, or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government, as represented by the Board, and shall along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Department.

§ 1212.48 Reapportionment of Board membership.

At least once in each 5-year period, but not more frequently than once in each 3-year period, the Board shall:

(a) Review, based on a three-year average, the geographical distribution in the United States of the production of honey and the quantity or value of the honey and honey products imported into the United States; and

(b) If warranted, recommend to the Secretary the reapportionment of the Board membership to reflect changes in the geographical distribution of the production of honey and the quantity or value of the honey and honey products imported into the United States.

Expenses and Assessments

§ 1212.50 Budget and expenses.

(a) At least 60 days prior to the beginning of each fiscal period, and as may be necessary thereafter; the Board shall prepare and submit to the Department a budget for the fiscal period covering its anticipated expenses and disbursements in administering this subpart. The budget shall allocate five percent (5%) of the Board's anticipated

revenue from assessments each fiscal period for production research and research relating to the production of honey.

Each such budget shall include:

(1) A statement of objectives and strategy for each program, plan, or project;

(2) A summary of anticipated revenue, with comparative data or at least one preceding year (except for the initial budget);

(3) A summary of proposed expenditures for each program, plan, or project; and

(4) Staff and administrative expense breakdowns, with comparative data for at least one preceding year (except for the initial budget).

(b) Each budget shall provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in this subpart.

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Department, including shifting funds from one program, plan, or project to another. Shifts of funds which do not cause an increase in the Board's approved budget and which are consistent with governing bylaws need not have prior approval by the Department.

(d) The Board is authorized to incur such expenses, including provision for a reserve, as the Department finds reasonable and likely to be incurred by the Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Board.

(e) With approval of the Department, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Board. Any funds borrowed by the Board shall be expended only for startup costs and capital outlays and are limited to the first year of operation of the Board.

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Voluntary contributions shall be free from any encumbrance by the donor, and the Board shall retain complete control of their use.

(g) The Board shall reimburse the Department for all expenses incurred by the Department in the implementation, administration, enforcement and supervision of the Order, including all referendum costs in connection with the Order.

(h) The Board may not expend for administration, maintenance, and functioning of the Board in any calendar year an amount that exceeds 15 percent of the assessments and other income received by the Board for that calendar year. Reimbursements to the Department required under paragraph (g) of this section, are excluded from this limitation on spending.

(i) The Board may also receive funds provided through the Department's Foreign Agricultural Service or from other sources, with the approval of the Secretary, for authorized activities.

§ 1212.51 Financial statements.

(a) The Board shall prepare and submit financial statements to the Department on a periodic basis. Each such financial statement shall include, but not be limited to, a balance sheet, income statement, and expense budget. The expense budget shall show expenditures during the time period covered by the report, year-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Department within 30 days after the end of the time period to which it applies.

(c) The Board shall submit annually to the Department an annual financial statement within 90 days after the end of the calendar year to which it applies.

§ 1212.52 Assessments.

(a) The Board will cover its expenses by levying in a manner prescribed by the Secretary an assessment on first handlers and importers.

(b) Each first handler shall pay an assessment to the Board at the rate of \$0.01 per pound of domestically produced honey or honey products the first handler handles. A producer shall pay the Board the assessment on all honey or honey products for which the producer is the first handler.

(c) Each first handler responsible for remitting assessments under paragraph (b) of this section shall remit the amounts due to the Board's office on a monthly basis no later than the fifteenth day of the month following the month in which the honey or honey products were marketed.

(d) Each importer shall pay an assessment to the Board at the rate of \$0.01 per pound of honey or honey products the importer imports into the United States. An importer shall pay the assessment to the Board through the United States Customs Service (Customs) when the honey or honey products being assessed enters the United States. If Customs does not collect an assessment from an importer,

the importer is responsible for paying the assessment to the Board.

(e) The import assessment recommended by the Board and approved by the Secretary shall be uniformly applied to imported honey or honey products that are identified as HTS heading numbers 0409.00.00 and 2106.90.9988 by the Harmonized Tariff Schedule of the United States.

(f) The Board may recommend to the Secretary an increase or decrease in the assessment as it deems appropriate by at least a two-thirds vote of members present at a meeting of the Board. The Board may not recommend an increase in the assessment of more than \$0.02 per pound of honey or honey products and may not increase the assessment by more than \$0.0025 in any single fiscal year.

(g) In situations of late payment:

(1) The Board shall impose a late payment charge on any first handler or importer who fails to remit to the Board the total amount for which the first handler or importer is liable on or before the payment due date the Board recommends. The amount of the late payment charge shall be prescribed by the Department.

(2) The Board shall require any first handler or importer subject to a late payment charge to pay interest on the unpaid assessments for which the first handler or importer is liable. The rate of interest shall be prescribed by the Department.

(3) First handlers or importers who fail to remit total assessments in a timely manner may also be subject to actions under federal debt collection procedures.

(h) Advance payment. The Board may accept advance payment of assessments from first handlers or importers that will be credited toward any amount for which the first handlers or importers may become liable. The Board does not have to pay interest on any advance payment.

(i) If the Board is not in place by the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments and invest them on behalf of the Board, and shall pay such assessments and any interest earned to the Board when it is formed.

§ 1212.53 Exemption from assessment.

(a) A first handler who handles less than 250,000 pounds of honey or honey products per calendar year or an importer who imports less than 250,000 pounds of honey or honey products per calendar year is exempt from paying assessments.

(b) A first handler who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan, handles only products that are eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, shall be exempt from the payment of assessments. An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, shall be exempt from the payment of assessments.

(c) A first handler or importer desiring an exemption shall apply to the Board, on a form provided by the Board, for a certificate of exemption. A first handler shall certify that the first handler will handle less than 250,000 of honey and honey products for the calendar year for which the exemption is claimed. An importer shall certify that the importer will import less than 250,000 pounds of honey and honey products during the calendar year for which the exemption is claimed.

(d) Upon receipt of an application, the Board shall determine whether an exemption may be granted. The Board will then issue, if deemed appropriate, a certificate of exemption to each person who is eligible to receive one. It is the responsibility of these persons to retain a copy of the certificate of exemption.

(e) Exempt importers shall be eligible for reimbursement of assessments collected by Customs. These importers shall apply to the Board for reimbursement of any assessment paid. No interest will be paid on the assessment collected by Customs. Requests for reimbursement shall be submitted to the Board within 90 days of the last day of the calendar year the honey or honey products were imported.

(f) If a person has been exempt from paying assessments for any calendar year under this section and no longer meets the requirements for an exemption, the person shall file a report with the Board in the form and manner prescribed by the Board and begin to pay the assessment on all honey or honey products handled or imported.

(g) Any person who desires an exemption from assessments for a subsequent calendar year shall reapply to the Board, on a form provided by the Board, for a certificate of exemption.

(h) The Board may recommend to the Secretary that honey and honey products exported from the United States be exempt from this subpart and recommend procedures for refunding assessments paid on exported honey and honey products and any necessary safeguards to prevent improper use of this exemption.

§ 1212.54 Operating reserve.

The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established: Provided that the funds in the reserve do not exceed one fiscal period's budget. Subject to approval by the Department, such reserve funds may be used to defray any expenses authorized under this part.

§ 1212.55 Prohibition on use of funds.

(a) The Board may not engage in, and shall prohibit the employees and agents of the Board from engaging in:

(1) Any action that is a conflict of interest;

(2) Except as otherwise provided in paragraph (b) of this section, using funds collected by the Board under the Order to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, state, national, and foreign governments, other than recommending to the Secretary amendments to the Order.

(3) A program, plan or project conducted pursuant to this subpart that includes false or misleading claims on behalf of honey or honey products.

(4) Any advertising, including promotion, research and information activities authorized that may be false or misleading or disparaging to another agricultural commodity.

(b) The prohibition in paragraph (a)(2) of this section shall not apply:

(1) To the development and recommendation of amendments to this subpart; or

(2) To the communication to appropriate government officials, in response to a request made by the officials, of information relating to the conduct, implementation, or results of promotion, research, consumer information, education, industry information, or producer information activities authorized under this subpart.

Promotion, Research, and Information

§ 1212.60 Programs, plans and projects.

(a) Scope of activities. The Board must develop and submit to the Secretary for approval plans and programs authorized by this section. The plans and programs may provide for:

(1) Establishing, issuing, and administering appropriate programs for promotion, research, and information including consumer and industry information, and advertising designed to strengthen the honey industry's position in the marketplace and to maintain, develop, and expand domestic and foreign markets for honey and honey products;

(2) Establishing and conducting research and development activities to encourage and expand the acquisition of knowledge about honey and honey products, their consumption and use, or to encourage, expand or improve the quality, marketing, and utilization of honey and honey products;

(3) Conducting activities that may lead to developing new markets or marketing strategies for honey and honey products;

(4) Conducting activities related to production issues or bee research activities; and

(5) Conducting activities designed to make the honey industry more efficient, to improve the quality of honey or to enhance the image of honey and honey products and the honey industry.

(b) No program, plan, or project shall be implemented prior to its approval by the Department. Once a program, plan, or project is so approved, the Board shall take appropriate steps to implement it.

(c) The Board must periodically evaluate each plan and program authorized under this part to ensure that it contributes to an effective and coordinated program of research, promotion and information. The Board must submit the evaluations to the Secretary. If the Board and the Secretary find that a plan or program does not further the purposes of the Act, then such plan or program should be terminated.

§ 1212.61 Independent evaluation.

The Board must authorize and fund not less than once every five years an independent evaluation of the effectiveness of this subpart and the plans and programs conducted by the Board under the Act. The Board must submit this independent evaluation to the Secretary and make the results available to the public.

§ 1212.62 Patents, copyrights, inventions, product formulations, and publications.

Except for a reasonable royalty paid by the Board to the inventor of a patented invention, any patents, copyrights, inventions, product formulations, or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government, as represented by the Board, and shall along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal,

budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Department. Upon termination of this Order, § 1212.83 shall apply to determine disposition of all such property.

Reports, Books, and Records

§ 1212.70 Reports.

(a) Each first handler or importer subject to this part must report to the Board, at the time and in the manner it prescribes, and subject to the approval of the Secretary, the information the Board deems necessary to perform its duties.

(b) First handlers must report:

(1) The total quantity of honey and honey products acquired during the reporting period;

(2) The total quantity of honey and honey products handled during the period;

(3) The quantity of honey processed for sale from the first handler's own production;

(4) The quantity of honey and honey products purchased from a first handler or importer responsible for paying the assessment due pursuant to this Order;

(5) The date that assessment payments were made on honey and honey products handled; and

(6) The first handler's tax identification number.

(c) Unless provided by Customs, importers must report:

(1) The total quantity of honey and honey products imported during the reporting period;

(2) A record of each lot of honey or honey products imported during such period, including the quantity, date, country of origin, and port of entry; and

(3) The importer of record's tax identification number.

(d) The Board may request any other information from first handlers and importers that it deems necessary to perform its duties under this subpart, subject to the approval of the Secretary.

(e) The Board, with the Secretary's approval, may request that persons claiming an exemption from assessments under § 1212.52(b) or (d) must provide it with any information it deems necessary about the exemption, including, without limitation, the disposition of exempted honey or honey products.

§ 1212.71 Books and records.

Each first handler and importer, including those who are exempt under this subpart, must maintain any books and records necessary to carry out the provisions of this part, and any regulations issued under this part, including the books and records

necessary to verify any required reports. Books and records must be made available during normal business hours for inspection by the Board's or Secretary's employees or agents. A first handler or importer must maintain the books and records for two years beyond the fiscal period to which they apply.

§ 1212.72 Confidential treatment.

All information obtained from books, records, or reports under the Act and this part shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members, first handlers, or importers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected thereof, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this part, together with a statement of the particular provisions of this part violated by such person.

Miscellaneous

§ 1212.80 Right of the Secretary.

All fiscal matters, programs or projects, contracts, rules or regulations, reports, or other actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

§ 1212.81 Referenda.

(a) After the initial referendum, the Secretary shall conduct subsequent referenda;

(1) Every seven years, to determine whether first handlers and importers of honey or honey products favor the continuation, suspension, or termination of the Order. The Order shall continue if it is favored by a majority of first handlers and importers

voting in the referendum and a majority of volume voting in the referendum who, during a representative period determined by the Secretary, have been engaged in the handling or importation of honey or honey products;

(2) At the request of the Board established in this Order;

(3) At the request of ten (10) percent or more of the number of persons eligible to vote under the Order; or

(4) Whenever the Department deems that a referendum is necessary.

(b) *Approval of order.* Approval in a referendum shall be established by a majority of eligible persons voting in the referendum and a majority of volume voting in the referendum who are first handlers or importers during the representative period by those voting as established by the Secretary.

(c) *Manner of conducting referenda.* A referendum conducted under this section shall be conducted in the manner determined by the Secretary to be appropriate.

§ 1212.82 Suspension or termination.

The Secretary shall suspend or terminate the operation of this part or subpart or any provision thereof, if the Secretary finds that this part or subpart or the provision obstructs or does not tend to effectuate the declared policy of the Act.

§ 1212.83 Proceedings after termination.

(a) If this subpart terminates, the Board shall recommend to the Secretary up to five of its members to serve as trustees for the purpose of liquidating the Board's affairs. Such persons, upon designation by the Secretary, will become trustees of any funds and property the Board possesses or controls at that time and any existing claims it has, including, without limitation, claims for any unpaid or undelivered funds or property.

(b) The trustees will:

(1) Serve until discharged by the Secretary;

(2) Carry out the Board's obligations under any contracts or agreements entered into pursuant to the Order;

(3) Account from time to time for all receipts and disbursements and deliver all property on hand, together with all the Board's and trustees' books and records to any person the Secretary directs; and

(4) Execute at the Secretary's direction any assignments or other instruments necessary or appropriate to vest in any person full title and right to all of the funds, property, and claims owned by the Board or the trustees under this subpart.

(c) Any person to whom funds, property, or claims have been

transferred or delivered pursuant to the Order will be subject to the same obligations imposed upon Board and the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Department to be disposed of, to the extent practical, to one or more honey industry organizations in the interest of continuing honey promotion, research, and information programs.

§ 1212.84 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, terminating or amending this subpart or any regulation issued under it will not:

(a) Affect or waive any right, duty, obligation, or liability that arose or may arise in connection with any provision of this part;

(b) Release or extinguish any violation of this part; or

(c) Affect or impair any rights or remedies of the United States or any person with respect to any violation.

§ 1212.85 Personal liability.

No member, alternate member, or employee of the Board may be held personally responsible, either individually or jointly with others, in any way whatsoever to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as a member, alternate member, or employee, except for acts of dishonesty or willful misconduct.

§ 1212.86 Separability.

If any provision of this subpart is declared invalid or the applicability of it to any person or circumstance is held invalid, the validity of the remainder of this subpart, or the applicability of it to other persons or circumstances will not be affected.

§ 1212.87 Amendments.

Amendments to this Order may be proposed from time to time by the Board or any interested person affected by the provisions of the Act, including the Department.

§ 1212.88 OMB control number.

The control number assigned to the information collection requirements in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0505-0001, and OMB control number 0581-[NEW, to be assigned by OMB].

Dated: May 15, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 08-1282 Filed 5-16-08; 3:33 pm]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2007-0037; Directorate Identifier 2007-NE-41-AD; Amendment 39-15521; AD 2008-10-14]

RIN 2120-AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd. & Co. KG. (RRD) TAY 650-15 Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Strip results from some of the engines listed in the applicability section of this directive revealed excessively corroded low pressure turbine disks stage 2 and stage 3. The corrosion is considered to be caused by the environment in which these engines are operated. Following a life assessment based on the strip findings it is concluded that inspections for corrosion attack are required. The action specified by this AD is intended to avoid a failure of a low pressure turbine disk stage 2 or stage 3 due to potential corrosion problems which could result in uncontained engine failure and damage to the airplane.

We are issuing this AD to detect corrosion that could cause stage 2 or stage 3 disk of the low pressure turbine to fail and result in an uncontained failure of the engine.

DATES: This AD becomes effective June 25, 2008. The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 25, 2008.

ADDRESSES: The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

FOR FURTHER INFORMATION CONTACT:

Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: jason.yang@faa.gov; telephone (781) 238-7747; fax (781) 238-7199.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on January 2, 2008 (73 FR 75). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states that:

Strip results from some of the engines listed in the applicability section of this directive revealed excessively corroded low pressure turbine disks stage 2 and stage 3. The corrosion is considered to be caused by the environment in which these engines are operated. Following a life assessment based on the strip findings it is concluded that inspections for corrosion attack are required.

Comments

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

Editorial Change To Clarify the Actions and Compliance Section

We added the revision date of September 1, 2006, to paragraph (e)(1) to clarify the requirements to that paragraph. Also, we added Tasks 72-52-23-200-000 and 72-52-24-200-000 to paragraph (e)(3) to clarify the requirements of that paragraph.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about two engines installed on airplanes of U.S. registry. We also estimate that it would take about 1.0 work-hours per product to inspect the disk, and that the average labor rate is \$80 per work-hour. If corrosion is found, we estimate that it would take about 2 work-hours to replace the disk. Required parts would cost about \$40,000 per product. Based on these

figures, we estimate the total cost of the proposed AD to U.S. operators to be \$80,480. Our cost estimate is exclusive of possible warranty coverage.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

Examining the AD Docket

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

available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-10-14 Rolls-Royce Deutschland Ltd & Co KG (RRD) (formerly Rolls-Royce plc, Derby, England): Amendment 39-15521. FAA-2007-0037; Directorate Identifier 2007-NE-41-AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective June 25, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to RRD TAY 650-15 turbofan engines that have a serial number listed in Table 1 of this AD, and low pressure turbine module M05300AA installed. These engines are installed on, but not limited to, Fokker F28 Mark 0100 airplanes.

TABLE 1.—AFFECTED TAY 650-15 ENGINES BY SERIAL NUMBER

Engine Serial No.
17251
17255
17256
17273
17275
17280
17281
17282
17300
17301
17327
17332
17365
17393
17437
17443
17470
17520
17521
17523
17539
17542
17556

TABLE 1.—AFFECTED TAY 650-15 ENGINES BY SERIAL NUMBER—Continued

Engine Serial No.
17561
17562
17563
17580
17581
17612
17618
17635
17637
17645
17661
17686
17699
17701
17702
17736
17737
17738
17739
17741
17742
17808

Reason

(d) Strip results from some of the engines listed in the applicability section of this directive revealed excessively corroded low pressure turbine disks stage 2 and stage 3. The corrosion is considered to be caused by the environment in which these engines are operated. Following a life assessment based on the strip findings it is concluded that inspections for corrosion attack are required. The action specified by this AD is intended to avoid a failure of a low pressure turbine disk stage 2 or stage 3 due to potential corrosion problems which could result in uncontained engine failure and damage to the airplane.

We are issuing this AD to detect corrosion that could cause stage 2 or stage 3 disk of the low pressure turbine to fail and result in an uncontained failure of the engine.

Actions and Compliance

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

(1) Prior to accumulating 11,700 flight cycles (FC) since new, and thereafter at intervals not exceeding 11,700 FC of the engine, inspect the low pressure turbine disks stage 2 and stage 3 for corrosion in accordance with RRD Alert Service Bulletin TAY-72-A1524, Revision 1, dated September 1, 2006.

(2) For engines that already exceed 11,700 FC on the effective date of this AD, perform the inspection within 90 days after the effective date of this AD.

(3) When, during any of the inspections as required by paragraph (e)(1) of this directive, corrosion is found, replace the affected parts. The RRD TAY 650 Engine Manual—E-TAY-3RR, Tasks 72-52-23-200-000 and 72-52-24-200-000 contains information on performing the inspection for corrosion and rejection criteria.

Other FAA AD Provisions

(f) *Alternative Methods of Compliance (AMOCs)*: The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(g) Refer to EASA Airworthiness Directive 2006-0288, dated September 15, 2006, and RRD Alert Service Bulletin TAY-72-A1524, Revision 1, dated September 1, 2006, for related information.

(h) Contact Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: jason.yang@faa.gov; telephone (781) 238-7747; fax (781) 238-7199, for more information about this AD.

Material Incorporated by Reference

(i) You must use Rolls-Royce Deutschland Alert Service Bulletin TAY-72-A1524, Revision 1, dated September 1, 2006, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, Dahlwitz, 15827 Blankenfelde-Mahlow, Germany; telephone 49 (0) 33-7086-1768; fax 49 (0) 33-7086-3356.

(3) You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Burlington, Massachusetts, on May 5, 2008.

Peter A. White,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E8-10633 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2007-29069; Directorate Identifier 2007-NM-176-AD; Amendment 39-15525; AD 2008-11-03]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 737-100, -200, and -200C Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Boeing Model 737-100, -200, and -200C series airplanes. This AD requires revising the FAA-approved maintenance inspection program to include inspections that will give no less than the required damage tolerance rating for each structural significant item (SSI), doing repetitive inspections to detect cracks of all SSIs, and repairing cracked structure. This AD results from a report of incidents involving fatigue cracking in transport category airplanes that are approaching or have exceeded their design service objective. We are issuing this AD to maintain the continued structural integrity of the entire fleet of Model 737-100, -200, and -200C series airplanes.

DATES: This AD is effective June 25, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 25, 2008.

The Director of the Federal Register approved the incorporation by reference of Boeing Document D6-37089, "Supplemental Structural Inspection Document for Model 737-100/200/200C Airplanes," Revision E, dated May 2007, as listed in this AD, on May 27, 2008 (73 FR 21237, April 21, 2008).

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

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800-647-5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 917-6440; fax (425) 917-6590.

SUPPLEMENTARY INFORMATION:**Discussion**

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR

part 39 to include an airworthiness directive (AD) that would apply to all Boeing Model 737-100, -200, and -200C series airplanes. That NPRM was published in the **Federal Register** on August 31, 2007 (72 FR 50294). That NPRM proposed to require revising the FAA-approved maintenance inspection program to include inspections that will give no less than the required damage tolerance rating for each structural significant item (SSI), doing repetitive inspections to detect cracks of all SSIs, and repairing cracked structure.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received from the one commenter.

Request To Allow Alternative Inspections for Previously Repaired/ Altered Structure

Boeing requests that the NPRM be revised to include a provision for alternative inspections when a repair area prohibits operators from doing the inspections required by paragraph (i) of the NPRM. Boeing requests that the initial alternative inspection be done within 12 months after the repair is discovered during the initial inspection required by paragraph (i) of the NPRM. Boeing points out that a similar provision was provided in paragraph (e) of AD 98-11-04 R1, amendment 39-10984 (64 FR 987, January 7, 1999). Boeing states that including such a provision will assist operators.

We agree. We have added a new paragraph (j) to this AD (and reidentified subsequent paragraphs) that provides for alternative inspections to those in paragraph (i) of this AD.

Request To Clarify Certain Sections of the Preamble of the NPRM

Boeing requests that certain sections in the preamble of the NPRM be clarified for the following reasons:

1. Boeing states that Advisory Circular (AC) No. 91-56, "Supplemental Structural Inspection Program for Large Transport Category Airplanes," dated May 6, 1981, applies to airplanes certified under the fail-safe and fatigue requirements of Civil Air Regulations (CAR) 4b or part 25 of the Federal Aviation Regulations (14 CFR part 25), not damage tolerance structural requirements as stated in the Issuance of Advisory Circular (AC) section.

2. Boeing notes that the Other Relevant Rulemaking section identifies the strut as one of the affected SSIs for Model 737-100, -200, and -200C series airplanes. Boeing states that those airplanes do not have an engine strut.

3. Boeing states that Boeing Document D6-37089, "Supplemental Structural Inspection Document for Model 737-100/200/200C Airplanes," Revision E, dated May 2007 (referred to in the NPRM as an appropriate source of service information for the required actions), does not describe procedures for repairing cracked structure, as specified in the Relevant Service Information section.

We partially agree. We agree with Boeing that the identified sections should be clarified. However, we find that no change to the final rule is necessary, since the identified sections of the NPRM do not reappear in the final rule.

Explanation of Change to Reported Incidents

We have revised the AD to specify that this AD results from a report of

incidents involving fatigue cracking only.

Explanation of Change to Costs of Compliance

The requirements for the baseline structure of Model 737-100, -200, and -200C series airplanes are currently described in 14 CFR 121.1109(c)(1) and 129.109(b)(1), not in 14 CFR 121.370(a) and 129.16 as indicated in the third paragraph of the Cost of Compliance section of the NPRM. Therefore, we have revised the Costs of Compliance section of the AD accordingly.

Explanation of Editorial Changes

We have revised the title of Boeing Document D6-37089-1 from "Appendix A Model 737-100/200/200C Airplanes" to "Supplemental Structural Inspection Document Appendix A Model 737-100/200/200C Airplanes" in this AD. In

addition, we have revised "Appendix" to "Appendix A" in paragraphs (g) and (h) of this AD.

Conclusion

We reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

There are about 676 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost	Number of U.S.-registered airplanes	Fleet cost
Revision of maintenance inspection program.	200 per operator (23 U.S. operators).	\$80	\$16,000 per operator	118	\$368,000.
Inspections	150 per airplane	80	\$12,000, per airplane, per inspection cycle.	118	\$1,416,000 per inspection cycle.

The number of work hours, as indicated above, is presented as if the accomplishment of the actions in this AD is to be conducted as "stand alone" actions. However, in actual practice, these actions for the most part will be done coincidentally or in combination with normally scheduled airplane inspections and other maintenance program tasks. Therefore, the actual number of necessary additional work hours will be minimal in many instances. Additionally, any costs associated with special airplane scheduling will be minimal.

Further, compliance with this AD would be a means of compliance with the aging airplane safety final rule (AASFR) for the baseline structure of Model 737-100, -200, and -200C series airplanes. The AASFR requires certain operators to incorporate damage tolerance inspections into their maintenance inspection programs. These requirements are described in 14 CFR 121.1109(c)(1) and 129.109(b)(1). Accomplishment of the actions required by this AD will meet the requirements of these CFR sections for the baseline structure. The costs for accomplishing the inspection portion of this AD were accounted for in the regulatory evaluation of the AASFR.

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

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government.

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

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

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, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-11-03 Boeing: Amendment 39-15525.
Docket No. FAA-2007-29069;
Directorate Identifier 2007-NM-176-AD.

Effective Date

(a) This airworthiness directive (AD) is effective June 25, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 737-100, -200, and -200C series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from a report of incidents involving fatigue cracking in transport category airplanes that are approaching or have exceeded their design service objective. We are issuing this AD to maintain the continued structural integrity of the entire fleet of Model 737-100, -200, and -200C series airplanes.

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.

Service Information

(f) The term "Revision E," as used in this AD, means Boeing Document D6-37089, "Supplemental Structural Inspection Document for Model 737-100/200/200C Airplanes," Revision E, dated May 2007.

(g) The term "Appendix A," as used in this AD, means Boeing Document D6-37089-1 "Supplemental Structural Inspection Document Appendix A Model 737-100/200/200C Airplanes," Original Release, dated May 2007, of Revision E.

Revision of the FAA-Approved Maintenance Inspection Program

(h) Before the accumulation of 66,000 total flight cycles, or within 12 months after the effective date of this AD, whichever occurs later, incorporate a revision into the FAA-approved maintenance inspection program that provides no less than the required damage tolerance rating (DTR) for each structural significant item (SSI) listed in Section 3.0, "Flap and Support Structure (Flap Structure) SSI Information," of Appendix A. (The required DTR value for each SSI is listed in Appendix A.) The revision to the maintenance inspection program must include and must be implemented in accordance with the procedures in Section 3.0 of Appendix A, and in accordance with the procedures in Section 5.0, "Damage Tolerance Rating (DTR) System Application," and Section 6.0, "SSI Discrepancy Reporting" of Revision E. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection

requirements contained in this AD and has assigned OMB Control Number 2120-0056.

Initial and Repetitive Inspections

(i) Except as provided by paragraph (j) of this AD: Before the accumulation of 66,000 total flight cycles, or within 4,000 flight cycles measured from 12 months after the effective date of this AD, whichever occurs later, do the applicable initial inspections to detect cracks of all SSIs, in accordance with Appendix A. Repeat the applicable inspections thereafter at the intervals necessary to obtain the required DTR specified in Appendix A.

(j) For any SSI that has been repaired or altered before the effective date of this AD such that the repair or design change affects your ability to accomplish the actions required by paragraph (i) of this AD: Before further flight, you must request FAA approval of an alternative method of compliance (AMOC) in accordance with section 39.17 of the Federal Aviation Regulations (14 CFR 39.17), or do the actions specified in paragraphs (j)(1) and (j)(2) of this AD as an approved means of compliance with the requirements of paragraph (i) of this AD.

(1) At the initial compliance time specified in paragraph (i) of the AD, identify each repair or design change to that SSI.

(2) Within 12 months after the identification of a repair or design change required by paragraph (j)(1) of this AD, assess the damage tolerance characteristics of each SSI affected by each repair or design change to determine the effectiveness of the applicable Supplemental Structural Inspection Document (SSID) inspection for that SSI and if not effective, incorporate a revision into the FAA-approved maintenance inspection program to include a damage-tolerance-based alternative inspection program for each affected SSI. Thereafter, inspect the affected structure in accordance with the alternative inspection program. The inspection method and compliance times (i.e., threshold and repeat intervals) of the alternative inspection program must be approved in accordance with the procedures specified in paragraph (m) of this AD.

Repair

(k) If any cracked structure is found during any inspection required by paragraph (i) or (j) of this AD, before further flight, repair the cracked structure using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

Inspection Program for Transferred Airplanes

(l) Before any airplane that is subject to this AD and that has exceeded the applicable compliance times specified in paragraph (i) of this AD can be added to an air carrier's operations specifications, a program for the accomplishment of the inspections required by this AD must be established in accordance with paragraph (l)(1) or (l)(2) of this AD, as applicable.

(1) For airplanes that have been inspected in accordance with this AD: The inspection of each SSI must be done by the new operator in accordance with the previous operator's schedule and inspection method, or the new

operator's schedule and inspection method, at whichever time would result in the earlier accomplishment for that SSI inspection. The compliance time for accomplishment of this inspection must be measured from the last inspection accomplished by the previous operator. After each inspection has been done once, each subsequent inspection must be performed in accordance with the new operator's schedule and inspection method.

(2) For airplanes that have not been inspected in accordance with this AD: The inspection of each SSI required by this AD must be done either before adding the airplane to the air carrier's operations specification, or in accordance with a schedule and an inspection method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. After each inspection has been done once, each subsequent inspection must be done in accordance with the new operator's schedule.

AMOCs

(m)(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 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 approval must specifically refer to this AD.

Material Incorporated by Reference

(n) You must use Boeing Document D6-37089, "Supplemental Structural Inspection Document for Model 737-100/200/200C Airplanes," Revision E, dated May 2007; and Boeing Document D6-37089-1 "Supplemental Structural Inspection Document Appendix A Model 737-100/200/200C Airplanes," Original Release, dated May 2007; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

(1) Boeing Document D6-37089-1 contains these errors: Pages REF 1 and REF 2 of the Reference Section and pages L-19.1 and L-19.2 of Section 4.0, as specified in the List of Effective Pages, do not exist.

(2) The Director of the Federal Register approved the incorporation by reference of Boeing Document D6-37089-1 "Supplemental Structural Inspection Document Appendix A Model 737-100/200/200C Airplanes," Original Release, dated May 2007, under 5 U.S.C. 552(a) and 1 CFR part 51.

(3) The Director of the Federal Register approved the incorporation by reference of Boeing Document D6-37089, "Supplemental

Structural Inspection Document for Model 737–100/200/200C Airplanes,” Revision E, dated May 2007, on May 27, 2008 (73 FR 21237, April 21, 2008).

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

(5) You may review copies of the service information that is incorporated by reference at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

Issued in Renton, Washington, on May 7, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–10977 Filed 5–20–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0181; Directorate Identifier 2007–NM–180–AD; Amendment 39–15524; AD 2008–11–02]

RIN 2120–AA64

Airworthiness Directives; Lockheed Model L–1011 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Lockheed Model L–1011 series airplanes. This AD requires revising the FAA-approved maintenance program by incorporating new airworthiness limitations for fuel tank systems to satisfy Special Federal Aviation Regulation No. 88 requirements. This AD also requires the accomplishment of certain fuel system modifications, the initial inspections of certain repetitive fuel system limitations to phase in those inspections, and repair if necessary. This AD results from a design review of the fuel tank systems. We are issuing this AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: This AD is effective June 25, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 25, 2008.

ADDRESSES: For service information identified in this AD, contact Lockheed Continued Airworthiness Project Office, Attention: Airworthiness, 86 South Cobb Drive, Marietta, Georgia 30063–0567.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

Robert A. Bosak, Aerospace Engineer, Propulsion and Services Branch, ACE–118A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30349; telephone (770) 703–6094; fax (770) 703–6097.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to all Lockheed Model L–1011 series airplanes. That NPRM was published in the **Federal Register** on February 20, 2008 (73 FR 9235). That NPRM proposed to require revising the FAA-approved maintenance program by incorporating new airworthiness limitations (AWLs) for fuel tank systems to satisfy Special Federal Aviation Regulation No. 88 (“SFAR 88”) requirements. That NPRM also proposed to require the accomplishment of certain fuel system modifications, the initial inspections of certain repetitive fuel system limitations (FSLs) to phase in those inspections, and repair if necessary.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received from the one commenter.

Request To Supersede AD 2001–08–21, Amendment 39–12198

ATA Airlines requests that we revise the NPRM by removing the proposed requirement to accomplish the FSL specified in paragraph 2.B.(1)(d) of Lockheed Service Bulletin 093–28–098, Revision 1, dated January 22, 2008. (Lockheed Service Bulletin 093–28–098, Revision 1, refers to Lockheed Service Bulletin 093–28–094, Revision 1, dated June 23, 2006, for accomplishing that FSL.) The commenter further requests that we instead issue a separate rulemaking action to supersede AD 2001–08–21 (66 FR 21072, April 27, 2001) to require the accomplishment of Revision 1 of Lockheed Service Bulletin 093–28–094. (As stated in the NPRM, AD 2001–08–21 requires the accomplishment of the original issue of Lockheed Service Bulletin 093–28–094, dated March 3, 2000, but more work is necessary for Revision 1 of the service bulletin.)

We agree that it is more appropriate to require the accomplishment of Revision 1 of Lockheed Service Bulletin 093–28–094 by superseding AD 2001–08–21. Our current policy specifies that, whenever a “substantive change” is made to an existing AD that imposes a new burden, we must supersede the AD. “Substantive changes” are those made to any instruction or reference that affects the substance of the AD. Substantive changes include part numbers, service bulletin and manual references, compliance times, applicability, methods of compliance, corrective action, inspection requirements, and effective dates. We consider the changes in Revision 1 of the service bulletin to be substantive. Therefore, we have revised paragraphs (h) and (i) and Table 2 of this AD by removing references to paragraph 2.B.(1)(d) and Lockheed Service Bulletin 093–28–094. Further, we will consider superseding AD 2001–08–21 with a separate rulemaking action.

Request To Extend the Compliance Time for Certain Actions

ATA Airlines requests that we extend the compliance time for accomplishing the FSLs in paragraphs 2.B.(1)(d), 2.B.(1)(e), 2.B.(1)(f), and 2.B.(1)(g) of Lockheed Service Bulletin 093–28–098, Revision 1, dated January 22, 2008, to the following: on or before the next heavy maintenance inspection after the effective date of the AD, but not to exceed 60 months after the effective date of the AD. The commenter recommends revising the compliance time by either adding a compliance time, initial threshold, and grace period

to Table 2 of the NPRM, or removing Table 2 from the NPRM and issuing separate rulemaking actions to address those FSLs. The commenter also requests that we include a note in the AD to define a heavy maintenance inspection as equivalent to a "D" check and similar to the definition in the Lockheed L-1011 Maintenance Review Board Report, dated March 1, 1998.

As justification for its request, the commenter states that the NPRM is inconsistent with other rulemaking actions addressing other airplane models. The commenter also states that those other rulemaking actions are consistent with the guidance in FAA Policy Memorandum PS-ANM112-05-001, "Policy Statement on Process for Developing SFAR 88-Related Instructions for Maintenance and Inspection of Fuel Tank Systems," dated October 6, 2004. In support of its position, the commenter refers to paragraphs 3.D, 3.D.1, and 4 of that policy memorandum, and to the "Four-Element Unsafe Condition Evaluation Criteria" section of FAA Policy Memorandum PS-ANM100-2003-112-15, "SFAR 88—Mandatory Action Design Criteria," dated February 25, 2003. The commenter contends that each identified unsafe condition and the AWL changes should be issued as separate rulemaking actions.

The commenter also contends that it would be unduly and disproportionately impacted by the proposed requirements of the NPRM. The commenter states that, for other airplane models, we have issued separate rulemaking actions to address design changes and the incorporation of AWLs for fuel tank systems into the FAA-approved maintenance program. The commenter also states that, in some instances, we have provided a compliance time of up to 5 years for accomplishing the design changes. The commenter, therefore, asserts that requiring the accomplishment of the design changes identified in Table 2 of the NPRM by December 16, 2008, is a substantial, immediate burden.

The commenter also asserts that paragraph (h) of the NPRM effectively makes the service bulletins identified in Table 2 of the NPRM retroactively applicable. The commenter notes that Table 2 does not include the compliance times recommended in those service bulletins. ATA Airlines believes that, as written, the NPRM would effectively make the compliance recommendation of up to 2-year-old service documents rule. As an example, the commenter points to Lockheed Service Bulletin 093-28-096, dated June 8, 2004, which recommends doing the initial inspection

of the wiring harnesses of the No. 1 and No. 3 engine tank valves on or before the next heavy maintenance inspection, but not to exceed 5 years from the date of the service bulletin. That service bulletin also recommends revising the maintenance planning documentation to require repeating the inspection at intervals not to exceed 10 years from the date of the last inspection. The commenter states that, upon issuance of the final rule, an operator is at risk of non-compliance, since it is possible for an airplane to have undergone a heavy maintenance inspection between publication of the service bulletin and the effective date of the AD without having accomplished the actions specified in the service bulletin.

We agree to extend the compliance time for accomplishing the design changes identified in paragraphs 2.B.(1)(d), 2.B.(1)(e), 2.B.(1)(f), and 2.B.(1)(g) of Lockheed Service Bulletin 093-28-098, Revision 1. We have added a new paragraph (h)(2) specifying that the FSLs in paragraphs 2.B.(1)(e), 2.B.(1)(f), and 2.B.(1)(g) must be done within 60 months after the effective date of this AD. As stated previously, we have removed the requirement to accomplish the FSL in paragraph 2.B.(1)(d) of Lockheed Service Bulletin 093-28-098, Revision 1.

However, we disagree with issuing separate ADs to address the other design changes identified in Table 2 of this AD. The policy memorandum to which the commenter refers to does not specify that the design changes must be addressed by separate rulemaking actions. We also point out that when the compliance time in an AD differs from the recommended compliance time in a service bulletin, operators are required to comply with the compliance time specified in the AD, not the service bulletin. We have not changed this AD in this regard.

Request To Extend the Compliance Time of Paragraph (g)

ATA Airlines requests that we extend the compliance time by 1 year to December 16, 2009 in paragraph (g) of the NPRM. The commenter states that the airplane manufacturers of other airplane models have provided comprehensive data to support operators in complying with a compliance date of December 16, 2008. As an example, the commenter refers to Docket Nos. FAA-2006-26710, FAA-2007-28383, and FAA-2007-28384 published on the Internet at <http://www.regulations.gov>. The commenter states that those NPRMs all refer to comprehensive maintenance planning documents provided by the airplane

manufacturer, and that those NPRMs provide explicit thresholds and grace periods for accomplishing many of the AWLs for fuel tank systems. The commenter also states that the airplane manufacturer either has or is providing comprehensive revisions to the AWLs section of the Instructions for Continued Airworthiness (ICA) to address critical design configuration control limitations (CDCCLs) and other SFAR 88 findings. The commenter asserts that Lockheed has not provided the same level of support, which substantially increases the burden on operators. The commenter believes that, as a result of the manner and timeliness of the data provided for the Model L-1011 series airplanes, it is appropriate and justifiable to provide a 12-month grace period for operators to amend their maintenance programs.

We disagree with extending the compliance time for paragraph (g) of this AD. We have determined that Lockheed has met the minimum requirements for supporting operators in complying with the SFAR 88 requirements. Further, in other similar NPRMs for other airplane models, we have not provided a grace period for revising the FAA-approved maintenance program or the AWLs section of ICA, as applicable, to incorporate AWLs for fuel tank systems. As stated in the preambles of those NPRMs, 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 efficient and coordinated implementation of these regulations and those NPRMs, we are using this same compliance date. We have not changed this AD in this regard.

Request To Extend the Comment Period

ATA Airlines requests that we extend the comment period for a minimum of 30 days. As justification, the commenter states that Lockheed Service Bulletin 093-28-098, Revision 1, dated January 22, 2008, was not available to operators until 9 days after the NPRM was published in the **Federal Register**.

We disagree with extending the comment period. We have attempted to contact this commenter to better understand its needs and rationale with regard to extending the comment period. However, we have been unable to reach the commenter after numerous attempts. To further delay this action would be inappropriate, since we have determined that an unsafe condition exists and it must be addressed to ensure continued safety.

Request To Revise Paragraph (b)

ATA Airlines notes that paragraph (b) of the NPRM specifies that no other airworthiness directives are affected by the NPRM. The commenter believes that this is incorrect because Lockheed Service Bulletin 093-28-098, Revision 1, dated January 22, 2008, refers to AD 80-25-04, amendment 39-3983 (45 FR 79011, November 28, 1980); AD 99-24-12, amendment 39-11436 (64 FR 66756, November 30, 1999); and AD 2001-08-21. (AD 80-25-04 requires accomplishing the actions specified in Lockheed Service Bulletin 093-28-062, Revision 1, dated August 20, 1980. AD 99-24-12 requires accomplishing the actions specified in Lockheed Service Bulletin 093-28-093, Revision 1, dated February 8, 1999. AD 2001-08-21 requires accomplishing the actions specified in Lockheed Service Bulletin 093-28-094, dated March 3, 2000.) The commenter states that AD 2001-08-21

should be identified as a superseded AD, according to paragraph 121.b. of Section 12 of the "Airworthiness Directives Manual," FAA-IR-M-8040.1A. We infer the commenter requests that we revise paragraph (b) of this AD to specify that this AD is related to AD 80-25-04 and AD 99-24-12, and that it supersedes AD 2001-08-21. We disagree with revising paragraph (b) of this AD. Paragraph (b) of an AD is reserved for referencing any previously issued AD that is revised or superseded by a new AD. As stated previously, we will consider superseding AD 2001-08-21 with a separate rulemaking action. No change to this AD is necessary in this regard.

Change Made to This AD

We have revised paragraph (g) of this AD to require revising the FAA-approved maintenance program to incorporate the FSLs and CDCCLs

specified in Lockheed Service Bulletin 093-28-098, Revision 1, except as provided by paragraphs (g)(1), (g)(2), and (h) of this AD. In the NPRM, we inadvertently omitted reference to paragraph (h).

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

There are about 108 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs, at an average labor rate of \$80 per work hour, for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Maintenance program revision to incorporate FSLs and CDCCLs.	4	None	\$320	63	\$20,160
Removal of auxiliary fuel tank No. 4, if applicable.	40	None	3,200	8	25,600
Modification and inspection of the wiring harnesses of the fuel level control switch.	19	974	2,494	63	157,122
Inspection of the airplane fuel tanks, vent boxes, and bonding jumpers, and the addition of bonding jumpers to the fuel/vent tube fittings.	370	18,491	48,091	63	3,029,733
Identification and inspection of the FQIS wiring harnesses.	4	336	656	63	41,328

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

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

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

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

under the criteria of the Regulatory Flexibility Act.

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, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–11–02 Lockheed: Amendment 39–15524. Docket No. FAA–2008–0181; Directorate Identifier 2007–NM–180–AD.

Effective Date

(a) This airworthiness directive (AD) is effective June 25, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Lockheed Model L–1011 series 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 (AMOC) in accordance with paragraph (k) 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.

Unsafe Condition

(d) This AD results from a design review of the fuel tank systems. We are issuing this AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss 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.

Service Bulletin Reference

(f) The term “service bulletin,” as used in this AD, means the Accomplishment Instructions of Lockheed Service Bulletin 093–28–098, Revision 1, dated January 22, 2008.

Maintenance Program Revision

(g) Before December 16, 2008, revise the FAA-approved maintenance program to incorporate the fuel system limitations (FSLs) specified in paragraphs 2.B.(1)(b), 2.B.(1)(e), 2.B.(1)(f), and 2.B.(1)(g) of the service bulletin, and the critical design configuration

control limitations (CDCCLs) specified in paragraph 2.C. of the service bulletin; except as provided by paragraphs (g)(1), (g)(2), and (h) of this AD.

(1) Where the FSLs specify to inspect, this AD would require doing a general visual inspection.

Note 2: For the purposes of this AD, a general visual inspection is: “A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.”

(2) For the CDCCLs specified in paragraphs 2.C.(2)(c), 2.C.(2)(d), and 2.C.(15)(a) of the service bulletin, do the applicable actions using a method approved in accordance with the procedures specified in paragraph (k) of this AD. The applicable service information listed in Table 1 of this AD is one approved method.

TABLE 1.—APPROVED METHODS FOR CERTAIN CDCCLs

For the CDCCL identified in the service bulletin in paragraph—	One approved method is—	For—
2.C.(2)(c)	Hamilton Sundstrand Overhaul Manual 28–24–03, Revision 14, dated May 15, 2000.	Overhauling and repairing the electrically-operated fuel boost pumps.
2.C.(2)(d)	Lockheed L–1011 Service Information Letter 28–12, dated March 17, 1998.	Keeping the electrical conduit for the electrically-operated fuel boost pumps open and unplugged at the wing rear spar.
2.C.(15)(a)	Lockheed Drawing 1527514, Revision D, dated September 26, 1981.	Installing the fuel tank valves, auxiliary power unit pump, sight gauges, fuel quantity indicating system tank units, over-wing filler cap adapter ring, boost pump mounting plate, and access doors for the boost pump, vent box, vent valve, and fuel level control switch.

Initial Accomplishment of FSLs and Repair if Necessary

(h) At the applicable compliance time specified in paragraph (h)(1) or (h)(2) of this AD, do the applicable FSLs specified in paragraphs 2.B.(1)(b), 2.B.(1)(e), 2.B.(1)(f), and 2.B.(1)(g) of the service bulletin and

repair any discrepancy, in accordance with the service bulletin. Any repair must be done before further flight.

(1) For the FSL identified in paragraph 2.B.(1)(b) of the service bulletin, do the FSL before December 16, 2008.

(2) For the FSLs identified in paragraphs 2.B.(1)(e), 2.B.(1)(f), and 2.B.(1)(g) of the

service bulletin, do the applicable FSLs within 60 months after the effective date of this AD.

Note 3: The service bulletin refers to the service information listed in Table 2 of this AD as additional sources of service information for doing the FSLs and repair.

TABLE 2.—ADDITIONAL SOURCES OF SERVICE INFORMATION FOR CERTAIN FSLs

The FSL identified in the service bulletin in paragraph—	Refers to Lockheed Service Bulletin—	For—
2.B.(1)(b)	093–28–089, Revision 3, dated October 4, 2006 (or later).	Removing auxiliary fuel tank No. 4, if applicable.
2.B.(1)(e)	093–28–095, dated September 13, 2006 (or later).	Inspecting the airplane fuel tanks and vent boxes for cleanliness and evidence of deteriorated or damaged fuel/vent tubes and components; inspecting bonding jumpers for proper installation, corrosion, frayed or broken strands, and the condition of the environmental sealing or bonding clamps and hardware; correcting any discrepant conditions; adding bonding jumpers to the fuel/vent tube fittings; and inspecting the bonding jumpers on the fuel/vent tube fittings.

TABLE 2.—ADDITIONAL SOURCES OF SERVICE INFORMATION FOR CERTAIN FSLs—Continued

The FSL identified in the service bulletin in paragraph—	Refers to Lockheed Service Bulletin—	For—
2.B.(1)(f)	093–28–096, Revision 2, dated June 23, 2006 (or later).	Inspecting the wiring harnesses of the No. 1 and No. 3 engine tank valves for evidence of damage and fuel contamination; replacing any damaged wire with new wire; and repairing or replacing any contaminated wires as applicable.
2.B.(1)(g)	093–28–097, dated August 3, 2006 (or later)	Identifying the wiring harnesses for the fuel quantity indicator system (FQIS); inspecting the FQIS wiring harnesses for any visible damage, wear, chafing, or indications of electrical arcing; and replacing or repairing any damaged wires as applicable.

No Reporting Requirement

(i) Although Lockheed Service Bulletin 093–28–095, dated September 13, 2006; Lockheed Service Bulletin 093–28–096, Revision 2, dated June 23, 2006; and Lockheed Service Bulletin 093–28–097, dated August 3, 2006; specify to notify Lockheed of any discrepancies found during inspection or any evidence of damage or wire replacement, this AD does not require that action.

No Alternative Inspections, Inspection Intervals, or CDCCLs

(j) After accomplishing the actions specified in paragraphs (g) and (h) 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 the service bulletin that is approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA; or unless the inspections, intervals, or CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (k) of this AD.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Atlanta 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.

Material Incorporated by Reference

(l) You must use Lockheed Service Bulletin 093–28–098, Revision 1, dated January 22, 2008, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Lockheed Continued Airworthiness Project Office, Attention: Airworthiness, 86 South Cobb Drive, Marietta, Georgia 30063–0567.

(3) You may review copies of the service information incorporated by reference at the FAA, Transport Airplane Directorate, 1601

Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

Issued in Renton, Washington, on May 8, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–10975 Filed 5–20–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28388; Directorate Identifier 2006–NM–163–AD; Amendment 39–15523; AD 2008–11–01]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Boeing Model 767–200, –300, –300F, and –400ER series airplanes. This AD requires revising the FAA-approved maintenance program to incorporate new airworthiness limitations (AWLs) for fuel tank systems to satisfy Special Federal Aviation Regulation No. 88 requirements. This AD would also require the initial inspection of certain repetitive AWL inspections to phase in those inspections, and repair if necessary. This AD results from a design review of the fuel tank systems. We are issuing this AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which,

in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: This AD is effective June 25, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 25, 2008.

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

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Judy Coyle, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6497; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Boeing Model 767–200, –300, –300F, and –400ER series airplanes. That NPRM was published in the **Federal Register** on July 3, 2007 (72 FR 36391). That NPRM proposed to require revising the FAA-approved maintenance program to incorporate new

airworthiness limitations (AWLs) for fuel tank systems to satisfy Special Federal Aviation Regulation No. 88 requirements. That NPRM also proposed to require the initial inspection of certain repetitive AWL inspections to phase in those inspections, and repair if necessary.

Actions Since NPRM Was Issued

Since we issued the NPRM, Boeing has published Section 9 of the Boeing 767 Maintenance Planning Data (MPD) Document, D622T001-9, Revision April 2008 (hereafter referred to as "Revision April 2008 of the MPD"). The NPRM referred to Revision March 2006 of the MPD as the appropriate source of service information for accomplishing the proposed actions. Revision April 2008 of the MPD adds additional component maintenance manual (CMM) information to AWL No. 28-AWL-06. Accordingly, we have revised paragraphs (f), (g), and (h) of this AD to refer to Revision April 2008 of the MPD. We also have added a new paragraph (j) to this AD specifying that actions done before the effective date of this AD in accordance with Revisions March 2006 through March 2008 of the MPD are acceptable for compliance with the corresponding requirements of paragraphs (g) and (h) of this AD.

Revision April 2008 of the MPD specifies that the repetitive task interval for AWL No. 28-AWL-05 is 25,000 flight hours or 6 years, whichever comes first. However, we have revised paragraph (g) of this AD to specify that the repetitive task interval for AWL No. 28-AWL-05 is 72 months only. The 25,000-flight-hour interval will be removed from that AWL in a future revision to the MPD. We have also revised the initial threshold for accomplishing AWL No. 28-AWL-05 in Table 1 of this AD.

In Revision March 2008 of the MPD, Boeing removed the repetitive task interval of 36,000 flight hours from AWLs No. 28-AWL-01, No. 28-AWL-18, and No. 28-AWL-26. Therefore, we have removed reference to 36,000 total flight cycles from the initial threshold of AWLs No. 28-AWL-01, No. 28-AWL-18, and No. 28-AWL-26 in Table 1 of this AD and revised the initial threshold to within 144 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.

Operators should note that, in Revision March 2008 of the MPD, Boeing also revised AWLs No. 28-AWL-18 and No. 28-AWL-26 to reflect the new maximum loop resistance values associated with the lightning

protection of the unpressurized fuel quantity indicating system (FQIS) wire bundle installations.

In Revision October 2007 of the MPD, Boeing revised the contents of Subsection D, "AIRWORTHINESS LIMITATIONS—SYSTEMS," of the MPD. The fuel system AWLs were removed from Subsection D and placed into a new Subsection E, "PAGE FORMAT: FUEL SYSTEMS AIRWORTHINESS LIMITATIONS." Therefore, we have revised paragraph (g) of this AD to require the incorporation of both Subsections D and E of Revision April 2008 of the MPD.

Operators should note that we have revised paragraph (g)(2) of this AD to require incorporating only AWLs No. 28-AWL-01 through No. 28-AWL-26 inclusive. AWLs No. 28-AWL-27 and No. 28-AWL-28 were added to Revision October 2007 of the MPD; we might issue additional rulemaking to require the incorporation of those AWLs. However, as an optional action, operators may incorporate those AWLs as specified in paragraph (g)(2) of this AD.

Other Changes Made to This AD

We have revised paragraph (h) of this AD to clarify that the actions identified in Table 1 of this AD must be done at the compliance time specified in that table. Also, for standardization purposes, we have revised this AD in the following ways:

- We have added a new paragraph (i) to this AD to specify that no alternative inspections, inspection intervals, or critical design configuration control limitations (CDCCLs) may be used unless they are part of a later approved revision of the Revision April 2008 of the MPD, or unless they are approved as an alternative method of compliance (AMOC). Inclusion of this paragraph in the AD is intended to ensure that the AD-mandated airworthiness limitations changes are treated the same as the airworthiness limitations issued with the original type certificate.

- We have revised Note 2 of this AD to clarify that an operator must request approval for an AMOC if the operator cannot accomplish the required inspections because an airplane has been previously modified, altered, or repaired in the areas addressed by the required inspections.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received from the six commenters.

Request To Allow Inspections Done According to a Maintenance Program

Japan Airlines (JAL) requests that we revise paragraph (h) of the NPRM to allow an operator to update its FAA-approved maintenance program to include the initial inspections and repair for certain AWLs. JAL states that the NPRM would require accomplishing the initial inspection and repair of certain AWLs, which would require JAL to establish a special inspection and special recordkeeping for the proposed requirement.

The compliance times specified in paragraph (h) of this AD are intended to provide a grace period for those airplanes that have already exceeded the specified threshold in the MPD. To be in compliance with the recording requirements of this AD, operators must record their compliance with the initial inspection for those airplanes over the specified threshold. We have revised paragraph (h) of this AD to specify that accomplishing the applicable AWLs as part of an FAA-approved maintenance program before the applicable compliance time constitutes compliance with the applicable requirements of that paragraph.

Request To Revise Intervals for Certain AWL Inspections

KLM Royal Dutch Airlines (KLM), on behalf of several operators, requests that we review a 45-page proposal to align certain airworthiness limitation item (ALI) intervals with the applicable maintenance significant item (MSI) and enhanced zonal analysis procedure (EZAP) intervals for Model 737, 747, 757, 767, and 777 airplanes. The recommendations in that proposal ensure that the ALI intervals align with the maintenance schedules of the operators. Among other changes, the proposal recommends revising certain AWL inspection intervals from 12 years/36,000 flight hours to only 12 years for Model 767 airplanes.

Qantas Airways also requests that the 36,000-flight-hour parameter be removed from the inspection interval for AWL No. 28-AWL-01, No. 28-AWL-05, No. 28-AWL-18, and No. 28-AWL-26. The commenter states that the flight-hour parameter does not adequately take into account actual airplane usage, and that its long haul utilization of the airplane is 4,000 flight hours per year. Based on this number, the commenter states that an AWL task due at 36,000 flight hours would need to be done in 9 years instead of 12 years.

Qantas Airways notes an inconsistency between the inspection interval specified in Revision March

2006 of the MPD and the compliance threshold specified in Table 1 of the NPRM. Table 1 of the NPRM specifies accomplishing the initial inspection within a certain number of flight cycles or a certain number of months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness, whichever occurs first. Qantas Airways would welcome the change from "flight hours" to "flight cycles," if the flight-hour parameter is not deleted from the inspection intervals specified in Revision March 2006 of the MPD.

We have reviewed the commenter's requests, and we agree to revise the compliance threshold for certain AWLs as identified by the commenters. As stated previously, Revision April 2008 of the MPD gives the repetitive intervals in calendar time. We have revised the threshold specified in Table 1 of this AD accordingly.

Request To Harmonize Task Descriptions

JAL states that, in Revision March 2006 of the MPD, the task descriptions defining the applicable area are different for AWLs Nos. 28-AWL-01 and 28-AWL-02. (AWL No. 28-AWL-01 is a repetitive inspection of the external wires over the center fuel tank, and AWL No. 28-AWL-02 is a CDCCL to maintain the original design features for the external wires over the center fuel tank.) JAL believes that the task descriptions for these AWLs should match. JAL presumes that, if one purpose for the inspection is to prevent a spark in the fuel vapor over the center fuel tank, then the applicable area should have a certain tolerance instead of defining the area by exact station number.

We agree that the task descriptions for AWL Nos. 28-AWL-01 and 28-AWL-02 should be harmonized. Revision April 2008 of the MPD includes a revised task description of AWL No. 28-AWL-01, which addresses JAL's comments. As stated previously, we have revised this AD to refer to Revision April 2008 of the MPD.

Request To Revise the Loop Resistance Values for Certain AWLs

Boeing, KLM, and Qantas Airways state that the loop resistance values for AWLs No. 28-AWL-18 and No. 28-AWL-26 specified in Revision March 2006 of the MPD are going to be revised, since those values are relevant for production airplanes. The commenters also state that the revised values will be more representative of the expected values for in-service airplanes. Boeing

points out that, according to paragraph (h) of the NPRM, the revised values should be able to be used in accordance with a later revision of the MPD if the revision is approved by the Seattle Aircraft Certification Office (ACO), FAA.

We agree that operators may use the revised loop resistance values for AWLs No. 28-AWL-18 and No. 28-AWL-26 in accordance with Revision April 2008 of the MPD. As stated previously, we have revised this AD accordingly.

Request To Correct Typographical Error in NPRM

Boeing requests that we correct typographical errors in Table 1 of NPRM. Boeing states that the digit "2" is missing from AWLs No. 28-AWL-05, No. 28-AWL-18, and No. 28-AWL-26 in Table 1 of the NPRM.

We agree that those typographical errors were published in the **Federal Register** version of the NPRM. Since those errors occurred during publication of the NPRM, we notified the **Federal Register** about those errors on July 3, 2007. The errors should be corrected when this AD is published in the **Federal Register**.

Request To Delegate Authority for Allowing Use of Equivalent Tools, Components, Materials, and Equipment

ABX Air requests that we delegate authority to a designated engineering representative (DER) or delegation option authorization (DOA) organization to approve the use of equivalent tools, components, materials, and equipment for cases where the CMM does not state that an equivalent item may be used. ABX Air believes that requiring approval from the Seattle ACO for equivalent items not cited in the CMMs will create an undue burden on operators. ABX Air states that there are instances when a part or material called out in a CMM is unavailable on the market, but an acceptable equivalent item is available; the commenter states that it would be impossible to obtain approval from the Seattle ACO for the equivalent item in a timely manner. ABX Air also states that there are instances where there are common equivalent items to items specified in a CMM. As an example, ABX Air points to a certain CMM that lists the part number for a required notebook sheet protector. ABX Air states that, according to the NPRM, a different notebook sheet protector cannot be used unless it is approved by the Seattle ACO. ABX Air believes that government regulation to this level is unmanageable and does not provide an increased level of safety. ABX Air also states that requiring a

specific manufacturer of voltmeters, common hardware, etc., does not add to the safety of the fleet of Model 767 airplanes. ABX Air also requests that we allow an operator or repair station to acquire and use an equivalent item without Seattle ACO approval, when the CMM states that the equivalent items may be used and the operator or repair station has procedures for determining equivalents.

JAL requests that we provide guidelines for using equivalent tools and chemical materials according to the CMMs. JAL states that normally operators can use equivalents without FAA approval when the CMM specifies that equivalents may be used. JAL also states that it has received further clarification from Boeing specifying that unless a CDCCL refers to a certain tool by part number or certain chemicals by name, an operator can continue to use equivalent tools or materials according to the CMMs.

We acknowledge the commenters' requests and are working with Boeing to provide appropriate flexibility while still ensuring that items critical for maintaining safety continue to be specifically identified in the CMMs. However, to delay issuance of this AD would be inappropriate.

We agree that when the CMMs allow use of equivalent items, operators and repair stations may use equivalents. We have already approved the use of the CMMs at the revision levels specified in Revision April 2008 of the MPD, including the use of equivalent tools or chemicals where the CMMs state equivalents are allowed. If the CMM does not allow use of an equivalent, none may be used. No change to this AD is necessary in this regard.

However, we disagree that DER/DOA organizations may approve equivalent items if the CMM does not specifically allow equivalents because current FAA Orders do not allow us to delegate approval of changes to airworthiness limitations. The FAA is considering granting a deviation from the order to allow manufacturer DER/DOA organizations to approve CMMs in the future. Until such deviation is in place, all CMM changes must be approved by the Seattle ACO. We have not changed this AD in this regard.

Request To Revise Appendix 1

Boeing requests that we revise Appendix 1 of the NPRM to reference additional ATA sections, add additional airplane maintenance manual (AMM) task titles and numbers, and correct certain AMM task titles and numbers. The affected AWLs are No. 28-AWL-02, No. 28-AWL-03, No. 28-AWL-07, No.

28-AWL-10, No. 28-AWL-12, No. 28-AWL-13, No. 28-AWL-17, No. 28-AWL-23, No. 28-AWL-24, and No. 28-AWL-26.

JAL requests that we update Appendix 1 of the NPRM to include all AWLs specified in the MPD, and that we indicate how to maintain the latest version of Appendix 1. JAL also requests that we correct the following error in Appendix 1 of the NPRM: For AWL No. 28-AWL-04, change "SWPM 20-10-15" to "SWPM 20-10-13."

We disagree with revising the AMM references, since we have deleted Appendix 1 from this AD. The purpose of Appendix 1 was to assist operators in identifying the AMM tasks that could affect compliance with a CDCCL. However, we have also received several similar comments regarding the appendices in other NPRMs that address the same unsafe condition on other Boeing airplanes. Those comments indicate that including non-required information in those NPRMs has caused confusion. Further, Revision April 2008 of the MPD contains most of the updated information that is listed in Appendix 1 of the NPRM. Therefore, we have removed Appendix 1 from this AD.

Request To Extend the Grace Period for AWL No. 28-AWL-03

KLM expects to have problems accomplishing the initial inspection of AWL No. 28-AWL-03 within the 24-month grace period. The commenter states that if it does the inspection and does not reach the specified values, then tank entry outside of heavy maintenance would be necessary. The commenter also states that it would be helpful to plan to do this inspection during an overhaul.

We infer that the commenter requests that we extend the grace period for AWL No. 28-AWL-03 in Table 1 of this AD to allow accomplishing the initial inspection during a regularly scheduled "4C" check (about 6 years). We disagree with extending the grace period to 6 years. In developing an appropriate compliance time for this action, we considered the safety implications, the rate of lightning strikes in the fleet, and the average age of the fleet. In consideration of these items, we have determined that an initial compliance time of 144 months (as discussed previously) with a grace period of 24 months will ensure an acceptable level of safety. We have not changed the grace period for AWL No. 28-AWL-03 in this regard.

Request To Extend the Exceptional Short-Term Extension

Qantas Airways requests that we allow exceptional short-term extensions of 10 percent of the task interval or 6 months, whichever is less, for AWL tasks. The commenter believes that the exceptional short-term extension of 30 days, which is specified in Revision March 2006 of the MPD, is too small for AWL tasks having 12-year intervals. The commenter states that, as part of the Boeing 747 Corrosion Prevention and Control Program mandated by AD 90-25-05, amendment 39-6790 (55 FR 49268, November 27, 1990), operators were given a provision to invoke exceptional short-term extensions of 10 percent of the task interval or 6 months, whichever is less. The commenter states that this is a more appropriate magnitude because operators are often permitted one-time exceptional extensions to maintenance checks and tasks of this proportion. The commenter also states that limiting the extension period to 30 days means that a "4C" check can never be extended by more than 30 days, which would force operators to do certain AWL inspections outside of a "4C" check.

We disagree with the commenter's request because exceptional short-term extensions are, in essence, pre-approved extensions without Seattle ACO review of the specifics of the situation. We consider that the ability to extend the interval without further approval for 30 days should be sufficient for most circumstances. However, if an operator finds that it needs an extension longer than 30 days, with appropriate justification one may be requested from the Seattle ACO, or governing regulatory authority. Longer extensions may be granted on a case-by-case basis because, as Qantas Airways points out, the task interval is long, and the FAA is interested in limiting out-of-sequence work. We have not changed this AD in this regard.

Request To Require Latest Revision of the AMM

JAL requests that we revise the NPRM to require incorporation of the latest revision of the manufacturer's AMM. JAL asserts that we have allowed Boeing to include statements in the Boeing AMM allowing operators to use certain CMM revision levels or later revisions. JAL states that, with the exception of the CMM, operators cannot find what revision level of the AMM needs to be incorporated into the operator's AMM in order to comply with the proposed requirements of the NPRM. JAL also

states that it could take several weeks to incorporate the manufacturer's AMM.

JAL further requests that we clarify whether it is acceptable to change the procedures in the AMM with Boeing's acceptance. JAL states that the MPD notes that any use of parts, methods, techniques, or practices not contained in the applicable CDCCL and AWL inspection must be approved by the FAA office that is responsible for the airplane model type certificate, or applicable regulatory agency. JAL also states that the Boeing AMM or CMM notes to obey the manufacturer's procedures when doing maintenance that affects a CDCCL or AWL inspection. However, JAL believes that according to the NPRM it is acceptable to change the AMM procedures with Boeing's acceptance.

We disagree with the changes proposed by the commenter. This AD does not require revising the AMM. This AD does require revising your maintenance program to incorporate the AWLs identified in Revision April 2008 of the MPD. However, complying with the AWL inspections or CDCCLs will require other actions by operators including AMM revisions. In the U.S., operators are not required to use original equipment manufacturer (OEM) maintenance manuals. Operators may develop their own manuals, which are reviewed and accepted by the FAA Flight Standards Service. In order to maintain that flexibility for operators, most of the AWLs contain all of the critical information, such as maximum bonding resistances and minimum separation requirements. The FAA Flight Standards Service will only accept operator manuals that contain all of the information specified in the AWLs, so there is no need to require operators to use the OEM maintenance manuals.

Regarding JAL's request for clarification of approval of AWL changes, we infer JAL is referring to the following sentence located in the "Changes to AMMs Referenced in Fuel Tank System AWLs" section of the NPRM: "A maintenance manual change to these tasks may be made without approval by the Manager, Seattle ACO, through an appropriate FAA PMI or PAI, by the governing regulatory authority, or by using the operator's standard process for revising maintenance manuals." If changes need to be made to tasks associated with an AWL, they may be made using an operator's normal process without approval of the Seattle ACO, as long as the change maintains the information specified in the AWL. For some CDCCLs, it was beneficial to not put all

the critical information into the MPD. This avoids duplication of a large amount of information. In these cases, the CDCCL refers to a specific revision of the CMM. U.S. operators are required to use those CMMs. Any changes to the CMMs must be approved by the Seattle ACO.

Request To Revise Note 2

Boeing requests that we revise Note 2 of the NPRM to clarify the need for an AMOC. Boeing states that the current wording is difficult to follow, and that the note is meant to inform operators that an AMOC to the required MPD AWLs might be required if an operator has previously modified, altered, or repaired the areas addressed by the limitations. Boeing requests that we revise Note 2 as follows:

- Add the words “according to paragraph (g)” at the end of the first sentence.
- Replace the words “revision to” with “deviation from” in the last sentence.
- Delete the words “(g) or” and “as applicable” from the last sentence.

As stated previously, we have clarified the language in Note 2 of this AD for standardization with other similar ADs. The language the commenter requests that we change does not appear in the revised note. Therefore, no additional change to this AD is necessary in this regard.

Request To Delete Reference to Task Cards

All Nippon Airways (ANA) requests that we delete the words “and task card,” unless the task card references are listed in Subsection D of the MPD or Appendix 1 of the AD. Those words are located in the following sentence in the “Ensuring Compliance with Fuel Tank System AWLs” section of the NPRM: “Operators that do not use Boeing’s revision service should revise their maintenance manuals and task cards to highlight actions tied to CDCCLs to ensure that maintenance personnel are complying with the CDCCLs.” ANA believes that if a task card refers to the AMM, which includes the CDCCL note, then highlighting the CDCCL items is not necessary because they are already highlighted in the AMM and maintenance personnel always refer to the AMM. ANA further states that the applicable task card references are not listed in Subsection D of the MPD, or in Appendix 1 of the NPRM; they refer only to the AMM. ANA, therefore, states that it is difficult to find out or distinguish the affected task card.

JAL believes that the proposed requirement regarding the CDCCLs is to incorporate the manufacturer’s maintenance manuals into an operator’s maintenance manual. If the description of a CDCCL is missing from the manufacturer’s AMM, then JAL believes that operators are not responsible for the requirements of the AD.

We agree that the task cards might not need to be revised because an operator might find that the AMM notes are sufficient. However, we disagree with deleting the reference to the task cards since some operators might need to add notes to their task cards. This AD does not require any changes to the maintenance manuals or task cards. The AD requires incorporating new AWLs into the operator’s maintenance program. It is up to the operator to determine how best to ensure compliance with the new AWLs. In the “Ensuring Compliance with Fuel Tank System AWLs” section of the NPRM, we were only suggesting, not requiring, ways that an operator could implement CDCCLs into its maintenance program. We have not changed this AD in this regard.

Request To Clarify Meaning of Task Cards

JAL requests that we clarify whether “task cards,” as found in the “Recording Compliance with Fuel Tank System AWLs” section of the NPRM, means Boeing task cards only or if they also include an operator’s unique task cards.

We intended that “task cards” mean both Boeing and an operator’s unique task cards, as applicable. The intent is to address whatever type of task cards are used by mechanics for maintenance. This AD would not require any changes to the AMMs or task cards relative to the CDCCLs. We are only suggesting ways an operator might implement CDCCLs into its maintenance program. No change to this AD is necessary in this regard.

Request To Delete Reference to Parts Manufacturer Approval (PMA) Parts

ANA requests that we delete the words “Any use of parts (including the use of parts manufacturer approval (PMA) approved parts),” unless a continuous supply of CMM-specified parts is warranted or the FAA is open 24 hours to approve alternative parts for in-house repair by the operator. Those words are located in the following sentence in the “Changes to CMMs Cited in Fuel Tank System AWLs” section of the NPRM: “Any use of parts (including the use of parts manufacturer approval (PMA) approved parts), methods, techniques, and practices not

contained in the CMMs needs to be approved by the Manager, Seattle ACO, or governing regulatory authority.”

ANA states that in some cases the parts specified in the CMMs cannot be obtained from the parts market or directly from the component vendor, so an operator is forced into using alternative parts to keep its schedule. ANA requests that we direct the component vendor to ensure a continuous supply of CMM parts and to direct the component vendor to remedy a lack of parts if parts are not promptly supplied. ANA further requests that we direct the component vendor to promptly review the standard parts and allow use of alternative fasteners and washers listed in Boeing D590. ANA asserts that, in some cases, a component vendor specifies an uncommon part to preserve its monopoly.

We disagree with revising the “Changes to CMMs Cited in Fuel Tank System AWLs” section of the NPRM. We make every effort to identify potential problems with the parts supply, and we are not aware of any problems at this time. The impetus to declare overhaul and repair of certain fuel tank system components as CDCCLs arose from in-service pump failures that resulted from repairs not done according to OEM procedures. We have approved the use of the CMMs—including parts, methods, techniques, and practices—at the revision levels specified in Revision April 2008 of the MPD. Third-party spare parts, such as parts approved by PMA, have not been reviewed. We expect that such parts might be found to be acceptable alternatives.

An operator may submit a request to the Seattle ACO, or governing regulatory authority, for approval of an AMOC if sufficient data are submitted to substantiate that use of an alternative part would provide an acceptable level of safety. The CDCCLs do not restrict where repairs can be performed, so an operator may do the work in-house as long as the approved CMMs are followed. If operators would like to change those procedures, they can request approval of the changes. The FAA makes every effort to respond to operators’ requests in a timely manner. If there is a potential for disrupting the flight schedule, the operator should include that information in its request. Operators should request approval for the use of PMA parts and alternative procedures from the FAA or the governing regulatory authority in advance in order to limit schedule disruptions. We have not changed this AD in this regard.

Request To Identify Other Test Equipment

JAL states that certain test equipment is designated in the MPD and that additional equipment should also be designated. For example, AWL No. 28-AWL-18 would require using loop resistance tester, part number (P/N) 906-10246-2 or -3. Therefore, JAL requests that we also identify alternative test equipment, so that operators do not need to seek an AMOC to use other equipment.

We disagree with identifying other test equipment. We cannot identify every possible piece of test equipment. We ensure that some are listed as recommended by the manufacturer. With substantiating data, operators can request approval of an alternative tester from the Seattle ACO, or the governing regulatory agency. We have not changed this AD in this regard.

Request To Clarify AWL No. 28-AWL-02

JAL requests that we clarify the intent of AWL No. 28-AWL-02. JAL states that Chapters 53-01 and 53-21 of the Boeing 767 AMM specify doing an inspection of the external wires over the center fuel tank according to AMM 28-11-00 before installing the floor panel over the center wing tank based on AWL No. 28-AWL-02. JAL also states that, according to Revision March 2006 of the MPD, AWL No. 28-AWL-02 contains two limitations: maintaining the existing wire bundle routing and clamping, and installing any new wire bundle per the Boeing standard wiring practices manual (SWPM). Therefore, JAL believes it is not necessary to inspect the external wires over the center fuel tank according to AMM 28-11-00 before installing the floor panel over the

center wing tank, unless that wire bundle routing and clamping are changed.

We point out that AWL No. 28-AWL-02 also contains a third limitation: verifying that all wire bundles over the center fuel tank are inspected according to AWL No. 28-AWL-01, which refers to AMM 28-11-00 for accomplishing the inspection. We do not agree that the inspection should be required only if the wire bundle routing and clamping are changed while maintenance is accomplished in the area. If any of the other bundles have a clamp or routing failure, it must be detected and corrected. After accomplishing the inspection required by AWL No. 28-AWL-01, an operator would not need to repeat the inspection for another 12 years. No change to this AD is necessary in this regard.

Request for Clarification for Recording Compliance With CDCCLs

JAL requests that we clarify the following sentence: "An entry into an operator's existing maintenance record system for corrective action is sufficient for recording compliance with CDCCLs, as long as the applicable maintenance manual and task cards identify actions that are CDCCLs." That sentence is located in the "Recording Compliance with Fuel Tank System AWLs" section of the NPRM. Specifically, JAL asks whether an operator must indicate the CDCCL in their recording documents or whether it is sufficient for the recording document to call out the applicable AMMs that are tied to the CDCCLs.

We have coordinated with the FAA Flight Standards Service and it agrees that, for U.S.-registered airplanes, if the applicable AMMs and task cards identify the CDCCL, then the entry into

the recording documents does not need to identify the CDCCL. However, if the applicable AMMs and tasks cards do not identify the CDCCL, then they must be identified. Other methods may be accepted by the appropriate FAA principal maintenance inspector (PMI) or principal avionics inspector (PAI), or governing regulatory authority. No change to this AD is necessary in this regard.

Request To Clarify the Approval of Service Bulletins

ABX Air asks that we clarify whether a service bulletin will need to be approved by the Manager, Seattle ACO, if a manufacturer publishes a service bulletin that modifies or repairs an affected component.

If the modification or repair described in the service bulletin affects compliance with this AD, then the service bulletin will need to be approved by the Manager, Seattle ACO. No change to this AD is necessary in this regard.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

There are about 824 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs, at an average labor rate of \$80 per work hour, for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Maintenance program revision	8	None	\$640	332	\$212,480
Inspections	8	None	640	332	212,480

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

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

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

(1) Is not a “significant regulatory action” under Executive Order 12866,

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

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

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, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–11–01 Boeing: Amendment 39–15523.

Docket No. FAA–2007–28388;

Directorate Identifier 2006–NM–163–AD.

Effective Date

(a) This airworthiness directive (AD) is effective June 25, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category; with an original standard airworthiness certificate or original export certificate of airworthiness issued before April 22, 2006.

Note 1: Airplanes with an original standard airworthiness certificate or original export certificate of airworthiness issued on or after

April 22, 2006, must already be in compliance with the airworthiness limitations specified in this AD because those limitations were applicable as part of the airworthiness certification of those airplanes.

Note 2: 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 (AMOC) according to paragraph (k) 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.

Unsafe Condition

(d) This AD results from a design review of the fuel tank systems. We are issuing this AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss 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.

Service Information Reference

(f) The term “Revision April 2008 of the MPD,” as used in this AD, means Section 9 of the Boeing 767 Maintenance Planning Data (MPD) Document, D622T001–9, Revision April 2008.

Maintenance Program Revision

(g) Before December 16, 2008, revise the FAA-approved maintenance program by incorporating the information in the subsections specified in paragraphs (g)(1) and (g)(2) of this AD; except that the initial inspections specified in Table 1 of this AD must be done at the compliance times specified in Table 1; and except that the task interval for AWL No. 28–AWL–05 is 72 months. Accomplishing the revision in

accordance with a later revision of the MPD is an acceptable method of compliance if the revision is approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA.

(1) Subsection D, “AIRWORTHINESS LIMITATIONS—SYSTEMS,” of Revision April 2008 of the MPD.

(2) Subsection E, “PAGE FORMAT: FUEL SYSTEMS AIRWORTHINESS LIMITATIONS,” AWLs No. 28–AWL–01 through No. 28–AWL–26 inclusive, of Revision April 2008 of the MPD. As an optional action, AWLs No. 28–AWL–27 and No. 28–AWL–28, as identified in Subsection E of Revision April 2008 of the MPD, also may be incorporated into the FAA-approved maintenance program.

Initial Inspections and Repair if Necessary

(h) Do the inspections specified in Table 1 of this AD at the compliance time specified in Table 1 of this AD, and repair any discrepancy, in accordance with Subsection D, “AIRWORTHINESS LIMITATIONS—SYSTEMS,” of Revision April 2008 of the MPD. The repair must be done before further flight. Accomplishing the actions required by this paragraph in accordance with a later revision of the MPD is an acceptable method of compliance if the revision is approved by the Manager, Seattle ACO. Accomplishing the inspections identified in Table 1 of this AD as part of an FAA-approved maintenance program before the applicable compliance time specified in Table 1 of this AD constitutes compliance with the requirements of this paragraph.

Note 3: For the purposes of this AD, a detailed inspection is: “An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.”

Note 4: For the purposes of this AD, a special detailed inspection is: “An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. The examination is likely to make extensive use of specialized inspection techniques and/or equipment. Intricate cleaning and substantial access or disassembly procedure may be required.”

TABLE 1.—INITIAL INSPECTIONS

AWL No.	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
28–AWL–01	A detailed inspection of external wires over the center fuel tank for damaged clamps, wire chafing, and wire bundles in contact with the surface of the center fuel tank.	Within 144 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.	Within 72 months after the effective date of this AD.

TABLE 1.—INITIAL INSPECTIONS—Continued

AWL No.	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
28-AWL-05	A special detailed inspection of the bulkhead fitting bond for the hydraulic line tank penetration.	Within 72 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.	Within 60 months after the effective date of this AD.
28-AWL-18	A special detailed inspection of the lightning shield to ground termination on the out-of-tank fuel quantity indicating system to verify functional integrity.	Within 144 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.	Within 24 months after the effective date of this AD.
28-AWL-26	A special detailed inspection of the lightning shield to ground termination on the out-of-tank surge tank fuel level sensor to verify functional integrity.	Within 144 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.	Within 24 months after the effective date of this AD.

No Alternative Inspections, Inspection Intervals, or Critical Design Configuration Control Limitations (CDCCLs)

(i) After accomplishing the actions specified in paragraphs (g) and (h) 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 Revision April 2008 of the MPD that is approved by the Manager, Seattle ACO; or unless the inspections, intervals, or CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (k) of this AD.

Credit for Actions Done According to Previous Revisions of the MPD

(j) Actions done before the effective date of this AD in accordance with Section 9 of the Boeing 767 Maintenance Planning Data (MPD) Document, D622T001-9, Revision March 2006; Revision October 2006; Revision January 2007; Revision October 2007; or Revision March 2008; are acceptable for compliance with the corresponding requirements of paragraphs (g) and (h) of this AD.

Alternative Methods of Compliance (AMOCs)

(k)(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.

Material Incorporated by Reference

(l) You must use Section 9 of the Boeing 767 Maintenance Planning Data (MPD) Document, D622T001-9, Revision April 2008, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of

this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

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

(3) You may review copies of the service information incorporated by reference at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

Issued in Renton, Washington, on May 8, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-10976 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2007-0024; Directorate Identifier 2007-NM-086-AD; Amendment 39-15526; AD 2008-11-04]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 737-100, -200, -200C, -300, -400, and -500 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Boeing Model 737-100, -200, -200C, -300, -400, and -500 series airplanes. This AD requires repetitive inspections

for cracking in and around the upper and lower hinge cutouts of the forward entry and forward galley service doorways, and corrective actions if necessary. This AD results from multiple reports of cracks found in the skin, bearstrap, and/or frame outer chord in the hinge cutout areas of the forward entry and forward galley service doorways. We are issuing this AD to detect and correct such cracking, which could result in rapid decompression of the airplane.

DATES: This AD is effective June 25, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 25, 2008.

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

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800-647-5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Howard Hall, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton,

Washington 98057-3356; telephone (425) 917-6430; fax (425) 917-6590.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to all Boeing Model 737-100, -200, -200C, -300, -400, and -500 series airplanes. That NPRM was published in the **Federal Register** on October 11, 2007 (72 FR 57890). That NPRM proposed to require repetitive inspections for cracking in and around the upper and lower hinge cutouts of the forward entry and forward galley service doorways, and corrective actions if necessary.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Add Optional Terminating Action for Certain Inspection Areas

The Air Transport Association (ATA), on behalf of its member United Airlines, concurs with the contents of the NPRM. United adds that Boeing Alert Service Bulletin 737-53A1200, dated April 13, 2006 (cited in the NPRM as the appropriate source of service information), does not require inspecting the hinge cutouts for cracks in the skin or bearstrap if an FAA-approved Boeing repair is installed. United requests that we revise the NPRM to include similar language.

We partially agree. We agree that the inspections specified in paragraph (f) of this AD may be terminated at areas repaired in accordance with Boeing 737-100/-200 SRM 53-30-3, Figures 20, 21, 31, or 32; or Boeing 737-300/-400/-500 SRM 53-10-01, Repair 5, 6, or 8; as applicable. Boeing concurs with this provision. We have added the provision in new paragraph (i) of this AD, and re-identified subsequent paragraphs. But we do not agree that a nonspecified previously installed

repair—even one issued by Boeing and approved by the FAA—is acceptable as a terminating action, unless the repair is properly evaluated as it relates to this AD. If a repair (or other modification or alteration) prevents an operator from accomplishing any action of this AD, then that operator must request FAA approval of an alternative method of compliance (AMOC) (14 CFR section 39.17). Paragraph (j) of the final rule provides operators the opportunity to request approval of specific repair configurations as terminating action.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

There are about 2,437 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs, per inspection cycle, for U.S. operators to comply with this AD.

ESTIMATED COSTS

Work hours	Average hourly labor rate	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
13 to 14	\$80	\$1,040 to \$1,120	1,055	\$1,097,200 to \$1,181,600.

Authority for This Rulemaking

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

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

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national

government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-11-04 Boeing: Amendment 39-15526. Docket No. FAA-2007-0024; Directorate Identifier 2007-NM-086-AD.

Effective Date

- (a) This airworthiness directive (AD) is effective June 25, 2008.

Affected ADs

- (b) None.

Applicability

- (c) This AD applies to all Boeing Model 737-100, -200, -200C, -300, -400, and -500 series airplanes, certificated in any category.

Unsafe Condition

- (d) This AD results from multiple reports of cracks found in the skin, bearstrap, and/or frame outer chord in the hinge cutout areas of the forward entry and forward galley service doorways. We are issuing this AD to detect and correct such cracking, which

could result in rapid decompression of the airplane.

Compliance

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

Repetitive Inspections

(f) Except as provided by paragraph (g) of this AD, at the applicable times specified in paragraph 1.E. of Boeing Alert Service Bulletin 737-53A1200, dated April 13, 2006, do external detailed, low frequency eddy current, high frequency eddy current, and high frequency eddy current rotary probe inspections, as applicable, for cracks in and around the upper and lower hinge cutouts of the forward entry and forward galley service doorways, in accordance with the Accomplishment Instructions of the service bulletin, except as provided by paragraphs (h) and (i) of this AD. Do not exceed the applicable repetitive interval for the previous inspection, as specified in the service bulletin as Option A or Option B. Repair any crack before further flight using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

Exceptions to Service Bulletin Specifications

(g) Where Boeing Alert Service Bulletin 737-53A1200, dated April 13, 2006, specifies a compliance time after the release date of the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

(h) Although Boeing Alert Service Bulletin 737-53A1200, dated April 13, 2006, specifies contacting Boeing for information about installing an optional preventive modification that would terminate the repetitive inspections specified in this AD, this AD requires that any terminating action be done by using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(i) The inspections specified in paragraph (f) of this AD may be terminated at areas repaired in accordance with Boeing 737-100/-200 SRM 53-30-1, Figures 20, 21, 31, or 32; or Boeing 737-300/-400/-500 SRM 53-10-01, Repair 5, 6, or 8; as applicable.

Alternative Methods of Compliance (AMOCs)

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

(2) 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, and the approval must specifically refer to this AD.

Material Incorporated by Reference

(k) You must use Boeing Alert Service Bulletin 737-53A1200, dated April 13, 2006, to do the actions required by this AD, unless the AD specifies otherwise.

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

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

(3) You may review copies of the service information incorporated by reference at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

Issued in Renton, Washington, on May 9, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-11118 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2008-0048; Directorate Identifier 2007-NM-276-AD; Amendment 39-15527; AD 2008-11-05]

RIN 2120-AA64

Airworthiness Directives; Airbus Model A310 and A300-600 Series Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Based on some recent in-service findings for fluid ingress and/or inner skin disbond damage on rudders, AIRBUS decided to introduce some further structural inspections to specific rudder areas. This type of damage

could result in reduced structural integrity of the rudder.

* * * * *

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

DATES: This AD becomes effective June 25, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 25, 2008.

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

FOR FURTHER INFORMATION CONTACT: Tom Stafford, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1622; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on January 22, 2008 (73 FR 3656). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Based on some recent in-service findings for fluid ingress and/or inner skin disbond damage on rudders, AIRBUS decided to introduce some further structural inspections to specific rudder areas. This type of damage could result in reduced structural integrity of the rudder.

For the reasons stated above, this AD requires the accomplishment of a thorough inspection program [a one-time inspection and repetitive inspections for damage of the rudder] by ultrasonic and/or thermographic methods, compared to the inspections already required by Airworthiness Directive (AD) 2006-0066, issued on 24 March 2006 [which corresponds to FAA AD 2006-07-13] as a precautionary measure, in order to verify the structural integrity of the rudder.

* * * * *

The corrective actions include reporting both positive and negative findings to Airbus, doing a temporary repair, and contacting Airbus for repair instructions and doing a permanent repair. The compliance times for doing the repairs range from before further flight to within 4,500 flight cycles after doing the inspection, depending on the inspection type and the configuration of

the airplane. The repetitive inspection intervals range from 1,200 flight cycles to 5,000 flight cycles, depending on the inspection type and the configuration of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Reduce the Compliance Time

The Allied Pilots Association (APA) requests that we reduce the compliance time to do the initial inspections specified in the NPRM from “500 flight cycles or 6 months” to “before further flight.” The APA states that it is unclear why any grace period is given for doing the inspections; the APA notes that statements by the Transportation Safety Board of Canada, and damage sustained during an earlier accident that resulted in destruction of the rudder and damage to the vertical fin due to an unknown quantity and type of damage, indicate the urgency of the inspections. The APA states that the affected rudders have been inspected only by visual means and have not been inspected by an effective means such as ultrasonic, infrared, and other sophisticated penetrating inspection methods. The APA concludes that the rudders subject to this AD are in unknown condition and at risk of an in-flight incident.

We do not agree with reducing the compliance time. Airbus has analyzed its data in order to calculate the “500 flight cycles or six months” compliance time. The analysis included a review of previous inspections of the rudders that partially checked the affected area and no detectable disbond was found. In developing the compliance time for this AD action, we considered not only the safety implications of the identified unsafe condition, but the average utilization rate of the affected fleet, the practical aspects of inspecting the fleet during the compliance time, and the availability of required parts. In addition, we have coordinated with the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community. We have determined that the “500 flight cycles or six months” compliance time ensures an adequate level of safety for the affected fleet. No change is necessary for this AD in this regard.

Request To Exempt Certain Airplanes

The Air Transport Association (ATA), on behalf of one of its members,

American Airlines, requests that airplanes on which the modification specified in Airbus Service Bulletin A300–55–6015 has been accomplished be exempted from the requirements of the NPRM. American Airlines states that airplanes on which Airbus Modification 08827 has not been incorporated in production have rudders in the part number series A55471500 (which are subject to the requirements of the NPRM). American Airlines states that Modification 08827 is a modification that applies only to the rudder. American Airlines notes that the modification specified in Airbus Service Bulletin A300–55–6015 allows the installation of a post-modification 08827 rudder and therefore, airplanes on which Modification 08827 has not been incorporated in production may have a post-modification rudder.

We acknowledge that Airbus Service Bulletins A300–55–6015, Revision 02, dated February 23, 2004; Revision 03, dated March 28, 2007; and Revision 04, dated November 14, 2007 specify procedures to do a modification that allows a post-modification 08827 rudder to be installed. However, we do not agree that a change to the applicability of this AD is necessary. An airplane on which a post-modification 08827 rudder is installed is not subject to this AD. The applicability of this AD specifies that only airplanes on which rudder part number (P/N) A55471500 series is fitted are subject to the AD. Airplanes fitted with a post-modification 08827 rudder will have a rudder part number other than P/N A55471500. No change has been made to this AD in this regard.

Conclusion

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

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect 123 products of U.S. registry. We also estimate that it will take about 22 work-hours 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 this AD to the U.S. operators to be \$216,480, or \$1,760 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket

contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-11-05 AIRBUS: Amendment 39-15527. Docket No. FAA-2008-0048; Directorate Identifier 2007-NM-276-AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective June 25, 2008.

Affected ADs

(b) The proposed AD supersedes AD 2006-07-13, Amendment 39-14540.

Applicability

(c) This AD applies to AIRBUS Model A310 and A300-600 series airplanes, certificated in any category, all certified models, all serial numbers, on which rudder Part Number (P/N) A55471500 series is fitted, except for those airplanes on which AIRBUS modification number 08827 has been incorporated in production.

Subject

(d) Air Transport Association (ATA) of America Code 55: Stabilizers.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states: Based on some recent in-service findings for fluid ingress and/or inner skin disbond damage on rudders, AIRBUS decided to introduce some further structural inspections to specific rudder areas. This type of damage could result in reduced structural integrity of the rudder.

For the reasons stated above, this AD requires the accomplishment of a thorough inspection program [a one-time inspection and repetitive inspections for damage of the rudder] by ultrasonic and/or thermographic methods, compared to the inspections already required by Airworthiness Directive (AD) 2006-0066, issued on 24 March 2006 [which corresponds to FAA AD 2006-07-13]

as a precautionary measure, in order to verify the structural integrity of the rudder.

* * * * *

The corrective actions include reporting both positive and negative findings to Airbus, doing a temporary repair, and contacting Airbus for repair and doing a permanent repair.

Actions and Compliance

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

(1) Within 500 flight cycles or 6 months after the effective date of this AD, whichever occurs first, perform a special detailed one-time inspection in the areas of rudder hoisting points and trailing edge screws, in accordance with the instructions given in Airbus Service Bulletin A310-55-2045 or A300-55-6044, both Revision 01, both dated December 20, 2007, as applicable.

(i) If no damage is found, within 30 days after the inspection or 30 days after the effective date of this AD, whichever occurs later, report to Airbus using Appendix 1 or 2, as applicable to the airplane configuration, of Airbus Service Bulletin A310-55-2045 or A300-55-6044, both Revision 01, as applicable.

(ii) If any damage is found, within the timescale(s) indicated in Airbus Service Bulletin A310-55-2045 or A300-55-6044, both Revision 01, as applicable, report to Airbus using Appendix 1 or 2, as applicable to the airplane configuration, of Airbus Service Bulletin A310-55-2045 or A300-55-6044, both Revision 01, as applicable, to get further instructions for repair. Accomplish the repair within the timescale(s) indicated in, and in accordance with, the instructions given in paragraph 3.B.(1)(a) or 3.B.(2)(a), as applicable to the airplane configuration, of Airbus Service Bulletin A310-55-2045 or A300-55-6044, both Revision 01, as applicable.

(2) Within 500 flight cycles or 6 months after the effective date of this AD, whichever occurs first, perform a special detailed inspection along the rudder Z-profile, in accordance with the instructions given in Airbus Service Bulletin A310-55-2044 or A300-55-6043, both Revision 01, both dated December 3, 2007, as applicable. For airplanes identified as Configuration 01 in the service bulletins, repeat the inspection thereafter at intervals not to exceed 1,400 flight cycles. For airplanes identified as Configuration 02 in the service bulletins, repeat the inspection thereafter at intervals not to exceed 5,000 flight cycles. For temporary repair along the rudder Z-profile for both airplanes identified as Configurations 01 and 02, refer to paragraph 3.C.(1) of Airbus Service Bulletin A310-55-2044 or A300-55-6043, both Revision 01, as applicable.

(i) If no damage is found, within 30 days after the inspection or 30 days after the effective date of this AD, whichever occurs later, report to AIRBUS using Appendix 1 or 2, as applicable to the airplane configuration, of Airbus Service Bulletin A310-55-2044 or A300-55-6043, both Revision 01, as applicable.

(ii) If any damage is found, verify the findings and apply all applicable corrective

actions within the timescale(s) indicated in, and in accordance with instructions given in paragraph 3.B.(1)(a) or 3.B.(2)(a), as applicable to the airplane configuration, of Airbus Service Bulletin A310-55-2044 or A300-55-6043, both Revision 01, as applicable. Within 30 days after the inspection or corrective action or 30 days after the effective date of this AD, whichever occurs later, submit a report to Airbus using Appendix 1 or 2, as applicable to the airplane configuration, of Airbus Service Bulletin A310-55-2044 or A300-55-6043, both Revision 01, as applicable.

Note 1: For rudder configuration identification, refer to Appendices 3 and 4 of Airbus Service Bulletin A310-55-2044, A310-55-2045, A300-55-6043, and A300-55-6044, as applicable to the airplane model and configuration.

(3) As of 30 days after the effective date of this AD: No person shall install a P/N A55471500 series rudder on any airplane as a replacement, unless it has been inspected and repaired, as applicable, in accordance with the instructions of Airbus Service Bulletins A310-55-2045, Revision 01, dated December 20, 2007, and A310-55-2044, Revision 01, dated December 3, 2007; or Airbus Service Bulletins A300-55-6044, Revision 01, dated December 20, 2007, and A300-55-6043, Revision 01, dated December 3, 2007; as applicable.

(4) Actions accomplished before the effective date of this AD in accordance with Airbus Service Bulletin A300-55-6044 or A310-55-2045, both dated July 23, 2007, are considered acceptable for compliance with the corresponding actions specified in paragraph (f)(1) of this AD.

(5) Actions accomplished before the effective date of this AD in accordance with Airbus Service Bulletin A300-55-6043 or A310-55-2044, both dated July 23, 2007, are considered acceptable for compliance with the corresponding actions specified in paragraph (f)(2) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Stafford, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1622; fax (425) 227-1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these

actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120-0056.

Related Information

(h) Refer to MCAI EASA Airworthiness Directive 2007-0266, dated October 8, 2007, and the service bulletins listed in Table 1 of this AD, for related information.

TABLE 1.—AIRBUS SERVICE INFORMATION

Airbus service bulletin	Revision	Date
A300-55-6043	01	December 3, 2007.
A300-55-6044	01	December 20, 2007.
A310-55-2044	01	December 3, 2007.
A310-55-2045	01	December 20, 2007.

Material Incorporated by Reference

(i) You must use the service information specified in Table 2 of this AD to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of

this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind

Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

TABLE 2.—MATERIAL INCORPORATED BY REFERENCE

Airbus service bulletin	Revision	Date
A300-55-6043, including Appendices 1 through 4	01	December 3, 2007.
A300-55-6044, including Appendices 1 through 4	01	December 20, 2007.
A310-55-2044, including Appendices 1 through 4	01	December 3, 2007.
A310-55-2045, including Appendices 1 through 4	01	December 20, 2007.

Issued in Renton, Washington, on May 6, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-10978 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 234

[Docket No. RITA 2007-28522]

RIN 2139-AA12

Revision of Airline Service Quality Performance Reports and Disclosure Requirements

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The U.S. Department of Transportation (Department) will collect additional data elements when flights are cancelled, diverted, or experience gate returns. The additional data elements will close data gaps and provide consumers a more accurate portrayal of arrival and tarmac delays. The previous NPRM was inadvertently published under RIN 2139-AA13.

DATES: This rule will be effective on October 1, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Bernard Stankus, Office of Airline Information, RTS-42, Bureau of Transportation Statistics, Research and Innovative Technology Administration, Telephone Number (202) 366-4387, Fax Number (202) 366-3383, or E-mail bernard.stankus@dot.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this rule, a copy of the notice of proposed rulemaking, and copies of the comments may be downloaded at <http://www.regulations.gov>, by searching docket RITA 2007-28522.

Background

The regulation (14 CFR part 234) requiring airlines that account for at least one percent of the domestic scheduled passenger revenues to submit monthly service quality performance reports was issued on September 9, 1987 (52 FR 34071). At that time, close to 40 percent of all flights were either late or cancelled. On-time performance reporting created a market-based incentive for carriers to improve their service and scheduling practices. The immediate result of this action was an

improvement in carriers' on-time performance. For the remainder of 1987, the industry had an on-time arrival rate of over 74 percent.

The Department added data elements to the reporting system in 1995 to enable the Federal Aviation Administration (FAA) to identify choke points within the air traffic control system (60 FR 66722, December 26, 1995). Aircraft tail number, wheels-off time and wheels-on time gave the FAA information concerning aircraft routings through the air traffic control system and detailed data on tarmac and airborne delays. A tarmac delay is one that takes place on the ground, such as on the ramp or taxiway.

In 1999 and 2000, airline delays increased dramatically with the increase in airline operations. Consumer complaints concerning flight delays increased by 58%. Section 227 of the Aviation Investment and Reform Act for the 21st Century (AIR-21) called upon the Secretary of Transportation to disclose to the public the source of delayed and cancelled flights. During this period, the Air Transport Association of America also petitioned the Department to report the causes of delays and cancellations. In August 2000, an Air Carrier On-time Reporting Advisory Committee was established to

make recommendations on causal reporting. The committee recommended four delay causes—Air Carrier, Extreme Weather, National Aviation System, and Late Arriving Aircraft. In response to public comments to the notice of proposed rulemaking, a fifth cause, Security, was added to the final rule (67 FR 70544, November 25, 2002).

The occurrence of lengthy tarmac delays in late 2006 and early 2007 once again focused public attention on the Department's collection of Airline Service Quality Performance Reports under 14 CFR part 234. In response to a media inquiry, the Bureau of Transportation Statistics (BTS) determined that the air carriers were inconsistent in reporting gate-departure times when there was a return to gate. Some carriers reported the initial gate departure time while others reported the "second" gate departure time. There are advantages and disadvantages with both methods.

If an airline reports the first gate-departure time, the Department knows the interval between the time the aircraft was initially ready to depart and when the aircraft actually departed the airport (wheels-off time). However, the air carrier would be credited with an on-time departure when in reality the aircraft returned to the gate only to depart well after scheduled departure time. In this instance, the taxi-out time is also miscalculated, because the time the aircraft was parked at the gate waiting re-boarding is counted in the taxi-out time.

Reporting the second gate-departure time does not fully represent the inconveniences that the passengers endured, by making it appear that they were on the aircraft for a much shorter duration before wheels-off (take-off) time. The gate departure time for carriers reporting the second gate departure time provides a more accurate assessment of departure delays, but does not account for tarmac delays occurring during the initial gate departure.

A second data gap concerned the reporting of tarmac times for flights that were subsequently cancelled. For example these flights could spend hours on the tarmac waiting for storms to pass before being cancelled. Since airlines do not report any data on cancelled flights other than the fact the flight was cancelled, the amount of time passengers spent on the tarmac waiting for take-off is not recorded.

A third data gap concerned the reporting of tarmac times at diversion airports for diverted flights i.e., a flight that landed somewhere other than the scheduled destination. Under the current reporting system, airlines do not

report any data once a flight is declared diverted. Therefore, the amount of time spent on the tarmac at the diversion airport or at the original destination airport if the flight was resumed is not recorded.

Comments

The Department issued a notice of proposed rulemaking to fill tarmac-delay data gaps on November 20, 2007 (72 FR 65230). A joint comment was received from the Air Transport Association of America (ATA) and the Regional Airline Association (RAA), representing 18 air carriers currently reporting performance data. Other comments were received from Delta Air Lines, the National Business Travel Association (NBTA), the American Society of Travel Agents (ASTA), the Coalition for an Airline Passengers Bill of Rights, and from five private citizens/airline consumers.

Of the five citizen comments, two stated that airlines should report all delays and publish their delay data on their Web sites, and one stated that the Department should fine air carriers \$1 million for their first lapse in reporting. The issue concerning the displaying of on-time data on carrier Web sites is being addressed in a separate rulemaking titled Enhancing Airline Passenger Protections (72 FR 65233, Docket OST 2007–0022). The Department is limited by law on the assessment of fines to air carriers. Failure to file accurate and timely reports required by part 234 violates 49 U.S.C. sec. 41708, which subjects the carrier to civil penalties of up to \$25,000 for each violation and \$25,000 for each day any violation continues under 49 U.S.C. sec. 46301. Two other comments addressed issues in other aviation related rulemakings—Enhancing Airline Passenger Protections (72 FR 65233, Docket OST 2007–0022) and Oversales and Denied Boarding Compensation (final rule, 73 FR 21026). Those comments were forwarded to the personnel coordinating those rulemakings. The last comment dealt with a specific lost/stolen baggage issue. That letter was forwarded to the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings for appropriate action.

The Coalition for an Airline Passengers Bill of Rights said all carriers operating aircraft with over 30 seats should be required to report delay data; and that international flights should be reportable. This issue is being addressed in the rulemaking titled Enhancing Airline Passenger Protections.

Tracking Individual Passenger Delay

NBTA was the only party to comment on whether the Department should track individual passenger delays. It stated:

"It would be an inappropriate burden to require air carriers to create statistics for every contingency a flight might face. * * * There are too many passenger-specific scenarios that airlines should not be spending time tracking. For instance, a delayed passenger switching carriers on a connecting trip would require interfaces across corporate databases that do not exist. NBTA agrees * * * that capturing individual passenger delays on missing connections, cancellations or diversion, would be difficult and for little benefit. Also, * * * travelers would be wary about the federal government collecting information on their personal flight data. While NBTA recognizes the need to give personally identifying information for the purposes of national security; giving that same information for the purposes of tracking delays is unreasonable."

The Department is not requiring air carriers to track and submit individual passenger data.

Gate Returns

A gate return occurs when the aircraft departs the boarding gate with passengers aboard and returns to a gate at that airport to deplane the passengers before the flight progresses to wheels-off at the departure airport. As stated previously, some carriers are reporting the first time the aircraft leaves the departure gate as the official gate departure time. Other carriers are reporting the last time the aircraft leaves the departure gate as the official gate departure time. Both methods of reporting produce misleading information for flights with multiple gate departures. The earlier gate departure makes it appear that the flight experienced an on-time departure and overstates taxi-out time. The reporting of the later departure time properly records a late departure but masks the total time the aircraft and passengers were sitting on the taxiway.

Commenters agreed that the Department should correct this reporting inconsistency. ATA and RAA proposed that the last time a flight leaves the boarding gate be reported as the official gate departure time. NBTA states that "* * * a flight that is delayed and given a new departure time should not be considered on-time when it leaves at the subsequent time." ATA and RAA also suggested that the Department add new data fields to collect the first time the flight left the boarding gate, the total time the aircraft was away from the gate at the departure airport, and the average time the aircraft was away from the gate at the departure airport.

The Coalition for Airline Passenger Bill of Rights commented that the longest time period away from the boarding gate is more informative than the average time. They also recommended that the Department clarify that the carrier may only count a gate return if passengers are permitted to deplane.

The Department will require air carriers to report the last time the aircraft leaves the boarding gate as the official gate-departure time. When there is a gate return, carriers will report new data fields to indicate the first time the aircraft left the boarding gate, the total time the aircraft was away from the boarding gate at the departure airport, and the longest single period of time that the aircraft was away from the boarding gate at the departure airport. Carriers will only report a gate return when passengers are permitted to deplane.

The Department agrees that the longest time away from the boarding gate is more meaningful information to consumers than the average time and the final rule requires the reporting of the longest time.

Cancelled Flights

All parties concur that the Department should collect additional data when a flight is cancelled after the aircraft leaves the boarding gate but before the flight lifts off from the tarmac.

“NBTA understands that in some cases it may be far preferable to have an extended tarmac delay than returning a flight to a gate, thus canceling or delaying the flight considerably * * * However, if a plane is cancelled after a tarmac delay, that fact needs to be taken into account when evaluating airline and airport performance. Current law does not provide this information and thus is not helpful to sophisticated buyers capable of evaluating trends over time.”

Currently, the carriers report only the scheduled departure and arrival times and no actual times for cancelled flights. To capture tarmac times for these cancelled flights, carriers now will complete the actual gate departure field, and report the new fields developed for total time away from gate and longest single period away from gate.

Diverted Flights

The rulemaking component which received the most wide-ranging comments was the reporting of data pertaining to flight diversions. Delta Air Lines objected to reporting data on diverted flights. It claimed that the reported data from diverted flights will have little or no value to DOT for the purpose of setting policy. Delta said the new requirements will cost up to

\$500,000, and result in “no tangible benefit to passengers.” Delta asserts that most if not all diversions occur because of safety factors. “As such, no amount of analysis by DOT of the diversion data requested in this NPRM will change in the least bit the frequency and effect of diversions.”

ATA/RAA supports the Department’s desire to collect additional data on diverted flights but believes the data should be limited. ATA/RAA said that the structure of the Department’s proposal to collect items at diverted airports would compromise the integrity of the fixed-length record format which is oriented to a single scheduled flight. They submitted examples where multiple diversion and turn backs would be difficult to capture under the proposal. Diversions account for 0.16 percent of all flights. “ATA believes that if the Department were concerned with information on such a small segment of operations, we should submit a proposal that would collect information for all possible scenarios.”

The Coalition for an Airline Passengers Bill of Rights said the data gaps in the on-time reporting system should be closed. The coalition said that a new set of codes to identify the cause of diversions should be implemented with a unique code to distinctly identify diversions caused by insufficient fuel.

ASTA, the world’s largest association of professional travel agencies, said it is “particularly important to include the data on diverted flights, which, while a small percentage of total flights, impact a large number of passengers. This data may be hard to collect, as the Air Transport Association (ATA) claims, but every effort should be made to get it so the manner in which these events occur, and their impact on the public, can be better understood.”

The Department agrees with the comments that, while the incidents of flights diversions are infrequent (16 out of every 10,000 flights), the impact on travel resulting from these relatively rare occurrences is noteworthy and is not adequately reflected in the Department’s on-time reports. BTS’ existing data understate the problem of extended tarmac delays because of lack of data created by gaps in the reporting system. After receiving numerous requests for information on tarmac delays, BTS decided to display a web page on tarmac delays of 3 hours or longer (http://www.bts.gov/programs/airline_information/taxi_out_times/html/over_3_hours_airport_2007_12.html). The lack of data from cancelled and diverted flights has the potential to disguise a serious problem and block its resolution. Alternatively,

the data could show that the problem is not as severe as some parties suggest. New carrier reports, identifying long tarmac delays on cancelled and diverted flights, would provide additional information on the extent of the problem. The Department also agrees with ATA that the reporting structure proposed in the NPRM would make it difficult, if not impossible, to report all possible flight scenarios, especially in the case of gate returns at diverted airports.

As proposed in the NPRM, the Department will add five data elements to capture diversions. However, instead of adding the gate-arrival and gate-departure times at the diverted airport, the carrier will instead report total time away from gate at the diverted airport and the longest time away from gate at the diverted airport. This change will avoid reporting uncertainty when there are gate returns at diverted airports or when a diverted flight remains on the tarmac without proceeding to an airport gate. The five data elements will be repeated for each additional airport to which a flight is diverted.

For on-time reporting purposes, a diversion is a non-stop flight that lands at a destination other than the original scheduled destination. Returns to the origin airport without arriving at a destination other than the origin airport are considered diverted flights.

The new data elements to be reported to BTS are:

Airport code of diverted airport.

Wheels-on time at diverted airport.

Total time away from gate at diverted airport.

Longest time away from gate at diverted airport.

Wheels-off time at diverted airport.

If a flight terminates at a diverted airport, the carrier would not report Wheels-off time at the diverted airport. If a flight ultimately arrived at the scheduled destination airport, the carrier would complete the fields for Actual Gate Arrival Time (at scheduled destination) and Wheels-on Time (Actual).

This reporting structure captures the data elements most desired by the Department and those consumer groups that submitted comments. The new reporting elements will provide information on:

(1) Where diverted flights landed,

(2) The total time the flights were on the ground away from the gates at the diverted airport,

(3) The single longest period of time that the passengers were in the plane, on the ground, and away from the gate,

(4) The total time spent at the diverted airport (wheels-off time minus wheels-on time),

(5) Time spent by passengers in the airport terminal, or in the aircraft at the gate, but with access to the terminal (wheels-off time minus wheels-on time minus total time away from gate at diverted airport),

(6) Whether the flight reached its final destination,

(7) The total minutes of delay for a diverted flight that reached its final destination.

Also, the Department will be able to differentiate between diverted flights that reach their final destination from those that terminate at alternative airports.

At this time, the Department will not require air carriers to report a code showing the cause for diverted flights. Since the issue was not raised in the NPRM, the air carriers and other parties did not have sufficient opportunity to comment. As ATA and Delta commented, diversions are unplanned, fairly rare occurrences which take place for a variety of reasons, including safety. The Department initiated collection of causal information in 2003 as a tool to spot problem areas within the aviation system and to identify the party best able to initiate corrective action to prevent or mitigate future incidences. For example, air carrier delays would be addressed by the airlines. National Aviation System delays would be addressed by the FAA and airports. Security delays would be the responsibility of the Transportation Security Administration. Additional codes on diverted flights would not provide the Department or the air carriers with relevant information that would prevent or lessen the incidences of future diversions.

ATA asked a number of questions, including a request for clarification that the definition of on-time performance is not changing due to the new requirements. For clarity, we are addressing each of ATA's questions in the order asked.

The definition of an on-time flight is unchanged. An on-time flight is still a flight that arrives at the destination gate less than 15 minutes after the published gate arrival time. In computing a carrier's on-time percentage, BTS divides total scheduled flights into the number of flights that arrived less than 15 minutes after their published arrival times.

ATA Q 1. Will diversion data be reported in a single or multiple records?

A 1. The Department prefers to keep the single-record format; however, that

opinion would change if it is shown that a multi-record format is more efficient or produces better data. The Department invites carriers to participate in a working group to determine the technical details for submitting and processing this rulemaking's required data. The Department will also ask for volunteers for a pilot test of the new reporting requirements. Finally, the Department will issue a technical directive. ATA accurately states that a collaborative effort will provide DOT "the greatest likelihood that the new data elements will accurately account for information on all flight scenarios. Furthermore, this approach will ensure that all carriers will implement the same methodology to report accurately, reliably, consistently, and comparably."

ASTA requested to be a party to any industry work group to determine the data that would be collected. The decision on the data to be collected was based on the comments filed in Docket RITA 2007-28522. Meetings with air carriers are needed to review the technical aspects of the reporting requirements and to assure that the regulated community understands the new requirements.

ATA Q 2. For flights that divert to an airport and do not reach a gate, how should the gate-arrival and gate-departure data fields be reported?

A 2. From the comments received, the Department determined that the data need would be met by collecting total time on tarmac and longest time away from the gate instead of the gate-arrival and gate-departure fields for diverted flights.

ATA Q 3. When a flight diverts, how should the flight data be represented?

A 3. Carriers will report the following: Airport code of the diverted airport. Wheels-on time at diverted airport. Total time spent away from gate at diverted airport.

Longest single period of time spent away from gate at diverted airport.

Wheels-off time at diverted airport.

If the flight terminates at the diverted airport, the carriers would report a "0" (zero) in the wheels-off time field. If the flight departs the diverted airport on its way to the scheduled destination airport, the carrier would repeat these same 5 data fields.

ATA Q 4. When a flight over-flies an intermediate stop and diverts, how should the flight be represented?

A 4. Any time a non-stop flight segment is operated from its scheduled origin airport and lands at a place other than the scheduled destination airport,

carriers will report the 5 data elements listed in Answer 3.

ATA Q 5. When a flight originates at an unscheduled airport prior to the scheduled airport, how should the data be represented?

A 5. Flights that truly originate at nonscheduled airports are not reported. However, if a carrier's flight #123—BOS—DCA—MIA was diverted to an alternate airport (BWI) before landing at DCA, flight #123 BWI to DCA would not be considered an originating flight. The carrier would report the five data items for the diverted airport, and report the wheels-on and gate-arrival times at DCA for the BOS—DCA segment of flight #123. The DCA—MIA segment of flight #123 would be reported as normal. If, instead, flight #123 landed at BWI and operated directly to MIA, the BWI—MIA segment would not be reported. For the BOS—DCA segment, the carrier would still report the diversion data but it would have no time to report for wheels-off at BWI. Also, the DCA—MIA portion of flight #123 would be reported as a cancelled flight.

ATA Q 6. When a flight extends beyond the scheduled destination airport, how should the data be represented?

A 6. Using the flight #123 example, if the carrier announced to its passengers in advance that the flight would not land at DCA but would fly directly to MIA, both the BOS—DCA and the DCA—MIA segments would be reported as cancelled flights. But if it was determined that conditions at DCA made it impossible to land after departure from BOS, and the flight continued to MIA, the MIA landing would be considered a diversion of the BOS—DCA segment. The DCA—MIA segment would be reported as a cancelled flight. These reporting instructions are consistent with the historical reporting of cancellations and diversions.

ATA Q 7. When a flight operates to an alternate airport, same city, how should the flight be represented?

A 7. Flights that land at alternate airports are reported as diverted flights even when the alternate airport serves the same city.

ATA Q 8. What happens when we have multiple operation issues? Such as a flight that is scheduled to operate Seattle-Boston, has a gate return, then leaves Seattle but diverts to Denver due to a medical emergency, then continues on, but again diverts due to weather in Boston, then at last makes it to Boston. Are we to have four different data records to account for the mishaps?

A 8. The carrier would report the flight as follows:

The last time the aircraft left the gate at the scheduled airport would be reported as the *Actual Gate Departure Time*. The time the aircraft originally left the gate would be reported as the *Gate Departure Time—First Time Out*. The carrier would complete the fields, *Total Time Away from Gate for All Gate Returns, including cancelled Flights and Longest Time Away from Gate for All Gate Returns, including Cancelled Flights* for the gate return at Seattle. The fields: *Airport code of the diverted airport; Wheels-on time at diverted airport; Total time spent away from gate at diverted airport; Longest single period of time spent away from gate at diverted airport; and Wheels-off time at diverted airport* would be completed for the landings at Denver and Newark.

ATA Q 9. How is On-Time calculated since we left our scheduled origin airport and did not arrive at the scheduled destination?

A 9. Flights that are scheduled and do not reach their scheduled destination are counted against the air carrier when computing the percentage of on-time arrivals; however, no minutes for late arrivals are computed for flights that do not reach their scheduled destinations.

ATA Q 10. If you divert to another airport and report the times there, then continue to the original destination, what scheduled times do you use for On-Time performance calculations?

A 10. On-time calculations are made by comparing the scheduled gate-arrival time at the scheduled destination with the actual gate-arrival time at the scheduled destination airport.

Rulemaking Notices and Analyses

Economic Summary

Executive Order 12866

Under Executive Order No 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is “significant” and therefore subject to OMB review and the requirements of the Executive Order. The Order defines “significant regulatory action” as one that is likely to result in a rule that may (1) have an

annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

It has been determined that this final rule is a “significant regulatory action” under Executive Order No. 12866. The rule was reviewed by OMB. In addition, this rule is significant under the Department’s Regulatory Policies and Procedures.

This Executive Order also requires each agency to write regulations that are simple and easy to understand. To the extent possible, this proposed rule meets these criteria.

Cost/Benefits

After a public meeting in June 2007 some carriers commented to BTS that the cost for programming to provide additional data on gate returns and cancelled and diverted flights could range from \$10,000 to \$60,000 per carrier. Delta Air Lines commented to the Docket that the reprogramming costs to capture information on diversions could be up to \$500,000 for Delta alone. Since the carriers have the additional data that the Department is requesting, the Department believes the original cost estimate of \$10,000 to \$60,000 is accurate. Delta’s estimate seems overstated because the new data elements are already available to the air carriers. Using the high end range of the original estimates, compliance with this rule could impose a one-time cost on the affected segment of the industry of \$1.2 million.

We believe that the rule will result in many unquantifiable benefits that exceed the costs. Consumers will have more accurate data for making their transportation selections. The public availability of these data may influence carriers to limit the length of the tarmac portion of delays (i.e., to reduce the amount of time that a delayed flight spends on the ground away from the gate). The FAA will have complete data on all long tarmac delays to use in its airport modeling. Aside from costs and benefits, it is important to note that H.R. 2881, the FAA Reauthorization Act of

2007 (Title IV—Air Service Improvements; Section 401), includes a provision that would require BTS to expand the reporting system to capture all operational data on gate returns and cancelled and diverted flights.

Regulatory Flexibility Act of 1980

This Act requires agencies to analyze the economic impact of regulatory changes on small entities. The carriers that are required to report Airline Service Quality Performance (ASQP) data are all large air carriers with annual passenger revenues exceeding \$600 million each. Thus, this final rule will not have a significant economic impact on a substantial number of small entities.

Trade Agreements Act

This Act prohibits agencies from setting standards that create unnecessary obstacles to foreign commerce of the United States. ASQP data are for domestic operations only and have no impact on the foreign commerce of U.S. carriers.

Unfunded Mandates Reform Act of 1995

This Act requires agencies to prepare a written assessment of the costs, benefits, and other effects of a proposed or final rule that include a Federal mandate likely to result in expenditures by State, local, or tribal government. This final rule imposes no expenditures on State, local or tribal governments.

Executive Order 13132, Federalism

The Department has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications.

Paperwork Reduction Act

The reporting burden associated with this final rule will be reviewed by OMB under the OMB Approval No. 2138–0041. The NPRM asked for public comments on costs and burdens. Based on carrier comments, the major burden increase will be reprogramming. We estimate a first-year increase in reporting burden of 900 hours per carrier or an industry increase of 18,000 hours. After the carriers have revised their systems, the reporting burden should increase slightly from 159 annual burden hours to 175 annual burden hours per carrier.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda each April and October. The RIN Number 2139-AA12 contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

The Final Rule**List of Subjects in 14 CFR Part 234**

Air carriers, Reporting and recordkeeping requirements.

■ Accordingly, the Department of Transportation amends 14 CFR Chapter II as follows:

PART 234—[AMENDED]

■ 1. The authority citation for part 234 is revised to read as follows:

Authority: 49 U.S.C. 329 and Sections 41708 and 41709.

■ 2. Section 234.4 is amended as follows:

- a. By adding paragraphs (a)(22) through (a)(29) as set forth below.
- b. By redesignating paragraphs (b) through (i) as paragraphs (c) through (j), respectively.
- c. By adding new paragraph (b).
- d. By revising newly designated paragraph (c).

§ 234.4 Reporting of on-time performance.

(a) * * *

(22) For gate returns, first gate-departure time at origin airport

(23) Total ground time away from gate for all gate/air returns at origin airport, including cancelled flights—actual minutes

(24) Longest time away from gate for gate return or cancelled flight

(25) Three-letter code of airport where diverted flight landed

(26) Wheels-on time at diverted airport

(27) Total time away from gate at diverted airport

(28) Longest period of time away from gate at diverted airport

(29) Wheels-off time at diverted airport

(b) Repeat fields (25) through (29) for each subsequent diverted airport landing

(c) When reporting the information specified in paragraph (a) of this section for diverted flights, a reporting carrier shall use the original scheduled flight number and the origin and destination airport codes except for item (25).

* * * * *

Issued in Washington, DC, on May 15, 2008.

M. Clay Moritz, Jr.,

Acting Assistant Director, Airline Information, Bureau of Transportation Statistics.

[FR Doc. 08–1274 Filed 5–16–08; 12:00 pm]

BILLING CODE 4910-HY-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****18 CFR Part 1b**

[Docket No. RM08–10–000; Order No. 711]

Submissions to the Commission Upon Staff Intention to Seek an Order To Show Cause

Issued May 15, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Commission is amending its regulations to expand and clarify the right of an entity to submit a written response to the Commission in the event staff intends to recommend that the Commission initiate a proceeding governed by 18 CFR Part 385, or make the entity a defendant in a civil action to be brought by the Commission. Subjects of investigations currently have the right under 18 CFR 1b.19 to be informed in the latter instance, but only in the event staff finds it appropriate and in the public interest. The amendment would grant that right, for both types of proceedings, in all cases except those in which extraordinary circumstances make prompt Commission review necessary to prevent detriment to the public interest or irreparable harm. The amendment also clarifies the timing requirements for such submissions. These changes codify current staff practice regarding recommendations for orders to show cause, and will allow subjects of investigations a fuller opportunity to present their positions to the Commission.

DATES: *Effective Date:* The rule will become effective immediately upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Kathryn Kuhlen, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6855.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Sudeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

Final Rule

Issued May 15, 2008.

I. Background

1. The procedural rule set forth in 18 CFR 1b.19 (2007) governs the procedures to be followed regarding submissions to the Commission in the event Commission staff recommends that the subject of an investigation be made a defendant in a civil action to be brought by the Commission. Before enactment of the Energy Policy Act of 2005,¹ this provision rarely came into play, as most investigations have been resolved either through closure without further action or by settlement. Indeed, at a recent technical conference on enforcement held by the Commission,² it appeared that many energy practitioners were unaware of the submission process set forth in this regulation, and expressed a desire for more clarity regarding the due process rights of the subjects of staff investigations.

2. In light of the comments at the technical conference and the need to ensure due process in our investigations, the Commission has reexamined 18 CFR 1b.19 and determined to clarify its provisions and expand the procedural rights it provides.

3. The current language in the regulation provides that staff need only advise the subject of an investigation of staff's intent to seek an order to show cause in the event staff determines that it is appropriate in the interest of the proper administration of the law to do so. However, it is staff's practice to advise the subject of an investigation of such intent in all cases, except where exigent circumstances, such as the danger of irreparable harm, require prompt Commission action. Therefore, we believe it appropriate to codify the current practice and provide subjects the right to be informed of staff's intent, with the concomitant ability to present a response to be provided to the Commission for its consideration along with staff's recommendation.

II. Commission Determination

4. This Final Rule amends 18 CFR 1b.19 to provide that in the event Commission staff intends to recommend to the Commission that it initiate a proceeding under 18 CFR Part 385 against the subject of an investigation being conducted under the provisions of 18 CFR Part 1b, or to recommend that

¹ Energy Policy Act of 2005, Public Law No. 109–58, 119 Stat. 594 (2005) (EPAAct 2005).

² Conference on Enforcement Policy, Docket No. AD07–13–000, Nov. 16, 2007.

the Commission make the subject of an investigation a defendant in a civil action to be brought by the Commission, the subject of that investigation shall have the right, in all but extraordinary circumstances, to be so informed and to have the opportunity to provide the Commission with a written non-public response to staff's recommendation. The Final Rule also provides that staff's notification to the subject of its right to make a response shall provide sufficient information and facts to enable the subject to make such a response, and further provides that within 30 days of such notice, the subject may submit its response to staff, which response staff will submit to the Commission together with its own recommendation.

5. Section 1b.19 currently provides that staff may inform the subject of an investigation³ of staff's intent to recommend that the subject be made a defendant in a civil proceeding to be brought by the Commission only when staff determines it is appropriate in the interest of the proper administration of the law. However, as noted above, it is staff's practice to notify the subject of an investigation when it determines to seek an order to show cause in all situations except where exigent circumstances make immediate consideration by the Commission necessary. The current regulation also does not specify the time period by which the subject is to provide its response, providing instead that staff shall inform the subject of the due date. The amended regulation codifies staff's current practice regarding notification and will provide subjects of an investigation with a fuller opportunity to present their positions to the Commission.

III. Information Collection Statement

6. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection requirements imposed by agency rule.⁴ This Final Rule contains no information reporting requirements, and the filings permitted under the regulation are collected during the course of an investigation and, as such, are exempt from the provisions of the Paperwork Reduction Act.⁵

IV. Environmental Analysis

7. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement

for any action that may have a significant adverse effect on the human environment.⁶ Issuance of this Final Rule does not represent a major federal action having a significant adverse effect on the human environment under the Commission's regulations implementing the National Environmental Policy Act.⁷ Part 380 of the Commission's regulations lists exemptions to the requirement that an Environmental Analysis or Environmental Impact Statement be done. Included is an exemption for procedural, ministerial or internal administrative actions.⁸ This rulemaking is exempt under that provision.

V. Regulatory Flexibility Act Certification

8. The Regulatory Flexibility Act of 1980⁹ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. This final rule concerns a matter of internal agency procedure and the Commission therefore certifies that it will not have such an impact. An analysis under the RFA is not required.

VI. Document Availability

9. 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.

10. 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.

11. 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.

VII. Effective Date

12. These regulations are effective immediately upon publication in the **Federal Register**. In accordance with 5 U.S.C. 553(d)(3), the Commission finds that good cause exists to make this Final Rule effective immediately. It concerns a matter of administrative procedures and expands rather than diminishes the rights of persons appearing before the Commission. There is therefore no reason to make it effective at a later time.

13. The provisions of 5 U.S.C. 801 regarding Congressional review of Final Rules do not apply to this Final Rule, because the rule concerns agency procedure and practice and will not substantially affect the rights of non-agency parties, other than to expand the ability of subjects of an investigation to present their views to the Commission before deliberations by the Commission on whether to initiate a proceeding governed by 18 CFR Part 385 against them.

14. The Commission is issuing this as a final rule without a period for public comment. Under 5 U.S.C. 553(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure and practice, or where the agency finds that notice and comment is unnecessary. This rule concerns only matters of agency procedure and will not significantly affect regulated entities or the general public, other than to expand the rights of subjects of an investigation to make certain submissions to the Commission.

List of Subjects in 18 CFR Part 1b

Rules relating to Investigations.

By the Commission.

Kimberly D. Bose,
Secretary.

■ In consideration of the foregoing, the Commission amends Section 1b.19, Part 1b, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 1b—RULES RELATING TO INVESTIGATIONS

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

Authority: 15 U.S.C. 717 *et seq.*; 16 U.S.C. 792 *et seq.*; 49 U.S.C. 60502; 49 A.P.U.S.C. 1-85; 42 U.S.C. 7101-7352; E.O. 12009, 42 FR 46297.

³ The current regulation refers to the subject as a "person." The amended regulation refers to the subject with the broader term "entity," consistent with the meaning of that term as used in 18 CFR Part 1c.

⁴ 5 CFR Part 1320.

⁵ 44 U.S.C. 3518(c); 5 CFR 1320.4.

⁶ Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

⁷ Order No. 486, 52 FR 47897 (Dec. 17, 1987); FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (Dec. 10, 1984) (*codified* at 18 CFR Part 380).

⁸ 18 CFR 380.4(1) and (5).

⁹ 5 U.S.C. 601-612 (RFA).

■ 2. Section 1b.19 is revised to read as follows:

§ 1b.19 Submissions.

In the event the Investigating Officer determines to recommend to the Commission that an entity be made the subject of a proceeding governed by part 385 of this chapter, or that an entity be made a defendant in a civil action to be brought by the Commission, the Investigating Officer shall, unless extraordinary circumstances make prompt Commission review necessary in order to prevent detriment to the public interest or irreparable harm, notify the entity that the Investigating Officer intends to make such a recommendation. Such notice shall provide sufficient information and facts to enable the entity to provide a response. Within 30 days of such notice, the entity may submit to the Investigating Officer a non-public response, which may consist of a statement of fact, argument, and/or memorandum of law, with such supporting documentation as the entity chooses, showing why a proceeding governed by part 385 of this chapter should not be instituted against said entity, or why said entity should not be made a defendant in a civil action brought by the Commission. If the response is submitted by the due date, the Investigating Officer shall present it to the Commission together with the Investigating Officer's recommendation. The Commission will consider both the Investigating Officer's recommendation and the entity's timely response in deciding whether to take further action.

[FR Doc. E8-11315 Filed 5-20-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 592

Rough Diamonds Control Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Foreign Assets Control of the U.S. Department of the Treasury ("OFAC") is amending the Rough Diamonds Control Regulations (the "Regulations") to add two requirements designed to enhance the collection of statistics related to importations and exportations of rough diamonds.

DATES: *Effective Date:* May 21, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director for Policy, tel.: 202/622-4855, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622-2410, Office of the General Counsel, Department of the Treasury, Washington, DC 20220 (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning the Office of Foreign Assets Control 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 August 4, 2003, the Office of Foreign Assets Control ("OFAC") promulgated the Rough Diamonds Control Regulations, 31 CFR part 592 (the "Regulations"), to implement Executive Order 13312 ("E.O. 13312") of July 29, 2003. E.O. 13312 was issued to implement the Clean Diamond Trade Act (Pub. L. 108-19) and the multilateral Kimberley Process Certification Scheme for rough diamonds (KPCS). The Regulations were amended on September 23, 2004, to revise certain reporting requirements (69 FR 56936). Today, OFAC is further amending the Regulations to enhance the compilation of statistical data relating to the importation and exportation of rough diamonds.

Specifically, OFAC is amending the Regulations by adding an additional note to the definition of the term *Controlled through the Kimberley Process Certification Scheme*, contained in section 592.301. Section 592.301 sets forth requirements that apply, as appropriate, to the importation into, or exportation from, the United States of any shipment of rough diamonds. The new note to this section explains that the U.S. Customs and Border Protection (CBP) will not release custody of an importation of rough diamonds, unless the import conforms with the CBP's formal entry for consumption requirements, as defined in the CBP regulations (*see* 19 CFR 141.0a(f)). In addition, OFAC is amending the Regulations to add a new section 592.502, which requires all importers and exporters of rough diamonds to file an annual report with the Department of State detailing their import, export and stockpile information.

Public Participation

Because the amendments to the Regulations involve a foreign affairs

function, Executive Order 12866 and the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601-612) does not apply.

Paperwork Reduction Act

The collections of information related to 31 CFR Part 592 are contained in 31 CFR Part 501 (the "Reporting, Procedures and Penalties Regulations"). Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been approved by the Office of Management and Budget under control number 1505-0198. 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 control number.

List of Subjects in 31 CFR Part 592

Administrative practice and procedure, Foreign trade, Exports, Imports, Kimberly Process, Penalties, Reporting and recordkeeping requirements, Rough diamond.

■ For the reasons set forth in the preamble, the Office of Foreign Assets Control amends 31 CFR part 592 as follows:

PART 592—ROUGH DIAMONDS CONTROL REGULATIONS

■ 1. The authority citation for part 592 continues to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); Pub. L. 108-19, 117 Stat. 631 (19 U.S.C. 3901-3913); E.O. 13312, 68 FR 45151, 3 CFR, 2003 Comp., p. 246.

Subpart C—General Definitions

■ 2. Amend § 592.301(b) by adding a new Note 4 to read as follows:

§ 592.301 Controlled through the Kimberley Process Certification Scheme.

* * * * *

(b) * * *

Note 4 to § 592.301: As of May 21, 2008, any diamond, regardless of value, that is described in subheadings 7102.10, 7102.21 or 7102.31, Harmonized Tariff Schedule of the United States and is imported into the United States shall not be released from the custody of U.S. Customs and Border Protection (CBP) except by a formal entry for consumption, as defined in § 141.0a(f) of the CBP regulations. *See* 19 CFR 141.0a(f).

Subpart E—Records and Reports

■ 3. Add a new § 592.502 to read as follows:

§ 592.502 Annual Reports by Rough Diamond Importers and Exporters.

(a) *Requirement for reports.* Reports shall be filed annually, by April 1 of each year, covering the preceding calendar year (January 1–December 31), except the first annual report, covering the period January 1–December 31, 2007, shall be filed by September 1, 2008.

(b) *Who must report; reporting period.* All persons who import rough diamonds into the United States or export rough diamonds from the United States during the reporting period (January 1–December 31).

(c) *What must be reported.* The report need not be in any specified format but must include the following information:

(1) The contact information of the U.S. importer or exporter, including name, address, telephone number, fax number, and e-mail address;

(2) Identification of total import and/or export activity for each of the three Harmonized Tariff Schedule classifications of rough diamonds during the reporting year, including:

(A) Total amount of carats of each classification of rough diamonds imported and/or exported; and

(B) Total of all shipments of each classification of rough diamonds imported and/or exported.

(3) Information on stockpiles of rough diamonds, if any, for each of the three Harmonized Tariff Schedule classifications, as of the end of the reporting year, reported in both total carats and approximate total value. For the purposes of this section, stockpiles are defined as the amount of rough diamonds held unsold at the end of the reporting period.

(d) *Where to send report.* Reports must be filed with the Office of the Special Advisor for Conflict Diamonds, U.S. Department of State via e-mail at USKimberleyProcess@state.gov. For further information, please call that office at 202/647–1713.

(e) *Failure to file report.* Any importer or exporter who fails to file a required report shall be subject to the penalties set forth in Subpart F of this part.

Dated: May 14, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–11318 Filed 5–20–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) has determined that USS DECATUR (DDG 73) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

DATES: This rule is effective May 21, 2008 and is applicable beginning April 29, 2008.

FOR FURTHER INFORMATION CONTACT:

Commander M. Robb Hyde, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave., SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone 202–685–5040.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR part 706.

This amendment provides notice that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, has certified that USS DECATUR (DDG 73) is a vessel of the Navy which, due to its special construction and purpose, cannot fully

comply with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Annex I, paragraph 2(f)(i) pertaining to placement of the masthead light or lights above and clear of all other lights and obstructions; Annex I, paragraph 2(f)(ii) pertaining to the vertical placement of task lights; Annex I, paragraph 3(a) pertaining to the location of the forward masthead light in the forward quarter of the vessel, and the horizontal distance between the forward and after masthead lights; and, Annex I, paragraph 3(c) pertaining to placement of task lights not less than two meters from the fore and aft centerline of the ship in the athwartship direction. The Deputy Assistant Judge Advocate General (Admiralty) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner different from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

List of Subjects in 32 CFR Part 706

Marine safety, Navigation (water), and Vessels.

■ For the reasons set forth in the preamble, amend part 706 of title 32 of the Code of Federal Regulations as follows:

PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for part 706 continues to read:

Authority: 33 U.S.C. 1605.

■ 2. Table Four, Paragraph 16 of § 706.2 is amended by removing the entry for USS DECATUR (DDG 73).

■ 3. Table Five, of § 706.2 is amended by revising the following entry for USS DECATUR (DDG 73), to read as follows:

■ 3. Table Four, in Paragraph 20 of § 706.2, is amended by adding, in numerical order, the following entry for USS GREEN BAY (LPD 20):

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

Vessel	Number	Angle in degrees of task lights off vertical as viewed from directly ahead of astern
USS GREEN BAY.	LPD 20	10

■ 4. Table Five of § 706.2 is amended by adding, in numerical order, the following entry for USS GREEN BAY:

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

TABLE FIVE

Vessel	No.	Masthead lights not over all other lights and obstructions. Annex I, sec. 2(f)	Forward masthead light not in forward quarter of ship. Annex I, sec. 3(a)	After masthead light less than 1/2 ship's length aft of forward masthead light. Annex I, sec. 3(a)	Percentage horizontal separation attained
USS GREENBAY	LPD 20			X	70.9
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *	* * * * *

Approved: April 29, 2008.

M. Robb Hyde,

Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law).

[FR Doc. E8-11217 Filed 5-20-08; 8:45 am]

BILLING CODE 3810-FF-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA-R05-OAR-2007-0957; FRL-8568-2]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Wisconsin; Redesignation of Kewaunee County to Attainment for Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On June 12, 2007, the Wisconsin Department of Natural Resources (WDNR) submitted a request to redesignate Kewaunee County to attainment of the 8-hour ozone standard. EPA proposed to approve this submission on December 11, 2007. EPA provided a 30-day review and comment period. The comment period closed on January 10, 2008. EPA received comments from the Sierra Club and the Door County Corporation Counsel. EPA is approving Wisconsin's request and the associated maintenance plan for continuing to attain the standard. As

part of this action, EPA is making a determination that Kewaunee County has attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based on complete, quality-assured ambient air quality monitoring data for the 2004-2006 ozone seasons that demonstrate that the 8-hour ozone NAAQS has been attained in Kewaunee County. Monitoring data for 2007 continue to show monitored attainment of the NAAQS. EPA is approving the maintenance plan for Kewaunee County and is redesignating Kewaunee County to attainment. Finally, EPA is approving, for purposes of transportation conformity, Wisconsin's 2012 and 2018 Motor Vehicle Emission Budgets (MVEBs) for Kewaunee County. **DATES:** This final rule is effective May 21, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA R05 OAR 2007-0957. All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, i.e., 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 either electronically through www.regulations.gov or in hard copy at the Environmental Protection Agency,

Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886-1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT:

Kathleen D'Agostino, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR 18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886 1767, dagostino.kathleen@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

Table of Contents

- I. What is the background for this rule?
- II. What comments did we receive on the proposed action?
- III. What action is EPA taking?
- IV. Statutory and Executive Order Reviews.

I. What is the background for this Rule?

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million (ppm). EPA published a final rule designating and classifying areas under the 1997 8-hour ozone NAAQS on April 30, 2004 (69 FR 23857).

On March 12, 2008, EPA Administrator Stephen L. Johnson signed a rule promulgating a more

stringent 8-hour ozone standard of 0.075 ppm. This rule was published in the **Federal Register** on March 27, 2008 (73 FR 16436). EPA will designate nonattainment areas under the 2008 8-hour ozone standard in 2010. This rule only addresses the status of Kewaunee County with respect to the 1997 8-hour ozone standard.

The background for today's actions with respect to the 1997 ozone standard is discussed in detail in EPA's December 11, 2007, proposal (72 FR 70255). In that rulemaking, we noted that, under EPA regulations at 40 CFR part 50, the 8-hour ozone standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations is less than or equal to 0.08 ppm. (See 69 FR 23857 (April 30, 2004) for further information). The data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90%, and no single year has less than 75% data completeness, as determined in accordance with Appendix I of Part 50.

Under the Clean Air Act (CAA), EPA may redesignate nonattainment areas to attainment if sufficient complete, quality-assured data are available to determine that the area has attained the standard and that it meets the other CAA redesignation requirements in section 107(d)(3)(E).

On June 12, 2007, the WDNR submitted a request to redesignate Kewaunee County to attainment of the 8-hour ozone standard. The request included three years of complete, quality-assured data for the period of 2004 through 2006, indicating the 8-hour NAAQS for ozone had been achieved. The December 11, 2007, proposed rule provides a detailed discussion of how Wisconsin met this and other CAA requirements.

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard. (69 FR 23951, April 30, 2004). *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882 (DC Cir. 2006). On June 8, 2007, in *South Coast Air Quality Management Dist. v. EPA*, Docket No. 04 1201, in response to several petitions for rehearing, the DC. Circuit clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. Therefore, the Phase 1 Rule provisions related to classifications for areas currently classified under subpart 2 of Title I, part D of the CAA as 8-hour nonattainment areas, the 8-hour attainment dates, and the timing for emissions reductions

needed for attainment of the 8-hour ozone NAAQS, remain effective. The June 8th decision left intact the Court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged. The June 8th decision reaffirmed the December 22, 2006, decision that EPA had improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) Section 185 penalty fees for 1-hour severe or extreme nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, contingent on an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS; and (4) certain transportation conformity requirements for certain types of federal actions. The June 8th decision clarified that the Court's reference to conformity requirements was limited to requiring the continued use of 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations.

For the reasons set forth in the proposal, EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation. EPA believes that the Court's December 22, 2006, and June 8, 2007, decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in light of the Court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

With respect to the requirement for transportation conformity under the 1-hour standard, the Court in its June 8th decision clarified that for those areas with 1-hour motor vehicle emissions budgets in their maintenance plans, anti-backsliding requires only that those 1-hour budgets must be used for 8-hour conformity determinations until replaced by 8-hour budgets. To meet this requirement, conformity determinations in such areas must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93.

II. What Comments Did We Receive on the Proposed Action?

EPA provided a 30-day review and comment period. The comment period closed on January 10, 2008. EPA received comments from Sierra Club and the Door County Corporation Counsel. A summary of the comments received, and EPA's responses, follow.

(1) *Comment:* Sections 172(c)(1) and 182(b)(2) of the CAA require the SIP to mandate Reasonably Available Control Technology (RACT) for all volatile organic compound (VOC) sources within the nonattainment area. Wisconsin has not demonstrated that the SIP meets this requirement. While Wisconsin promulgated some VOC RACT rules for the 1-hour ozone standard, the State has not reviewed them to determine whether they are still valid and sufficiently stringent under the 8-hour standard.

Response: Under EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA, to qualify for redesignation, states requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. September 4, 1992, Calcagni memorandum ("Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division). See also Michael Shapiro Memorandum, September 17, 1993, and 60 FR 12459, 12465-12466 (March 7, 1995) (Redesignation of Detroit-Ann Arbor). See *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004), which upheld this interpretation. See, e.g. also 68 FR 25418, 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

Kewaunee County was not classified under subpart 2 of the CAA and thus was not subject to the section 182 RACT requirement. The applicable part D, subpart 1, SIP requirements for Kewaunee County are contained in sections 172(c)(1)-(9). The commenter specifically cites section 172(c)(1), which requires reasonably available control measures (RACT). For purposes of redesignation, a state must meet all requirements of section 110 and part D that were applicable prior to submittal of the complete redesignation request. The State of Wisconsin submitted a complete ozone redesignation request for Kewaunee County prior to the deadline for submissions required under section 172(c)(1)-(9); therefore, these submissions are not applicable requirements for purposes of redesignation.

Moreover, where EPA determines that an area is attaining the standard, since the requirement for submission of an attainment demonstration is suspended, and RACM is a component of an attainment demonstration, the requirement for submission of RACM is suspended. 40 CFR 51.918, 70 FR 71645–71646 (November 29, 2005), General Preamble 57 FR 13498 (April 16, 1992).

The commentor also cites section 182(b)(2) of the CAA, which requires RACT in areas classified as moderate or above. At the time the redesignation request was submitted, Kewaunee County was not classified under subpart 2 of the CAA and, therefore, was not subject to section 182(b)(2), which only applies to areas classified as moderate or above under subpart 2 of the CAA.

It should be noted that the Court's ruling in *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882 vacated the portion of EPA's Phase 1 8-hour Ozone Implementation Rule that classified certain areas under Subpart 1. In response to this vacatur, EPA is in the process of developing a rule that will classify the areas that were initially classified under subpart 1. EPA believes that, since EPA has not yet determined these new classifications and requirements, redesignation can now go forward. This belief is based upon: (1) EPA's longstanding policy of evaluating requirements in accordance with the requirements due at the time the request is submitted; and, (2) consideration of the inequity of applying retroactively any requirements that might in the future be applied.

(2) *Comment:* Wisconsin's Oxides of Nitrogen (NO_x) RACT rules have not yet been approved by EPA into the Wisconsin SIP. Therefore, Wisconsin does not meet the requirement to have a fully approved SIP.

Response: Under section 182(f) of the CAA, NO_x RACT is required in areas classified as moderate or above under subpart 2 of the CAA. As discussed in greater detail above, Kewaunee County was not classified under subpart 2 of the CAA and thus is not subject to the requirements of section 182(f).

(3) *Comment:* Wisconsin does not have a fully approved SIP because it has failed to submit the nonattainment SIP for the 8-hour ozone standard, which was due June 15, 2007. Unless Wisconsin has a fully approved nonattainment SIP in place for 8-hour ozone, the Administrator is prohibited from approving Wisconsin's redesignation request.

Response: As discussed above, it is EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA that, to

qualify for redesignation, states requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. Applicable requirements of the CAA that come due subsequent to the state's submittal of a complete request remain applicable until a redesignation to attainment is approved, but are not required as a prerequisite to redesignation. See section 175A(c) of the CAA. *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004). See also 68 FR 25424, 25427 (May 12, 2003) (redesignation of the St. Louis/East St. Louis area to attainment of the 1 hour ozone NAAQS).

The State of Wisconsin submitted a complete ozone redesignation request for Kewaunee County prior to the deadline for submission of an attainment demonstration; therefore, an attainment demonstration is not an applicable requirement for purposes of redesignation. Moreover, where EPA determines that an area is attaining the standard, an attainment demonstration is not an applicable requirement for purposes of redesignation, since attainment has already been reached. "Procedures for Processing Requests to Redesignate Areas to Attainment," from John Calcagni, Director, Air Quality Management Division, to Regional Air Division Directors, September 4, 1992 and General Preamble 57 FR 13564 (April 16, 1992). See also 40 CFR 51.918.

(4) *Comment:* Wisconsin has not submitted a SIP to control mercury. Therefore, Wisconsin's SIP is incomplete and EPA cannot redesignate any area as in attainment.

Response: EPA promulgated the Clean Air Mercury Rule under section 111(d) of the CAA. Therefore, the submission of a plan to control mercury is not required under subpart 1 as part of an ozone SIP, and is irrelevant to the approval of an ozone redesignation. Wisconsin has met all currently applicable SIP requirements for purposes of redesignation for Kewaunee County under Section 110 and part D of the CAA, as required by section 107(d)(3)(E)(v) of the CAA.

(5) *Comment:* Wisconsin lacks adequate funding and personnel to provide a user-friendly Web site for its permits, to respond to EPA comments regarding Prevention of Significant Deterioration (PSD) permits, and maintain organized files accessible to the public. These shortcomings were identified by EPA as part of its review of the State's PSD program in 2006. Until the funding and resources issues

are resolved, EPA may not approve the redesignation.

Response: EPA approved Wisconsin's PSD program on May 27, 1999 (64 FR 28745). EPA may rely on prior SIP approvals in approving a redesignation request. See Calcagni Memorandum, page 3, *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984, 989–990 (6th Cir. 1998), *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001). The review to which the commentor refers was part of the national NSR Program Evaluation Project. These permit program reviews were intended to highlight the positive aspects of a state's air permitting program and to foster quality improvements in the program. In that report, EPA highlighted many program strengths, including "a good modeling program, a good public comment process, and overall clear and well-organized permits." The report goes on to find that WDNR maintains a Web site containing all permit actions, has consistently logged Best Available Control (BACT) and Lowest Achievable Emission Rate (LAER) determinations into the RACT/BACT/LAER/ Clearinghouse, has a program for improving the quality and issuance of permits and works with EPA to ensure decisions for determinations are made based on EPA policy. In the report, EPA found a few areas which could be improved. EPA suggested that WDNR could be more prompt in sending applications for PSD projects, improve its permit tracking system and be more prompt in responding to permit comments before the final permit is issued. EPA did not find Wisconsin's PSD SIP to be deficient, and believes that Wisconsin has adequate personnel and funding to carry out its plan. Section 110(a)(2)(E).

(6) *Comment:* Wisconsin has not specified contingency measures should Kewaunee County not attain the 8-hour standard in the future. Instead, Wisconsin proposes to "evaluate the sufficiency of control measures that have already been promulgated, but not fully implemented at the time of violation, to return the area to attainment" and then, at an unspecified future time "determine that additional [unspecified] measures are necessary to return the area to attainment * * * from the list. * * *

Response: Wisconsin has included a list of potential contingency measures in its maintenance plan. These include: reduced VOC content in the Architectural, Industrial and Maintenance coatings rule and/or commercial and consumer products rule and/or federal vehicle toxics rule and broadening the application of the NO_x

RACT program. Wisconsin has specified the triggering event as a violation and has committed to implement appropriate contingency measures within eighteen months. Thus, the state has identified a schedule and procedure for adoption and implementation, and a time limit for action by the State. Because it is not possible, however, to determine what control measure will be most appropriate and effective should a contingency measure be triggered at some point in the future, Wisconsin is not limited to selecting measures only from its list. If a contingency measure is triggered, the State can adopt a contingency measure from this list or choose another contingency measure which has been determined to be effective.

A state can choose as its contingency measure any adopted but not fully implemented control measure providing that it is not included in the calculation of the maintenance inventory. The emissions reductions from these programs are real, not considered in maintenance plan emissions budgets, and can be achieved more quickly since the state has already gone through the adoption process. Wisconsin goes beyond this minimal requirement by committing to evaluate the sufficiency of these control measures to return the area to attainment. To prohibit a state from using any control measure adopted prior to the actual triggering of a contingency measure would only penalize states that are proactive in addressing anticipated air quality problems. EPA's approval of measures that have already been adopted has been upheld in the analogous context of section 172(c)(9) contingency measures. *Louisiana Environmental Action Network v. EPA*, 382 F.3d 575 (Fifth Cir. 2004). EPA concludes that there is adequate assurance that the State will promptly correct a violation of the NAAQs that occurs after redesignation. Section 175A and section 107(d)(3)(E).

(7) *Comment*: Wisconsin does not have a fully approved SIP because it has not yet complied with the Credible Evidence Rule (62 FR 8314).

Response: Wisconsin's SIP is consistent with the Credible Evidence Rule. Specifically, Wisconsin rule NR439.06 states, "Notwithstanding the compliance determination methods which the owner or operator of a source is authorized to use under this chapter, the department may use any relevant information or appropriate method to determine a source's compliance with applicable emission limitations." This rule was approved by EPA on August 15, 1994 (59 FR 41709) with respect to VOCs, and on May 27, 1999 (64 FR

28745) with respect to all pollutants. Further, credible evidence requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. EPA believes that the requirements linked with a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. The credible evidence SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. 61 FR 53174–53176 (October 10, 1996), 61 FR 20458 (May 7, 1996); 60 FR 62748 (December 7, 1995), 65 FR 37890 (June 19, 2000), 66 FR 50399 (October 19, 2001). Section 110 elements not linked to the area's nonattainment status are not applicable for purposes of redesignation.

(8) *Comment*: To qualify for redesignation, section 107(d)(3)(E)(iii) of the CAA requires that the improvement in air quality be "due to permanent and enforceable reductions in emissions * * *." Wisconsin's request for redesignation does not make this showing, instead, it shows a calculated reduction, which is neither real nor permanent and enforceable.

Response: Wisconsin has calculated the change in emissions between 2002, one of the years used to designate the area as nonattainment, and 2005, one of the years Kewaunee County monitored attainment. See Tables 3, 4 and 5 at 72 FR 70262. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of permanent and enforceable regulatory control measures that Kewaunee County and upwind areas have implemented in recent years. Kewaunee County is impacted by the transport of ozone and ozone precursors from upwind areas. Therefore, local controls as well as controls implemented in upwind areas are relevant to the improvement in air quality in Kewaunee County.

Wisconsin adopted NO_x controls for large existing sources and established emissions standards for new sources as part of its rate of progress plan under the 1-hour ozone standard. Reductions in VOC and NO_x emissions have occurred statewide and in upwind areas as a result of federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include: Maximum Achievable Control Technology Standards, the National Low Emission Vehicle (NLEV) program, Tier 2 emission standards for vehicles,

gasoline sulfur limits, low sulfur diesel fuel standards, and heavy-duty diesel engine standards. On October 27, 1998 (63 FR 57356), EPA issued a NO_x SIP call requiring the District of Columbia and 22 states to reduce emissions of NO_x. In Michigan, Illinois, and Indiana alone, the NO_x SIP call has been responsible for a reduction in ozone season NO_x emissions in excess of 196,400 tons between 2000 and 2004. The reduction in NO_x emissions has resulted in lower concentrations of transported ozone entering Kewaunee County.

(9) *Comment*: Wisconsin's redesignation request purports to show a decrease in actual emissions, through permanent and enforceable measures, between 2002 and 2005, claiming that "Wisconsin has documented specific permanent and enforceable programs responsible for emission reductions over this time period." The emission reductions "appear to be either a result of a different metric to calculate emissions in 2002 versus 2005, or due to unenforceable and non-permanent reductions." For example, emissions from point sources and nonpoint sources in Appendix 4 are calculated based on variables such as vehicle miles traveled, amount of fuel combusted, and county employment. These variables directly affect the emissions from year to year, but are neither permanent nor enforceable. Therefore, Wisconsin's submission does not demonstrate that any such decreases are due to permanent and enforceable reductions.

Response: It is not necessary for every change in emissions between the nonattainment year and the attainment year to be permanent and enforceable. Rather, it is necessary for the improvement in air quality to be reasonably attributable to permanent and enforceable reductions in emissions. As discussed above, Kewaunee County and upwind areas have implemented a number of permanent and enforceable regulatory control measures which have reduced emissions and resulted in a corresponding improvement in air quality. Wisconsin adopted NO_x controls for large existing sources and established emissions standards for new sources as part of its rate of progress plan under the 1-hour ozone standard. Reductions in VOC and NO_x emissions have occurred statewide and in upwind areas as a result of federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include: Maximum Achievable Control Technology Standards, the NLEV program, Tier 2

emission standards for vehicles, gasoline sulfur limits, low sulfur diesel fuel standards, and heavy-duty diesel engine standards. On October 27, 1998 (63 FR 57356), EPA issued a NO_x SIP call requiring the District of Columbia and 22 states to reduce emissions of NO_x. In Michigan, Illinois, and Indiana alone, the NO_x SIP call has been responsible for a reduction in ozone season NO_x emissions in excess of 196,400 tons between 2000 and 2004.

Further, Wisconsin has followed EPA guidance in development of inventories for 2002 and 2005. For the nonroad sector, the same version of the National Mobile Inventory Model (NMIM) was run for both years. The reduction in emissions from 2002–2005 is the result of fleet turnover and emissions controls, not differences in methodology. With respect to the onroad sector, MOBILE6.2.03 was run for both years, with an increase in vehicle miles traveled between 2002 and 2005. The reduction in emissions is due to federal motor vehicle control programs and fleet turnover, not differences in methodology. With respect to area sources, Wisconsin used appropriate emission calculation methodologies. While there were some minor changes in emissions factors or throughput for some area source categories, these were minor and did not greatly affect the overall inventory. Wisconsin did not claim area source emission reductions between 2002 and 2005. Point source methodology remained consistent between the 2002 and 2005 inventories. Point source emissions were estimated by collecting process-level information for each facility. Typically throughput information was multiplied by an emission factor for that process. Emission factor sources included mass balance, stack testing, continuous emissions monitors, engineering judgment and EPA's Factor Information Retrieval database.

(10) *Comment:* In Appendix 4, there were different emission factors applied in 2002 and 2005, or a different method for calculating emissions was used, with 2005 emission factors or methods generally resulting in lower emissions than the factors or methods applied in 2002. For example, the emission factors for fuel combustion in 2005 are much lower than the factors used to calculate 2002 emissions. While emission factors may have been updated to be more accurate, the mere updating of emission factors from one year to another does not result in lower emissions. If Wisconsin is to demonstrate that emissions actually decreased between 2002 and 2005, the same emission factor must be applied in both reference years.

Response: Wisconsin followed EPA guidance in development of inventories for 2002 and 2005. For the nonroad sector, the same version of NMIM was run for both years. The reduction in emissions from 2002–2005 is the result of fleet turnover and federal motor vehicle control programs, not differences in methodology. With respect to the onroad sector, MOBILE6.2.03 was run for both years, with an increase in vehicle miles traveled between 2002 and 2005. The reduction in emissions can be attributed to federal motor vehicle control programs and fleet turnover, not differences in methodology. Point source methodology also remained consistent between the 2002 and 2005 inventories. While there were some minor changes in emissions factors or throughput for some area source categories, these were minor and did not greatly affect the overall inventory. Wisconsin did not claim area source emission reductions between 2002 and 2005. The emission factors for the area source fuel combustion category did change, as the commentor stated. This category is such a small portion of the entire inventory, however, that these tiny differences are irrelevant. In 2005, the area source fuel combustion category represents 0.08% of the VOC inventory for Kewaunee County and 2.6% of the NO_x inventory. Between 2002 and 2005, emissions from the fuel combustion category decreased by 0.054 tons per day for VOC and increased by 0.011 tons per day for NO_x. We do not believe that the difference in emissions calculation methodology in any way affects Wisconsin's demonstration that the improvement in air quality in Kewaunee County was due to a permanent and enforceable reduction in emissions.

(11) *Comment:* One of the most significant sources of ozone-causing pollution is fossil fueled electricity generation. The WDNR calculates NO_x emission reductions for these units based on a comparison of historical actual emissions. Actual emissions in 2005 are not the enforceable emission rates and do not represent a permanent and enforceable reduction. Because the sources could have emitted significantly more in 2005, and could in the future, these facilities' actual emissions cannot be used to show a permanent and enforceable reduction between 2002 and 2005. The failure to rely on enforceable emission rates is unlawful and arbitrary.

Response: There are no fossil fueled electricity generation units in Kewaunee County. Therefore, emissions from these facilities were not included or considered as part of the maintenance

plan inventory for Kewaunee County. It should be noted, however, that the NO_x SIP call issued by EPA on October 27, 1998, required the District of Columbia and 22 states to reduce emissions of NO_x. In Michigan, Illinois, and Indiana alone, the NO_x SIP call has been responsible for a reduction in ozone season NO_x emissions in excess of 196,400 tons between 2000 and 2004. These emission reductions are primarily in the fossil fueled electricity generation sector. This reduction in NO_x emissions has resulted in a reduction of ozone and ozone precursors being transported into Kewaunee County.

(12) *Comment:* EPA has not adopted Wisconsin's RACT rules for electric generating units into the Wisconsin SIP. Nevertheless Wisconsin's redesignation submission assumes that RACT rules for NO_x are in place in the future as part of the demonstration that the purported historical improvement in ozone concentrations is due to enforceable reductions in emissions. This reliance on future regulations as a basis for a historical improvement in air quality is unlawful and arbitrary. Even if future reductions in emissions could be used to make the demonstration under section 107(d)(3)(E)(iii), Wisconsin's reliance on RACT rules is unlawful and arbitrary because the RACT rules are not final.

Response: Wisconsin has adopted NO_x RACT rules which are currently under review by EPA. These rules apply to the Milwaukee-Racine and Sheboygan nonattainment areas and will result in future upwind reductions in emissions. While Wisconsin included these rules in the discussion of permanent and enforceable control measures, WDNR did not, in fact, take credit for these projected NO_x RACT reductions in demonstrating a permanent and enforceable reduction in emissions between the years 2002 and 2005 and EPA is not relying on them as a basis for finding that this criterion for redesignation has been met.

(13) *Comment:* Section 175A(d) of the CAA requires that the maintenance plan "include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned which were contained in the State implementation plan for the area before designation of the area as an attainment area." Such measures include the New Source Review (NSR) program. These measures, contained in Wisconsin Administrative Code NR 408, are not included in the maintenance plan being proposed by the Department. As EPA has explained, "the State will be expected to maintain its implemented control strategy despite

redesignation to attainment, unless such measures are shown to be unnecessary for maintenance or are replaced with measures that achieve equivalent reductions." However, upon redesignation, Kewaunee County sources would no longer be subject to rule NR 408, effectively removing sources from the control strategy. This is unlawful and redesignation cannot be approved unless and until rule NR 408 is redrafted such that it continues to apply in Kewaunee County after redesignation.

Response: As clearly stated in EPA's October 14, 1994, policy memorandum from Mary D. Nichols entitled "Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment," "EPA believes it is reasonable to interpret 'measure,' as used in section 175A(d), not to include part D NSR." Congress used the undefined term "measure" differently in different provisions of the Act, which indicates that the term is susceptible to more than one interpretation and that EPA has the discretion to interpret it in a reasonable manner in the context of section 175A. See *Greenbaum v. United States EPA*, 370 F. 3d 527, 535–38 (6th Cir. 2004). (Court finds persuasive EPA's argument that the very nature of the NSR permit program supports its interpretation that it is not intended to be a contingency measure pursuant to section 175A(d).) It is reasonable to interpret "measure" to exclude part D NSR in this context because PSD, a program that is the corollary of part D NSR for attainment areas, goes into effect in lieu of part D NSR upon redesignation. PSD requires that new sources demonstrate that their construction will not increase ambient concentrations significantly and will not result in concentrations above the air quality standard. The State has demonstrated that the area will be able to maintain the standard without Part D NSR in effect, and the State's PSD program will become effective in the area upon redesignation to attainment. See the rationale set forth at length in the Nichols Memorandum. See also the discussions of why full approval and retention of NSR is not required in redesignation actions in the following redesignation rulemakings: 60 FR 12459, 12467–12468 (March 7, 1995) (Redesignation of Detroit, MI); 61 FR 20458, 20469–20470 (May 7, 1996) levels (Cleveland-Akron-Lorain, OH); 66 FR 53665, 53669 (October 23, 2001) (Louisville, KY); 61 FR 31831, 31836–31837 (June 21, 1996) (Grand Rapids, MI).

(14) *Comment:* The United States Court of Appeals for the District of

Columbia held in *South Coast Air Quality Management District v. Environmental Protection Agency*, that controls established in an area under the 1-hour ozone standard, including NSR requirements, must remain in place pursuant to the anti-backsliding provision of section 172(e) of the CAA. The court held that anything "designed to constrain ozone levels is a 'control' pursuant to the anti-backsliding provisions in section 172(e), and cannot be relaxed even when an area is reclassified as a lower nonattainment designation." The existing nonattainment NSR program in effect for Kewaunee County Wisconsin is a "control" which cannot be relaxed. The redesignation would result in the nonattainment NSR provisions no longer applying to Kewaunee County sources. This is an unlawful relaxation of "controls" established in nonattainment areas of Wisconsin. This violates the anti-backsliding provision in section 172(e). EPA cannot approve the redesignation until Rule NR 408 is revised to ensure that it continues to apply to sources in Kewaunee County, which was designated as nonattainment for 1-hour ozone under the 1990 Amendments to the CAA.

Response: The Kewaunee County area is an attainment area subject to a CAA section 175A maintenance plan under the 1-hour standard. The anti-backsliding issues before the DC Circuit concerned whether an area designated nonattainment could rely on a less stringent nonattainment NSR program for the 8-hour standard instead of the more stringent program that had applied to the nonattainment area based on its 1-hour nonattainment classification. The issue before the court did not concern whether an area designated attainment is required to implement a nonattainment NSR review program. Sections 161 and 172(b) of the CAA make clear that areas not designated nonattainment are subject to the PSD program, not the NSR program that applies in nonattainment areas.

(15) *Comment:* EPA rules explicitly require maintenance demonstrations to be supported by modeling (40 CFR 51.112 and 65 FR 6711). Until Wisconsin conducts such a modeling demonstration, EPA cannot approve the maintenance plan.

Response: A maintenance demonstration need not be based on modeling. See *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001), *Sierra Club v. EPA*, 375 F. 3d 537 (7th Cir. 2004). See also 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003). 40 CFR 51.112 provides in relevant part that "[e]ach plan must

demonstrate that the measures, rules and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements." Both the language and the context of this regulation indicate that it applies to attainment demonstrations, and not to stand-alone maintenance plans submitted under CAA section 175A. There is no reference in the regulation to modeling requirements applicable to a section 175A plan revision for the sole purpose of providing maintenance and not attainment. EPA policy and longstanding practice allows States to demonstrate maintenance by preparing an attainment emissions inventory corresponding to the period during which the area monitored attainment, and to project maintenance by showing that future emissions are projected to remain below this level for the next ten years. See Calcagni memo. Holding emissions at or below the level of attainment is adequate to reasonably assure continued maintenance of the standard. See 65 FR 37879, 37888 (June 19, 2000). Moreover, since EPA has determined that the area is in actual attainment of the 8-hour ozone standard, the requirement for submission of an attainment demonstration is no longer applicable. 40 CFR 51.918. Furthermore, regional modeling performed by the Lake Michigan Air Directors Consortium to support attainment planning efforts for the states of Wisconsin, Illinois, Indiana, Michigan and Ohio shows continued attainment of the NAAQS in Kewaunee County in 2009, 2012 and 2018. See "Regional Air Quality Analyses for Ozone, PM2.5, and Regional Haze: Final Technical Support Document," dated April 25, 2008.

(16) *Comment:* Because NR 408 would not apply to Kewaunee County after redesignation, the proposal to redesignate Kewaunee County is effectively a proposal to remove the NSR provisions. This violates section 110(l) of the CAA which states that "the administrator may not approve a revision of a plan if the revision would interfere with any reasonable applicable requirement concerning attainment and reasonable further progress * * * or any other applicable requirement of this chapter." Increasing the major source threshold, lowering the control technology requirements, and removing the offset requirements all will result in increased air pollution and interfere with both attainment and reasonable further progress.

Response: Section 110(l) provides that the Administrator shall not approve a SIP revision "if the revision would

interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.” Kewaunee County is monitoring attainment of the NAAQS and, thus, there is no need for “reasonable further progress” toward attainment. Furthermore, Wisconsin is not revising the applicability or terms of its NSR program. It is true that certain requirements of the Clean Air Act and the Wisconsin SIP (such as NSR) do not apply in attainment areas. However, EPA does not believe that fact means that a decision to redesignate an area as attainment is “interfering” with attainment or with requirements that apply only to nonattainment areas. For the reasons set forth above and in the proposal, EPA believes that Wisconsin’s maintenance plan is adequate to maintain attainment for at least 10 years, and therefore concludes that this action will not interfere with attainment or reasonable further progress, or any other applicable CAA requirement.

(17) *Comment:* The commentor states that he does not oppose the Kewaunee County redesignation, but makes the following points. Upwind sources of ozone and its precursors cause or contribute significantly to downwind (e.g. Door County) non-compliance with NAAQS. Local and long-range transport of ozone and its precursors have and will continue to preclude downwind attainment of the NAAQS. The overarching goal is to reduce emissions so that the NAAQS are universally met. Reducing emissions upwind is the only means to decrease concentrations downwind. The commentor suggests that rather than focusing on redesignation, EPA should find the upwind sources that cause or contribute significantly to downwind non-compliance with ozone standards, regulate emissions from upwind regions to address the issue of transport and allow downwind areas a fair opportunity to achieve compliance, and place a moratorium on upwind sources being deemed to have attained the NAAQS if impacted downwind areas continue to show monitored nonattainment of the NAAQS.

Response: This rule is a redesignation action that is designed to determine whether an area has met the requirements for redesignation to attainment. Considerations of how to address issues of transport from upwind areas are not related to the current redesignation action. As noted in the proposal, section 110(a)(2)(D) of the CAA, which requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to

air quality problems in another state, continues to apply to the state regardless of the attainment designation of an area. The requirements of section 110(a)(2)(D) are not linked with a particular nonattainment area’s designation and classification in that state. Therefore, these requirements are not applicable for purposes of redesignation. See 65 FR 37890 (June 19, 2000), 66 FR 50399 (October 19, 2001) and 68 FR 25418, 25426–25427 (May 12, 2003).

That being said, however, EPA has long recognized that ozone transport is a problem affecting many portions of the eastern United States. The Lake Michigan region both receives high levels of transported ozone and ozone precursors from upwind source areas and contributes to the high levels of ozone and ozone precursors affecting downwind receptor areas. Downwind shoreline areas around Lake Michigan are affected by both regional transport of ozone and subregional transport from major urban areas in the Lake Michigan region.

Considerable progress has been made in reducing transported pollution. EPA promulgated and States have implemented the NO_x SIP call, which has significantly reduced NO_x emissions throughout the eastern half of the United States. In Michigan, Illinois, and Indiana alone, the NO_x SIP call has been responsible for a reduction in ozone season NO_x emissions in excess of 196,400 tons between 2000 and 2004. Other federal measures including the NLEV program, Tier 2 emission standards for vehicles, gasoline sulfur limits, low sulfur diesel fuel standards, and heavy-duty diesel engine standards continue to be implemented and will result in reductions in upwind emissions. In addition, EPA finalized the Clean Air Interstate Rule (CAIR) on May 12, 2005. CAIR is designed to achieve large reductions of Sulfur Dioxide (SO₂) and/or NO_x emissions across 28 eastern states and the District of Columbia and specifically addresses the transported pollution from upwind states that affects downwind air quality problems. (Illinois, Indiana, Wisconsin and Michigan are all subject to CAIR.) SO₂ and NO_x contribute to the formation of fine particles and NO_x contributes to the formation of ground-level ozone.

III. What Action Is EPA Taking?

EPA is taking several related actions for Kewaunee County. First, EPA is making a determination that Kewaunee County has attained the 1997 8-hour ozone NAAQS. EPA is also determining that Kewaunee County has met the

requirements for redesignation under section 107(d)(3)(E) of the CAA, and EPA is, therefore, approving the State’s request to change the legal designation of Kewaunee County from nonattainment to attainment of the 8-hour ozone NAAQS. Further, EPA is approving as meeting the requirements of CAA section 175A Wisconsin’s maintenance plan SIP revision for Kewaunee County (such approval being one of the CAA criteria for redesignation to attainment status. Section 107(d)(3)(E)(iv)). Finally, for Kewaunee County, EPA is approving the 2012 MVEBs of 0.43 tpd of VOC and 0.80 tpd of NO_x and 2018 MVEBs of 0.32 tpd of VOC and 0.47 tpd of NO_x.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for these actions to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule “grants or recognizes an exemption or relieves a restriction,” and section 553(d)(3) which allows an effective date less than 30 days after publication “as otherwise provided by the agency for good cause found and published with the rule.” The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today’s rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today’s rule relieves the State of planning requirements for this 8-hour ozone nonattainment area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for these actions to become effective on the date of publication of these actions.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely affects the status of a geographical area and

approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is

not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action 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 21, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action 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

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Volatile organic compounds.

40 CFR Part 81

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

Dated: May 12, 2008.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ 40 CFR Parts 52 and 81 are 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 YY—Wisconsin

■ 2. Section 52.2585 is amended by adding paragraph (u) to read as follows:

§ 52.2585 Control strategy: Ozone.

* * * * *

(u) Approval—On June 12, 2007, Wisconsin submitted a request to redesignate Kewaunee County to attainment of the 8-hour ozone standard. As part of the redesignation request, the State submitted an ozone maintenance plan as required by section 175A of the Clean Air Act. Part of the section 175A maintenance plan includes a contingency plan. The ozone maintenance plan establishes 2012 motor vehicle emissions budgets for Kewaunee County of 0.43 tons per day of volatile organic compounds (VOC) and 0.80 tons per day of nitrogen oxides (NO_x) and 2018 motor vehicle emissions budgets for Kewaunee County of 0.32 tons per day of VOCs and 0.47 tons per day of NO_x.

PART 81—[AMENDED]

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

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

■ 4. Section 81.350 is amended by revising the entry for Kewaunee County, WI: Kewaunee County in the table entitled “Wisconsin—Ozone (8-Hour Standard)” to read as follows:

§ 81.350 Wisconsin.

* * * * *

WISCONSIN—OZONE (8-HOUR STANDARD)						
Designated area		Designation ^a			Classification	
		Date ¹	Type		Date ¹	Type
*	*	*	*	*	*	*
Kewaunee County, WI: Kewaunee County.		5/21/08	Attainment.			
*	*	*	*	*	*	*

^a Includes Indian Country located in each county or area, except as otherwise specified.
¹ This date is June 15, 2004, unless otherwise noted.

Proposed Rules

Federal Register

Vol. 73, No. 99

Wednesday, May 21, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 35

[Docket No. PRM-35-18; NRC-2005-0020]

Peter G. Crane; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking: Denial.

SUMMARY: The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM-35-18) submitted by Peter G. Crane (petitioner). The petitioner requested that the NRC amend the regulations that govern medical use of byproduct material concerning release of individuals who have been treated with radiopharmaceuticals. The petitioner believes that this regulation is defective on legal and policy grounds. The petitioner requested that the patient release rule be partially revoked insofar as it allows patients to be released from radioactive isolation with more than the equivalent of 30 millicuries of radioactive iodine I-131 (I-131) in their bodies. The NRC, for the reasons described in the **SUPPLEMENTARY INFORMATION** of this document has determined that the issues raised in the petition do not justify a rule change.

DATES: The docket for the petition for rulemaking PRM-35-18 is closed on May 21, 2008.

ADDRESSES: You can access publicly available documents related to this petition for rulemaking using the following methods:

Federal e-Rulemaking Portal: Go to <http://www.regulations.gov> and search for documents filed under Docket ID [NRC-2005-0020].

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agency Wide Document Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Neelam Bhalla, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone 301-415-6843, e-mail Neelam.Bhalla@nrc.gov.

SUPPLEMENTARY INFORMATION:

The Petition

On December 21, 2005 (70 FR 75752), the NRC published a notice of receipt of a petition for rulemaking dated September 2, 2005, filed by Peter G. Crane. The petitioner requested that the NRC revoke the 1997 amendment to 10 CFR 35.75, "Release of individuals containing unsealed byproduct material or implants containing byproduct material" (62 FR 4120; January 29, 1997, Patient Release Criteria Rule), insofar as it allows the release of patients from radioactive isolation with more than the equivalent of 30 millicuries of radioactive I-131 in their bodies.

Subsequently, during the public comment period, the petitioner filed a document dated January 30, 2006, in which he stated that after filing the petition, additional information relevant to the issue of criteria for the release of patients treated with radioactive I-131 had come to his attention and some of the comments filed warranted a response from the petitioner. In the January 30, 2006, document, the petitioner further clarified his grounds for filing the petition. In addition, the petitioner submitted an additional comment on March 6, 2006, as corrected by a submittal dated March 10, 2006. The NRC considered these documents together with the original petition.

NRC's patient release criteria are specified in 10 CFR 35.75. This regulation was amended in 1997 and

authorizes the release of patients from licensee control if the total effective dose equivalent (TEDE) to any other individual from exposure to the released individual is not likely to exceed 5 millisievert (mSv) (0.5 rem) (Typical natural background radiation in the United States is 0.3 rem per year). Before that time, NRC regulations required hospitalization of patients until the radioactivity in their bodies decreased to the equivalent of 30 millicuries (mCi) of I-131. The provisions of the current rule allow outpatient treatment for greater than 30 mCi of I-131 based on the licensee's determination that the TEDE to an individual from the released patient is not likely to exceed 5 mSv (0.5 rem). The petitioner requested NRC to revoke the current rule and re-adopt the release criteria that existed before 1997.

The petitioner believes that this regulation is defective on legal and policy grounds. The petitioner asserts that the 1997 rulemaking was defective on legal grounds because it was purportedly adopted in response to a petition from a member of the public; however, the petition was actually drafted at the request of the NRC staff, with NRC staff assistance, under NRC staff specifications. The petitioner alleges that the NRC violated its own rules because (1) the NRC staff failed to disclose in papers forwarding the rulemaking, that the staff had assisted the former petitioner by encouraging the individual to submit the petition and (2) the NRC did not mention any such assistance in its rulemaking notices in the **Federal Register**.

The petitioner supports this assertion by referring to a memorandum from the Executive Director for Operations (EDO) dated February 23, 1994, addressed to "All NRC Employees," that discusses the requirements in 10 CFR 2.802(b), which limits the assistance that the NRC may give prospective petitioners. The petitioner states that the memorandum advised that every year after 1991, the EDO had issued an announcement to NRC employees which clarified the permissible scope of NRC staff interaction with a prospective petitioner for rulemaking. The memorandum stated that should any NRC staff assistance be provided to a prospective petitioner regarding technical or substantive issues, that assistance must be disclosed to the Commission in the

paper forwarding the rulemaking action for approval. Also, NRC staff assistance must be noticed in any public notice regarding the petition and any rulemaking that may result from the petition that is published in the **Federal Register**. The petitioner asserts that "assistance" as defined by the NRC includes encouraging a prospective petitioner to submit a petition, and that the NRC staff in its rulemaking notices in the **Federal Register** did not mention any such encouragement to the former petitioner to file the petition.

The petitioner also asserts that the release of patients under the current rule creates an unwarranted hazard to the public and patient's family, particularly children. The petitioner's safety concerns are summarized as follows:

1. Dose to family members, especially children.

The petitioner argues that patients treated for thyroid cancer with I-131 are being sent home under conditions that guarantee that family members will receive large and potentially harmful doses of radiation under uncontrolled conditions. The petitioner expresses concern for exposure to children stating that children are more radiation-sensitive than adults and argues that children deserve more protection, not less.

2. Dose to members of the public during patient transport.

The petitioner expresses concern about dose to members of the public during transport from patients who have been administered large amounts of I-131. The petitioner states that by reverting to the 1997 release criteria, the exposure to members of the public will be less because patients being transported home will not be released with large amounts of radioactivity in their bodies.

3. Contamination and dose concerns due to vomiting.

The petitioner expresses concern about the risks of vomiting of the I-131 dosage, with resultant exposure to family members in cleaning patient vomit, and a loss of the administered dose to the patient.

4. Hypothyroid patients are not able to fully comprehend or remember the instructions provided to them.

The petitioner asserts that although the patients are supposed to receive instructions on minimizing exposure to others, patients may have trouble comprehending and remembering the guidance, given their hypothyroid state. The petitioner draws from personal experience and states that the severe hypothyroid state impairs a person's ability to follow safety guidelines for the

protection of family members and other members of the public.

5. NRC has allowed for reduction of exposure to hospital employees and clergy members at the expense of elevated exposure to family members, and particularly, children.

The petitioner has referred to a discussion in the statements of consideration of the final rule published on January 29, 1997 (62 FR 4120) of relevant benefits and risks associated with the options of patient release and hospitalization. The petitioner asserts that the NRC acknowledged that family members of patients would receive higher doses of radiation, and justified this in part by arguing that members of the clergy who visit hospitals frequently would receive lower doses of radiation because cancer patients would be at home instead of in the hospital.

Public Comments on the Petition

The notice of receipt of the petition for rulemaking invited interested persons to submit comments. The comment period closed on March 6, 2006. NRC received 48 comment letters including 3 submittals from the petitioner. There were 14 letters in support of the petition. These were primarily from cancer patients who had been treated with I-131 and released under the provisions of 10 CFR 35.75 or the equivalent State regulations. These patients expressed concern that they had to take care of themselves. However, had they been hospitalized, they would have been taken care of by the hospital staff. Several of these commenters expressed concern about exposure to family members and others, in particular from patient vomiting.

One commenter supported the petition for a concern not cited by the petitioner. This commenter stated that the current release criteria have resulted in an increase in the number of events when radiation monitoring equipment detects radiation at municipal waste-handling facilities and that the States have to respond to these events.

Commenters opposing the petition generally included physicians, medical physicists, and radiation safety officers, as well as several medical professional organizations. These professional organizations included the American Society of Therapeutic Radiation Oncologists (ASTRO), the American Association of Physicists in Medicine (AAPM), the American Board of Nuclear Physicians (ABNP), the American Thyroid Association, the Endocrine Society, the American College of Radiology (ACR), the Society of Nuclear Medicine (SNM), the National Association of Nuclear Pharmacists, the

American Pharmacists Association, and the Council on Radionuclides and Radiopharmaceuticals (CORAR).

Commenters opposing the petition stated that reverting from the current release criteria back to the 30-mCi rule would result in additional and unnecessary healthcare costs, and would unnecessarily limit access to treatment for patients who cannot afford hospitalization. Commenters opposing the petition also stated that the provisions of the current rule provide patients the comfort and convenience of being in their homes, rather than the confinement in a hospital environment.

Many physicians opposing the petition disagreed with the petitioner's assertion that the patients are released while they are a risk of exposure to others. These physicians commented that they carefully interview the patients and assess their ability to follow and understand radiation safety precautions and their living conditions at home, and then decide on outpatient treatment. These physicians also stated that they discuss with their patients arrangements to have any children in the households stay away from their homes during the initial week of their treatments. With regard to the petitioner's concern about patient vomiting, some physicians stated that they provide special instructions to the patients to handle the vomitus and prescribe anti-nausea medication, if needed. These commenters indicated that vomiting is a rare complication with these patients.

One commenter generally opposed the petition but noted the recommendations of the International Commission on Radiological Protection (ICRP), in ICRP Publication 94 (published in 2004), entitled, "Release of patients after therapy with unsealed radionuclides." The commenter stated that ICRP Publication 94 now recommends that doses to children be constrained to less than 1 mSv (100 millirem) and that doses to children from patient contamination have the potential to be far greater than from external exposure. In light of this, the commenter suggested that there may be a need for NRC to consider adding instructions in NUREG-1556, Volume 9, "Consolidated Guidance About Material Licenses: Program Specific Guidance About Medical Use Licenses," regarding the avoidance of exposure to children to patient contamination. NUREG-1556, Volume 9, Appendix U, "Model Procedures for Release of Patients or Human Research Subjects Administered Radioactive Materials," provides instructions to minimize exposure to family members and other members of

the public (U.2.3.1). Although these instructions include precautions to reduce the spread of contamination, the instructions do not specifically caution against avoiding exposure of children to patient contamination. Therefore, the commenter suggested that NRC revise NUREG-1556, Volume 9, to include specific guidance for patients on precautions to avoid children's exposure to radioactive contamination.

Petition Resolution

After reviewing the information provided in the petition, as supplemented, and the comments, the NRC has determined that the issues raised in the petition do not justify a rule change. The NRC believes that the current NRC regulations provide adequate protection to family members and other members of the public. The NRC's responses to the petitioner's specific concerns are provided below.

NRC Responses to the Issues Raised by the Petitioner

The petitioner asserts that the 1997 rulemaking was defective because it was purportedly adopted in response to a petition from a member of the public submitted in December 1990, but was actually drafted at the request of the NRC staff, and according to NRC staff specifications. The petitioner asserts that the NRC staff's failure to disclose this fact to the Commission in the rulemaking documents and the failure to notice this assistance in the **Federal Register** violated the Commission's rules.

The petitioner asserts that NRC staff offered inappropriate assistance to the rulemaking petitioner. However, there were neither NRC regulations nor internal policies that addressed the staff role or level of assistance that could be provided to potential petitioners at the time that the alleged staff assistance occurred. In any event, a decision to initiate rulemaking to adopt the petitioner's proposals could not rest on a question of staff compliance with internal NRC procedures. However initiated, the 1997 rulemaking involved broad participation with 63 commenters, including medical practitioners and medical organizations, regulatory agencies in Agreement States, public interest groups and private individuals. Moreover, the American College of Nuclear Medicine and the American Medical Association filed petitions later that were included in the rulemaking. Their independent proposals as well as the broad participation by interested parties negate the inference drawn by the petitioner that the resulting rulemaking

was merely the product of staff influence. To reopen the earlier rulemaking would require evidence that alleged procedural defects substantively affected the final rule in a manner requiring that additional rulemaking be initiated. No such evidence has been brought to our attention, nor is the Commission aware of any basis for such a conclusion. Thus, even assuming that the petitioner's allegations of undue staff assistance were true, the petitioner has not demonstrated a substantive basis for reopening the earlier rulemaking or for initiating rulemaking in response to this petition.

Dose to Family Members, Especially Children

The petitioner asserts that patients treated for thyroid cancer with I-131 are being sent home under conditions that guarantee that family members will receive large and potentially harmful doses of radiation under uncontrolled conditions. The petitioner expresses particular concern for exposure to children because children are more radiation-sensitive than adults.

The concerns related to doses to the family members and members of the public from released patients were extensively considered during the development of the current patient release criteria rule. By way of background, in 1991 (56 FR 23360, May 21, 1991) NRC published a final rule that amended 10 CFR Part 20 "Standards for Protection Against Radiation" to include a change to the dose limits for individual members of the public in 10 CFR 20.1301. The rule lowered dose limits for members of the public from 500 millirem per year to 100 millirem per year. However, the criteria for the release of patients under 10 CFR 35.75 had been based on a dose limit of 500 millirem to members of the public. When 10 CFR Part 20 was issued, there was no discussion in the supplemental information on whether or how the provisions of 10 CFR 20.1301 were intended to apply to the release of patients.

Some stakeholders were uncertain about what effect the revised 10 CFR Part 20 would have on patient release criteria and subsequently, three petitions for rulemaking were received related to this issue. One petition was received from Dr. Carol Marcus, one from the American College of Nuclear Medicine (ACNM), and one from the American Medical Association (AMA). Dr. Marcus, and the ACNM petitions requested the NRC to amend the revised Part 20 and 10 CFR 35.75 to raise the annual radiation dose limits to members of the public from 1 millisievert (0.1

rem) to 5 millisieverts (0.5 rem) from patients administered radioactive materials, and the AMA petition requested that patient release be regulated by Part 35 rather than Part 20. NRC decided to resolve all of these petitions in a single rulemaking.

In June 1994 a proposed rule was published to amend 10 CFR 20.1301(a)(1) to specifically clarify that the dose to individual members of the public from a licensed operation does not include doses received by individuals exposed to patients released under 10 CFR 35.75. 59 FR 30724 (June 14, 1994). However, the dose limits in the revised Part 20 were not changed.

In the proposed rule, the NRC also proposed to amend 10 CFR 35.75 to change the patient release criteria from 30 millicuries of activity in a patient or a dose rate of 5 millirem per hour at 1 meter from a patient, to a dose-based criteria where the TEDE to an individual from exposure to a released patient is not likely to exceed 5 mSv (0.5 rem). Under the regulations in effect before 1997, activity within a patient was measured to determine whether a patient could be released from licensee control. However, the NRC determined that this type of an approach was not dependable, in that there were variants among the isotopes that would cause variations in the dose that would result to another individual from exposure to the released patient. The NRC believed that the primary consideration in the release of patients should not be the activity within the patient, but the potential doses to other individuals. NRC concluded that basing the patient release criteria on the dose to individuals exposed to a patient (*i.e.* dose-based regulation) would provide a consistent, scientific basis for such decisions that treats all radionuclides on a risk-equivalent basis. A dose-based rule was therefore proposed that would allow consideration of case-specific factors to more accurately assess the dose to other individuals.

The final rule amending Part 20 and Part 35 to incorporate these changes was published in 1997 (62 FR 4120, January 29, 1997). In April 1997, the NRC also published a report "Regulatory Analysis on Criteria for the Release of Patients Administered Radioactive Material" (NUREG-1492). The report assessed the potential internal and external doses to individuals exposed to patients who have been administered radiopharmaceuticals and performed a comprehensive risk/benefit analysis for adopting the 5 mSv (0.5 rem) TEDE criterion for patient release. The report stated that the criterion was based on the ICRP Publication 60, "1990

Recommendations of the International Commission on Radiation Protection,” and the recommendations of the NCRP in NCRP Report No. 116, “Limitation of Exposure to Ionizing Radiation.” Each of these reports provided a basis for allowing individuals to receive annual doses up to 5 mSv (0.5 rem) under certain circumstances. These recommendations of the ICRP and NCRP were based on a finding that annual doses in excess of 1 mSv (0.1 rem) to a small group of people, provided that they do not occur often, need not be regarded as unduly hazardous. The dose-based release limits also used assumptions that the internal doses for individuals who may come in contact with released patients were very small compared with doses from external exposures.

The petitioner has not provided any data to refute the analysis provided in NUREG-1492. However, one commenter noted that ICRP Publication 94 now recommends that doses to children be limited to less than 1 mSv (100 millirem) and that doses to children from patient contamination have the potential to be far greater than from external exposure. The commenter recommended that NRC consider adding instructions in NUREG-1556, Volume 9, regarding the avoidance of exposure of children to patient contamination.

The NRC carefully considered this issue in reviewing the petition and reviewed ICRP Publication 94. The recommendations in the report do not explicitly state that patients should be hospitalized. However, ICRP recommends that public dose limits and dose constraints for others be observed, and be followed with optimization, realizing that procedures of optimization and their effects on individual behavior will differ among individuals and their circumstances.

In addition, ICRP recommends: “Since high absorbed thyroid dose may occur in infants and young children from contamination, and children’s thyroids are very radiosensitive for carcinogenesis, this population should be restricted to the public dose limit of 1 mSv/year.” The report states that although the dose to adults exposed to released patients is mostly from external radiation, children may receive a dose from contamination. Therefore, restrictions following the release of patients should focus on infants and children. Recently, ICRP has also published a comprehensive revision to its recommendations made in 1991, in ICRP Publication 103. ICRP Publication 103 repeats the recommendations made in ICRP Publication 94 that young children and infants, as well as visitors

not engaged in the care of patients, should be limited to a dose of 1 mSv (0.1 rem) per year.

This recommendation represents a departure from previous ICRP recommendations, which did not make a distinction for children or infants. Therefore, NRC considered the following regulatory options for limiting the exposure to children and infants from released patients:

(1) Amend 10 CFR 35.75 to limit children and infants exposure to 1 mSv (0.1 rem);

(2) Amend 10 CFR 35.75 (b) to include special instructions if the dose to an infant or child could exceed 1 mSv (0.1 rem); or

(3) Revise the guidance in NUREG-1556, Volume 9, to include the ICRP Publication 94 recommendations and issue a Regulatory Issue Summary (RIS) to medical licensees to make them aware of the ICRP recommendations.

Option (1) Amend 10 CFR 35.75 to Limit Children and Infants Exposure to 1 mSv (0.1 rem)

NRC has determined not to change the rule to adopt a lower limit for children and infants. The NRC does not believe that such a rule change would be effective because it is difficult to meaningfully estimate the doses that may result from patient contamination. The factors involved in assessing such doses are largely indeterminate, and even assumptions are likely to be so much in error as to be meaningless. For example, the amount of iodine in the patient’s saliva is highly variable even for patients receiving the same treatment, and the amount of saliva that may be ingested by a child is dependent on the details of the family’s living arrangements, family habits and the age of the child, and cannot be reliably assumed to assess the dose to the child or the infant. This makes a dose-based approach to protecting children from patient contamination an impractical choice. NRC believes that an alternative approach that is more likely to provide better protection for children and infants would be for patients to take precautions to maintain the dose to children and infants as low as is reasonably achievable (ALARA). NRC therefore has determined that the instructions to the patients, as well as any guidance to physicians, should be modified to stress the need to keep children and infants away from any possible sources of contamination.

10 CFR 35.75(b) requires licensees to provide instructions, including written instructions on actions recommended to maintain doses to other individuals ALARA. Therefore, NRC determined

that this guidance should be strengthened to protect children and infants from any sources of patient contamination. To achieve this goal, NRC has revised the guidance in NUREG 1556, Volume 9 and has developed a Regulatory Issue Summary (RIS) to convey to the licensees the concerns expressed in ICRP Publications 94 and 103 about doses to children from patient contamination and the actions licensees and patients should take to keep children away from any sources of patient contamination. These actions would be based on the individual patient’s circumstances and may include hospitalization of the patient based on the patient’s family situation. NRC will issue the RIS and the revised guidance in NUREG 1556, Volume 9, to all medical use licensees and to the Agreement States concurrent with the issuance of this petition resolution.

NRC believes that enhancing the guidance is a more efficient way of protecting children and infants than amending the regulations. In addition, in considering the disposition of a petition for rulemaking, NRC must consider whether addressing the topics raised in the petition are likely to result in a significant increase in safety or security for all affected stakeholders. As explained above, NRC does not believe that the issues raised in this petition significantly impact safety and security such as would warrant a rulemaking. Additionally, the NRC must consider the potential impact of a rulemaking on the agency’s efficiency and effectiveness. NRC has limited resources for rulemaking; therefore any topic to be considered in the NRC rulemaking process must have a strong technical basis before it can be considered in the agency’s prioritization process for rulemaking. In any given budget cycle, only a limited number of rulemakings can be funded. Topics with minimal safety or security impact may not reach the funding threshold. The NRC does not believe that there is a sufficiently strong technical basis to consider the issues in this petition in a rulemaking.

Option (2) Amend 10 CFR 35.75 (b) to Include Special Instructions if the Dose to an Infant or Child Could Exceed 1 mSv (0.1 rem)

NRC determined that it is not necessary to amend 10 CFR 35.75(b) to require that special instructions be provided if the dose to an infant or child could exceed 1 mSv (0.1 rem). Section 35.75(b) presently requires a licensee to provide the released individual, or the individual’s parent or guardian with instructions, including written

instructions, on actions recommended to maintain doses to other individuals as low as is reasonably achievable (ALARA), if the TEDE to any other individual is likely to exceed 1 mSv (0.1 rem). The requirement that instructions be provided if the TEDE is likely to exceed 1 mSv to any other individual includes that these instructions must be provided if the TEDE to children and infants is likely to exceed 1 mSv (0.1 rem).

Option (3) Revise the Guidance in NUREG-1556, Volume 9, to Include the ICRP 94 Recommendations and Issue a Regulatory Issue Summary (RIS) to Medical Licensees to Make Them Aware of the ICRP Recommendations

As discussed under Option (1), NRC determined to revise the guidance in NUREG-1556, Volume 9, and issue a RIS to make licensees aware of the ICRP's new recommendations, and to heighten licensees' awareness of the requirements of the regulations in 10 CFR 35.75(b). NRC believes that the protection for children is best achieved through maintaining doses ALARA. NRC believes that this can be accomplished under the current patient release criteria, but that the instructions to the patients, as well as any guidance to physicians, need to be modified to emphasize the need to keep children away from any possible sources of contamination. The guidance needs to be sufficiently flexible so that the patient's physician has the option of keeping the patient in the hospital for longer periods than currently required if the patient's living conditions warrant such a decision. The NRC believes that these actions will adequately protect infants and children.

The petitioner also asserts that NRC has allowed for reduction of exposure to hospital employees and clergy members at the expense of elevated exposure to family members. The petitioner's assertion is based upon a misinterpretation of a response to a comment on the proposed rule as discussed in the Statements of Consideration of the final rule published on January 29, 1997 (62 FR 4120). Specifically, a commenter had noted that it would not be possible to maintain the same level of contamination control at home that could be maintained in a hospital. In responding to this comment, the NRC noted that the two situations were not comparable because areas in hospitals have potential for contamination from many patients, and that people who frequent the hospital, such as clergy, would therefore have the potential to be exposed to contamination from many

patients. However, in the case of a released patient at home, therapeutic administrations usually occur no more than once a year and probably no more than once in a lifetime. The reference to exposure of hospital clergy to contamination from many patients was intended as an example, and was not intended to imply that removing patients from the hospital would constitute a benefit to clergy that would compensate for an additional risk to a patient's children. Rather, the Statements of Consideration in the 1997 final rule explain that NRC considered the results of studies and recommendations current at the time, evaluated the benefits to patients from being home, and concluded that doses to household members from one patient would be low, compared to increased exposure to hospital personnel from recurring administrations. NRC believes that the current rule provides adequate protection of the public and family members and minimizes exposure of hospital employees.

Dose to Members of the Public During Patient Transport

The petitioner expresses concern about dose to members of the public during transport from patients who have been administered large amounts of I-131. The guidance in NUREG-1556, Volume 9, provides adequate instructions for the patient to minimize time in public places (for example, public transportation, grocery stores, and shopping centers). Also, ICRP Publication 94 concludes that patients traveling after radioiodine therapy rarely present a hazard to other passengers if travel times are limited to a few hours. From the comments received, it appears that a vast majority of the patients return home in private vehicles. Other than describing a single anecdotal account of an I-131 patient who allegedly traveled home on a bus, vomited, and exposed her husband and children to radiation, the petitioner provides no specific data in support of his position.

Contamination and Dose Concerns Due to Vomiting

In support of his petition, the petitioner expresses concern about dose to family members who clean up the patient's vomit, and a loss of administered dose to the patient. Although the petitioner describes a case that he states is known to him, the petitioner provides no specific data in support of his concern. Some physicians have commented on the petitioner's concern and stated that the incidence of vomiting in their experience is rare, and

that the physicians are able to prescribe anti-nausea drugs, if needed. The same view was expressed by physician members of the Advisory Committee on the Medical Uses of Isotopes at its November 2006 meeting. In addition, some physicians stated that they provide special instructions to their patients regarding handling of the vomitus and prescribe anti-nausea drugs, if needed.

Hypothyroid Patients Are Not Able to Fully Comprehend or Remember Instructions.

The petitioner expresses concern that most patients are in a hypothyroid state and, therefore, are unable to fully comprehend or remember the instructions provided to them. The petitioner describes these patients as "sick, and quite possibly stressed, groggy, and mentally fogged, to remember the guidance and follow it." The petitioner does not provide any new or specific information in support of his concern.

The regulations in 10 CFR 35.75(b) require instructions be provided to the individual, or the individual's parent or guardian, including written instructions, on actions recommended to maintain doses to other individuals ALARA if the TEDE to any other individual is likely to exceed 1 mSv (0.1 rem). In the 2002 revision to Part 35 (67 FR 20249; April 24, 2002), 10 CFR 35.75(b) was revised to specify that licensees may provide instructions to either the released individual or to the individual's parent or guardian, to acknowledge that it is not appropriate to provide the individual being released with instructions in some cases (e.g., the individual is a minor or incapable of understanding the instructions). In addition, the regulations do not mandate the release of patients. Physicians always have the option of hospitalizing individuals based on their judgment of an individual's condition. One of the commenters, a physician, noted that at his institution if a patient is determined to be incontinent, incapable of self-care, or unable to adhere to the instructions, then the patient is treated as an inpatient.

Waste Issue

One commenter in support of the petition stated that the rule has resulted in an increase on the burden of State responders due to an increase in the alarms triggered at the municipal waste handling facilities. Although this issue was not raised by the petitioner, the NRC staff reviewed this concern. These alarms are generally triggered by any radioactivity detected at these facilities.

The commenter did not provide any data on how many or what fraction of these alarms are triggered by the wastes from these patients. With regard to the environmental pathways of radioiodine, ICRP Publication 94 states that “regarding the release of patients from the hospital, the radioiodine is in the patient where it decays or is excreted primarily in urine, and finds its way into the environment.” According to the report, the impact of the released I-131 on the environment should be minimal, considering that I-131 has a relatively short half life of 8 days. The time it takes for the excreta of patients to be processed and returned to the ecosystem is relatively long. In addition, the impact of I-131 on the environment from this pathway is usually independent of whether the patient is hospitalized after treatment or released to go home.

Conclusion

The decision to deny the petition is consistent with NRC’s Strategic Plan for Fiscal Years 2008–2013. NRC’s strategic safety goal to “ensure adequate protection of public health and safety and the environment” would continue to be maintained because NRC believes that the current rule is adequate to protect public health and safety from the release of these patients. The decision is also consistent with the Strategic Plan’s focus on Organization Excellence. Specifically, the openness objective was accomplished by soliciting and considering public comments on the petition. It is expected that denying this petition will continue to maintain the NRC’s effectiveness objective because reverting to the 1997 release criteria as requested by the petitioner would place a significant regulatory burden on licensees with no commensurate benefit to public health and safety.

In conclusion, NRC finds that the arguments presented in PRM-35-18 do not support a rulemaking to revoke the patient release criteria in 10 CFR 35.75. Reverting to the 1997 patient release criteria would impose unnecessary regulatory burden and is not warranted for the protection of public health and safety. To address the petitioner’s concern for exposure to children and infants, NRC has prepared a RIS and additional guidance which will be issued to all NRC medical use licensees, and to the Agreement States, concurrent to the resolution of this petition.

For the reasons cited in this document, the NRC denies this petition for rulemaking.

Dated at Rockville, Maryland, this 7th day of May 2008.

For the Nuclear Regulatory Commission.

R.W. Borchardt,

Executive Director for Operations.

[FR Doc. E8-11344 Filed 5-20-08; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. AD08-8-000]

Demand Response in Organized Electric Markets

May 13, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Supplemental Notice of Technical Conference.

SUMMARY: The Commission is providing an agenda for the technical conference to be held in this proceeding on May 21, 2008, from 9 a.m. to 4:30 p.m. (EST), and detailed information regarding attendance, internet access, and transcripts. This conference will provide a forum to consider issues related to demand response in organized electric markets, as discussed in the Commission’s Notice of Proposed Rulemaking which was issued on March 8, 2008 in Commission Docket Nos. RM07-19-000 and AD07-7-000.

FOR FURTHER INFORMATION CONTACT: Ryan Irwin, Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-6454, Ryan.Irwin@ferc.gov.

Elizabeth Arnold, Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8818, Elizabeth.Arnold@ferc.gov.

On April 10, 2008, the Commission issued a Notice (April 10 Notice) scheduling a staff technical conference in the above-captioned proceeding. As stated in the April 10 Notice, the conference will provide a forum to consider issues related to demand response in organized electric markets, as discussed in the Notice of Proposed Rulemaking issued in Docket Nos. RM07-19-000 and AD07-7-000. *Wholesale Competition in Regions with Organized Electric Markets*, 73 FR 12,576 (Mar. 7, 2008), FERC Stats. & Regs. ¶ 32,682 at P 95 (2008) (Competition NOPR). The technical

conference will be held on May 21, 2008, from 9 a.m. to 4:30 p.m. (EST), in the Commission Meeting Room at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. The conference will be open for the public to attend and advance registration is not required. Members of the Commission may attend the conference.

The agenda for this conference is attached. If any changes occur, the revised agenda will be posted on the calendar page for this event on the Commission’s Web site, <http://www.ferc.gov>, prior to the event.

A free webcast of this event is available through <http://www.ferc.gov>. Anyone with internet access who desires to view this event can do so by navigating to the Calendar of Events at <http://www.ferc.gov> and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the free webcasts. It also offers access to this event via television in the Washington, DC area and via phone-bridge for a fee. If you have any questions, visit <http://www.CapitolConnection.org> or contact Danelle Perkowski or David Reininger at (703) 993-3100.

Transcripts of the conference will be available immediately for a fee from Ace Reporting Company (202-347-3700 or 1-800-336-6646). They will be available for free on the Commission’s eLibrary system and on the Calendar of Events approximately one week after the conference.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an e-mail to accessibility@ferc.gov or call toll free 1-866-208-3372 (voice) or 202-208-1659 (TTY), or send a FAX to 202-208-2106 with the required accommodations.

For more information about this conference, please contact:

Ryan Irwin, Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-6454, Ryan.Irwin@ferc.gov.

Elizabeth Arnold, Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC

20426, (202) 502-8818,
Elizabeth.Arnold@ferc.gov.

Kimberly D. Bose,
Secretary.

Demand Response in Organized Electric Markets Technical Conference

May 21, 2008

Agenda

9 a.m. Welcoming Remarks

9:20 Presentation by the Honorable
Marsha Smith

Commissioner, Idaho Public Utilities
Commission and President,
National Association of Regulatory
Utility Commissioners (NARUC), on
behalf of NARUC.

9:45 Panel 1—Value of and
Appropriate Compensation for
Demand Response in Organized
Electric Markets

This panel explores the value of
demand response in organized
electric markets and appropriate
compensation for demand response
under currently approved tariffs. In
particular, this panel addresses the
issue of ensuring that demand
response resources are
appropriately compensated in a
manner that is comparable to other
resources. The panel will examine
whether demand response
resources are appropriately valued
for the benefit that they bring.

- Eric Woychik, Vice President,
Regulatory Affairs, Comverge, Inc.
- Daniel Violette, Principal, Summit
Blue Consulting.
- James Eber, Director—Demand
Response and Dynamic Pricing,
Commonwealth Edison Company.
- Lawrence Stalica, Vice President,
Linde Energy Services, Inc.
- David Brewster, President,
EnerNOC, Inc.
- Robert Borlick, Energy Consultant,
Borlick Associates.
- David LaPlante, Vice President,
Wholesale Markets Strategy, ISO
New England Inc.
- Paul Peterson, Senior Associate,
Synapse Energy Economics, Inc.

11:45 Lunch

1:15 Panel 2—Demand Response in
Organized Markets—Barriers to
Comparable Treatment and
Solutions to Eliminate Potential
Barriers: ISO New England, NYISO
and PJM

This session addresses barriers to
comparable treatment for demand
response in the organized markets
in ISO New England Inc., New York
Independent System Operator, Inc.
(NYISO) and PJM Interconnection,
L.L.C. (PJM) and explores specific

solutions for dealing with these
barriers. Panelists are encouraged to
address barriers to comparable
treatment for demand response
beyond those already identified in
the Competition NOPR.

- The Honorable Anne George,
Commissioner, Connecticut
Department of Public Utility
Control; Chair, NARUC Committee
on Electricity and Co-Chair of
NARUC-FERC Demand Response
Collaborative.
- Andrew Ott, Senior Vice
President—Markets, PJM
Interconnection, L.L.C.
- Henry Yoshimura, Manager,
Demand Response, ISO New
England Inc.
- Paul Tyno, Executive Vice
President of Program Development,
Energy Curtailment Specialists, Inc.
- Edward Tatum, Jr., Vice President,
RTO & Regulatory Affairs, Old
Dominion Electric Cooperative.
- Timothy Roughan, Director of
Distributed Resources, National
Grid USA.
- Sandra Levine, Senior Attorney,
Conservation Law Foundation.

2:45 Break

3 p.m. Panel 3—Demand Response in
Organized Markets—Barriers to
Comparable Treatment and
Solutions to Eliminate Potential
Barriers: CAISO, Midwest ISO, and
SPP

This session addresses barriers to
comparable treatment for demand
response in the organized markets
in California Independent System
Operator Corporation (CAISO),
Midwest Independent Transmission
System Operator, Inc. (Midwest
ISO), and Southwest Power Pool,
Inc. (SPP) and explores specific
solutions for dealing with these
barriers. Panelists are encouraged to
address barriers to comparable
treatment for demand response
beyond those already identified in
the Competition NOPR.

- Dennis Derricks, Director, Electric
Regulatory Policy, Integrys Energy
Group Inc.
- DeWayne Todd, Power Manager,
Alcoa.
- Michael Robinson, Senior Manager
of Market Design, Midwest
Independent Transmission System
Operator, Inc.
- Jason Salmi Klotz, Senior Analyst,
Energy Division, California Public
Utilities Commission.
- Joyce Reives, Director, DPL Energy
Resources Inc.
- H. Walter Johnson, Principal,
Technology Strategies, California
Independent System Operator

Corporation.

- J. Craig Baker, Senior Vice
President, Regulatory Services,
American Electric Power.

4:30 Concluding Remarks

[FR Doc. E8-11314 Filed 5-20-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 385

[Docket No. RM08-8-000]

Ex Parte Contacts and Separation of Functions

Issued May 15, 2008.

AGENCY: Federal Energy Regulatory
Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing
to revise its regulations to clarify its
rules governing ex parte contacts and
separation of functions as they apply to
proceedings arising out of investigations
initiated under Part 1b of the
Commission's regulations. This
proposal is intended to provide clearer
guidance to both Commission litigation
staff and persons outside the
Commission in determining whether
they may properly contact decisional
employees once the Commission has
established further proceedings on
matters that had been investigated
under Part 1b. The Commission also is
proposing to clarify its regulations
governing intervention to specify that
intervention is not permitted as a matter
of right in proceedings arising from Part
1b investigations.

DATES: Comments are due July 21, 2008.

ADDRESSES: You may submit comments,
identified by docket number by any of
the following methods:

- *Agency Web Site:* <http://ferc.gov>.

Documents created electronically using
word processing software should be
filed in native applications or print-to-
PDF format and not in a scanned format.

- *Mail/Hand Delivery:* Commenters
unable to file comments electronically
must mail or hand deliver an original
and 14 copies of their comments to:
Federal Energy Regulatory Commission,
Secretary of the Commission, 888 First
Street, NE., Washington, DC 20426.

Instructions: For detailed instructions
on submitting comments and additional
information on the rulemaking process,
see the Comment Procedures Section of
this document.

FOR FURTHER INFORMATION CONTACT:
Wilbur Miller, 888 First Street, NE.,

Washington, DC 20426, (202) 502-8953, wtmiller@ferc.gov.

SUPPLEMENTARY INFORMATION:

Notice of Proposed Rulemaking

Issued May 15, 2008.

I. Background

1. The Commission is seeking comment on a proposal to revise its regulations to clarify the application of its rules governing off-the-record (or ex parte) communications and separation of functions as they apply to proceedings arising out of investigations under 18 CFR Part 1b. The Commission has become aware of some uncertainty regarding the situations in which persons outside the Commission and Commission litigation staff may contact decisional employees of the Commission once it establishes a proceeding governed by 18 CFR Part 385 in a matter that has been under investigation pursuant to Part 1b. These proposed revisions are intended to clarify the applicable rules, place respondents and litigation staff on similar footing, and continue to ensure the integrity of Commission proceedings. Finally, the Commission is proposing to clarify its regulations governing interventions to specify that intervention is not permitted as a matter of right in proceedings arising from investigations under Part 1b.

II. Discussion

A. Separation of Functions and Off-the-Record Communications

2. The Commission's regulations governing off-the-record communications (Rule 2201),¹ or ex parte contacts, and separation of functions (Rule 2202)² serve related purposes. Both seek to protect due process rights and ensure the integrity of litigated proceedings by limiting off-the-record contacts between persons involved in litigating a matter and decisional employees of the Commission.³ Decisional employees are defined to include Commissioners and their staffs, Administrative Law Judges (ALJs), and other Commission employees and contractors who may reasonably be expected to be involved in the decisional process of a

proceeding.⁴ Rule 2201 prohibits off-the-record communications by persons outside the Commission, made in connection with specified proceedings, with decisional employees. Rule 2202 prohibits litigation staff from advising on or participating in the findings, conclusions or decisions of adjudications.⁵

3. Rules 2201 and 2202 have important implications for investigations conducted under Part 1b. Generally speaking, Part 1b investigations are carried out by staff from the Office of Enforcement and are non-public. By regulation, information obtained by staff during the course of a Part 1b investigation is considered non-public until such time as the Commission determines disclosure is appropriate, or until disclosure occurs during an adjudicatory proceeding or pursuant to the Freedom of Information Act.⁶ Part 1b investigations therefore differ from other types of investigations carried out by the Commission, such as investigations into the justness and reasonableness of the rates in a particular market. Investigations that are not carried out under Part 1b generally are announced publicly, and include public comment and the maintenance of a public record in the same manner as adjudicatory proceedings.⁷

4. During an investigation under Part 1b, the assigned employees gather information and examine the actions of regulated companies and market participants. The matters raised may not necessarily result in a proceeding governed by Part 385. For example, staff may close an investigation after concluding that no violation occurred, or the investigation may be closed for other reasons without sanctions being imposed. In other cases, the investigation may result in a settlement including payment of a civil penalty. There are no parties and no right to intervene in a Part 1b investigation and, as explained below, the ex parte and separation of functions rules do not apply. In some cases, staff may recommend that the Commission initiate further proceedings. If the Commission initiates a proceeding governed by Part 385, such as an order to show cause, an investigator may be

assigned to litigate the matter, which brings Rules 2201 and 2202 into play.⁸

1. Separation of Functions

5. Rule 2202 prohibits litigation staff from advising in the outcome of "any proceeding in which a Commission adjudication is made after hearing." The Commission discussed the scope of this prohibition at length in the *Policy Statement*, specifically addressing its application in the context of investigations. The Commission noted that it has generally interpreted Rule 2202 as applying where a matter has been "set for a trial-type evidentiary hearing."⁹ It did not at that time address the application of Rule 2202 to other types of proceedings, such as "paper hearings" in which the Commission determines matters based on written submissions.

6. The Commission addressed the application of Rule 2202 to investigations in *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 (2007) (ETP).¹⁰ In ETP, the Commission stated:

To provide additional due process in all future civil penalty cases under the FPA, NGPA, and NGA, at the time the Office of Enforcement investigative staff completes its investigation, it will transmit to the Commission a report with recommended findings and conclusions of fact and law and the Commission will attach the report to a show cause order to respond to the recommended findings. The Commission will not make any findings, preliminary or otherwise, at least until it has considered the response. In addition, at the point Office of Enforcement investigative staff submits a report to the Commission, designated Office of Enforcement investigative staff will become non-decisional employees for purposes of participating in the remainder of that enforcement proceeding, including any hearing or other procedures used by the Commission to resolve the proceeding.¹¹

The Commission thus expressed its intention to provide greater due process in investigations than is currently required by Rule 2202 by invoking the separation of functions prohibitions sooner than would otherwise be the case.¹² Otherwise, Rule 2202 could be interpreted as applying only when and if the Commission ordered a trial-type evidentiary hearing.

7. In this proceeding, we propose to revise Rule 2202 to bring it in line with the procedures adopted in ETP, with

⁴ Rule 2201(c)(3). Litigation staff, settlement judges, neutrals and employees designated as non-decisional are excluded.

⁵ Although the coverage of Rules 2201 and 2202 is not identical—off-the-record communications compared to advising on decisions—in practice the coverage normally overlaps.

⁶ 18 CFR 1b.9 (2008); see 5 U.S.C. 552 (Freedom of Information Act).

⁷ E.g., *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 FERC ¶ 61,220 (2001).

⁸ *Policy Statement*, at P 24–26.

⁹ *Id.*, at P 12.

¹⁰ See also *Amaranth Advisors, LLC*, 122 FERC ¶ 61,087 (2008).

¹¹ ETP, 121 FERC ¶ 61,282, at P 89 (2007) (footnote omitted).

¹² The Commission explained that it was exercising its discretion to extend procedural protections beyond the requirements of the regulations. *Id.* at P 88.

¹ Rule 2201 of the Commission's Rules of Practice and Procedure, 18 CFR 385.2201 (2008).

² Rule 2202 of the Commission's Rules of Practice and Procedure, 18 CFR 385.2202 (2008).

³ The Commission examined the purposes and operation of Rules 2201 and 2202 in detail in *Statement of Administrative Policy on Separations of Functions*, 101 FERC ¶ 61,340 (2002) (*Policy Statement*).

one alteration. Rule 2202 would specifically state that separation of functions restrictions begin to apply once the Commission issues a show cause order in an investigation under Part 1b of the Commission's regulations. The ETP order refers to the submission of staff's report, rather than a subsequent show cause order, as the "start time" for application of the separation of functions. Upon further consideration, however, we believe that the initiation of a proceeding under Part 385 would be a more practical triggering event. In the context of a Part 1b investigation, it is the issuance of a show cause order or the initiation of a civil action that commences a proceeding, making it the most logical and clearly delineated event to begin application of the rules limiting contacts with Commissioners and decisional staff. This approach is similar to that employed by other agencies.¹³ It also provides a clear demarcation point, which should be helpful to both Commission staff and outside parties as they endeavor to remain in compliance with the rules.

8. Once a proceeding governed by Part 385 or a civil action is initiated, the Commission will designate which of the employees within the Office of Enforcement will be considered decisional for purposes of the relevant proceeding. All other Office of Enforcement employees will be non-decisional. If employees from other Commission offices are participating as part of the investigative staff after the proceeding governed by Part 385 is initiated, those employees will be designated as non-decisional at this time. The restrictions will continue to apply regardless of whether the Commission sets the matter for trial-type evidentiary hearing or some other procedure, such as a paper hearing. The Commission invites comment on this proposal.

2. Off-the-Record Communications

9. The Commission's rule governing off-the-record, or *ex parte*, communications, Rule 2201,¹⁴ is similar in purpose, scope and operation to Rule

2202. Rule 2201 regulates contacts between persons outside the Commission and the Commission's decisional employees, while Rule 2202 regulates contacts between decisional and non-decisional employees.¹⁵ With respect to scope, Rule 2201 applies to any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issues, any proceeding initiated pursuant to rule 206 by the filing of a complaint with the Commission, or any proceeding initiated by the commission on its own motion or in response to a filing.¹⁶

The rule explicitly excludes rulemakings, investigations under Part 1b, proceedings without a party and proceedings in which no party disputes a material issue.¹⁷ As a result, the restrictions on *ex parte* contacts do not apply while a Part 1b investigation is underway. They come into play only when the Commission initiates a proceeding.

10. The Commission understands that the application of Rule 2201 to investigations has been the source of some uncertainty within the regulated community. For example, in connection with a Conference on Enforcement Policy held on November 16, 2007, the National Rural Electric Cooperative Association (NRECA) asked the Commission to clarify several points:

- That a Part 1b investigation is not a "proceeding" to which the *ex parte* rules apply unless and until it is set for hearing.
- That communications between persons outside the Commission and Commissioners or decisional staff during investigations are not limited to situations covered in 18 CFR 1b.19, which allows investigative personnel to invite the subject of a Part 1b investigation to make a submission to the Commission in response to an expected recommendation that the Commission initiate civil action.
- That the subject of a Part 1b investigation would not be acting inappropriately by contacting a Commissioner where the subject thought it was being treated unfairly or had a question that only the Commission could address.

11. As noted above, a Part 1b investigation is expressly excluded from the coverage of Rule 2201. Consequently, the subject of such an investigation could, without acting contrary to Rule 2201, contact a Commissioner while an investigation

was pending but before the Commission initiated a proceeding based on the investigative staff's report.

Concurrently with the issuance of this notice of proposed rulemaking, however, we are announcing¹⁸ a policy to govern contacts by persons outside the Commission with Commissioners and their staffs. In the Revised Policy Statement on Enforcement, we institute a policy under which the subject of a Part 1b investigation may not communicate with Commissioners or their personal staffs about the investigation in person or by telephone. Instead, such communications must be written.¹⁹ The subject may still speak to decisional staff other than Commissioners and their personal staffs about an investigation, and may speak to Commissioners and their personal staffs about subjects other than the investigation as otherwise permitted by the Commission's regulations. If and when the Commission issues a show cause order instituting enforcement proceedings, off-the-record communications of any sort would be prohibited by Rule 2201. To summarize, we are not proposing to revise Rule 2201 to prohibit off-the-record communications concerning Part 1b investigations between persons outside the Commission and Commissioners or decisional employees. We are, however, establishing a policy under which Commissioners and their personal staffs will accept only written communications during the pendency of such investigations.

12. With respect to NRECA's remaining question on contacting the Commission, section 1b.19²⁰ is not the sole avenue open to the subject of an investigation. Furthermore, the answer to this question remains the same in light of the final rule we are issuing today to clarify section 1b.19.²¹ Under both current practice and the revised section 1b.19 that we announce today, Office of Enforcement staff will notify the subject of an investigation, except in extraordinary cases,²² of its intention to recommend that the Commission initiate enforcement proceedings. The revised section 1b.19 provides that, where staff gives such notification, the subject may submit a response within

¹³ For example, the Securities and Exchange Commission's rules on contacts between litigants and decisional staff begin to apply at the time a proceeding is commenced. Depending on the type of proceeding, initiation of the proceeding generally occurs through various types of filings or through issuance of an order commencing proceedings. 17 CFR 200.111(c) (2008). The Federal Trade Commission follows the same approach, 16 CFR 4.7(e) (2008), and specifically excludes investigations that have not reached the adjudicative stage, 16 CFR 4.7(f).

¹⁴ Rule 2201 of the Commission's Rules of Practice and Procedure, 18 CFR 385.2201 (2008).

¹⁵ See *Policy Statement*, 101 FERC ¶ 61,340, at P 7.

¹⁶ Rule 2201(c)(1)(i), 18 CFR 385.2201(c)(1)(i).

¹⁷ Rule 2201(c)(1)(ii), 18 CFR 385.2201(c)(1)(ii).

¹⁸ Revised Policy on Enforcement, Docket No. PL08-3-000.

¹⁹ See 18 CFR 1b.18 (2008).

²⁰ 18 CFR 1b.19 (2008).

²¹ *Submissions to the Commission upon Staff Intention to Seek and Order to Show Cause*, Docket No. RM08-10-000.

²² An example of such an extraordinary circumstance would be the need to seek an injunction to prevent immediate and irreparable harm.

30 days. Nothing in the former or revised version of this provision prohibits other contacts between the subject of an investigation and the Commissioners or decisional employees, nor does it act to override the explicit exclusion of Part 1b investigations from Rule 2201. Communications during a Part 1b investigation would, however, be subject to the policy we are announcing today, as explained above and set forth in the Revised Policy on Enforcement.

13. In view of the revision that this proposed rule would make to the separation of functions provision, there would be an inconsistency between Rules 2201 and 2202 in the context of a Part 1b investigation. The proposed change to Rule 2202 would provide that the separation of functions restrictions apply when the Commission initiates a proceeding under Part 385 through an order to show cause. This proposed rulemaking would include a parallel change to Rule 2201 to ensure similar treatment of investigative staff and respondents to a proceeding. The Commission seeks comment on this proposed revision to Rule 2201.

B. Intervention

14. The Commission in *ETP* also addressed the question of intervention in enforcement proceedings arising from Part 1b investigations. Without categorically stating that intervention in an enforcement proceeding is impermissible, the Commission stated that, “[a]s a general proposition,” intervention should not be allowed. An enforcement proceeding necessarily focuses on the conduct and culpability of the subject party and does not directly implicate the rights of third parties in the same manner as, for example, a rate proceeding. Intervention by third parties thus could delay or complicate an enforcement proceeding and sidetrack it from its purpose. The Commission did note, however, that intervention might be appropriate once the enforcement proceeding had reached the stage of determining a sanction. This might, for instance, allow third parties to participate in determinations that might directly affect them, such as the allocation of disgorged profits.²³

15. The Commission’s rules currently provide that intervention is not appropriate in Part 1b investigations. Part 1b specifically states, “There are no

parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part.”²⁴ This provision, however, does not specifically refer to enforcement proceedings arising out of a Part 1b investigation and does not distinguish between such proceedings and the investigations themselves. Because Rule 214,²⁵ which governs interventions, makes no specific reference to proceedings arising from Part 1b investigations, the current rules may be read to allow intervention in such proceedings on the same basis as any other Commission adjudication. The more sensible view is that, once an enforcement proceeding is established, intervention should not be available except under limited circumstances.

16. The Commission proposes to revise Rule 214 to state specifically that intervention is not permitted as a matter of right in enforcement proceedings arising from Part 1b investigations. This would leave open the possibility that intervention in an enforcement proceeding might be appropriate in some circumstances, such as where a third party wished to determine the impact of a sanction or other resolution upon its own interests. The Commission seeks comment on this proposal.

17. It should be noted that different considerations may govern intervention issues in proceedings arising from Part 1b investigations. The Commission has, for example, been less reluctant to permit intervention in proceedings involving reliability penalties.²⁶ Another situation that differs from the “classic” Part 1b investigation can arise where an entity files a complaint. The Commission may conduct a complaint proceeding while at the same time ordering a Part 1b investigation. In such situations, the Commission has allowed intervention more readily in the complaint proceeding, although intervention would not be proper in the Part 1b investigation.²⁷ This proposed revision is not intended to restrict the Commission’s ability to determine the appropriateness of intervention in individual cases.

²⁴ 18 CFR 1b.11 (2008).

²⁵ Rule 214 of the Commission’s Rules of Practice and Procedure, 18 CFR 385.214 (2008).

²⁶ See, e.g., *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 509, *order on reh’g*, Order No. 672–A, FERC Stats. & Regs. ¶ 31,212 (2006).

²⁷ E.g., *New York Independent System Operator, Inc.*, 120 FERC ¶ 61,024 (2007).

III. Information Collection Statement

18. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.²⁸ This proposed rulemaking does not contain any information collection requirements and compliance with the OMB regulations is thus not required.

IV. Environmental Analysis

19. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.²⁹ Issuance of the revisions proposed in this Notice of Proposed Rulemaking will not represent a major federal action having a significant adverse effect on the quality of the human environment under the Commission’s regulations implementing the National Environmental Policy Act of 1969. Part 380 of the Commission’s regulations lists exemptions to the requirement to draft an Environmental Analysis or an Environmental Impact Statement. Included is an exemption for procedural, ministerial or internal administrative actions.³⁰ This proposed rulemaking is exempt under that provision.

V. Regulatory Flexibility Act Certification

20. The Regulatory Flexibility Act of 1980 (RFA)³¹ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. This proposed rulemaking concerns procedural matters and is primarily intended to clarify existing regulations. The Commission certifies that it will not have a significant economic impact upon participants in Commission proceedings. An analysis under the RFA is not required.

VI. Comment Procedures

21. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due July 21, 2008. Comments must refer to Docket No. RM08–8–000, and must include the commenter’s name, the organization

²⁸ 5 CFR 1320.12 (2008).

²⁹ Order No. 486, *Regulations Implementing the National Environmental Policy Act*, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (1987).

³⁰ 18 CFR 380.4(1) and (5) (2008).

³¹ 5 U.S.C. 601–612.

²³ *ETP*, 121 FERC ¶ 61,282, at P 19 & n.28; see *Williams Gas Pipelines Central, Inc.*, 94 FERC ¶ 61,285 (2001) (allowing intervention in enforcement proceeding where state public service commission sought to clarify impact of settlement on state interests).

they represent, if applicable, and their address in their comments.

22. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

23. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

24. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

25. 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.

26. 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.

27. 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.

List of Subjects in 18 CFR part 385

Administrative practice and procedure, Electric utilities, Penalties, Pipelines, Reporting and recordkeeping requirements.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Part 385, Chapter I, Title 18, *Code of Federal Regulations*, as follows.

PART 385—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 385 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 791a–825v, 2601–2645; 28 U.S.C. 2461; 31 U.S.C. 3701, 9701; 42 U.S.C. 7101–7352, 16441, 16451–16463; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

2. Amend § 385.214 by adding new paragraph (a)(4) to read as follows:

§ 385.214 Intervention (Rule 214).

(a) * * *

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

3. Amend section 385.2201 by revising paragraph (c)(1) to read as follows:

§ 385.2201 Rules governing off-the-record communications (Rule 2201).

* * * * *

(c) * * *

(1) *Contested on-the-record proceeding* means

(i) Except as provided in paragraph (c)(1)(ii), any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated pursuant to rule 206 by the filing of a complaint with the Commission, any proceeding initiated by the Commission on its own motion or in response to a filing, or any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter.

(ii) The term does not include notice-and-comment rulemakings under 5 U.S.C. 553, investigations under part 1b of this chapter, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue.

* * * * *

4. Amend section 385.2202 by revising it to read as follows:

§ 385.2202 Separation of functions (Rule 2202).

In any proceeding in which a Commission adjudication is made after

hearing, or in any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.

[FR Doc. E8–11326 Filed 5–20–08; 8:45 am]

BILLING CODE 6717–01–P

POSTAL SERVICE

39 CFR Part 111

Mailing Requirement Changes for Parcel Select

AGENCY: Postal Service™.

ACTION: Proposed rule.

SUMMARY: This proposal would revise *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®) to reflect changes to the mailing requirements of our Shipping Services product, Parcel Select®, by requiring new markings on BMC-Presort or OBMC-Presort (Inter-BMC), and origin-entered Barcoded Intra-BMC and Barcoded Inter-BMC packages.

DATES: We must receive your comments on or before June 20, 2008.

ADDRESSES: Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza, SW., Room 3436, Washington, DC 20260–3436. You may inspect and photocopy all written comments at USPS Headquarters Library, 475 L'Enfant Plaza, SW., 11th Floor N, Washington, DC between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Bert Olsen at 202–268–7276.

SUPPLEMENTARY INFORMATION: Parcel Select has been redefined as a Shipping Services product using permit imprint or metered postage when mailing 50 pieces or more. In addition to destination-entered packages, Parcel Select will include BMC-Presort or OBMC-Presort (Inter-BMC), and origin-entered Barcoded Intra-BMC and Barcoded Inter-BMC packages. To support the expanded product make-up and the separation of Parcel Select from Parcel Post®, effective September 30, 2008, the “Parcel Post” marking will not be allowed on any Parcel Select package. We encourage shippers to begin using the following markings as

soon as possible, but no later than September 30, 2008:

- Destination Entry—"Parcel Select."
- BMC—"Parcel Select BMC Presort" or "Parcel Select BMC PRSRT"
- OBMC Presort (Inter-BMC)—"Parcel Select OBMC Presort" or "Parcel Select OBMC PRSRT".
- Barcoded Intra-BMC and Barcoded Inter-BMC—"Parcel Select Barcoded" or "Parcel Select BC".

Although we are exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C. of 553(b), (c)] regarding proposed rulemaking by 39 U.S.C. 410(a), we invite public comments on the following proposed revisions 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 proposed to be 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:

* * * * *

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

400 Commercial Parcels

* * * * *

402 Elements on the Face of a Mailpiece

2.0 Placement and Content Markings

* * * * *

2.2 Parcel Select, Bound Printed Matter, Media Mail, and Library Mail Markings

2.2.1 Basic Markings

[Revise the text of 2.2.1 as follows:]

* * * * *

The basic required marking (see 2.2.2) must be printed on each piece claimed at the respective price. The basic required marking must be placed in the postage area (i.e., printed or produced as part of, or directly below or to the left

of, the permit imprint indicia or meter stamp or impression). Optionally, the basic required marking may be printed on the shipping address label as service indicators composed of a service icon and service banner (see *Exhibit 2.2.1*):

a. The service icon that identifies the marking will be a 1-inch solid black square. If the service icon is used, it must appear in the upper left corner of the shipping label.

b. The service banner must appear directly below the postage payment area and the service icon, and it must extend across the shipping label. If the service banner is used, the appropriate subclass marking (e.g., "PARCEL SELECT", "MEDIA MAIL") must be preceded by the text "USPS" and must be printed in minimum 20-point bold sans serif typeface, uppercase letters, centered within the banner, and bordered above and below by minimum 1-point separator lines. There must be a 1/16-inch clearance above and below the text.

[Revise the heading of *Exhibit 2.2.1* from *Package Services Indicator Examples* to "Marking Indicator Examples" as follows:]

Exhibit 2.2.1 Marking Indicator Examples

[Revise *Exhibit 2.2.1* by replacing "USPS PARCEL POST" with "USPS PARCEL SELECT".]

[Delete 2.2.2 and renumber current 2.2.3 through 2.2.6 as 2.2.2 through 2.2.5 and revise the heading of new 2.2.2 as follows:]

2.2.2 Parcel Select Markings

[Revise the text in 2.2.2 as follows:]

Each piece in a Parcel Select mailing must bear a price marking. Markings must appear in either the postage area described in 2.2.1 or in the address area on the line directly above or two lines above the address if the marking appears alone (i.e., if no other information appears on that line). One of the following product markings will be required:

- a. Destination Entry—"Parcel Select".
- b. BMC—"Parcel Select BMC Presort" or "Parcel Select BMC PRSRT".
- c. OBMC Presort (Inter-BMC)—"Parcel Select OBMC Presort" or "Parcel Select OBMC PRSRT".
- d. Barcoded Intra-BMC and Barcoded Inter-BMC—"Parcel Select Barcoded" or "Parcel Select BC".

* * * * *

Neva R. Watson,

Attorney, Legislative.

[FR Doc. E8–11210 Filed 5–20–08; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–1170; FRL–8362–1]

Benfluralin, Carbaryl, Diazinon, Dicrotophos, Fluometuron, Formetanate Hydrochloride, Glyphosate, Metolachlor, Napropamide, Norflurazon, Pyrazon, and Tau-Fluvalinate; Proposed Tolerance Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to revoke certain tolerances for the herbicides benfluralin and napropamide and the insecticides carbaryl and diazinon. Also, EPA is proposing to modify certain tolerances for the herbicides fluometuron, glyphosate, norflurazon, and pyrazon and the insecticides carbaryl, diazinon, dicrotophos, formetanate hydrochloride, and tau-fluvalinate. In addition, EPA is proposing to establish new tolerances for the herbicides fluometuron, glyphosate, metolachlor, and pyrazon and the insecticides carbaryl and formetanate hydrochloride. The regulatory actions proposed in this document are in follow-up to the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and tolerance reassessment program under the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(q).

DATES: Comments must be received on or before July 21, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–1170, 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.

Instructions: Direct your comments to docket ID number EPA-HQ-OPP-2007-1170. 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](http://www.regulations.gov) or e-mail. The [regulations.gov](http://www.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](http://www.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](http://www.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](http://www.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, 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 Dr., 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 Facility telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT: Jane Smith, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave, NW., Washington, DC 20460-0001; telephone number: (703) 308-0048; e-mail address: smith.jane-scott@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 applicability provisions in Unit II.A. 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](http://www.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.

C. What Can I do if I Wish the Agency to Maintain a Tolerance that the Agency Proposes to Revoke?

This proposed rule provides a comment period of 60 days for any person to state an interest in retaining a tolerance proposed for revocation. If EPA receives a comment within the 60-day period to that effect, EPA will not proceed to revoke the tolerance immediately. However, EPA will take steps to ensure the submission of any needed supporting data and will issue an order in the **Federal Register** under FFDCA section 408(f), if needed. The order would specify data needed and the timeframes for its submission, and would require that within 90 days some person or persons notify EPA that they will submit the data. If the data are not submitted as required in the order, EPA will take appropriate action under FFDCA.

EPA issues a final rule after considering comments that are submitted in response to this proposed rule. In addition to submitting comments in response to this proposal, you may also submit an objection at the time of the final rule. If you fail to file an objection to the final rule within the time period specified, you will have waived the right to raise any issues resolved in the final rule. After the specified time, issues resolved in the

final rule cannot be raised again in any subsequent proceedings.

II. Background

A. What Action is the Agency Taking?

EPA is proposing to revoke, modify, and establish specific tolerances for residues of the herbicides benfluralin, fluometuron, glyphosate, metolachlor, napropamide, norflurazon, and pyrazon; and the insecticides carbaryl, diazinon, dicotophos, formetanate hydrochloride, and tau-fluvalinate in or on commodities listed in the regulatory text.

EPA is proposing these tolerance actions to implement the tolerance recommendations made during the reregistration and tolerance reassessment processes (including follow-up on canceled or additional uses of pesticides). As part of these processes, EPA is required to determine whether each of the amended tolerances meets the safety standard of FFDCA. The safety finding determination of "reasonable certainty of no harm" is discussed in detail in each Reregistration Eligibility Decision (RED) and Report of the Food Quality Protection Act (FQPA) Tolerance Reassessment Progress and Risk Management Decision (TRED) for the active ingredient. REDs and TREDs recommend the implementation of certain tolerance actions, including modifications to reflect current use patterns, meet safety findings, and change commodity names and groupings in accordance with new EPA policy. Printed copies of many REDs and TREDs may be obtained from EPA's National Service Center for Environmental Publications (EPA/NSCEP), P.O. Box 42419, Cincinnati, OH 45242-2419, telephone number: 1-800-490-9198; fax number: 1-513-489-8695; Internet at <http://www.epa.gov/ncepihom> and from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161, telephone number: 1-800-553-6847 or (703) 605-6000; Internet at <http://www.ntis.gov>. Electronic copies of REDs and TREDs are available on the Internet <http://www.epa.gov/pesticides/reregistration/status.htm> for benfluralin, carbaryl, diazinon, dicotophos, fluometuron, formetanate hydrochloride, glyphosate, metolachlor, napropamide, norflurazon, pyrazon, and tau-fluvalinate.

The selection of an individual tolerance level is based on crop field residue studies designed to produce the maximum residues under the existing or proposed product label. Generally, the level selected for a tolerance is a value

slightly above the maximum residue found in such studies, provided that the tolerance is safe. The evaluation of whether a tolerance is safe is a separate inquiry. EPA recommends the raising of a tolerance when data show that:

1. Lawful use (sometimes through a label change) may result in a higher residue level on the commodity.
 2. The tolerance remains safe, notwithstanding increased residue level allowed under the tolerance.
- In REDs, Chapter IV on "Risk management, Reregistration, and Tolerance reassessment" typically describes the regulatory position, FQPA assessment, cumulative safety determination, determination of safety for U.S. general population, and safety for infants and children. In particular, the human health risk assessment document which supports the RED describes risk exposure estimates and whether the Agency has concerns. In TREDs, the Agency discusses its evaluation of the dietary risk associated with the active ingredient and whether it can determine that there is a reasonable certainty (with appropriate mitigation) that no harm to any population subgroup will result from aggregate exposure. EPA also seeks to harmonize tolerances with international standards set by the Codex Alimentarius Commission, as described in Unit III.

Explanations for proposed modifications in tolerances can be found in the RED and TRED document and in more detail in the Residue Chemistry Chapter document which supports the RED and TRED. Copies of the Residue Chemistry Chapter documents are found in the Administrative Record electronically. Electronic copies are available through EPA's electronic public docket and comment system, [regulations.gov](http://www.regulations.gov) at <http://www.regulations.gov>. You may search for docket ID number EPA-HQ-OPP-2007-1170 and/or Benfluralin (EPA-HQ-OPP-2004-0210), Fluometuron (EPA-HQ-OPP-2004-0372), Formetanate Hydrochloride (EPA-HQ-OPP-2004-0032), Metolachlor (EPA-HQ-OPP-2007-0045), Napropamide (EPA-HQ-OPP-2004-0162), Pyrazon (EPA-HQ-OPP-2004-0381), and Tau-Fluvalinate (EPA-HQ-OPP-2005-0230) then click on that docket ID number to view its contents.

EPA has determined that the aggregate exposures and risks are not of concern for the pesticide active ingredients mentioned in this unit based upon the data identified in the RED or TRED which lists the submitted studies that the Agency found acceptable.

EPA has found that the tolerances that are proposed in this document to be

modified, are safe; i.e., that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residues, in accordance with FFDCA section 408(b)(2)(C). (Note that changes to tolerance nomenclature do not constitute modifications of tolerances). These findings are discussed in detail in each RED or TRED. The references are available for inspection as described in this document under **SUPPLEMENTARY INFORMATION**.

In addition, EPA is proposing to revoke certain specific tolerances because either they are no longer needed or are associated with food uses that are no longer registered under FIFRA. Those instances where registrations were canceled were because the registrant failed to pay the required maintenance fee and/or the registrant voluntarily requested cancellation of one or more registered uses of the pesticide. It is EPA's general practice to propose revocation of those tolerances for residues of pesticide active ingredients on crop uses for which there are no active registrations under FIFRA, unless any person in comments on the proposal indicates a need for the tolerance to cover residues in or on imported commodities or legally treated domestic commodities.

1. *Benfluralin*. The use of benfluralin on peanuts was voluntarily canceled on June 25, 2003 (68 FR 37811)(FRL-7312-5); therefore, the Agency has determined that the tolerance on peanuts should be revoked. The Agency is also revising commodity terminology to conform to current practice by removing the "N" for negligible residues associated with the tolerances and changing the heading in 40 CFR 180.208 to the common chemical name, benfluralin. Therefore, EPA proposes revoking the tolerance in 40 CFR 180.208(a) for residues of benfluralin (N-Butyl-N-ethyl- $\alpha\alpha\alpha$ -trifluoro-2,6-dinitro-p-toluidine) in/on peanuts at 0.05(N); deleting the "(N)" for all the tolerance entries; and changing the heading in 40 CFR 180.208 to benfluralin.

Currently, there are no Codex MRLs in place for benfluralin.

2. *Carbaryl*. Currently tolerances on raw agricultural food commodities are established for residues of carbaryl, including its hydrolysis product 1-naphthol calculated as 1-naphthyl N-methylcarbamate. The Agency has determined that the hydrolysis product, 1-naphthol calculated as 1-naphthyl N-methylcarbamate does not contribute significantly to the residues and has considerably less potential as a cholinesterase inhibitor; therefore, the

residue of concern for plants should be the parent compound, carbaryl, only. Additionally, the Agency determined that the regulated residues of concern in/on livestock (meat and milk) should be expanded to also include the free and conjugated residues of carbaryl: 5,6-dihydro-5,6-dihydroxy carbaryl, and 5-methoxy-6-hydroxy carbaryl. Consequently, 40 CFR 180.169(a)(3) and (a)(4) are not required. Therefore, EPA proposes revising the tolerance expressions for raw agricultural commodities in 40 CFR 180.169(a)(1) to regulate residues of the insecticide carbaryl (1-naphthyl N-methylcarbamate) and revising the tolerance expressions for livestock (meat and milk) in 40 CFR 180.169(a)(2) to regulate the residues of the insecticide carbaryl (1-naphthyl N-methylcarbamate) including its metabolites 1-naphthol (naphthyl-sulfate), 5,6-dihydrodihydroxycarbaryl and 5,6-dihydrodihydroxy naphthol, calculated as 1-naphthyl N-methylcarbamate and the free and conjugated residues of carbaryl: 5,6-dihydro-5,6-dihydroxy carbaryl, and 5-methoxy-6-hydroxy carbaryl; transferring the tolerances in 40 CFR 180.169(a)(3) to 40 CFR 180.169(a)(2); transferring tolerances in 40 CFR 180.169(a)(4) to 40 CFR 180.169(a)(1) and removing 40 CFR 180.169(a)(3) and (a)(4).

Based on the available field trial data and food processing that indicate residues of carbaryl are as high as 10.6 ppm in/on apple wet pomace (in which residues concentrate at 1.3x), 9.55 ppm in/on aspirated grain fractions (7.4x), 8.09 ppm in/on citrus oil (2.4x), 7.94 ppm in/on raisins (1.4x), and 11 ppm rice hulls (2.4x), the Agency has determined tolerances should be established in/on apple, wet pomace at 15 ppm; grain, aspirated fractions at 70 ppm; citrus, oil at 20 ppm; grape, raisin at 12 ppm; and rice, hulls at 30 ppm. Based on the available field trial data that indicate residues of carbaryl are as high as 0.5 ppm in/on sugar beet roots and 30 ppm in/on sorghum grain stover, the Agency determined that tolerances should be established for beet, sugar, roots at 0.5 ppm and sorghum, grain, stover at 30 ppm. Therefore, EPA proposes establishing tolerances in 40 CFR 180.169(a)(1) as proposed for carbaryl residues of concern in/on apple, wet pomace at 15 ppm; grain, aspirated fractions at 70 ppm; citrus, oil at 20 ppm; grape, raisin at 12 ppm; rice, hulls at 30 ppm; beet, sugar, roots at 0.5 ppm; and sorghum, grain, stover at 30 ppm.

The Agency has determined that many of the existing carbaryl tolerances

on individual commodities should be reassigned as crop group/subgroup tolerances because the Agency has the field trial residue data and/or tolerances in place for the representative commodities required to establish the corresponding crop group tolerances. Specifically, based on available field trial data that indicate residues of carbaryl do not exceed 0.1 ppm in/on almonds, chestnuts, hazelnuts, and pecans, the Agency determined that the tolerance should be decreased to 0.1 ppm in/on nut, tree group 14, except walnuts replacing the individual tolerances. Based on available field trial data that indicate residues of carbaryl do not exceed 2 ppm in/on the roots of garden beet, carrot, horseradish, parsnip, radish, rutabaga, and salsify, the Agency determined that the tolerance should be decreased to 2 ppm in/on vegetable, root and tuber, group 1, except sugar beet and sweet potato replacing the individual tolerances. Based on available field trial data that indicate residues of carbaryl do not exceed 3 ppm in/on blueberry, the Agency determined that tolerance should be decreased to 3 ppm in/on bushberry subgroup 13-07B replacing the individual tolerance. Based on available field trial data that indicate residues of carbaryl do not exceed 5 ppm in/on eggplant, tomatoes and peppers, the Agency determined that tolerance should be decreased to 5 ppm in/on vegetable, fruiting, group 8 replacing the individual tolerances. Therefore, EPA proposes decreasing and revising the individual tolerances to crop group tolerances in newly revised 40 CFR 180.169 (a)(1) for residues of the insecticide carbaryl in/on "almond, chestnut, hazelnut, and pecan from 1 ppm to nut, tree group 14, except walnut at 0.1 ppm"; "beet, garden, roots; carrot, roots; parsnip; radish; rutabaga; salsify, roots; and turnip, roots from 5 ppm, and horseradish from 10 ppm to vegetable, root and tuber, group 1, except sugar beet and sweet potato at 2 ppm;" blueberry from 10 ppm to bushberry subgroup 13-07B at 3 ppm; and eggplant, pepper, and tomato from 10 ppm to vegetable, fruiting, group 8 at 5 ppm.

Based on available field trial data that indicate residues of carbaryl do not exceed 1.0 ppm in/on bean, cowpea, and lentil seed; the Agency determined that the tolerance should be decreased to 1.0 ppm on pea and bean, dried shelled, except soybean, subgroup 6C replacing the individual tolerances. Based on available field trial data that indicated residues of carbaryl do not exceed 60 ppm in/on cowpea forage,

cowpea hay and field pea vines; the Agency determined the tolerance should be decreased to 60 ppm on vegetable, foliage of legume, group 7 replacing the individual tolerances. Based on available field trial data that indicate residues of carbaryl do not exceed 3 ppm in/on cucumber, melon, pumpkin, summer squash, and winter squash; the Agency determined that the tolerance should be decreased to 3 ppm on vegetable, cucurbit, group 9 replacing the individual tolerances. Based on available field trial data that indicate residues of carbaryl do not exceed 3 ppm in/on celery and Swiss chard; the Agency determined that the tolerance should be decreased to 3 ppm on leaf petioles subgroup 4B replacing the individual tolerances. Therefore, EPA proposes decreasing and revising tolerances in 180.169(a)(1) as proposed for carbaryl residues of concern in/on "bean and lentil, seed from 10 ppm and cowpea from 5 ppm to pea and bean, dried shelled, except soybean, subgroup 6C at 1.0 ppm;" cowpea, forage; cowpea, hay; and pea, field, vines from 100 ppm to vegetable, foliage of legume, group 7 at 60 ppm; cucumber; melon; pumpkin; squash, summer; and squash, winter from 10 ppm to vegetable, cucurbit, group 9 at 3 ppm; and celery from 10 ppm and Swiss chard from 12 ppm to leaf petioles subgroup 4B at 3 ppm.

Based on available field trial data that indicate residues of carbaryl as high as 75 ppm on the tops/greens of garden beets, salsify and turnips; the Agency determined that the tolerance should be increased to 75 ppm in/on vegetable, leaves of root and tuber, group 2, except sugar beet tops replacing the individual tolerances. Based on available field trial data that indicate residues of carbaryl as high as 2 ppm in/on on potatoes, the Agency has determined the tolerance should be increased to 2 ppm in/on vegetable, root and tuber, group 1, except sugar beet and sweet potato replacing the individual tolerance on potato. Therefore, EPA proposes increasing and revising the individual tolerances to crop group tolerances in 40 CFR 180.169 (a)(1) as proposed for carbaryl residues of concern in/on "beet, garden, tops and turnip, greens from 12 ppm and salsify, tops from 10 ppm to vegetable, leaves of root and tuber, group 2 except sugar beet tops at 75 ppm;" and "potato from 0.2(N) ppm to vegetable, root and tuber, group 1, except sugar beet and sweet potato at 2 ppm." The Agency determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on livestock feeding studies and estimating a maximum dietary burden, residues of carbaryl do not exceed 0.5 ppm in fat, 1 ppm in milk, 1 ppm in meat, and 3 ppm in meat byproducts of cattle, goats, hog, horses, and sheep, the Agency has determined the tolerances should be increased to 0.5 ppm in fat, 1 ppm in milk, 1 ppm in meat, and 3 ppm in meat byproducts of cattle, goats, hog, horses, and sheep. Because of the increased tolerances on livestock meat byproducts at 3 ppm cover livestock liver and kidney residues, separate tolerances for livestock liver and kidney at 1 ppm are no longer needed. Therefore, EPA proposes increasing and removing tolerances in 40 CFR 180.169(a)(2) as proposed for the combined carbaryl residues of concern in/on cattle, goat, hog, horse and sheep fat from 0.1 to 0.5 ppm; cattle, goat, hog, horse and sheep meat from 0.1 to 1.0 ppm; cattle, goat, hog, horse and sheep meat byproducts from 0.1 to 3.0 ppm; and milk from 0.3 to 1.0 ppm; and remove the tolerances in/on cattle, goat, swine, horse and sheep liver and kidney at 1 ppm. The Agency determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on available field trial residue data that indicate residues do not exceed 50 ppm in/on alfalfa, 75 ppm in/on alfalfa hay, 5 ppm in/on bananas, 25 ppm in/on sugar beet tops, 50 ppm in/on clover forage, 70 ppm in/on clover hay, 0.1 ppm in/on sweet corn including field and pop corn grains, 20 ppm in/on field corn stover, 20 ppm in/on pop corn stover, 30 ppm in/on field corn forage, 3 ppm in/on cranberry, 0.5 ppm in/on flax seed, 15 ppm in/on grass hay, 1 ppm in/on millet proso grain (translating from wheat grain), 20 ppm in/on millet proso straw (translating from wheat straw), 4 ppm in/on okra, 0.05 ppm in/on peanut, 20 ppm in/on peanut hay, 0.1 ppm in/on pistachio, 5 ppm in/on prickly pear cactus fruit, 60 ppm in/on rice straw, 30 ppm in/on sorghum grain forage, 0.5 ppm in/on soybeans, 15 ppm in/on soybean forage and hay, 4 ppm in/on strawberry, 0.5 ppm in/on sunflower seed, 15 ppm in/on trefoil forage, 25 ppm in/on trefoil hay, 1 ppm in/on wheat grain, 30 in/on wheat hay (which should include 30 ppm in/on wheat forage) and 20 ppm in/on wheat straw, the Agency determined that the tolerances should be decreased to these residue levels that are not exceeded for each of these commodities. Field trial residue data also indicates that separate tolerances

should be established for corn, field, grain at 0.02 ppm, corn, pop at 0.02 ppm, and wheat, forage at 30 ppm. The Agency is also revising commodity terminology to conform to current practice. Therefore, EPA proposes decreasing, establishing, and revising the tolerances in 40 CFR 180.169(a)(1) as proposed for carbaryl residues of concern in/on alfalfa from 100 to 50 ppm; alfalfa, hay from 100 to 75 ppm; banana from 10 to 5 ppm; beet, sugar, tops from 100 to 25 ppm; clover from 100 to clover, forage at 50 ppm; clover, hay from 100 to 70 ppm; "corn, sweet, kernel plus cob with husks removed" from 5 to 0.1 ppm; corn, stover at 100 ppm to corn, field, stover at 20 ppm and corn, pop, stover at 20 ppm; corn, forage at 100 ppm to corn, field, forage at 30 ppm; cranberry from 10 to 3 ppm; flax, seed from 5 to 0.5 ppm; grass, hay from 100 to 15 ppm; millet, proso, grain from 3 to 1 ppm; millet, proso, straw from 100 to 20 ppm; okra from 10 to 4 ppm; peanut from 5 to 0.05 ppm; peanut, hay from 100 to 20 ppm; pistachio from 1 to 0.1 ppm; prickly pear cactus, fruit from 12 ppm to cactus, fruit at 5 ppm; rice, straw from 100 to 60 ppm; sorghum, forage from 100 to sorghum, grain, forage at 30 ppm; soybean from 5 to soybean, seed at 0.5 ppm; soybean, forage from 100 to 15 ppm; soybean, hay from 100 to 15 ppm; strawberry from 10 to 4 ppm; sunflower, seed from 1 to 0.5 ppm; trefoil, forage from 100 to 15 ppm; trefoil, hay from 100 to 25 ppm; wheat, grain from 3 to 1 ppm; wheat, hay from 100 to 30; wheat, straw from 100 to 20 ppm, and establishing corn, field, grain at 0.02; corn, pop, grain at 0.02 ppm; and wheat, forage at 30 ppm.

Based on the available field trial data that indicate carbaryl residues as high as 50 ppm in/on almond hulls, 15 ppm in/on asparagus, 21 ppm in/on cabbage, 215 ppm in/on sweet corn stover, 185 ppm in/on sweet corn forage, 22 ppm dandelion leaves, 22 ppm in/on parsley leaves, 15 ppm rice grain, 12 ppm in/on the representative commodities of pome fruit group 11, and 22 ppm in/on spinach, the Agency determined the tolerances should be increased to these levels. Therefore, EPA proposes increasing and revising the tolerances in 40 CFR 180.169(a)(1) as proposed for carbaryl residues of concern in/on almond, hulls from 40 to 50 ppm; asparagus from 10 to 15 ppm; cabbage from 10 to 21 ppm; corn, stover from 100 ppm to corn, sweet, stover at 215 ppm; corn, forage from 100 ppm to corn, sweet, forage at 185 ppm; dandelion, leaves from 12 to 22 ppm; parsley, leaves from 12 to 22 ppm; rice, grain from 5 to 15 ppm; fruit, pome at 10 ppm

to fruit, pome, group 11 at 12 ppm; spinach from 12 to 22 ppm. The Agency determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

There are currently no active registrations with uses on cotton; therefore, the Agency has determined that tolerances for cotton, undelinted seed at 5 ppm should be revoked. Based on poultry feeding studies and the fact there are no longer direct uses on poultry and poultry houses, there is no reasonable expectation of finite residues [in accordance with 40 CFR 180.6(a)(3)] in poultry and egg; therefore, the Agency has determined that tolerances for poultry meat and fat at 5 ppm and egg at 0.5 should be revoked. In the event there may be existing stocks of products bearing labels having uses on cotton and/or direct uses on poultry and poultry houses, the tolerances on cotton, poultry and egg will be revoked on October 31, 2009. The tolerance expiration date of October 31, 2009 should allow sufficient time for end users to exhaust those existing stocks and for treated commodities to clear the channels of trade. In order to consolidate the tolerances on poultry meat, fat and egg, the Agency is transferring the carbaryl tolerance on egg entry from 40 CFR 180.319 to 40 CFR 180.169(a)(2). Therefore, EPA proposes transferring the entry in 40 CFR 180.319 carbaryl residues of concern which corresponds with egg at 0.5 ppm to 40 CFR 180.169(a)(2) as proposed; revoking the tolerances in 40 CFR 180.169(a)(2) for carbaryl residues of concern in/on cotton, undelinted seed at 5 ppm on October 31, 2009; poultry, fat at 5 ppm on October 31, 2009; poultry, meat at 5 ppm on October 31, 2009; and newly transferred egg at 0.5 ppm on October 31, 2009; and removing the entry in 40 CFR 180.319 for carbaryl (1-naphthyl N-methylcarbamate) and its metabolite 1-naphthol, calculated as carbaryl which corresponds to egg at 0.5 ppm.

The Agency has also determined that many of the existing carbaryl tolerances on individual commodities should be reassigned as crop group/subgroup tolerances because the Agency has the field trial residue data and/or tolerances in place for the representative commodities required to establish the corresponding crop group tolerances. Based on the available field trial data that indicate residues of carbaryl do not exceed 10 ppm in/on kale and mustard greens, the Agency has determined the tolerances for kale and mustard greens should be decreased to 10 ppm and

removed since both commodities should be covered by vegetable, brassica, leafy, group 5, except cabbage at 10 ppm tolerance. Therefore, EPA proposes revising the tolerances in 40 CFR 180.169 as proposed for carbaryl residues of concern in/on apricot; cherry; nectarine; peach; plum, prune, fresh at 10 ppm to fruit, stone, group 12 at 10 ppm; "blackberry, boysenberry, dewberry, loganberry, raspberry at 12 ppm to caneberry subgroup 13-07A at 12 ppm;" "broccoli; Brussels sprouts; cabbage, Chinese; cauliflower; collards; kohlrabi; and mustard greens from 10 ppm and kale and mustard greens from 12 ppm to vegetable, brassica, leafy, group 5, except cabbage at 10 ppm;" bean and pea (with pods) at 10 ppm to vegetable, legume, edible-podded subgroup 6A at 10 ppm; prickly pear cactus, pads to cactus, pads; sorghum, grain to sorghum, grain, grain; dill, fresh to dillweed, fresh leaves; fruit, citrus to fruit, citrus, group 10; and grass to grass, forage.

The proposed tolerance actions herein for carbaryl, to implement the recommendations of the carbaryl RED, reflect use patterns in the U.S. which support a different tolerance than the Codex level on: pome fruit group 11; sugar beet root; vegetable, root and tuber, group 1, except sugar beet and sweet potato; field and sweet corn stover; cattle, goat, hog, horse, and sheep meat; rice grain, hulls, and straw; soybean, seed; sunflower seed; sorghum forage; tree nut group 14; wheat straw, grain, fodder and bran; because of differences in good agricultural practices. However, compatibility exists for stone fruit, and will exist based on this tolerance action for carbaryl residues in or on almond hulls; asparagus; vegetable, fruiting, group 8; cattle, goat, hog, horse, and sheep meat byproducts (including liver and kidney); field corn/maize; sweet corn; wheat germ and flour.

3. *Diazinon*. Based on available field trial data that indicate residues of diazinon as high as 0.16 ppm in/on apricots, cherries, nectarines, peaches and plums, the Agency determined that the tolerances should be decreased to 0.2 ppm. There are no active registrations reflecting uses on field corn; therefore the Agency determined the tolerance in/on corn, field, forage is no longer needed. Based on available field trial data that indicate residues of diazinon are less than 0.05 ppm in/on watercress, the Agency determined that the tolerance should be decreased to 0.05 ppm. EPA is also revising the commodity terminology to conform to current Agency practice. Therefore, EPA proposes decreasing the tolerances in 40

CFR 180.153(a)(1) for diazinon residues of concern in/on apricot from 0.5 to 0.20 ppm; cherry from 0.75 to cherry, sweet and cherry, tart at 0.2 ppm; nectarine from 0.5 to 0.2 ppm; peach from 0.7 to 0.2 ppm; plum, prune, fresh from 0.5 to 0.2 ppm; and watercress from 0.7 to 0.05 ppm; and revoking corn, field, forage at 40.0 ppm.

Because there are no food use registrations in/on olives, the Agency has determined the tolerance is no longer needed. Also, based on available livestock studies indicating residues of diazinon in fat as high as 0.39 ppm, the Agency has determined that the tolerance in/on cattle, fat should be decreased to 0.5 ppm. Therefore, EPA proposes revoking the tolerance in 40 CFR 180.153(a)(1) for diazinon residues of concern in/on olive at 1.0 ppm and decreasing the tolerance in/on cattle fat from 0.7 ppm to 0.5 ppm.

The Agency published a cancellation order on March 6, 2002 (67 FR 10196) (FRL-6826-2) as a follow up to a January 4, 2002 notice of receipt from the end-use products registrants, requesting cancellations and amendments of their diazinon product registrations terminating all indoor uses, certain agricultural uses and certain outdoor non-agricultural uses and limiting some registrations to specific regions. Specifically, in the cancellation order, the uses were amended for banana, cucumbers, celery, parsley, parsnips, peppers, potatoes, sweet potatoes, winter squash, summer squash, Swiss chard, and turnips (roots and greens) to regional uses. Therefore, the Agency has determined the corresponding tolerances should be transferred from permanent tolerances to regional tolerances. The uses were canceled which correspond to the tolerances on radicchio at 0.7 ppm; citrus at 0.7 ppm; sheep fat at 0.7 ppm; sheep, meat (fat basis) at 0.7 ppm; and sheep, meat byproducts (fat basis) at 0.7 ppm. Therefore, the Agency has determined that these tolerances should be revoked, except for the tolerance on kiwi which is being retained for import purposes. EPA is also revising the commodity terminology to conform to current Agency practice. Therefore, EPA proposes transferring the tolerances in 40 CFR 180.153(a)(1) to 40 CFR 180.153(c) for banana; cucumber; celery; parsley, leaves; parsnip; pepper; potato; potato, sweet; squash, summer; squash, winter; Swiss chard; turnip, roots; and turnip, greens to turnip, tops; revoking tolerances in 40 CFR 180.153(a)(1) for radicchio at 0.7 ppm; citrus at 0.7 ppm; sheep fat at 0.7 ppm; sheep, meat byproducts (fat basis) at 0.7 ppm; and sheep, meat byproducts (fat basis) at 0.7

ppm; and revising a tolerance in 40 CFR 180.153(a)(1) to add a footnote to kiwifruit that reads as follows: "There are no domestic registrations in/on kiwifruit as of March 6, 2002."

The Agency published a cancellation order December 6, 2006 (72 FR 40874) (FRL-8139-6) which resulted in the cancellation of certain uses of diazinon in the granular, liquid and/or wettable powder formulations on a variety of commodities; however, only uses on sugar beets, sweet corn, Chinese broccoli, Chinese cabbage, Chinese mustard, Chinese radish, grapes, hops, walnuts, and mushroom houses were canceled on all registrations such that the tolerances are no longer needed. Therefore, EPA proposes revoking the tolerances in 40 CFR 180.153 for diazinon residues of concern in/on beet, sugar, roots at 0.5 ppm; beet, sugar, tops at 10 ppm; corn, sweet, forage at 40 ppm; corn, sweet, kernel plus cob with husks removed at 0.7 ppm; grape at 0.75 ppm; hop, dried cones at 0.75 ppm; mushroom at 0.75 ppm; walnuts at 0.5 ppm; radish, oriental, roots at 0.10 ppm; and radish, oriental, tops at 0.10 ppm.

The registration for the use on almonds is only in California; therefore, the Agency has determined that the tolerance in/on almonds is a regional registration. Therefore, EPA proposes transferring the tolerance in 40 CFR 180.153(a)(1) for almond at 0.5 ppm to 40 CFR 180.153(c); correcting the citation in 40 CFR 180.153(c) from 180.1(n) to 180.1(m); and correcting the CAS number from 33-41-5 to 333-41-5.

Because field pea hay and vines are no longer recognized as raw agricultural commodities, field pea hay and vines are no longer considered to be a significant food/feed item; therefore, the associated tolerances are no longer needed. Therefore, EPA proposes revoking the tolerances in 40 CFR 180.153(a)(1) in/on pea, field, hay at 10.0 ppm and pea, field, vines at 25.0 ppm.

There are currently no registrations for food and feed handling establishment uses outlined in 40 CFR 180.153(a)(2) and 40 CFR 180.153(a)(3). Therefore, EPA proposes removing the paragraphs in 40 CFR 180.153(a)(2) and 40 CFR 180.153(a)(3).

The individual tolerances in/on blackberry, loganberry and raspberry are being consolidated under the caneberry subgroup at 0.75 ppm. EPA is revising the commodity terminology to conform to current Agency practice. Therefore, EPA proposes revising and increasing tolerances in 40 CFR 180.153(a) for diazinon residues of concern from "blackberry at 0.5 ppm, loganberry at

0.75 ppm, and raspberry at 0.5 ppm to caneberry subgroup 13-07A at 0.75 ppm" and revising endive to escarole.

The proposed tolerance actions herein for diazinon, to implement the recommendations of the diazinon RED, reflect use patterns in the U.S. which support a different tolerance than the Codex level on some commodities because of differences in good agricultural practices. However, compatibility exists for all of the citrus fruits, Chinese cabbage, grapes, mushrooms, olives, peaches, plums, and sheep byproducts and fat, based on the proposed reassessed U.S. tolerances implemented.

4. *Dicrotophos*. Based on available cotton field trial data that indicate residues of dicrotophos as high as 0.13 ppm in/on cotton seed and 1.8 ppm in/on cotton gin by products, the Agency determined that the tolerances should be increased to 0.2 ppm on cotton, undelinted seed and a tolerance should be established on cotton gin by products at 2.0 ppm. Therefore, EPA proposes increasing a tolerance in 40 CFR 180.299 for dicrotophos residues of concern in/on cotton, undelinted seed from 0.05 to 0.2 ppm and establishing a tolerance of in/on cotton gin by products at 2.0 ppm. The Agency determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

The Agency is also standardizing the subsections of the 40 CFR 180 and changing the section heading to dicrotophos. Therefore, EPA proposes revising 40 CFR 180.299 by establishing 4 subsections entitled: "(a) General, (b) Section 18 emergency exemptions—reserved; (c) Tolerances with regional registrations—reserved and (d) Indirect or inadvertent residues—reserved and change the heading from dimethyl phosphate of 3-hydroxy-N,Ndimethyl-cis-crotonamide to dicrotophos."

Currently, there are no Codex MRLs in place for dicrotophos.

5. *Fluometuron*. Tolerances are currently established for negligible residues of the herbicide fluometuron (1,1-dimethyl-3-(α , α , α -trifluoro-m-tolyl)urea) in 40 CFR 180.229 for plant commodities. Based on reevaluation of the plant and animal metabolism data, the Agency determined that the regulated residues of concern in/on plants consist of the parent compound, fluometuron, and the metabolite, trifluoromethylaniline (TFMA); and in animal tissue the regulated residues consist of the parent compound, the hydroxylated metabolites [CGA-236431 (1-(4-hydroxy-3-trifluoromethyl-

phenyl)urea), CGA-236432 (1-methyl-3-(4-hydroxy-3-trifluoromethylphenyl)urea), CGA-13211 (1,1-dimethyl-3-(4-hydroxy-3-trifluoromethylphenyl)urea)], and their conjugates (determined as TFMS). The chemical name for fluometuron should be corrected to the CAS name (N,N-dimethyl-N'-(3-trifluoromethylphenyl)urea) in the tolerance expression. Therefore, EPA proposes revising the tolerance expression for plants in 40 CFR 180.229(a)(1) and 180.229(d) for the combined residues of the herbicide fluometuron (N,N-dimethyl-N'-(3-trifluoromethylphenyl)urea) and its metabolite trifluoromethylaniline (TFMA) determined as TFMA. EPA also proposes revising the tolerance expression for livestock in 40 CFR 180.229(a)(2) for the combined residues of the herbicide fluometuron (N,N-dimethyl-N'-(3-trifluoromethylphenyl)urea), its metabolites determined as TFMA, and the hydroxylated metabolites [CGA-236431 (1-(4-hydroxy-3-trifluoromethylphenyl)urea), CGA-236432 (1-methyl-3-(4-hydroxy-3-trifluoromethylphenyl)urea), CGA-13211 (1,1-dimethyl-3-(4-hydroxy-3-trifluoromethylphenyl)urea)].

Based on available field trial data that indicate residues of fluometuron as high as 0.58 ppm in or on cotton and 3.1 ppm in/on cotton gin byproducts, the Agency determined that the tolerance should be increased in/on cotton, undelinted seed to 1.0 ppm and a tolerance should be established in/on cotton gin by products at 3.5 ppm. Therefore, EPA proposes increasing the tolerance in 40 CFR 180.229(a)(1) for the combined residues of fluometuron and its metabolites of concern in/on cotton, undelinted seed from 0.1 ppm to 1.0 ppm and establishing a tolerance in 40 CFR 180.229(a)(1) in/on cotton, gin byproducts at 3.5 ppm. The Agency determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on the livestock feeding studies that indicate residues of fluometuron as high as 0.041 ppm in liver; 0.0096 ppm in kidney; 0.0041 ppm in milk; and 0.0315 ppm egg, poultry meat, fat and meat byproducts, the Agency determined that tolerances should be established in cattle, goat, horse, hog, sheep and poultry meat byproducts at 0.1 ppm, in poultry meat and fat at 0.1 ppm and in milk at 0.02 ppm. Therefore, EPA proposes establishing tolerances in 40 CFR 180.229(a)(2) for the combined residues of fluometuron

and its metabolites of concern in cattle, meat byproducts; egg; goat, meat byproducts; hog, meat byproducts; horse, meat byproducts; poultry, fat; poultry, meat; poultry, meat byproducts; and sheep, meat byproducts at 0.1 ppm and milk at 0.02 ppm.

Based on the available rotational crop field trial data that indicate residues of fluometuron as high as 0.46 ppm in/on cereal grains, 2.8 ppm in cereal grain forage, 5.8 ppm in/on cereal grain fodder and straw, 0.1 ppm in/on peanut, 1.7 ppm in/on soybean seed, 2.4 ppm in/on soybean forage, 2.7 ppm in/on soybean hay, the Agency determined that tolerances should be established on grain, cereal, group 15 at 0.5 ppm; grain, cereal, forage, group 16 at 3.0 ppm; grain, cereal, fodder and straw group 16 at 6.0 ppm; peanut at 0.1 ppm; peanut, hay at 4.0 ppm; soybean, seed at 2.0 ppm; soybean, forage at 3.0 ppm; and soybean, hay at 3.0 ppm for the inadvertent and indirect residues of fluometuron. Therefore, EPA proposes establishing tolerances in 40 CFR 180.229(d) for the combined residues of fluometuron and its metabolites of concern in grain, cereal, group 15 at 0.5 ppm; grain, cereal, forage, group 16 at 3.0 ppm; grain, cereal, fodder and straw, group 16 at 6.0 ppm; peanut at 0.1 ppm; peanut, hay at 4.0 ppm; soybean, seed at 2.0 ppm; soybean, forage at 3.0 ppm; and soybean, hay at 3.0 ppm.

Based on the available food processing studies that indicate residues of fluometuron as high as 0.1 ppm (concentration factor of 1.7X) in peanut meal; 0.25 ppm (3.2X) in rice hulls; and 0.38 ppm (1.8X) in wheat milled byproducts, the Agency determined that tolerances should be established on peanut, meal at 0.2 ppm; rice, hulls at 1.0 ppm; and wheat, milled byproducts at 1.0 ppm. Therefore, EPA proposes establishing tolerances in 40 CFR 180.229(d) for the combined residues of fluometuron and its metabolites of concern in peanut, meal at 0.2 ppm; rice, hulls at 1.0 ppm; and wheat, milled byproducts at 1.0 ppm.

Currently, there are no Codex MRLs in place for fluometuron.

6. *Formetanate hydrochloride*. Based on available field trial data that indicate residues of formetanate hydrochloride as high as 0.43 ppm in/on apples and pears; 0.98 ppm in/on grapefruits and oranges; <0.60 ppm in/on lemons; <0.03 ppm (the limit of quantitation) in/on tangerines and limes; and limited data at <0.03 ppm in/on nectarines and peaches; the Agency determined that the tolerances should be decreased to 0.50 ppm in/on apple and pear; 1.5 ppm in/on grapefruit and orange, sweet; 0.03 ppm in/on lime and tangerine; 0.60 ppm

in/on lemon; 0.40 ppm in/on nectarine and peach and a tolerance be established on tangelo at 0.03 ppm. Therefore, EPA proposes decreasing the tolerances in 40 CFR 180.276(a) for residues of formetanate hydrochloride in/on apple from 3 to 0.50 ppm; grapefruit from 4 to 1.5 ppm; lemon from 4 to 0.60 ppm; lime from 4 to 0.03 ppm; nectarine 4 to 0.40 ppm; orange, sweet from 4 to 1.5 ppm; peach from 5 to 0.40 ppm; pear from 3 to 0.50 ppm; and tangerine from 4 to 0.03 ppm and establishing a tolerance in/on tangelo at 0.03 ppm.

Based on the field trial and processing studies on apples that indicate the highest average field trial residues are 0.38 ppm and a 4X concentration factor in wet pomace, the Agency determined a tolerance in/on apple, wet pomace should be established at 1.5 ppm. Therefore, EPA proposes establishing a tolerance in 40 CFR 180.276(a) for residues of formetanate hydrochloride in/on apple, wet pomace at 1.5 ppm.

Currently, there are no Codex MRLs in place for formetanate hydrochloride.

7. *Glyphosate*. The Agency proposed changes in tolerances for glyphosate in the **Federal Register** notice published on June 7, 2006 (71 FR 32899) (FRL–8062–7), which include harmonization with some Codex tolerances. The Agency received public comment from Monsanto Company generally agreeing with the proposed tolerance changes to 40 CFR 180.364 for glyphosate. However, Monsanto alerted the Agency of more recent changes to glyphosate MRLs finalized by the Codex Alimentarius Commission in July of 2006. Monsanto provided a detailed list of suggested changes to the U.S. tolerances established on glyphosate to achieve better alignment with the newly established Codex MRLs. In response to this comment, the Agency agreed to consider Monsanto's recommendations for harmonization with Codex in a future proposal. The Agency has now determined that the following commodities can be harmonized with Codex MRLs: Cereal grain crop group 15, cotton seed, corn (maize), rape seed, canola seed, and liver and kidney commodities of cattle, goats, hogs, horses and sheep.

The current tolerance for residues of glyphosate in or on "grain, cereal, group 15" is 0.1 parts per million (ppm), but excludes the major crop grains barley, field corn, grain sorghum, oat and wheat, and covers the minor crop grains buckwheat, millet, popcorn, rice, rye, sweet corn, teosinte, triticale, and wild rice. Individual tolerances currently exist for barley, grain (20 ppm); corn, field, grain (1.0 ppm); sorghum, grain,

grain (15 ppm); oat, grain (20 ppm); and wheat, grain (5.0 ppm).

In an effort to achieve compatibility with Codex, the Agency has determined that the glyphosate tolerance for "grain, cereal, group 15" should be inclusive of the major crop grains (barley, sorghum, oat, and wheat) the minor grain crops (buckwheat, millet, rye, teosinte, and triticale), and increased to 30 ppm. Individual tolerances should be established for the minor crop grains, popcorn, rice, sweet corn, and wild rice, each at 0.1 ppm, and the tolerance for field corn increased from 1.0 to 5.0 ppm. Therefore, EPA proposes to amend tolerances in 40 CFR 180.364 for glyphosate in/on "grain, cereal, group 15, except barley, field corn, sorghum, oat and wheat" to "grain, cereal, group 15, except field corn, popcorn, rice, sweet corn and rice, wild" and increase the tolerance to 30 ppm; and to revoke the individual tolerances for barley, grain at 20 ppm; oat, grain at 20 ppm; sorghum, grain, grain at 15 ppm; wheat, grain at 5 ppm; wheat middlings at 20 ppm; wheat, shorts at 20 ppm; and wheat, bran at 20 ppm; and establish individual tolerances for corn, sweet, grain at 0.1 ppm; corn, pop, grain at 0.1 ppm; rice, grain at 0.1 ppm; rice, wild at 0.1 ppm; and increase the tolerance for corn, field, grain from 1 ppm to 5 ppm. The Agency has determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue. The Agency has determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

In order to further harmonize with Codex, the Agency has determined that the tolerances for glyphosate residues in/on the following commodities should be increased: Cotton, undelinted seed from 35 ppm to 40 ppm; rapeseed, seed from 10 ppm to 20 ppm; canola, seed from 10 ppm to 20 ppm; and and that the tolerance for canola, meal at 15 ppm and rapeseed, meal at 15 ppm should be revoked, as they will be covered by the canola, seed and rapeseed, seed tolerances at 20 ppm. Therefore, EPA proposes increasing the tolerances in 40 CFR 180.364 for the glyphosate residues of concern in/on cotton, undelinted seed from 35 ppm to 40 ppm; rapeseed, seed from 10 ppm to 20 ppm; canola, seed from 10 ppm to 20 ppm; and revoking rapeseed, meal at 15 ppm and canola, meal at 15 ppm. The Agency determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from

aggregate exposure to the pesticide chemical residue.

Currently, separate tolerances exist for the liver of cattle, goat, horse, sheep and hog at 0.5 ppm, and for the kidney of each of these livestock animals at 4 ppm. In an effort to harmonize with Codex, the Agency has determined that the individual tolerances for liver and kidney should be combined into one commodity defined as meat byproducts for each of the livestock animals, cattle, goat, horse, sheep and hog, and increased to 5 ppm. Therefore, EPA proposes revoking tolerances in 40 CFR 180.364 for residues of glyphosate in or on cattle, kidney at 4.0 ppm; cattle, liver at 0.5 ppm; goat, kidney at 4.0 ppm; goat, liver at 0.5 ppm; horse, kidney at 4.0 ppm; horse, liver at 0.5 ppm; sheep, kidney at 4.0 ppm; sheep, liver at 0.5 ppm; hog, kidney at 4.0 ppm; and hog, liver at 0.5 ppm; and establish tolerances in 40 CFR 180.364 for cattle, meat byproducts at 5 ppm; goat, meat byproducts at 5 ppm; horse, meat byproducts at 5 ppm; sheep, meat byproducts at 5 ppm; and hog, meat byproducts at 5 ppm. The Agency has determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

In the **Federal Register** published December 20, 2006 (71 FR 76180) (FRL–8105–9), tolerances for residues of glyphosate in or on sunflower, seed and safflower, seed were increased from 0.1 to 85 ppm; however, duplicate tolerances for these commodities were erroneously published in 40 CFR 180.364 (a) as sunflower at 85 ppm and sunflower, seed at 0.1 ppm; and safflower at 85 ppm and safflower, seed at 0.1 ppm. The correct terminology for these commodities is "sunflower, seed" and "safflower, seed." Also, in the same **Federal Register** Notice, a tolerance for the revised commodity definition "vegetable, legume, group 6 except soybean and pea, dry" was established at 5.0 ppm, but this tolerance was published in 40 CFR 180.364(a) in addition to the existing tolerance for the commodity "vegetable, legume, group 6 except soybean" at 5.0 ppm. Therefore, EPA proposes to correct these errors by revoking the incorrect tolerances in 40 CFR 180.364(a) for sunflower, seed at 0.1 ppm; safflower, seed at 0.1 ppm; and "vegetable, legume, group 6 except soybean" at 5.0 ppm; and correcting the terminology for sunflower to "sunflower, seed" at 85 ppm and safflower to "safflower, seed" at 85 ppm.

There are a number of Codex MRLs for glyphosate for which harmonization

with a U.S. tolerance is not possible at this time. In the case of fodder, hay and/or straw commodities of alfalfa, barley, bean, grasses, maize, oat, pea, sorghum, and wheat, the U.S. tolerances are determined on a "wet weight" basis whereas the Codex MRLs are determined on a "dry weight" basis, and are, therefore, not comparable. Sugarcane molasses, having a U.S. tolerance for glyphosate of 30 ppm, could not be harmonized to the lower Codex MRL of 10 ppm due to the concentration of the glyphosate residues demonstrated by processing data. Some U.S. glyphosate tolerances could not be harmonized because the Codex MRL is based on the individual commodity and the U.S. tolerance is a crop group tolerance (e.g. vegetable, legume, group 6, except soybean.) which is higher to cover all commodities in the group. The U.S. tolerance for glyphosate in/on banana could not be lowered to harmonize with Codex due to differing use patterns.

8. *Metolachlor*. Tolerances for metolachlor in/on spinach at 0.3 ppm, grass forage at 10 ppm, grass hay at 0.2 ppm and tomato at 0.1 ppm expired on 12/31/01 and tomato expired on 6/30/02. Based on additional new field trial data that indicate residues as high as 8.4 ppm in/on grass forage, 0.11 ppm in/on grass hay, 0.38 ppm in/on spinach and 0.08 ppm in/on tomatoes, the Agency has determined that permanent tolerances should be established in /on grass, forage at 10 ppm; grass, hay at 0.20 ppm; spinach at 0.50 ppm and tomato at 0.10 ppm. The establishment of these tolerances was inadvertently omitted from the proposal of August 8, 2008 (72 FR 44439) (FRL-8138-8). In that proposal the Agency also revised the terminology for the "seed and pod vegetables (except soybean) crop group" which includes okra and dill commodities to the new terminology, "vegetable legume crop group" which does not include dill and okra; therefore, at that time, separate tolerances should have been proposed for okra at 0.50 ppm and dill at 0.50 ppm. Therefore, EPA proposes establishing tolerances in 40 CFR 180.368(a)(1) for the combined metolachlor residues of concern in/on grass, forage at 10 ppm; grass, hay at 0.20 ppm; spinach at 0.50 ppm; tomato at 0.10 ppm; dill at 0.50 ppm and okra at 0.50 ppm.

9. *Napropamide*. The sole registrant for napropamide requested the cancellation of the use of napropamide on the following commodities: Pistachio, grapefruit, lemon, orange, tangerine, nectarine, apricot, cherry, peach, plum, prune, apple, pear, fig,

avocado, pomegranate, artichoke, and olives as published in the **Federal Register** on April 26, 2006 (71 FR 24687) (FRL-8059-2). Based on the cancellation of these uses on U.S. registrations, the Agency has determined the tolerances for artichoke, globe; avocado; fig; fruit, citrus; fruit, pome; fruit, stone; olive; pistachio; and pomegranate (the only tolerance in 40 CFR 180.328(b)) should be revoked on April 26, 2009. This expiration/revocation date should provide sufficient time for end users to exhaust those existing stocks and for treated commodities to clear the channels of trade. Also, there have been no registrations with uses on cucurbit vegetables for some time; therefore the Agency has determined that the tolerance in/on vegetables, cucurbit, group 9 should be revoked. Therefore, EPA proposes revoking the tolerances in 40 CFR 180.328(a) on the following commodities: Artichoke, globe; avocado; fig; fruit, citrus; fruit, pome; fruit, stone; olive; and pistachio each with an expiration/revocation date of April 26, 2009; the pomegranate tolerance in 40 CFR 180.328(b) with an expiration/revocation date of April 26, 2009; and revoking vegetables, cucurbit, group 9 on the date of publication of the final rule.

Currently, tolerances are established for the negligible residues (N) of the herbicide N,N-diethyl-2-(1-naphthalenyloxy) propionamide. The negligible residue term and designation indicating negligible residues is no longer in accordance with Agency practice and should be removed. The common chemical name for N,N-diethyl-2-(1-naphthalenyloxy) propionamide is napropamide and should be included in the tolerance expression. Lastly, the section should be revised to include the subsections for section 18 emergency exemptions and indirect or inadvertent residues and change subsection (b) designation to (c) for regional registrations. Therefore, the Agency proposes revising the tolerance expression in 40 CFR 180.328(a) to regulate the herbicide napropamide (N,N-diethyl-2-(1-naphthalenyloxy) propionamide in or on food commodities and revising the subsections as follows: "(b) Section 18 emergency exemptions - reserved, (c) tolerances with regional registrations -reserved and (d) indirect or inadvertent residues -reserved."

The Agency is updating commodity terminology to correspond to current practice. Currently, there is a tolerance in place for small fruit at 0.1 ppm in 40 CFR 180.328(a) which is considered obsolete and should be revised to

correspond with current Agency commodity terminology. The current commodity terminology for small fruit is berry group 13 and cranberry, strawberry and grape (which were covered in the small fruit group, but not included in the berry group). Therefore, EPA is proposing to revise the tolerance in 40 CFR 180.328(a) for residues of the herbicide napropamide from small fruit at 0.1 ppm to berry, group 13 at 0.1 ppm; coffee, bean, green to coffee, green bean; and mint to peppermint, tops and spearmint, tops; and establish tolerances for cranberry, grape, and strawberry each at 0.1 ppm; revise vegetable, fruiting to vegetable, fruiting, group 8; and nut to nut, tree, group 14.

Currently, there are no Codex MRLs in place for napropamide.

10. *Norflurazon*. Based on the available feeding studies in livestock where residues of norflurazon were estimated less than 0.5 ppm in liver, the Agency determined tolerances should be established for cattle, goat, hog, horse, and sheep liver at 0.50 ppm. Therefore, EPA proposes increasing the tolerance in 40 CFR 180.356(a) for the norflurazon residues of concern in/on cattle, goat, hog, horse, and sheep, liver from 0.25 ppm to 0.50 ppm. The Agency determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

11. *Pyrazon*. Based on available crop field trial data that indicate residues of pyrazon as high as 0.79 ppm in/on garden beet roots, 4.64 ppm in/on garden beet tops, 0.14 ppm in/on sugar beet roots, 1.99 ppm in/on sugar beet tops 0.02 ppm in milk, the Agency determined that the tolerances should be increased to 0.9 ppm in/on beet, garden, roots; 7.0 ppm in/on beet, garden, tops; 0.2 ppm in/on beet, sugar, roots; 3.0 ppm in/on beet, sugar, tops; and 0.02 ppm in milk. The terminology negligible residues (N) associated with tolerances in 40 CFR 180.316 is no longer applicable and a terminology the Agency is no longer using. Therefore, EPA proposes increasing and revising the tolerances in 40 CFR 180.316(a) for the combined residues of pyrazon and its metabolites in/on beet, garden, roots from 0.1(N) to 0.9 ppm; beet, garden, tops from 1 ppm to 7.0 ppm; beet, sugar, roots from 0.1(N) to 0.2 ppm; beet, sugar, tops from 1 ppm to 3.0 ppm; and milk from 0.01(N) ppm to 0.02 ppm. The Agency determined that the increased tolerances are safe; i.e. there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on available crop field trial data and processing data that indicate residues of pyrazon as high as 0.2 ppm and a concentration factor of 6x in sugar beet molasses, the Agency determined that a tolerance should be established for beet, sugar, molasses at 1.5 ppm. Based on the available feeding studies and the estimated maximum dietary burden in livestock that indicate pyrazon residues as high as the level of quantitation, the Agency has determined tolerances should be established at the combined levels of quantitation of pyrazon and its metabolites in cattle, goat, horse, and sheep fat, meat, and meat byproducts (except liver) at 0.10 ppm. Based on the available feeding studies and estimated maximum dietary burden in livestock where residues of pyrazon were estimated as high as 0.123 ppm in liver, the Agency determined tolerances should be established for cattle, goat, horse, and sheep liver at 0.15 ppm. Therefore, EPA proposes establishing tolerances in 40 CFR 180.316(a) for the combined residues of pyrazon and its metabolites in/on beet, sugar, molasses at 1.5 ppm; cattle, fat at 0.10 ppm; cattle, liver at 0.15 ppm; cattle, meat at 0.10 ppm; cattle, meat byproducts, except liver at 0.10 ppm; goat, fat at 0.10 ppm; goat, liver at 0.15 ppm; goat, meat at 0.10 ppm; goat, meat byproducts, except liver at 0.10 ppm; horse, fat at 0.10 ppm; horse, liver at 0.15 ppm; horse, meat at 0.10 ppm; horse, meat byproducts, except liver at 0.10 ppm; sheep, fat at 0.10 ppm; sheep, liver at 0.15 ppm; sheep, meat at 0.10 ppm; sheep, meat byproducts, except liver at 0.10 ppm.

Based on available rotational crop field trial data that indicate the highest average field trial residues of pyrazon as high as 0.17 ppm wheat forage, 0.13 ppm in wheat hay, <0.10 ppm in wheat straw, 0.30 ppm in soybean forage and hay, and 0.30 ppm in field corn forage and stover, the Agency determined that tolerances should be established for the inadvertent and indirect residues of pyrazon in wheat, forage at 0.3 ppm; wheat, hay at 0.2 ppm; wheat straw at 0.1 ppm; soybean forage and hay at 0.5 ppm; and field corn forage and stover at 0.5 ppm. Therefore, EPA proposes establishing tolerances in 40 CFR 180.316(d) for the combined residues of pyrazon and its metabolites in/on wheat, forage at 0.3 ppm; wheat, hay at 0.2 ppm; wheat, straw at 0.1 ppm; soybean, forage at 0.5 ppm; soybean, hay at 0.5 ppm; corn, field, forage at 0.5 ppm; and corn, field, stover at 0.5 ppm.

Currently, there are no Codex MRLs in place for pyrazon.

12. *Tau-Fluvalinate*. A tolerance is currently established in 40 CFR 180.427(a) for residues of fluvalinate, (alpha RS, 2R)-fluvalinate [(RS)-alpha-cyano-3-phenoxybenzyl (R)-2-[2-chloro-4-(trifluoromethyl)anilino]-3-methylbutanoate] in/on honey at 0.05 ppm. "Fluvalinate" is the common name for the racemic mixture of the 4 isomers of cyano-(3-phenoxyphenyl)methyl N-[2-chloro-4-(trifluoromethyl)phenyl]-valinate (CAS name). "Tau-fluvalinate" is the term for the half resolved mixture (2 of the 4 isomers) and is the regulated residue. The tolerance expression should be corrected to reflect the correct common name of tau-fluvalinate and the CAS name. Additionally, based on available field trial data that indicate residues of tau-fluvalinate as high as 0.015 ppm in/on honey, the Agency determined that the tolerance should be decreased to 0.02 ppm. The registrant submitted a comment to docket announcing the RED requesting the tolerance be maintained at 0.05 ppm; however, they later withdrew the request. Therefore, EPA proposes decreasing the tolerance 40 CFR 180.427(a) in/on honey from 0.05 to 0.02 ppm and revising the tolerance expression to read as follows: "Tolerances are established for residues of the insecticide tau-fluvalinate [cyano-(3-phenoxyphenyl)methyl N-[2-chloro-4-(trifluoromethyl)phenyl]-D-valinate]." Currently, there are no Codex MRLs in place for tau-fluvalinate.

B. What is the Agency's Authority for Taking this Action?

A "tolerance" represents the maximum level for residues of pesticide chemicals legally allowed in or on raw agricultural commodities and processed foods. Section 408 of FFDCA, 21 U.S.C. 346a, as amended by FQPA of 1996, Public Law 104-170, authorizes the establishment of tolerances, exemptions from tolerance requirements, modifications in tolerances, and revocation of tolerances for residues of pesticide chemicals in or on raw agricultural commodities and processed foods. Without a tolerance or exemption, food containing pesticide residues is considered to be unsafe and therefore "adulterated" under section 402(a) of FFDCA, 21 U.S.C. 342(a). Such food may not be distributed in interstate commerce (21 U.S.C. 331(a)). For a food-use pesticide to be sold and distributed, the pesticide must not only have appropriate tolerances under the FFDCA, but also must be registered under FIFRA (7 U.S.C. 136 *et seq.*). Food-use pesticides not registered in the United States must have tolerances in order for commodities treated with

those pesticides to be imported into the United States.

EPA is proposing these tolerance actions to implement the tolerance recommendations made during the reregistration and tolerance reassessment processes (including follow-up on canceled or additional uses of pesticides). As part of these processes, EPA is required to determine whether each of the amended tolerances meets the safety standard of FQPA. The safety finding determination is discussed in detail in each post-FQPA RED and TRED for the active ingredient. REDs and TREDs recommend the implementation of certain tolerance actions, including modifications to reflect current use patterns, to meet safety findings, and change commodity names and groupings in accordance with new EPA policy. Printed and electronic copies of the REDs and TREDs are available as provided in Unit II.A.

EPA has issued post-FQPA REDs and TREDs for benfluralin, carbaryl, diazinon, dicofol, fluometuron, formetanate-hydrochloride, metolachlor, napropamide, norflurazon, pyrazon and tau-fluvalinate. Also, EPA issued a RED prior to FQPA for glyphosate and made a safety finding which reassessed its tolerances according to the FFDCA standard, maintaining them when new tolerances were established as noted in Unit II.A. REDs and TREDs contain the Agency's evaluation of the database for these pesticides, including requirements for additional data on the active ingredients to confirm the potential human health and environmental risk assessments associated with current product uses, and in REDs state conditions under which these uses and products will be eligible for reregistration. The REDs and TREDs recommended the establishment, modification, and/or revocation of specific tolerances. RED and TRED recommendations such as establishing or modifying tolerances, and in some cases revoking tolerances, are the result of assessment under the FFDCA standard of "reasonable certainty of no harm." However, tolerance revocations recommended in REDs and TREDs that are proposed in this document do not need such assessment when the tolerances are no longer necessary.

EPA's general practice is to propose revocation of tolerances for residues of pesticide active ingredients on crops for which FIFRA registrations no longer exist and on which the pesticide may therefore no longer be used in the United States. EPA has historically been concerned that retention of tolerances that are not necessary to cover residues

in or on legally treated foods may encourage misuse of pesticides within the United States. Nonetheless, EPA will establish and maintain tolerances even when corresponding domestic uses are canceled if the tolerances, which EPA refers to as "import tolerances," are necessary to allow importation into the United States of food containing such pesticide residues. However, where there are no imported commodities that require these import tolerances, the Agency believes it is appropriate to revoke tolerances for unregistered pesticides in order to prevent potential misuse.

Furthermore, as a general matter, the Agency believes that retention of import tolerances not needed to cover any imported food may result in unnecessary restriction on trade of pesticides and foods. Under section 408 of FFDCA, a tolerance may only be established or maintained if EPA determines that the tolerance is safe based on a number of factors, including an assessment of the aggregate exposure to the pesticide and an assessment of the cumulative effects of such pesticide and other substances that have a common mechanism of toxicity. In doing so, EPA must consider potential contributions to such exposure from all tolerances. If the cumulative risk is such that the tolerances in aggregate are not safe, then every one of these tolerances is potentially vulnerable to revocation. Furthermore, if unneeded tolerances are included in the aggregate and cumulative risk assessments, the estimated exposure to the pesticide would be inflated. Consequently, it may be more difficult for others to obtain needed tolerances or to register needed new uses. To avoid potential trade restrictions, the Agency is proposing to revoke tolerances for residues on crops uses for which FIFRA registrations no longer exist, unless someone expresses a need for such tolerances. Through this proposed rule, the Agency is inviting individuals who need these import tolerances to identify themselves and the tolerances that are needed to cover imported commodities.

Parties interested in retention of the tolerances should be aware that additional data may be needed to support retention. These parties should be aware that, under FFDCA section 408(f), if the Agency determines that additional information is reasonably required to support the continuation of a tolerance, EPA may require that parties interested in maintaining the tolerances provide the necessary information. If the requisite information is not submitted, EPA may issue an order revoking the tolerance at issue.

When EPA establishes tolerances for pesticide residues in or on raw agricultural commodities, consideration must be given to the possible residues of those chemicals in meat, milk, poultry, and/or eggs produced by animals that are fed agricultural products (for example, grain or hay) containing pesticides residues (40 CFR 180.6). When considering this possibility, EPA can conclude that:

1. Finite residues will exist in meat, milk, poultry, and/or eggs.
2. There is a reasonable expectation that finite residues will exist.
3. There is a reasonable expectation that finite residues will not exist. If there is no reasonable expectation of finite pesticide residues in or on meat, milk, poultry, or eggs, tolerances do not need to be established for these commodities (40 CFR 180.6(b) and (c)).

EPA has evaluated certain specific meat, milk, poultry, and egg tolerances proposed for revocation in this document and has concluded that there is no reasonable expectation of finite pesticide residues of concern in or on those commodities.

C. When Do These Actions Become Effective?

EPA is proposing that the tolerance actions become effective on the date of publication of the final rule in the **Federal Register** unless otherwise indicated (i.e. napropamide and carbaryl). The tolerances proposed for revocation in this document are associated with uses that have been canceled for several years. The Agency believes that treated commodities have had sufficient time for passage through the channels of trade. However, if EPA is presented with information that existing stocks would still be available and that information is verified, the Agency will consider extending the expiration date of the tolerance. If you have comments regarding existing stocks and whether the effective date allows sufficient time for treated commodities to clear the channels of trade, please submit comments as described under **SUPPLEMENTARY INFORMATION**.

Any commodities listed in this proposal treated with the pesticides subject to this proposal, and in the channels of trade following the tolerance revocations, shall be subject to section 408(1)(5) of FFDCA, as established by FQPA. Under this unit, any residues of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of the Food and Drug Administration that:

1. The residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA, and

2. The residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from tolerance. Evidence to show that food was lawfully treated may include records that verify the dates when the pesticide was applied to such food.

III. Are the Proposed Actions Consistent with International Obligations?

The tolerance actions in this proposal are not discriminatory and are designed to ensure that both domestically produced and imported foods meet the food safety standards established by FFDCA. The same food safety standards apply to domestically produced and imported foods.

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international Maximum Residue Limits (MRLs) established by the Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, section 408(b)(4) of FFDCA requires that EPA explain the reasons for departing from the Codex level in a notice published for public comment. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual REDs and TREDs, and in the Residue Chemistry document which supports the RED and TRED, as mentioned in Unit II.A. Specific tolerance actions in this proposed rule and how they compare to Codex MRLs (if any) are discussed in Unit II.A.

IV. Statutory and Executive Order Reviews

In this proposed rule, EPA is proposing to establish tolerances under FFDCA section 408(e), and also modify and revoke specific tolerances established under FFDCA section 408. The Office of Management and Budget (OMB) has exempted these types of actions (e.g., establishment and modification of a tolerance and tolerance revocation for which extraordinary circumstances do not

exist]] from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this proposed rule has been exempted from review under Executive Order 12866 due to its lack of significance, this proposed 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). This proposed rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or 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). Nor does it require any special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any other Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). 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). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency previously assessed whether establishment of tolerances, exemptions from tolerances, raising of tolerance levels, expansion of exemptions, or revocations might significantly impact a substantial number of small entities and concluded that, as a general matter, these actions do not impose a significant economic impact on a substantial number of small entities. These analyses for tolerance establishments and modifications, and for tolerance revocations were published on May 4, 1981 (46 FR 24950) and on December 17, 1997 (62 FR 66020) (FRL–5753–1), respectively, and were provided to the Chief Counsel for Advocacy of the Small Business Administration. Taking into account this analysis, and available information concerning the pesticides listed in this proposed rule, the Agency hereby certifies that this proposed rule will not have a significant negative economic impact on a substantial number of small entities. In a memorandum dated May 25, 2001, EPA

determined that eight conditions must all be satisfied in order for an import tolerance or tolerance exemption revocation to adversely affect a significant number of small entity importers, and that there is a negligible joint probability of all eight conditions holding simultaneously with respect to any particular revocation. (This Agency document is available in the docket of this proposed rule). Furthermore, for the pesticide named in this proposed rule, the Agency knows of no extraordinary circumstances that exist as to the present proposal that would change the EPA's previous analysis. Any comments about the Agency's determination should be submitted to the EPA along with comments on the proposal, and will be addressed prior to issuing a final rule. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” This proposed rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this proposed rule does not have any “tribal implications” as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” “Policies that have tribal implications” is defined in the Executive order to include regulations that have “substantial direct

effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” This proposed rule will not have substantial direct effects on tribal governments, 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 in Executive Order 13175. Thus, Executive Order 13175 does not apply to this proposed rule.

List of Subjects in 40 CFR Part 180

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

Dated: May 8, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR chapter I be 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 180.153 is amended by revising the table in paragraph (a)(1); and paragraph (c) to read as follows:

§ 180.153 Diazinon; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
Almond, hulls	3.0
Apple	0.50
Apricot	0.20
Bean, lima	0.50
Bean, snap, succulent	0.50
Beet, garden, roots	0.75
Blueberry	0.50
Caneberry subgroup 13-07A	0.75
Carrot, roots	0.75
Cattle, fat	0.5
Cherry, sweet	0.20
Cherry, tart	0.20
Cranberry	0.50
Escarole	0.7
Fig	0.50
Ginseng	0.75
Hazelnut	0.50
Kiwifruit1	0.75
Lettuce	0.7
Melon	0.75
Nectarine	0.20
Onion, bulb	0.75
Onion, green	0.75
Peach	0.20
Pear	0.50
Pea, succulent	0.50
Pineapple	0.50

Commodity	Parts per million	Commodity	Parts per million	Expiration/Revocation Date	Commodity	Parts per million	Expiration/Revocation Date
Plum, prune, fresh	0.20	Caneberry sub-group 13-07A	12.0	None	Sorghum grain, forage	30	None
Radish	0.50	Cabbage	21	None	Sorghum grain, grain	10	None
Rutabaga	0.75	Cactus, fruit	5.0	None	Sorghum, grain, stover	30	None
Spinach	0.70	Cactus, pads	12	None	Soybean, seed ..	0.5	None
Strawberry	0.50	Citrus, oil	20	None	Soybean, forage	15	None
Tomato	0.75	Clover, forage ..	50	None	Soybean, hay	15	None
Vegetable, brassica, leafy, group 5	0.70	Clover, hay	70	None	Spinach	22	None
Watercress	0.05	Corn, field, forage	30	None	Strawberry	4.0	None
'There are no domestic registrations for kiwifruit as of March 6, 2002.		Corn, field, grain	0.02	None	Sunflower, seed	0.5	None
* * * * *		Corn, field, stover	20	None	Sweet potato, roots	0.2	None
(c) <i>Tolerances with regional registrations.</i> Tolerances with regional registration, as defined in §180.1(m), are established for residues of the insecticide diazinon (O, O-diethyl O-(6-methyl-2-(1-methylethyl)-4-pyrimidinyl)- phosphorothioate; CAS Reg. No. 333-41-5) in or on the following food commodities:		Corn, pop, grain	0.02	None	Trefoil, forage ..	15	None
Commodity	Parts per million	Corn, pop, stover	20	None	Trefoil, hay	25	None
Almond	0.50	Corn, sweet, forage	185	None	Vegetable, brassica, leafy, group 5, except cabbage	10	None
Banana	0.20	Corn, sweet, kernel plus cob with husks removed	0.1	None	Vegetable, cucurbit, group 9	3.0	None
Celery	0.70	Corn, sweet, stover	215	None	Vegetable, foliage legume, group 7	60	None
Cucumber	0.75	Cotton, undelinted seed	5.0	10/31/09	Vegetable, fruiting, group 8	5.0	None
Parsley, leaves	0.75	Cranberry	3.0	None	Vegetable, leaves of root and tuber, group 2, except sugar beet tops	75	None
Parsnip	0.50	Dandelion, leaves	22	None	Vegetable, legume, edible-podded, subgroup 6A	10	None
Pepper	0.5	Endive	10	None	Vegetable, root and tuber, group 1, except sugar beet and sweet potato ..	2.0	None
Potato	0.10	Flax, seed	0.5	None	Walnut	1.0	None
Potato, sweet	0.10	Fruit, citrus, group 10	10	None	Wheat, forage ..	30	None
Squash, summer	0.50	Fruit, pome, group 11	12	None	Wheat, grain	1.0	None
Squash, winter	0.75	Fruit, stone, group 12	10	None	Wheat, hay	30	None
Swiss chard	0.70	Grain, aspirated fractions	70	None	Wheat, straw	20	None
Turnip, roots	0.50	Grape	10	None	(2) Tolerances are established for residues of the insecticide carbaryl (1-naphthyl N-methylcarbamate) including its metabolites 1-naphthol (naphthyl-sulfate), 5,6-dihydrodihydroxycarbaryl and 5,6-dihydrodihydroxy naphthol, calculated as 1-naphthyl N-methylcarbamate and the free and conjugated residues of carbaryl: 5,6-dihydro-5,6-dihydroxy carbaryl, and 5-methoxy-6-hydroxy carbaryl in/on the following food commodities:		
Turnip, tops	0.75	Grape, raisin	12	None	Commodity	Parts per million	Expiration/Revocation Date
* * * * *		Grass, forage	100	None	Cattle, fat	0.5	None
3. Section 180.169 is amended by revising paragraphs (a)(1), (a)(2) and (c) to read as follows:		Grass, hay	15	None	Cattle, meat	1.0	None
§ 180.169 Carbaryl; tolerances for residues.		Leaf petiole subgroup 4B	3.0	None			
(a) <i>General.</i> (1) Tolerances are established for residues of the insecticide carbaryl (1-naphthyl N-methylcarbamate) <i>per se</i> in/on the following food commodities:		Lettuce	10	None			
Commodity	Parts per million	Millet, proso, grain	1.0	None			
Alfalfa	50	Millet, proso, staw	20	None			
Alfalfa, hay	75	Nut, tree group 14, except walnut	0.1	None			
Almond, hulls	50	Okra	4.0	None			
Apple, wet pomace	15	Olive	10	None			
Asparagus	15	Oyster	0.25	None			
Banana	5.0	Parsley, leaves	22	None			
Beet, sugar, tops	25	Pea and bean, dried shelled, except soybean, subgroup 6C	1.0	None			
Beet, sugar, roots	0.5	Peanut	0.05	None			
Bushberry subgroup 13-07B	3.0	Peanut, hay	20	None			
		Pineapple	2.0	None			
		Pistachio	0.1	None			
		Rice, grain	15	None			
		Rice, hulls	30	None			
		Rice, straw	60	None			

Commodity	Parts per million	Expiration/Revocation Date
Cattle, meat by-products	3.0	None
Egg	0.5	10/30/09
Goat, fat	0.5	None
Goat, meat	1.0	None
Goat, meat by-products	3.0	None
Hog, fat	0.5	None
Hog, meat	1.0	None
Hog, meat by-products	3.0	None
Horse, fat	0.5	None
Horse, meat	1.0	None
Horse, meat by-products	3.0	None
Milk	1.0	None
Poultry, fat	5.0	10/30/09
Poultry, meat	5.0	10/30/09
Sheep, fat	0.5	None
Sheep, meat	1.0	None
Sheep, meat by-products	3.0	None

* * * * *

(c) *Tolerances with regional registrations.* Tolerances are established for the residues of the insecticide carbaryl (1-naphthyl N-methylcarbamate) per se in/on the following food commodities:

Commodity	Parts per million
Dillweed, fresh leaves	0.2

* * * * *

4. Section 180.208 is amended by revising the heading and paragraph (a) is to read as follows:

§ 180.208 Benfluralin; tolerances for residues.

(a) *General.* Tolerances are established for residues of the herbicide benfluralin, (N-Butyl-N-ethyl- $\alpha\alpha\alpha$ -trifluoro-2,6-dinitro-p-toluidine) in or on the following food commodities:

Commodity	Parts per million
Alfalfa, forage	0.05
Alfalfa, hay	0.05
Clover, forage	0.05
Clover, hay	0.05
Lettuce	0.05
Trefoil, forage	0.05
Trefoil, hay	0.05

* * * * *

5. Section 180.229 is amended by revising paragraph (a) and adding text to paragraph (d) to read as follows:

§ 180.229 Fluometuron; tolerances for residues.

(a) *General.* (1) Tolerances are established for the combined residues of the herbicide fluometuron (N, N-

dimethyl-N'-(3-trifluoromethyl)phenyl)urea) and its metabolite trifluoromethylaniline (TFMA) determined as TFMA in or on the following food commodities:

Commodity	Parts per million
Cotton, gin byproducts	3.5
Cotton, undelinted seed	1.0

(2) Tolerances are established for the combined residues of the herbicide fluometuron (N,N-dimethyl-N'-(3-trifluoromethyl)phenyl)urea), its metabolites determined as TFMA, and the hydroxylated metabolites [CGA-236431 (1-(4-hydroxy-3-trifluoromethylphenyl)urea), CGA-236432 (1-methyl-3-(4-hydroxy-3-trifluoromethylphenyl)urea), CGA-13211 (1,1-dimethyl-3-(4-hydroxy-3-trifluoromethylphenyl)urea)] in or on the following food commodities:

Commodity	Parts per million
Cattle, meat byproducts	0.1
Egg	0.1
Goat, meat byproducts	0.1
Hog, meat byproducts	0.1
Horse, meat byproducts	0.1
Milk	0.02
Poultry, fat	0.1
Poultry, meat	0.1
Poultry, meat byproducts	0.1
Sheep, meat byproducts	0.1

* * * * *

(d) *Indirect or inadvertent residues.* Tolerances are established for the combined residues of the herbicide fluometuron (N, N-dimethyl-N'-(3-trifluoromethyl)phenyl)urea) and its metabolite trifluoromethylaniline (TFMA) determined as TFMA in or on the following food commodities:

Commodity	Parts per million
Grain, cereal, group 15	0.5
Grain, cereal, forage group 16	3.0
Grain, cereal, fodder, and straw, group 16	6.0
Peanut	0.1
Peanut, hay	4.0
Peanut, meal	0.2
Soybean, seed	2.0
Soybean, forage	3.0
Soybean, hay	3.0
Rice, hulls	1.0
Wheat, milled byproducts	1.0

6. Section 180.276 is amended by revising the table in paragraph (a) to read as follows:

§ 180.276 Formetanate hydrochloride; tolerances for residues.

(a) *General.* * * *

Commodity	Parts per million
Apple	0.50
Apple, wet pomace	1.5
Grapefruit	1.5
Lemon	0.60
Lime	0.03
Nectarine	0.40
Orange, sweet	1.5
Peach	0.40
Pear	0.50
Tangelo	0.03
Tangerine	0.03

* * * * *

7. Section 180.299 is revised to read as follows:

§ 180.299 Dicrotophos; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide dicrotophos (dimethyl phosphate of 3-hydroxy-N,N-dimethyl-cis-crotonamide) in/on the following food commodities:

Commodity	Parts per million
Cotton, gin by products	2.0
Cotton, undelinted seed	0.2

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

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

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

8. Section 180.316 is amended by revising the table in paragraph (a) and by adding text to paragraph (d) to read as follows:

§ 180.316 Pyrazon; tolerances for residues.

(a) *General.* * * *

Commodity	Parts per million
Beet, garden, roots	0.9
Beets, garden, tops	7.0
Beets, sugar, molasses	1.5
Beets, sugar, roots	0.2
Beets, sugar, tops	3.0
Cattle, fat	0.10
Cattle, liver	0.15
Cattle, meat	0.10
Cattle, meat byproducts, except liver	0.10
Goat, fat	0.10
Goat, liver	0.15
Goat, meat	0.10
Goat, meat byproducts, except liver	0.10
Horse, fat	0.10
Horse, liver	0.15
Horse, meat	0.10
Horse, meat byproducts, except liver	0.10
Milk	0.02

Commodity	Parts per million
Sheep, fat	0.10
Sheep, liver	0.15
Sheep, meat	0.10
Sheep, meat byproducts, except liver	0.10

* * * * *

(d) *Indirect or inadvertent residues.* Tolerances are established for combined residues of the herbicide pyrazon (5-amino-4-chloro-2-phenyl-3(2H)-pyridazinone) and its metabolites (calculated as pyrazon) in or on the following food commodities:

Commodity	Parts per million
Corn, field, forage	0.5
Corn, field, stover	0.5
Soybean, forage	0.5
Soybean, hay	0.5
Wheat, forage	0.3
Wheat, hay	0.2
Wheat, straw	0.1

§ 180.319 [Amended]

9. Section 180.319 is amended in the table by removing the entry for Carbaryl (1-naphthyl N-methylcarbamate) and its metabolites 1-naphthol, calculated as carbaryl.

10. Section 180.328 is revised to read as follows:

§ 180.328 Napropamide; tolerances for residues.

(a) *General.* Tolerances are established for the herbicide napropamide (N,N-diethyl-2-(1-naphthalenyloxy) propionamide in or on the following food commodities:

Commodity	Parts per million	Expiration/Revocation Date
Almond, hulls	0.1	None
Artichoke, globe	0.1	4/26/09
Asparagus	0.1	None
Avocado	0.1	4/26/09
Basil	0.1	None
Berry group 13 ..	0.1	None
Cranberry	0.1	None
Coffee, green bean	0.1	None
Fig	0.1	4/26/09
Fruit, citrus	0.1	4/26/09
Fruit, pome	0.1	4/26/09
Fruit, stone	0.1	4/26/09
Grape	0.1	None
Kiwifruit	0.1	None
Marjoram	0.1	None
Nut, tree, group 14	0.1	None
Olive	0.1	4/26/09
Peppermint, tops	0.1	None
Persimmon	0.1	None
Pistachio	0.1	04/26/09

Commodity	Parts per million	Expiration/Revocation Date
Rhubarb	0.1	None
Rosemary	0.1	None
Savory, summer	0.1	None
Savory, winter ...	0.1	None
Spearmint, tops	0.1	None
Strawberry	0.1	None
Sweet potato, roots	0.1	None
Vegetable, brassica, leafy, group 5	0.1	None
Vegetable, fruiting, group 8	0.1	None

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

(c) *Tolerances with regional registrations.* Tolerances are established for the herbicide napropamide (N,N-diethyl-2-(1-naphthalenyloxy) propionamide in or on the following food commodities:

Commodity	Parts per million	Expiration/Revocation Date
Pomegranate	0.1	4/26/09

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

11. Section 180.356 is amended in paragraph (a) by revising the tolerance level for the commodities listed in the table to read to as follows:

§ 180.356 Norflurazon; tolerances for residues.

(a) *General.* * * *

Commodity	Parts per million
* * *	*
Cattle, liver	0.50
* * *	*
Goat, liver	0.50
* * *	*
Hog, liver	0.50
* * *	*
Horse, liver	0.50
* * *	*
Sheep, liver	0.50
* * *	*
* * *	*

12. Section 180.364 is amended by revising the table in paragraph (a) to read as follows:

§ 180.364 Glyphosate; tolerances for residues.

(a) *General.* * * *

Commodity	Parts per million
Acerola	0.2
Alfalfa, seed	0.5
Almond, hulls	25
Aloe vera	0.5
Ambarella	0.2
Animal feed, nongrass, group 18	400
Artichoke, globe	0.2
Asparagus	0.5
Atemoya	0.2
Avocado	0.2
Bamboo, shoots	0.2
Banana	0.2
Barley, bran	30
Beet, sugar, dried pulp	25
Beet, sugar, roots	10
Beet, sugar, tops	10
Berry group 13	0.2
Betelnut	1.0
Biriba	0.2
Blimbe	0.2
Borage, seed	0.1
Breadfruit	0.2
Cacao bean	0.2
Cactus, fruit	0.5
Cactus, pads	0.5
Canistel	0.2
Canola, seed	20
Cattle, meat byproducts	5.0
Chaya	1.0
Cherimoya	0.2
Citrus, dried pulp	1.5
Coconut	0.1
Coffee, bean	1.0
Corn, field, forage	6.0
Corn, field, grain	5.0
Corn, pop, grain	0.1
Corn, sweet, grain	0.1
Cotton, gin byproducts	175
Cotton, undelinted seed	40
Cranberry	0.2
Crambe, seed	0.1
Custard apple	0.2
Date	0.2
Dokudami	2.0
Durian	0.2
Egg	0.05
Epazote	1.3
Feijoa	0.2
Fig	0.2
Fish	0.25
Flax, meal	8.0
Flax, seed	4.0
Fruit, citrus, group 10	0.5
Fruit, pome, group 11	0.2
Fruit, stone, group 12	0.2
Galangal, roots	0.2
Ginger, white, flower	0.2
Goat, meat byproducts	5.0
Gourd, buffalo, seed	0.1
Governor's plum	0.2
Gow kee, leaves	0.2
Grain, aspirated fractions	100
Grain, cereal, forage, fodder and straw, group 16, except corn forage	100
Grain, cereal, group 15 except rice, wild rice, field corn, sweet corn, and popcorn	30

Commodity	Parts per million	Commodity	Parts per million	Commodity	Parts per million
Grape	0.2	Soybean, hay	200	* * *	* *
Grass, forage, fodder and hay, group 17	300	Soybean, hulls	100	Tomato	0.10
Guava	0.2	Soybean, seed	20	* * *	* *
Herbs subgroup 19A	0.2	Spanish lime	0.2		
Hog, meat byproducts	5.0	Spearmint, tops	200		
Hop, dried cones	7.0	Spice subgroup 19B	7.0		
Horse, meat byproducts	5.0	Star apple	0.2	* * *	
llama	0.2	Starfruit	0.2		
Imbe	0.2	Stevia, dried leaves	1.0		
Imbu	0.2	Strawberry	0.2		
Jackfruit	0.2	Sugar apple	0.2		
Jaboticaba	0.2	Sugarcane, cane	2.0		
Jojoba, seed	0.1	Sugarcane, molasses	30		
Juneberry	0.2	Sunflower, seed	85		
Kava, roots	0.2	Surinam cherry	0.2		
Kenaf, forage	200	Tamarind	0.2		
Kiwifruit	0.2	Tea, dried	1.0		
Lesquerella, seed	0.1	Tea, instant	7.0		
Leucaena, forage	200	Teff, grain	5.0		
Lingonberry	0.2	Ti, leaves	0.2		
Longan	0.2	Ti, roots	0.2		
Lychee	0.2	Ugli fruit	0.5		
Mamey apple	0.2	Vegetable, leafy, brassica, group 5	0.2		
Mango	0.2	Vegetable, bulb, group 3	0.2		
Mangosteen	0.2	Vegetable, cucurbit, group 9	0.5		
Marmaladebox	0.2	Vegetable, foliage of legume, except soybean, subgroup 7A	0.2		
Meadowfoam, seed	0.1	Vegetable, fruiting, group 8	0.1		
Mioga, flower	0.2	Vegetable, leafy, except brassica, group 4	0.2		
Mustard, seed	0.1	Vegetable, leaves of root and tuber, group 2, except sugar beet tops	0.2		
Noni	0.20	Vegetable, legume, group 6 except soybean and pea, dry ...	5.0		
Nut, pine	1.0	Vegetable, root and tuber, group 1, except sugar beet ...	0.2		
Nut, tree, group 14	1.0	Wasabi, roots	0.2		
Okra	0.5	Water spinach, tops	0.2		
Olive	0.2	Watercress, upland	0.2		
Oregano, Mexican, leaves	2.0	Wax jambu	0.2		
Palm heart	0.2	Yacon, tuber	0.2		
Palm heart, leaves	0.2				
Palm, oil	0.1				
Papaya	0.2				
Papaya, mountain	0.2				
Passionfruit	0.2				
Pawpaw	0.2				
Pea, dry	8.0				
Peanut	0.1				
Peanut, hay	0.5				
Pepper leaf, fresh leaves	0.2				
Peppermint, tops	200				
Perilla, tops	1.8				
Persimmon	0.2				
Pineapple	0.1				
Pistachio	1.0				
Pomegranate	0.2				
Poultry, meat	0.1				
Poultry, meat byproducts	1.0				
Pulasan	0.2				
Quinoa, grain	5.0				
Rambutan	0.2				
Rapeseed, seed	20				
Rice, grain	0.1				
Rice, grain, wild	0.1				
Rose apple	0.2				
Safflower, seed	85				
Salal	0.2				
Sapodilla	0.2				
Sapote, black	0.2				
Sapote, mamey	0.2				
Sapote, white	0.2				
Sesame, seed	0.1				
Sheep, meat byproducts	5.0				
Shellfish	3.0				
Soursop	0.2				
Soybean, forage	100				

14. Section 180.427 is amended by revising the heading and paragraph (a) to read as follows:

§ 180.427 Tau-fluvalinate; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide tau-fluvalinate [cyano-(3-phenoxyphenyl)methyl N-[2-chloro-4-(trifluoromethyl)phenyl]-D-valinate] in/on the following food commodities:

Commodity	Parts per million
Honey	0.02

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R1-ES-2008-0051; 92210-1117-0000-FY08-B4]

RIN 1018-AU37

Endangered and Threatened Wildlife and Plants; Proposed Revised Designation of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed revised designation of critical habitat for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of the draft economic analysis (DEA) of the proposed revised critical habitat designation and an amended required determination section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed revised rule, the associated

13. Section 180.368 is amended by alphabetically adding commodities to the table in paragraph (a)(1) to read as follows:

§ 180.368 Metolachlor; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
* * *	*
Dill	0.50
* * *	*
Grass, forage	10
Grass, hay	0.20
* * *	*
Okra	0.50
* * *	*
Spinach	0.50

draft economic analysis, and the amended required determinations section. If you submitted comments previously, then you do not need to resubmit them because we have already incorporated them into the public record and we will fully consider them in preparation of our final rule.

DATES: We will consider comments received or postmarked on or before June 20, 2008.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: RIN 1018-AU37; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203. We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Matt Kales, Acting Project Leader, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE., 98th Ave., Suite 100, Portland, OR 97266; telephone 503-231-6179. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed revised critical habitat designation for the northern spotted owl published in the **Federal Register** on June 12, 2007 (72 FR 32450), the draft economic analysis of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh threats to the species caused by the designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- The amount and distribution of northern spotted owl habitat,

- What areas occupied at the time of listing that contain features essential for the conservation of the species we should include in the designation and why, and

- What areas not occupied at the time of listing are essential to the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.

(4) Information on the extent to which any State and local environmental protection measures we reference in the DEA may have been adopted largely as a result of the species' listing.

(5) Information on whether the DEA identifies all State and local costs and benefits attributable to the proposed revised critical habitat designation, and information on any costs or benefits that we have overlooked.

(6) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes likely if we designate revised critical habitat.

(7) Information on whether the DEA identifies all costs that could result from the revised designation.

(8) Information on whether the DEA correctly assesses the effect on regional costs associated with any land use controls that may result from the revised critical habitat designation.

(9) The extent to which the description in the draft economic analysis of economic impacts to public land management and other activities is complete and accurate.

(10) Information on areas that the revised critical habitat designation could potentially impact to a disproportionate degree.

(11) Economic data on the incremental costs of designating any particular area as revised critical habitat.

(12) Information on any quantifiable economic or other potential benefits of the proposed revised designation of critical habitat. Factors which may be considered under the potential benefits of critical habitat designation may include, but are not limited to, aesthetic considerations, recreational use, biodiversity, aquatic resources, intrinsic values, and benefits to local communities.

(13) Any foreseeable economic, national security, or other relevant impacts resulting from the proposed revised designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts. Other impacts in addition to economic effects that may be considered in the

designation of critical habitat may include, but are not limited to, social factors, ecological factors, impacts on forest management, impacts on fire management, and impacts on local communities. The proposed revised designation specifically requested public comment on whether "any areas should or should not be excluded from the revised designation under section 4(b)(2) of the Act and why" (72 FR 32450).

(14) The potential impact, if any, of the proposed revised designation on the receipt of Federal timber-based revenues by counties, including, but not limited to, counties receiving timber-based revenues under the O&C Lands Act of 1937. Such impacts may include, but are not limited to, effects to the stability of county programs due to fluctuating or uncertain timber revenues.

(15) Any foreseeable economic or other potential benefits resulting from the proposed revised designation. Factors which may be considered under the potential benefits of critical habitat designation may include, but are not limited to, aesthetic considerations, recreational use, biodiversity, aquatic resources, intrinsic values, and benefits to local communities.

(16) After considering the potential impacts and benefits of the proposed revised critical habitat designation, whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area as critical habitat under section 4(b)(2) of the Act.

(17) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

In addition, the Final Recovery Plan for the Northern Spotted Owl is now available. The public is invited to use this reopened comment period to provide comments on the revised critical habitat designation in light of the Recovery Plan or any other relevant information that has become available since the last comment period, such as the Scientific Review of the Draft Northern Spotted Owl Recovery Plan prepared by Sustainable Ecosystems Institute for the Service.

You may submit your comments and materials concerning our proposed revised rule, the associated DEA, and our amended required determinations by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this notice, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the proposed revised rule and DEA by mail from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**), by visiting the Federal eRulemaking Portal at <http://www.regulations.gov>, or on our Web site at <http://www.fws.gov/oregonfwo/species/>. You may obtain copies of the Final Recovery Plan and Sustainable Ecosystems Institute report on the Internet at <http://www.fws.gov/pacific/ecoservices/endangered/recovery/NSORecoveryPlanning.htm>.

Background

It is our intent to discuss only those topics directly relevant to the revised designation of critical habitat in this notice. For more information on the taxonomy and biology of the northern spotted owl, refer to the final listing rule published in the **Federal Register** on June 26, 1990 (55 FR 26114), and the proposed revised critical habitat rule published on June 12, 2007 (72 FR 32450).

We published the final rule to list the northern spotted owl as threatened in the **Federal Register** on June 26, 1990 (55 FR 26114), and designated critical habitat for the species on January 15, 1992 (57 FR 1796). On April 21, 2003, we published a notice of review initiating a 5-year review of the northern spotted owl (68 FR 19569), and on July 25, 2003, we published a second information request for the 5-year review (68 FR 44093). The 5-year review was completed on November 15, 2004, and concluded that the northern spotted owl should remain listed as a threatened species. On April 26, 2007, we published the notice of availability for the draft recovery plan for the northern spotted owl (72 FR 20865).

On January 13, 2003, we entered into a settlement agreement with the American Forest Resource Council, Western Council of Industrial Workers, Swanson Group Inc., and Rough & Ready Lumber Company to conduct a rulemaking to consider potential revisions to critical habitat for the northern spotted owl that includes a revised consideration of economic impacts and any other relevant aspects of designation. The dates for completion of this review were extended and called for the Service to submit a proposed revised critical habitat designation to the **Federal Register** by June 1, 2007, and to submit a final revised critical habitat designation to the **Federal Register** by June 1, 2008. We published the proposed revised designation of critical habitat for the northern spotted owl on June 12, 2007 (72 FR 32450), and reopened an additional comment period on the proposal on September 5, 2007 (72 FR 50929).

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any

other relevant impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis of the proposed revised critical habitat designation based on our June 12, 2007, proposed rule to revise critical habitat for the northern spotted owl.

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed revised critical habitat designation for the northern spotted owl. The DEA quantifies the economic impacts of all potential conservation efforts for the northern spotted owl; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact of the proposed revised critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species; for example, under the Federal listing and other Federal, State, and local regulations. The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur after the proposed revised critical habitat is finalized. The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed revised critical habitat designation for the northern spotted owl over the next 20 years.

The current draft economic analysis estimates the foreseeable economic impacts of the proposed revised critical habitat designation. The economic analysis identifies potential incremental costs as a result of the proposed revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs coextensive with listing. The analysis quantifies economic impacts of northern spotted owl conservation efforts associated primarily with the following activities: (1) Timber management, (2)

section 7 consultation, (3) survey and monitoring efforts, and (4) barred owl management.

The annualized pre-designation (1990 to 2007) impacts associated with species conservation activities for the northern spotted owl in area proposed for revised designation are \$563 million applying a 3 percent discount rate and \$600 million applying a 7 percent discount rate. These impacts are related to timber management, survey and monitoring efforts, barred owl management, and section 7 consultations. The post-designation impacts associated with species conservation were estimated over the period 2008 to 2027 for the same four categories of activities. The quantified post-designation baseline impacts (those estimated to occur in the absence of the critical habitat designation) are \$601.80 to \$602.21 million annualized applying a 7 percent discount rate, or \$601.77 to \$602.15 million annualized applying a 3 percent discount rate, over the 20-year period of analysis. Because these costs are projected to occur whether critical habitat is designated or not, they are not considered in our determination of whether the benefits of including an area as critical habitat outweigh the benefits of excluding the area.

Of the activities considered in the analysis, only administrative costs of actions taken under section 7 of the Endangered Species Act associated with the geographic area proposed as revised critical habitat for the northern spotted owl were determined to be incremental costs associated with the critical habitat designation, and therefore appropriate to consider in that designation. The DEA forecasts these incremental impacts associated with the proposed rulemaking to be \$132,000 to \$202,000 annualized over the next 20 years using a 7 percent discount rate, and \$122,000 to \$195,000 annualized using a 3 percent discount rate. The U.S. Forest Service (USFS) is expected to bear approximately 60 percent of the total anticipated upper-bound incremental impacts, while the Service is forecast to bear more than 30 percent of these impacts. The remaining incremental impacts (about 10 percent) are anticipated to be borne by the Bureau of Land Management (BLM).

Only the incremental costs of designating critical habitat, over and above the costs associated with species protection under the Act more generally, may be considered in designating critical habitat, therefore the methodology for distinguishing these two categories of costs is important. This is particularly true in the current case, where 99.97% of the total costs of

species conservation over the next 20 years are projected to be baseline costs, and 0.03% are projected to be incremental costs associated with the critical habitat designation. In the absence of critical habitat, Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered species or threatened species—costs associated with such actions are considered baseline costs. Once an area is designated as critical habitat, proposed actions that have a Federal nexus in this area will also require consultation and potential revision to ensure that the action does not result in the destruction or adverse modification of designated critical habitat—costs associated with these actions are considered incremental costs. The DEA explains that incremental consultation which takes place as a result of critical habitat designation may fall into one of three categories: (1) Additional effort to address adverse modification in a new consultation; (2) re-initiation of consultation to address effects to critical habitat; and (3) incremental consultation resulting entirely from critical habitat designation (i.e., where a proposed action may affect unoccupied critical habitat). Based on historical data, the DEA estimates that there will be 28 incremental consultations annually in the first category, plus one additional re-initiation of consultation (category 2) for each affected National Forest or BLM district regarding its land or resource management plan. Because no unoccupied habitat is being proposed for designation, no consultations in category 3 are projected.

The DEA further projects that there will be no changes in management of any habitat resources that entail quantifiable costs resulting from these additional consultations over the 20-year period. This is because we believe that all costs of habitat management to protect northern spotted owls are already envisioned in the Northwest Forest Plan (NFWP) and the Western Oregon Plan Revisions (WOPR). As the DEA explains, “Both the NFWP and WOPR apply to lands within the current critical habitat designations, as well as in the proposed designation; however, neither plan was developed nor designed specifically in response to critical habitat” (DEA, p. 39). Thus, the roughly \$21 billion in historical and projected costs for protecting species in critical habitat areas are attributable solely to the plans (which were in turn developed partially in response to the

listing of the northern spotted owl) and not to either the current or proposed critical habitat designations. The Service notes that the majority of both current and proposed critical habitat areas are designated as Late Successional Reserves under the NFWP (which correspond roughly to Late Successional Management Areas under the WOPR), on which large scale harvesting of trees is generally not permitted, in order to protect late-successional and old-growth forests that are important to NSO preservation. However, we believe that the past and future management of these areas to protect northern spotted owls is a function solely of the plans, which did not result from, and will not be influenced in their future application by, the presence of critical habitat. Thus we project no incremental timber management costs as a result of the critical habitat designation.

Ideally, we would have distinguished in the DEA between management of land previously designated as critical habitat within each NFWP land use allocation (LUA) category and management of land not designated as critical habitat within the same category. If such an analysis found that there was no statistically discernable difference between timber harvest probabilities on critical habitat and non-critical habitat land within an LUA category, this would further support our conclusion that designation as critical habitat did not affect past management of habitat and therefore will be unlikely to have substantive costs in the future. Conversely, if such an analysis found that within a given LUA category, there was a lower probability of harvest on critical habitat land than on non-critical habitat land, this might have caused us to reassess that conclusion. However, we have been unable to find, and the Federal land managers that we have consulted have been unable to provide, timber harvest data that distinguishes between critical habitat and non-critical habitat land. As a result we have been able to quantitatively assess only baseline impacts, by looking at harvest probabilities by LUA category (but not by critical habitat) before the NFWP was implemented and after implementation of the NFWP (see Table 3–4 in the DEA). Lacking the relevant data for a statistical analysis of potential incremental impacts, we have instead relied on discussions with Service biologists and USFS and BLM land managers to assess incremental impacts. These discussions have confirmed that the anticipated impacts of the proposed designation on

timber management range from minimal to none (see Section ES-1 of the DEA).

We request comment on the accuracy of our methodology for distinguishing baseline and incremental costs, and the assumptions underlying it. We also request comment on alternative methodologies. Finally, we request comment on whether there is data available that could be used to distinguish harvest outcomes on critical habitat versus non-critical habitat land within each NWFP LUA category.

The DEA considers the potential economic effects of actions relating to the conservation of the northern spotted owl, including costs associated with sections 4, 7, and 10 of the Act, as well as costs attributable to the designation of revised critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the northern spotted owl in areas containing features essential to the conservation of the species. The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use).

The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector. Finally, the DEA looks retrospectively at costs that have been incurred since the date we listed the northern spotted owl as threatened (June 26, 1990; 55 FR 26114), and considers those costs that may occur in the 20 years following the revised designation of critical habitat. Because the DEA considers the potential economic effects of all actions relating to the conservation of the northern spotted owl, including costs associated with sections 4, 7, and 10 of the Act and those attributable to the revised designation of critical habitat, the DEA

overestimates the potential economic impacts of the revised critical habitat designation.

As we stated earlier, we are soliciting data and comments from the public on this DEA, as well as on all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or its supporting documents to incorporate or address information we receive during this comment period. In particular, we may exclude an area from revised critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as revised critical habitat, provided the exclusion will not result in the extinction of the species.

Required Determinations—Amended

In our June 12, 2007, proposed revised rule (72 FR 32450), we said that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data to make these determinations. In this document we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we revise our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)) (SBREFA), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this revised designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for the northern spotted owl would affect a substantial number of small entities, we considered the number of small entities affected within particular types of

economic activities. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement. The designation of critical habitat will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize this proposed revised critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

Appendix B of the DEA evaluates the potential economic effects of the proposed revised designation on small entities, based on the estimated incremental impacts associated with the proposed rulemaking. The screening analysis is based on the estimated impacts associated with the proposed rulemaking as described in chapters 3 through 7 and Appendix A of the DEA. The analysis evaluates the potential for economic impacts related to several categories, including: (1) Timber management, (2) barred owl management and control, (3) northern spotted owl surveys and monitoring, (4) fire management, (5) linear projects (i.e., transportation, pipelines, and powerlines), (6) restoration, (7) recreation, and (8) administrative costs associated with Section 7 consultation. Of these activities, incremental impacts associated with the proposed revised critical habitat designation are anticipated only for the additive administrative costs of section 7 consultations and technical assistance requests (Appendix A of the DEA). The DEA concludes that as these incremental economic impacts will be borne entirely by Federal government agencies (USFS, BLM and the Service); the proposed rulemaking is not expected to affect any small entities.

In summary, we have considered whether the proposed revised designation would result in a significant economic impact on a substantial number of small entities. Based on currently available information and as explained above, all incremental economic impacts of the proposed

revised designation are expected to be borne entirely by Federal agencies and no impacts on any small entities are anticipated. We therefore certify that, if promulgated, the proposed revised designation would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 13211—Energy Supply, Distribution, and Use

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. The DEA finds none of these criteria relevant to this analysis (Appendix B of the DEA). Thus, based on information in the DEA, we do not expect northern spotted owl conservation activities within proposed revised critical habitat to lead to energy-related impacts. As such, we do not expect the proposed revised designation of critical habitat to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), we make the following findings:

(a) The rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal

Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except as (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, or permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that the proposed designation will significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The proposed revised designation of critical habitat imposes no obligations on State or local governments. The SBA does not consider the Federal Government to be a small governmental jurisdiction or entity. Consequently, we do not believe that the revised critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630—Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing revised critical habitat for the northern spotted owl in a takings implications assessment. This proposed revised critical habitat designation would only affect Federal lands and would not affect private property interests. Therefore, our takings

implications assessment concludes that the proposed revised designation of critical habitat for the northern spotted owl does not pose significant takings implications.

Authors

The primary authors of this notice are the staff of the Division of Endangered

Species, Pacific Region, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 15, 2008.

Lyle Lavery,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E8-11321 Filed 5-20-08; 8:45 am]

BILLING CODE 4310-55-P

Notices

Federal Register

Vol. 73, No. 99

Wednesday, May 21, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of a meeting of the Advisory Committee on Voluntary Foreign Aid (ACVFA).

Date: Wednesday, June 4, 2008 (9 a.m. to 3:30 p.m., times may be adjusted).

Location: The Lane Room, 16th Floor, The Commerce Club, 34 Broad Street, NW., Atlanta, Georgia 30303.

Please note that this is the anticipated agenda and is subject to change.

Keynote: A senior USAID official has been invited to speak on the important role of partnerships as part of USAID's work in international development and humanitarian assistance.

Atlanta's Cross-Cutting Partnerships: An examination of successful partnerships will take place with representatives from private voluntary organizations, universities, for-profit firms and the U.S. Government. Particular attention will be paid to those programs that have been or could be successfully replicated in other countries. Invited panelists include Dr. Julie Gerberding, Director of the U.S. Centers for Disease Control and Prevention, Helene Gayle, President and CEO of CARE (ACVFA Member), Ron Jarvis, Senior Vice President for Pro, Tool Rental and Environment for Home Depot, Michael Nyenhuis, President and CEO of MAP International (ACVFA Member) and a senior representative from an Atlanta area academic institution.

American Awareness of U.S. Foreign Assistance: ACVFA members and Atlanta community leaders will moderate small group discussions with participants on ways to raise awareness of U.S. foreign assistance, including the important collaborative role of partner organizations.

The meeting is free and open to the public. Persons wishing to attend the

meeting can register online at http://www.usaid.gov/about_usaid/acvfa or with Jocelyn Rowe at jrowe@usaid.gov or 202-712-4002.

Dated: May 12, 2008.

Jocelyn M. Rowe,

Executive Director, Advisory Committee on Voluntary Foreign Aid (ACVFA), U.S. Agency for International Development.

[FR Doc. E8-11337 Filed 5-20-08; 8:45 am]

BILLING CODE 6116-01-P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 16, 2008.

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

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs

potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Forest Service

Title: Airplane Pilot Qualifications and Approval Record, Helicopter Pilot Qualifications and Approval Record, Airplane Data Record, and Helicopter Data Record.

OMB Control Number: 0596-0015.

Summary of Collection: The Forest Service (FS) is the largest owner and operator of aircraft in the federal government outside of the Department of Defense. In conducting the Forest Service Land management mission they use 44 owned aircraft with 315 aircraft on loan to 18 States for fire suppression activities. The majority of FS flying is in support of wildland fire suppression. In addition to the agency owned aircraft, the FS contracts with approximately 400 vendors for aviation services used in resource protection and administrative projects. Contractor aircraft and pilots are used to place water and chemical retardants on fires, provide aerial delivery of firefighters to fires, perform reconnaissance, resource surveys, search for lost personnel, and fire detection. Contracts for such services established rigorous qualification requirements for pilots and specific condition/equipment/performance requirements for aircraft. The authority is granted under the Federal Aviation Administration Regulations in Title 14 (Aeronautics and Space) of the Code of Federal Regulations.

Need and Use of the Information: FS will collect information using FS forms to document the basis for approval of contract pilot and aircraft for use in specific FS aviation missions. The information collected from contract pilots in face to face meetings (such as name, age, pilots license number, number of hours flown in type of aircraft, etc.) is based on the length and type of contract but is usually done on a reoccurring annual basis. Without the information supplied on these forms, FS contracting officers and pilot/aircraft inspectors cannot determine if pilots and aircraft meet the detailed qualification, equipment, and condition requirements essential to safe, efficient accomplishment of FS specified flying

missions and which are included in contract specifications.

Description of Respondents:

Individuals or households; Business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 2,700.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 1,226.

Forest Service

Title: 36 CFR Part 228, Subpart A—Locatable Minerals.

OMB Control Number: 0596–0022.

Summary of Collection: The United States Mining Law of 1982, as amended, governs the prospecting for and appropriation of metallic and most nonmetallic minerals on 192 millions acres of National Forest set up by proclamation from the public domain. It gives individuals the right to search for and extract valuable mineral deposits of locatable minerals and secure title to the lands involved. Recording that claim in the local courthouse and with the appropriate BLM State Office affords protection to the mining claimant from subsequent locators. A mining claimant is entitled to reasonable access to claim for further prospecting, mining or necessary related activities, subject to the other laws and applicable regulations. The purpose of the regulations at 36 CFR part 228, subpart A, is to set some specific rules and procedures through which use of the surface of National Forest System lands in connection with mineral operations authorized by the United States mining laws shall be conducted so as to minimize adverse environmental impacts on surface resources. The Forest Service (FS) will collect information using form FS 2800–5, Plan of Operations for Mining Activities on National Forest System Lands.

Need and Use of the Information: FS will collect information requirements for a Notice of Intent to include the name, address, and telephone number of the operator; the area involved; the nature of the proposed operations; the route of access to the area of operations and the method of transport. The information requirements for a Plan of Operations includes: The name and legal mailing address of the operators; a description of the type of operations proposed; a description of how it would be conducted; a description of the type and standard of existing/proposed roads/access route; a description of the means of transportation to be used; a description of the period during which the proposed activity will take place; and measures to meet the environmental protection requirements. The

information requirements for a cessation of operation include: verification to maintain the structures, equipment and other facilities; expected reopening date; estimate of extended duration of operations; and maintenance of the site, structure, equipment and other facilities during nonoperating periods.

Description of Respondents: Business or other for-profit.

Number of Respondents: 737.

Frequency of Responses: Reporting: Other (approved for a given period).

Total Burden Hours: 4,661.

Forest Service

Title: Social and Cultural Structure of Private Forestry.

OMB Control Number: 0596–NEW.

Summary of Collection: Non-industrial Private Forest (NIPF) land represents about 95 percent of the private forest owners and 63 percent of the private forestland in the southern United States. NIPF lands provide many important public and private benefits including timber supply, forest health, watershed protection, biodiversity, aesthetics, wildlife, recreation, income, and investment. These benefits are enhanced when landowners receive professional forestry assistance, though very few landowners seek assistance or have written management plans for their forests. Forest Service along with a team of researchers from the Southern Research Station, and the College of Agricultural, Environmental, and Natural Sciences, Tuskegee University will conduct a study of minority forest landowners at three sites in the South.

Need and Use of the Information:

This study will provide guidance for (a) reaching underserved landowners, (b) motivating a wider range of forest landowners to take action to meet their objectives, and (c) developing new survey questions for use in NIPF studies nationwide. The information collected during face-to-face interviews with forest landowners includes responses to “twenty statements test” to measure identity, identification of social networks utilized to acquire forest management information, demographic data, life history regarding land ownership and forest management. Learning how diverse forest landowners operate within social and cultural contexts will produce practical and theoretical benefits. The information gathered will contribute to scientific presentations and publications and will assist in developing new approaches for delivery of assistance to forest landowners.

Description of Respondents:

Individuals or Households.

Number of Respondents: 100.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 200.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–11356 Filed 5–20–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 16, 2008.

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

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

Natural Resource Conservation Service

Title: Emergency Watershed Protection Program Recovery.

OMB Control Number: 0578-0030.

Summary of Collection: The Emergency Watershed Protection (EWP) Program regulations at 7 CFR 624 set forth the basic policies, program provisions, and eligibility requirements for sponsors to participate in the EWP program. The Natural Resource Conservation Service (NRCS) is responsible for administration of EWP Program. EWP assistance is provided to sponsors to undertake emergency measures for runoff retardation and soil erosion prevention to safeguard lives and property from floods, drought, and the products of erosion on any watershed whenever fire, flood, or any other natural disaster occurrence is causing or has caused a sudden impairment of that watershed. The sponsor's request is submitted formally as a letter (NRCS-PDM-20A) to the NRCS State Conservationist for consideration. Form NRCS-PDM-20, Damage Survey Report (DSR) is the agency decision-making document that includes the economic, social, and environmental evaluation, as well as the engineer's cost estimate.

Need and Use of the Information: The collected information allows the responsible federal official to make EWP eligibility determinations and provide federal cost-share payments to the sponsors. Without the information NRCS would not be able to implement the program.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 190.

Frequency of Responses: Reporting: Other (Disaster Occurrence).

Total Burden Hours: 5,035.

Ruth Brown,

Departmental Information Collection
Clearance Officer.

[FR Doc. E8-11357 Filed 5-20-08; 8:45 am]

BILLING CODE 3410-16-P

DEPARTMENT OF AGRICULTURE

Forest Service

Caribou-Targhee National Forest, ID; Supplemental Environmental Impact Statement for the Targhee Revised Forest Plan With Proposed Forest Plan Amendment

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare a supplemental environmental impact statement.

SUMMARY: The Caribou-Targhee National Forest is proposing to prepare a Supplemental Environmental Impact Statement (SEIS) to the Targhee Revised

Forest Plan (FEIS) to disclose effects of a proposed amendment to the TRFP to address Plan direction for forested vegetation that presently does not reflect the ecological capability of forest ecosystems found on the Targhee National Forest and to also clarify TRFP direction on snags.

DATES: Comments concerning the scope of the analysis must be received within 45 days from the date of this publication. The draft supplemental environmental impact statement is expected July of 2008 and the final supplemental environmental impact statement is expected November 2008.

ADDRESSES: Send written comments to Robbin Redman, Forest Planner, Caribou-Targhee National Forest, 1405 Hollipark Drive, Idaho Falls, Idaho. Electronic comments can be sent to comments-intermttn-caribou-targhee@fs.fed.us.

FOR FURTHER INFORMATION CONTACT: Robbin Redman, Forest Planner, Caribou-Targhee National Forest, 1405 Hollipark Drive, Idaho Falls, Idaho 83401 or telephone (208) 557-5821.

Purpose and Need for Action

The Caribou-Targhee National Forest (C-T) has completed an assessment of forest vegetation for the Targhee portion of the C-T and in addition to this assessment the Forest has previously completed identification of the properly functioning condition (PFC) for forested landscapes in the Madison-Pitchstone Plateau Subsection. Scientific research papers published after the TRFP and PFC were also completed that help the Forest to identify desired conditions that better match the ecological capabilities of forested vegetation including a range of amounts and distribution of old growth and late seral structural stages by forest type.

The results of the information discussed above indicate a need to amend guidance in the TRFP for old growth and late seral structural stages to better describe desired conditions in the TRFP for old growth and late seral structural stages. Specifically, review of existing information and TRFP direction indicates the following:

The TRFP established guidelines for old growth and late seral forest stages that suggest minimum percentages of forested acres of old growth and late seral forest be present in each principal watershed. Presence and persistence of late seral stages and old growth are highly dependent on natural disturbance cycles that vary with forest type. For example, several principal watersheds are dominated by the lodgepole pine forest type, which rarely

develops old growth conditions on the Targhee National Forest. Natural disturbance cycles in lodgepole pine forest such as insects, disease, and fire recur frequently enough to preclude development of old-growth conditions in most of this type. Therefore, the old growth and late seral guidelines presently in the TRFP do not reflect the ecological capability of these forest ecosystems.

Similarly, several principal watersheds have a large component of the aspen forest type. On the Targhee, aspen is primarily seral to conifer. Stable aspen is rare and limited to harsh sites generally along ecotones with poor growing conditions where conifer cannot establish. Absent disturbances in seral types, these aspen stands will eventually be replaced by conifer types and it is unlikely that late seral or old growth aspen stands will develop or persist. Even though the ecological capability of these forest types is different from others such as spruce/fir the Forest is still proposing to manage for old growth and replacement old growth in these forest types, this would be for vegetation diversity.

Recent insect outbreaks have changed the number and distribution of snags over much of the Targhee NF. Currently TRFP snag direction requires several levels of analysis of snags: at the prescription area, at the watershed level and at a 100 acre level. This direction will be reviewed and adjusted to reflect current conditions and allow for wildlife habitat needs.

Proposed Action

The Caribou-Targhee National Forest is proposing to amend the TRFP with regard to Plan direction for old growth and late seral forested vegetation. The Proposed old growth direction will be to manage for ten percent of forested acres in a combination of old growth and replacement old growth in ecological subsections. The old growth would meet Region 4 Characteristics of Old Growth Forests definitions. The Forest is also proposing to clarify snag direction in the Plan to allow more ease in implementation while still providing for wildlife habitat needs.

Possible Alternatives

The Forest has developed the Proposed Action and the no-action alternative which is to continue with current TRFP direction.

Lead and Cooperating Agencies

The Caribou-Targhee National Forest is the lead agency for this project.

Responsible Official

The responsible official is: Larry Timchak, Forest Supervisor, Caribou-Targhee National Forest, 1405 Hollipark Drive, Idaho Falls, Idaho 83401.

Nature of Decision To Be Made

Given the purpose and need, the deciding officer will decide whether or not to amend the Targhee Revised Forest Plan with regard to TRFP direction for old growth and late seral structural stages and to clarify TRFP snag direction.

Scoping Process

The C-T Forest is now seeking comments on this proposal and will seek comments on the Draft Supplemental Environmental Impact Statement when it becomes available.

Comment Requested

This notice of intent initiates the scoping process which guides the development of the supplemental environmental impact statement. The Forest is seeking comments that may be used to develop alternatives to the Proposed Action. We are seeking specific comments on snag requirements for cavity nesters for the TRFP, specifically management guidance for retention of snags and specific comments on a more appropriate percentage of old growth and at what level it is appropriate to be maintained for vegetation diversity. To be most helpful comments should include rationale for any recommendations.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft supplemental environmental impact statement will be prepared for comment. The comment period on the draft supplemental 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 supplemental environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental

impact statement may be waived or dismissed by the courts. *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

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

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.

Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Dated: May 14, 2008.

Lawrence Timchak,

Forest Supervisor.

[FR Doc. E8-11248 Filed 5-20-08; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF COMMERCE**International Trade Administration**

(A-122-840)

Carbon and Certain Alloy Steel Wire Rod from Canada: Notice of Amended Final Results of Antidumping Duty Administrative Review

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

EFFECTIVE DATE: May 21, 2008.

FOR FURTHER INFORMATION CONTACT: Salim Bhabhrwala or David Neubacher, at (202) 482-1784 or (202) 482-5823, respectively; AD/CVD Operations, Office 1, Import Administration,

International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION: On January 24, 2006, the Department of Commerce ("Department") published in the **Federal Register** the final results for the second administrative review of the antidumping duty order on carbon and certain alloy steel wire rod from Canada. See *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Steel Alloy Steel Wire Rod from Canada*, 71 FR 3822 (Jan. 24, 2006) (*Final Results*). Mittal Canada, Inc. (formerly Ispat Sidbec Inc.) ("Mittal") challenged several aspects of the *Final Results* before a NAFTA binational panel. On November 28, 2007, the panel issued a decision. See *Carbon and Certain Alloy Steel Wire Rod from Canada*, Decision of the Panel, USA-CDA-2006-1904-04 (Nov. 28, 2007).

On April 17, 2008, the United States Department of Commerce, Mittal, and Gerdau Ameristeel U.S., Inc. and Keystone Consolidated Industries, Inc. entered into a Settlement Agreement covering this NAFTA proceeding ("Agreement"). Pursuant to this settlement of litigation, Mittal filed a consent motion to terminate the panel review and vacate the panel's decisions in the proceeding referenced above. On April 29, 2008, the NAFTA Secretariat of the U.S. Section published the notice of termination of the panel review. See *North American Free Trade Agreement (NAFTA), Article 1904; Binational Panel Reviews: Notice of Consent Motion to Terminate Panel Review*, 73 FR 23183 (Apr. 29, 2008). The review period covered by these amended final results is from October 1, 2003 through September 30, 2004.

Assessment of Duties

Pursuant to the Agreement, the Department is amending the final results of the contested review and will instruct U.S. Customs and Border Protection (CBP) to liquidate all entries of Canadian wire rod that were entered, or withdrawn from warehouse, for consumption during the period of October 1, 2003 through September 30, 2004, that were produced and exported by Mittal or Ispat Sidbec Inc., at the assessment rate of 3.86% *ad valorem*. Because parties waived any right to challenge these amended final results pursuant to the Agreement, the Department will issue assessment instructions to CBP following publication of this notice.

Cash-Deposit Requirements

As provided by section 751(a)(1) of the Tariff Act of 1930, as amended, and as stipulated in the Agreement with regard to the settlement of the second administrative review, the cash-deposit rate for all shipments of Canadian wire rod produced and exported by Mittal entered, or withdrawn from warehouse, for consumption on or after May 21, 2008, 2008, shall be 3.86% *ad valorem*. The deposit requirements shall remain in effect until further notice.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: May 15, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8-11435 Filed 5-20-08; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[Docket Number: 080513661-8662-01]

The Draft Report of the NOAA Science Advisory Board Working Group To Examine Advisory Options for Improving Communications Among NOAA's Partners

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of availability and request for public comment.

SUMMARY: NOAA Research (OAR) publishes this notice on behalf of the NOAA Science Advisory Board (SAB) to announce the availability for public comment of the draft report of the SAB Working Group to Examine Advisory Options for Improving Communications among NOAA's Partners (here called the Partnerships Working Group).

DATES: Comments on this preliminary report must be received by 5 p.m. EDT June 20, 2008.

ADDRESSES: The Draft Report of the Working Group will be available on the NOAA Science Advisory Board Web site at <http://www.sab.noaa.gov/Reports/>.

The public is encouraged to submit comments electronically to noaa.sab.comments2@noaa.gov. For individuals who do not have access to the Internet, comments may be submitted in writing to: NOAA Science Advisory Board (SAB) c/o Dr. Cynthia

Decker, 1315 East-West Highway-R/SAB, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, Executive Director, Science Advisory Board, NOAA, 1315 East-West Highway-R/SAB, Silver Spring, Maryland 20910. (Phone: 301-734-1156, Fax: 301-734-1459, E-mail: Cynthia.Decker@noaa.gov) during normal business hours of 9 a.m. to 5 p.m. Eastern Time, Monday through Friday, or visit the NOAA SAB Web site at <http://www.sab.noaa.gov>.

SUPPLEMENTARY INFORMATION: The preliminary report of the Partnerships Working Group has been drafted pursuant to the request initiated by the NOAA Science Advisory Board and approved by the Under Secretary of Commerce for Oceans and Atmosphere, to examine advisory options for improving communications among the various public, private, and academic entities engaged in environmental information matters. The Terms of Reference for the Working Group can be found on the SAB Web site at http://www.sab.noaa.gov/Working_Groups/current/partnerships/PWG_terms.pdf.

This report was prepared in response to the charge to the working group to examine advisory options including: Expanded use of existing NOAA Federal Advisory Committee Act (FACA) committees and/or the National Research Council; changing the structure and/or re-chartering the existing NOAA FACA committees, including the SAB, into new FACA committees or some combinations of approaches. With input from the appropriate offices in NOAA and the Department of Commerce, the PWG members debated the various options available, ranging from ad hoc meetings at various venues on an irregular basis to establishment of a formal federal advisory committee to NOAA. The group considered the strengths and weaknesses of all these options but agreed that NOAA should create a formal and clear mechanism to ensure that a wide variety of external stakeholders can provide advice and receive feedback from the agency. The PWG recommended that NOAA use a combination of approaches, starting with establishment of a Working Group under the Science Advisory Board to immediately address concerns from the external weather community, assess the success of this approach after 1-2 years, and consider at that time whether to establish a separate federal advisory committee with a mandate for the broader environmental services enterprise. The terms of reference for the proposed standing Working Group

are included in the appendix of the report.

The Working Group will consider public comments on the draft report and incorporate them, as appropriate, in the final report to be delivered to the SAB.

The SAB is chartered under the Federal Advisory Committee Act and is the only Federal Advisory Committee with the responsibility to advise the Under Secretary on long- and short-term strategies for research, education, and application of science to resource management and environmental assessment and prediction.

The SAB welcomes all comments on the content of the preliminary report. We also request comments on any inconsistencies perceived within the report, and possible omissions of important topics or issues. This draft report is being issued for comment only and is not intended for interim use. For any shortcoming noted within the preliminary report, please propose specific remedies. Suggested changes will be incorporated where appropriate, and a final report will be posted on the SAB Web site.

Please follow these instructions for preparing and submitting comments. Using the format guidance described below will facilitate the processing of comments and assure that all comments are appropriately considered. Overview comments should be provided first and should be numbered. Comments that are specific to particular pages, paragraphs or lines of the section should follow any overview comments and should identify the page and line numbers to which they apply. Please number each page of your comments.

Dated: May 14, 2008.

Mark E. Brown,

Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. E8-11145 Filed 5-20-08; 8:45 am]

BILLING CODE 3510-KD-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

RIN 0648-XH98

Endangered and Threatened Species; Initiation of a 5-Year Review of the Endangered U.S. Distinct Population Segment (DPS) of Smalltooth Sawfish

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

ACTION: Notice of initiation of a 5-year review; request for information.

SUMMARY: We, the National Marine Fisheries Service (NMFS), announce a 5-year review of the U.S. DPS of Smalltooth Sawfish (*Pristis pectinata*) under the Endangered Species Act of 1973 (ESA). A 5-year review is a periodic process conducted to ensure that the listing classification of a species is accurate. A 5-year review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information on the smalltooth sawfish that has become available since its original listing as an endangered species on April 1, 2003. Based on the results of this 5-year review, we will make the requisite findings under the ESA.

DATES: To allow us adequate time to conduct this review, we must receive your information no later than July 21, 2008. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: Please submit information to Shelley Norton, National Marine Fisheries Service, 263 13th Avenue South, St. Petersburg, FL 33701. Information received in response to this notice and review will be available for public inspection, by appointment, during normal business hours, at the above address. Information may also be submitted by e-mail to: shelley.norton@noaa.gov. Include in the subject line of the e-mail the following identifier: Smalltooth sawfish information for 5-year review. Information may also be submitted via facsimile (fax) to 727-824-5309.

FOR FURTHER INFORMATION CONTACT: Shelley Norton at the above address, or at 727-824-5312.

SUPPLEMENTARY INFORMATION: Under the ESA, a list of endangered and threatened wildlife and plant species must be maintained. The list is published at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every five years. On the basis of such reviews under section 4(c)(2)(B), we determine whether or not any species should be removed from the List (delisted), or reclassified from endangered to threatened or from threatened to endangered. Delisting a species must be supported by the best scientific and commercial data available and only considered if such data substantiates that the species is neither endangered nor threatened for one or more of the following reasons: (1) the

species is considered extinct; (2) the species is considered to be recovered; and/or (3) the original data available when the species was listed, or the interpretation of such data, were in error. Any change in Federal classification would require a separate rulemaking process. The regulations in 50 CFR 424.21 require that we publish a notice in the Federal Register announcing those species currently under active review. This notice announces our active review of the smalltooth sawfish, currently listed as endangered.

Public Solicitation of New Information

To ensure that the 5-year review is complete and based on the best available scientific and commercial data available, we are soliciting new information from the public, concerned governmental agencies, Tribes, the scientific community, industry, environmental entities, and any other interested parties concerning the status of the smalltooth sawfish.

The 5-year review considers the best scientific and commercial data available and all new information that has become available since the listing determination or most recent status review. Categories of requested information include: (A) species biology including, but not limited to, population trends, distribution, abundance, demographics, and genetics; (B) habitat conditions including, but not limited to, amount, distribution, and suitability; (C) conservation measures that have been implemented that benefit the species; (D) status and trends of threats; and (E) other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

If you wish to provide information for this 5-year review, you may submit your information and materials to Shelley Norton (see **ADDRESSES** section). Our practice is to make submissions of information, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold a respondent's identity as allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your submission. We will not, however, consider anonymous submissions. To the extent consistent with applicable law, 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. Information and materials received will be available for public inspection, by appointment, during normal business hours (see **ADDRESSES** section).

Authority: 16 U.S.C. 1531 et seq.

Dated: May 16, 2008.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8-11422 Filed 5-20-08; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XH96

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper and Grouper Off the Southern Atlantic States

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

ACTION: Notice of receipt of an application for an exempted fishing permit; request for comments.

SUMMARY: NMFS announces the receipt of an application for an exempted fishing permit (EFP) from the Gulf and South Atlantic Fisheries Foundation, Inc.. If granted, the EFP would authorize the applicants, with certain conditions, to collect limited numbers of undersized and out-of-season snapper and grouper in South Atlantic Federal waters. This study is intended to characterize catch and discard mortality within the South Atlantic commercial hook and line snapper-grouper fishery.

DATES: Comments must be received no later than 5 p.m., eastern time, on June 20, 2008.

ADDRESSES: You may submit comments on the application by any of the following methods:

- E-mail: Steve.Branstetter@noaa.gov. Include in the subject line of the e-mail comment the following document identifier: "FND_EFP".
- Mail: Steve Branstetter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.
- Fax: 727-824-5308.

The application and related documents are available for review upon written request to any of the above addresses.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, 727-824-5305; fax:

727-824-5308; e-mail:
Steve.Branstetter@noaa.gov.

SUPPLEMENTARY INFORMATION: The EFP is requested under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

The described research is part of a Cooperative Research Program Grant. The Cooperative Research Program is a means of involving commercial and recreational fishermen in the collection of fundamental fisheries information. Resource collection efforts support the development and evaluation of fisheries management and regulatory options.

The proposed collection for scientific research involves activities otherwise prohibited by regulations implementing the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region. The applicants require authorization to possess undersized and out-of-season snapper and grouper for scientific research activities during the period July 1, 2008, through September 30, 2009. Specimens would be collected from Federal waters off the east coast of Florida and Federal waters off the coasts of Georgia, South Carolina, and North Carolina. Sampling would occur during normal fishing operations of the commercial snapper-grouper vertical hook-and-line fishery. Sampling would occur year-round, collecting up to 500 fish during the course of the sampling. Data collections for this study would support improved information about the catch, bycatch, discards, and discard mortality for species in the snapper-grouper complex. These data would provide insight on a stock's resilience to fishing, and would help refine estimates of long-term biological productivity of the stocks. Currently, these data are unavailable, and it is anticipated project results would yield valuable data within this fishery.

NMFS finds this application warrants further consideration. Based on a preliminary review, NMFS intends to issue an EFP. Possible conditions the agency may impose on this permit, if it is indeed granted, include but are not limited to, a prohibition of conducting research within marine protected areas, marine sanctuaries, or special management zones, without additional authorization. Additionally, NMFS may prohibit the possession of Nassau or goliath grouper, and require any sea turtles taken incidentally during the course of fishing or scientific research activities to be handled with due care to prevent injury to live specimens, observed for activity, and returned to

the water. A final decision on issuance of the EFP will depend on a NMFS review of public comments received on the application, consultations with the affected states, the South Atlantic Fishery Management Council, and the U.S. Coast Guard, and a determination that it is consistent with all applicable laws.

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

Dated: May 15, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8-11421 Filed 5-20-08; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration (NOAA)

[Docket Number: 080513656-8657-01]

Office of Oceanic and Atmospheric Research; NOAA Science Advisory Board's Ecosystem Sciences and Management Working Group

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of solicitation for members of the NOAA Science Advisory Board's Ecosystem Sciences and Management Working Group.

SUMMARY: The Under Secretary of Commerce for Oceans and Atmosphere requested the NOAA Science Advisory Board (SAB) to establish a standing working group to provide scientific advice and broad direction on NOAA's ecosystem related programs in the context of both national and international activities. The Ecosystem Sciences and Management Working Group (ESMWG) will focus on research, monitoring, and management components of NOAA's ecosystem portfolio, as well as the underlying observations and data management issues. The ESMWG will assist in establishing plans, assessing progress, and reviewing priorities on a continuing basis. The ESMWG will be composed of 10-12 scientists and leaders in the following disciplines as related to ecosystem sciences and management: social science, oceanography, living marine resources, sampling and remote sensing, and modeling. The SAB is requesting nominations for membership in the ESMWG.

DATES: Nominations must be received July 21, 2008.

ADDRESSES: Nominations should be submitted electronically to noaa.sab.ecosystem@noaa.gov, or mailed to: NOAA Science Advisory Board (SAB) c/o Dr. Cynthia Decker, 1315 East-West Highway-R/SAB, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, 301-734-1156.

SUPPLEMENTARY INFORMATION: The complete Terms of Reference of this working group can be found on the NOAA Science Advisory Board Web site: http://www.sab.noaa.gov/working_groups/standing/docs/2008/ESMWG_TOR_FINAL.pdf.

At this time, the SAB is soliciting for up to twelve members in the following disciplines related to ecosystem sciences and management: social science, oceanography, living marine resources, sampling and remote sensing, and modeling. Members should have a credible science background, and an operational knowledge of federal agencies and interactions with state and local partners. Members will be appointed for three-year terms on a rolling and randomized basis with the opportunity for one additional term. The Working Group will convene 2-3 times per year.

The intent is to select the membership of the group from the suggested candidates; however, the SAB retains the prerogative to name members to the working group who were not nominated if it deems this necessary to achieve the desired balance. Once selected, the SAB will post the review panel members' names at <http://www.sab.noaa.gov>.

Nominations:

Anyone is eligible to nominate members of the working group. Self-nominations will be accepted. Nominations should provide: (1) The nominee's full name, title, institutional affiliation, and contact information; (2) the nominee's area(s) of expertise; and (3) a concise Curriculum Vitae (CV) or resume that covers education, experience, relevant publications and summarizes how this expertise addresses the ESMWG terms of reference.

Dated: May 16, 2008.

Mark E. Brown,

Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

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DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

RIN 0648-X104

Taking of Marine Mammals Incidental to Specified Activities; Operation of an LNG Facility in Massachusetts Bay

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

ACTION: Notice of issuance of an incidental harassment authorization.

SUMMARY: In accordance with regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to operation of an offshore liquefied natural gas (LNG) facility in the Massachusetts Bay, has been issued to Northeast Gateway Energy Bridge™ L.L.C. (Northeast Gateway) for a period of 1 year.

DATES: This authorization is effective from May 15, 2008, until May 14, 2009.

ADDRESSES: A copy of the application, IHA, and a list of references used in this document may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225. A copy of the application may be obtained by writing to this address or by telephoning the contact listed here and is also available at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha>.

The Maritime Administration (MARAD) and U.S. Coast Guard (USCG) Final Environmental Impact Statement (Final EIS) on the Northeast Gateway Energy Bridge LNG Deepwater Port license application is available for viewing at <http://dms.dot.gov> under the docket number 22219.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 713-2289, ext 137.

SUPPLEMENTARY INFORMATION:**Background**

Sections 101(a)(5)(A) and 101(a)(5)(D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than

commercial fishing) within a specified geographical region if certain findings are made and regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Subsection 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as follows:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Description of the Activity

The Port consists of two subsea Submerged Turret Loading (STL) buoys, each with a flexible riser assembly and a manifold connecting the riser assembly, via a steel flowline, to the subsea Pipeline Lateral. Northeast Gateway utilizes vessels from its current fleet of specially designed Energy-Bridge™ Regasification Vessels (EBRVs), each capable of transporting approximately 2.9 billion ft³ (Bcf; 82 million m³) of natural gas condensed to 4.9 million ft³ (138,000 m³) of LNG. Northeast Gateway will also add vessels to its fleet that will have a cargo capacity of approximately 151,000 m³.

The mooring system installed at the Port is designed to handle both the existing vessels and any of the larger capacity vessels that may come into service in the future. The EBRVs dock to the STLTM™ buoys which serve as both the single-point mooring system for the vessels and the delivery conduit for natural gas. Each of the STLTM buoys is secured to the seafloor using a series of suction anchors and a combination of chain/cable anchor lines.

During the Port operations, EBRVs servicing the Port would utilize the newly configured and International Maritime Organization-approved Boston Traffic Separation Scheme (TSS) on their approach to and departure from the NEG Port at the earliest practicable point of transit. EBRVs would maintain speeds of 12 knots or less while in the TSS except when transiting the Off Race Point Seasonal Management Area between March 1 and April 30, the Great South Channel Seasonal Management Area between April 1 and July 31, or when there have been active right whale sightings, active acoustic detections, or both, in the vicinity of the transiting EBRV in the TSS or at the Port, in which case the vessels would slow their speeds to 10 knots or less. See the Mitigation, Monitoring and Reporting Measurements section.

As an EBRV makes its final approach to the Port, vessel speed will gradually be reduced to 3 knots at 1.86 mi (1.16 km) out to less than 1 knot at a distance of 1,640 ft (500 m) from the Port. When an EBRV arrives at the Port, it will retrieve one of the two permanently anchored submerged STLTM™ buoys. It will make final connection to the buoy through a series of engine and bow thruster actions. The EBRV will require the use of thrusters for dynamic positioning during docking procedure. Typically, the docking procedure is completed over a 10- to 30-minute period, with the thrusters activated as necessary for short periods of time in second bursts, not a continuous sound source. Once connected to the buoy, the EBRV will begin vaporizing the liquefied natural gas (LNG) into its natural gas state using the onboard regasification system. As the LNG is regasified, natural gas will be transferred at pipeline pressures off the EBRV through the STLTM™ buoy and flexible riser via a steel flowline leading to the connecting Pipeline Lateral. When the LNG vessel is on the buoy, wind and current effects on the vessel will be allowed to "weathervane" on the single-point mooring system; therefore, thrusters will not be used to maintain a stationary position. It would take approximately 8 days for each EBRV to moor to the

STLTM™ Buoy, regasify its cargo of LNG and send it to the Northeast Gateway Pipeline Lateral, and disengage from the buoy.

It is estimated that the Port could receive approximately 65 cargo deliveries a year. During this time period thrusters will be engaged in use for docking at the Port approximately 10 to 30 minutes for each vessel arrival and departure.

The specified design life of the NEG Port is about 40 years, with the exception of the anchors, mooring chain/rope, and riser/umbilical assemblies, which are based on a maintenance-free design life of 20 years. The buoy pick-up system components are considered consumable and will be inspected following each buoy connection, and replaced (from inside the STLTM compartment during the normal cargo discharge period) as deemed necessary. The underwater components of the Port will be inspected once yearly using either divers or remotely operated vehicles to check and record the condition of the various STLTM system components. These activities will be conducted using the Port's normal support vessel, and to the extent possible will coincide with planned weekly visits to the Port.

Detailed information on these activities can be found in the MARAD/USCG Final EIS on the Northeast Gateway Project (see **ADDRESSES** for availability) and in the IHA application. Detailed information on the LNG facility's operation and maintenance activities, and noise generated from operations was also published in the **Federal Register** on March 13, 2007 (72 FR 11328). No changes have been made to these proposed activities.

Comments and Responses

A notice of receipt and request for public comment on the application and proposed authorization was published on March 27, 2008 (73 FR 16266). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission) and two private citizens.

Comment 1: The Commission recommends that NMFS issue the IHA provided that (a) all marine mammal mitigation, monitoring, and reporting measures identified in the **Federal Register** notice are included in the authorization and retained in any proposed regulations issued by NMFS to govern the activities over a five-year period; and (b) operations be suspended immediately if a dead or seriously injured right whale or other marine mammal is found in the vicinity of the operations and the death or injury could

be attributable to the applicant's activities. Any suspension should remain in place until NMFS (1) has reviewed the situation and determined that further deaths or serious injuries are unlikely or (2) has issued regulations authorizing such takes under section 101(a)(5)(A) of the MMPA.

Response: NMFS concurs with the Commission's recommendation raised in the above comment, and extends the requirement to any type of injury, not just serious injury, if it could be attributable to LNG activities.

Comment 2: One private citizen states that more due diligence on the front end is needed before NMFS issues the IHA.

Response: NMFS has conducted extensive review of the best science available regarding the biology of the marine mammals affected and the propagation of sounds from operations of the offshore LNG port. This information is supported by Draft and Final Environmental Impact Statements issued by MARAD and USCG under the National Environmental Policy Act (NEPA) and a biological opinion pursuant to the Endangered Species Act (ESA).

Comment 3: One private citizen questions why NMFS grants the permit if there is harassment to marine mammals.

Response: As stated in the beginning of this document, the MMPA directs the Secretary to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made. NMFS has made these findings and followed the appropriate process set forth in MMPA section 101(a)(5)(D).

Marine Mammals Affected by the Activity

Marine mammal species that potentially occur in the vicinity of the Northeast Gateway facility include several species of cetaceans and pinnipeds:

North Atlantic right whale (*Eubalaena glacialis*),
humpback whale (*Megaptera novaeangliae*),
fin whale (*Balaenoptera physalus*),
minke whale (*B. acutorostrata*),
pilot whale (*Globicephala* spp.),
Atlantic white-sided dolphin (*Lagenorhynchus acutus*),
bottlenose dolphin (*Tursiops truncatus*),
common dolphin (*Delphinus delphis*),
killer whale (*Orcinus orca*),
harbor porpoise (*Phocoena phocoena*),

harbor seal (*Phoca vitulina*), and gray seal (*Halichoerus grypus*).

Information on those species that may be impacted by this activity are discussed in detail in the MARAD and USCG Final EIS on the Northeast Gateway LNG proposal. Please refer to that document for more information on these species and potential impacts from construction and operation of this LNG facility. In addition, general information on these marine mammal species can also be found in Wursig *et al.* (2000) and in the NMFS Stock Assessment Reports (Waring *et al.*, 2007). This latter document is available at: <http://www.nefsc.noaa.gov/nefsc/publications/tm/tm201/>. An updated summary on several commonly sighted marine mammal species distribution and abundance in the vicinity of the proposed action area is provided below.

Humpback Whale

The highest abundance for humpback whales was distributed primarily along a relatively narrow corridor following the 100-m (328 ft) isobath across the southern Gulf of Maine from the northwestern slope of Georges Bank, south to the Great South Channel, and northward alongside Cape Cod to Stellwagen Bank and Jeffreys Ledge. The relative abundance of whales increased in the spring with the highest occurrence along the slope waters (between the 40- and 140-m, or 131- and 459-ft, isobaths) off Cape Cod and Davis Bank, Stellwagen Basin and Tillies Basin and between the 50- and 200-m (164- and 656-ft) isobaths along the inner slope of Georges Bank. High abundance was also estimated for the waters around Platts Bank. In the summer months, abundance increased markedly over the shallow waters (<50 m, or <164 ft) of Stellwagen Bank, the waters (100 – 200 m, or 328 – 656 ft) between Platts Bank and Jeffreys Ledge, the steep slopes (between the 30- and 160-m isobaths) of Phelps and Davis Bank north of the Great South Channel towards Cape Cod, and between the 50- and 100-m (164- and 328-ft) isobath for almost the entire length of the steeply sloping northern edge of Georges Bank. This general distribution pattern persisted in all seasons except winter, when humpbacks remained at high abundance in only a few locations including Porpoise and Neddick Basins adjacent to Jeffreys Ledge, northern Stellwagen Bank and Tillies Basin, and the Great South Channel.

Fin Whale

Spatial patterns of habitat utilization by fin whales were very similar to those of humpback whales. Spring and

summer high-use areas followed the 100-m (328 ft) isobath along the northern edge of Georges Bank (between the 50- and 200-m (164- and 656-ft) isobaths), and northward from the Great South Channel (between the 50- and 160-m, or 164- and 525-ft, isobaths). Waters around Cashes Ledge, Platts Bank, and Jeffreys Ledge are all high-use areas in the summer months. Stellwagen Bank was a high-use area for fin whales in all seasons, with highest abundance occurring over the southern Stellwagen Bank in the summer months. In fact, the southern portion of the Stellwagen Bank National Marine Sanctuary (SBNMS) was used more frequently than the northern portion in all months except winter, when high abundance was recorded over the northern tip of Stellwagen Bank. In addition to Stellwagen Bank, high abundance in winter was estimated for Jeffreys Ledge and the adjacent Porpoise Basin (100- to 160-m, 328- to 656-ft, isobaths), as well as Georges Basin and northern Georges Bank.

Minke Whale

Like other piscivorous baleen whales, highest abundance for minke whale was strongly associated with regions between the 50- and 100-m (164- and 328-ft) isobaths, but with a slightly stronger preference for the shallower waters along the slopes of Davis Bank, Phelps Bank, Great South Channel and Georges Shoals on Georges Bank. Minke whales were sighted in the SBNMS in all seasons, with highest abundance estimated for the shallow waters (approximately 40 m, or 131 ft) over southern Stellwagen Bank in the summer and fall months. Platts Bank, Cashes Ledge, Jeffreys Ledge, and the adjacent basins (Neddick, Porpoise and Scantum) also supported high relative abundance. Very low densities of minke whales remained throughout most of the southern Gulf of Maine in winter.

North Atlantic Right Whale

North Atlantic right whales were generally distributed widely across the southern Gulf of Maine in spring with highest abundance located over the deeper waters (100- to 160-m, or 328- to 525-ft, isobaths) on the northern edge of the Great South Channel and deep waters (100 300 m, 328 - 984 ft) parallel to the 100-m (328-ft) isobath of northern Georges Bank and Georges Basin. High abundance was also found in the shallowest waters (< 30 m, or <98 ft) of Cape Cod Bay, over Platts Bank and around Cashes Ledge. Lower relative abundance was estimated over deep-water basins including Wilkinson Basin, Rodgers Basin and Franklin

Basin. In the summer months, right whales moved almost entirely away from the coast to deep waters over basins in the central Gulf of Maine (Wilkinson Basin, Cashes Basin between the 160- and 200-m, or 525- and 656-ft, isobaths) and north of Georges Bank (Rogers, Crowell and Georges Basins). Highest abundance was found north of the 100-m (328-ft) isobath at the Great South Channel and over the deep slope waters and basins along the northern edge of Georges Bank. The waters between Fippennies Ledge and Cashes Ledge were also estimated as high-use areas. In the fall months, right whales were sighted infrequently in the Gulf of Maine, with highest densities over Jeffreys Ledge and over deeper waters near Cashes Ledge and Wilkinson Basin. In winter, Cape Cod Bay, Scantum Basin, Jeffreys Ledge, and Cashes Ledge were the main high-use areas. Although SBNMS does not appear to support the highest abundance of right whales, sightings within SBNMS are reported for all four seasons, albeit at low relative abundance. Highest sighting within SBNMS occurred along the southern edge of the Bank.

Pilot whale

Pilot whales arrived in the southern Gulf of Maine in spring, with highest abundance in the region occurring in summer and fall. Summer high-use areas included the slopes of northern Georges Bank along the 100-m (328-ft) isobath and pilot whales made extensive use of the shoals of Georges Bank (<60 m, or <197 ft, depth). Similarly, fall distributions were also primarily along the slopes of northern Georges Bank, but with high-use areas also occurring amongst the deep-water basins and ledges of the south-central Gulf of Maine. Within SBNMS, pilot whales were sighted infrequently and were most often estimated at low density. Cape Cod Bay and southern SBNMS were the only locations with pilot whale sightings for winter.

Atlantic White-Sided Dolphin

In spring, summer and fall, Atlantic white-sided dolphins were widespread throughout the southern Gulf of Maine, with the high-use areas widely located either side of the 100-m (328-ft) isobath along the northern edge of Georges Bank, and north from the Great South Channel to Stellwagen Bank, Jeffreys Ledge, Platts Bank and Cashes Ledge. In spring, high-use areas existed in the Great South Channel, northern Georges Bank, the steeply sloping edge of Davis Bank and Cape Cod, southern Stellwagen Bank and the waters between Jeffreys Ledge and Platts Bank.

In summer, there was a shift and expansion of habitat toward the east and northeast. High-use areas were identified along most of the northern edge of Georges Bank between the 50- and 200-m (164- and 656-ft) isobaths and northward from the Great South Channel along the slopes of Davis Bank and Cape Cod. High sightings were also recorded over Truxton Swell, Wilkinson Basin, Cashes Ledge and the bathymetrically complex area northeast of Platts Bank. High sightings of white-sided dolphin were recorded within SBNMS in all seasons, with highest density in summer and most widespread distributions in spring located mainly over the southern end of Stellwagen Bank. In winter, high sightings were recorded at the northern tip of Stellwagen Bank and Tillies Basin.

A comparison of spatial distribution patterns for all baleen whales (Mysticeti) and all porpoises and dolphins combined showed that both groups have very similar spatial patterns of high- and low-use areas. The baleen whales, whether piscivorous or planktivorous, were more concentrated than the dolphins and porpoises. They utilized a corridor that extended broadly along the most linear and steeply sloping edges in the southern Gulf of Maine indicated broadly by the 100 m (328 ft) isobath. Stellwagen Bank and Jeffreys Ledge supported a high abundance of baleen whales throughout the year. Species richness maps indicated that high-use areas for individual whales and dolphin species co-occurred, resulting in similar patterns of species richness primarily along the southern portion of the 100-m (328-ft) isobath extending northeast and northwest from the Great South Channel. The southern edge of Stellwagen Bank and the waters around the northern tip of Cape Cod were also highlighted as supporting high cetacean species richness. Intermediate to high numbers of species are also calculated for the waters surrounding Jeffreys Ledge, the entire Stellwagen Bank, Platts Bank, Fippennies Ledge and Cashes Ledge.

Killer Whale, Common Dolphin, Bottlenose Dolphin, and Harbor Porpoise

Although these four species are some of the most widely distributed small cetacean species in the world (Jefferson *et al.*, 1993), they were not commonly seen in the vicinity of the project area in Massachusetts Bay (Wiley *et al.*, 1994; NCCOS, 2006; Northeast Gateway Marine Mammal Monitoring Weekly Reports, 2007).

Harbor Seal and Gray Seal

In the U.S. waters of the western North Atlantic, both harbor and gray seals were usually found from the coast of Maine south to southern New England and New York (Warrings *et al.*, 2007).

Along the southern New England and New York coasts, harbor seals occur seasonally from September through late May (Schneider and Payne, 1983). In recent years, their seasonal interval along the southern New England to New Jersey coasts had increased (deHart, 2002). In U.S. waters, harbor seal breeding and pupping normally occur in waters north of the New Hampshire/Maine border, although breeding has occurred as far south as Cape Cod in the early part of the 20th century (Temte *et al.*, 1991; Katona *et al.*, 1993).

Although gray seals were often seen off the coast from New England to Labrador, within the U.S. waters, only small numbers of gray seals have been observed pupping on several isolated islands along the Maine coast and in Nantucket-Vineyard Sound, Massachusetts (Katona *et al.*, 1993; Rough, 1995). In the late 1990s, a year-round breeding population of approximately over 400 gray seals was documented on outer Cape Cod and Muskeget Island (Warring *et al.*, 2007).

Potential Effects of Noise on Marine Mammals

The effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995): (1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both); (2) The noise may be audible but not strong enough to elicit any overt behavioral response; (3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases; (4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat; (5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine

mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise; (6) If mammals remain in an area because it is important for feeding, breeding or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and (7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic (or explosive events) may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

There are three general kinds of sounds recognized by NMFS: continuous (such as shipping sounds), intermittent (such as vibratory pile driving sounds), and impulse. No impulse noise activities, such as blasting or standard pile driving, are associated with this project. The noise sources of potential concern are regasification/offloading (which is a continuous sound) and dynamic positioning of vessels using thrusters (an intermittent sound). Based on research by Malme *et al.* (1983; 1984), for both continuous and intermittent sound sources, Level B harassment is presumed to begin at received levels of 120-dB.

None of the continuous sound sources associated with operation of the Northeast Gateway Project is expected to exceed the 120-dB threshold for Level B harassment. However, the intermittent noises from thruster use associated with dynamic positioning of vessels during operation (docking) may occasionally exceed this 120-dB threshold. Consequently, thruster use has the potential for a "take" by Level B harassment of any marine mammal occurring within a zone of ensonification (greater than 120 dB) emanating from the sound source. The potential impacts to marine mammals associated with sound propagation from

vessel movements, anchors, chains and LNG regasification/offloading could be the temporary and short-term displacement of seals and whales from within the 120-dB zones ensonified by these noise sources. Animals would be expected to re-occupy the area once the noise ceases. In the vicinity of the LNG Port, where the water depth is about 80 m (262 ft), the 120-dB radius is estimated to be approximately 2.56 km (1.6 mi) from the second source during dynamic positioning for the container ship, making a zone of influence (ZOI) of 21 km² (8.1 mi²).

Estimates of Take by Harassment

The basis for Northeast Gateway's "take" estimate is the number of marine mammals that would be exposed to sound levels in excess of 120 dB. This is determined by multiplying the ZOI by local marine mammal density estimates, corrected to take account for 50 percent marine mammals that may be underwater, and then by estimated LNG container ship visits per year. In the case of data gaps, a conservative approach was used to ensure the potential number of takes is not underestimated, as described next.

NMFS recognizes that baleen whale species other than North Atlantic right whales have been sighted in the project area from May to November. However, the occurrence and abundance of fin, humpback, and minke is not well documented within the project area. Nonetheless, NMFS uses the data on cetacean distribution within Massachusetts Bay, such as those published by the National Centers for Coastal Ocean Science (NCCOS, 2006), to determine potential takes of marine mammals in the vicinity of project area.

The NCCOS study used cetacean sightings from two sources: (1) the North Atlantic Right Whale Consortium (NARWC) sightings database held at the University of Rhode Island (Kenney, 2001); and (2) the Manomet Bird Observatory (MBO) database, held at NMFS Northeast Fisheries Science Center (NEFSC). The NARWC data contained survey efforts and sightings data from ship and aerial surveys and opportunistic sources between 1970 and 2005. The main data contributors included: Cetacean and Turtles Assessment Program (CETAP), Canadian Department of Fisheries and Oceans, PCCS, International Fund for Animal Welfare, NOAA's NEFSC, New England Aquarium, Woods Hole Oceanographic Institution, and the University of Rhode Island. A total of 653,725 km (406,293 mi) of survey track and 34,589 cetacean observations were provisionally selected for the NCCOS study in order to

minimize bias from uneven allocation of survey effort in both time and space. The sightings-per-unit-effort (SPUE) was calculated for all cetacean species by month covering the southern Gulf of Maine study area, which also includes the project area (NCCOS, 2006).

The MBO's Cetacean and Seabird Assessment Program (CSAP) was contracted from 1980 to 1988 by NMFS NEFSC to provide an assessment of the relative abundance and distribution of cetaceans, seabirds, and marine turtles in the shelf waters of the northeastern United States (MBO, 1987). The CSAP program was designed to be completely compatible with NMFS NEFSC databases so that marine mammal data could be compared directly with fisheries data throughout the time series during which both types of information were gathered. A total of 5,210 km (8,383 mi) of survey distance and 636 cetacean observations from the MBO data were included in the NCCOS analysis. Combined valid survey effort for the NCCOS studies included 567,955 km (913,840 mi) of survey track for small cetaceans (dolphins and porpoises) and 658,935 km (1,060,226 mi) for large cetaceans (whales) in the southern Gulf of Maine. The NCCOS study then combined these two data sets by extracting cetacean sighting records, updating database field names to match the NARWC database, creating geometry to represent survey tracklines and applying a set of data selection criteria designed to minimize uncertainty and bias in the data used.

Owning to the comprehensiveness and total coverage of the NCCOS cetacean distribution and abundance study, NMFS calculated the estimated take number of marine mammals based on the most recent NCCOS report published in December 2006. A summary of seasonal cetacean distribution and abundance in the project area is provided above, in the Marine Mammals Affected by the Activity section. For a detailed description and calculation of the cetacean abundance data and sighting per unit effort (SPUE), please refer to the NCCOS study (NCCOS, 2006). These data show that the upper limit of the relative abundance of North Atlantic right, fin, humpback, minke, and pilot whales, and Atlantic white-sided dolphins for all seasons, as calculated by SPUE in number of animals per square kilometer, is 0.0082, 0.0097, 0.0265, 0.0059, 0.0407, and 0.1314 n/km, respectively.

In calculating the area density of these species from these linear density data, NMFS used 0.4 km (0.25 mi), which is a quarter the distance of the radius for

visual monitoring (see Monitoring, Mitigation, and Reporting section below), as a conservative hypothetical strip width (W). Thus the area density (D) of these species in the project area can be obtained by the following formula:

$$D = \text{SPUE}/2W,$$

Based on the calculation, the estimated take numbers per year for North Atlantic right, fin, humpback, minke, and pilot whales, and Atlantic white-sided dolphins, within the 120-dB ZOI of the LNG Port facility area of approximately 21 km² (8.1 mi²) maximum ZOI, corrected for 50 percent underwater, are 21, 90, 165, 15, 104, and 336, respectively. This estimate is based on an average of 65 visits by LNG container ships to the project area per year (or approximately 1.25 visits per week), operating the vessels' thrusters for dynamic positioning before offloading natural gas. It is expected that total amount of time of dynamic positioning is about 30 minutes, therefore, any marine mammals that are potentially exposed to noise levels about 120 dB re 1 microPa from container ships' dynamic positioning would be brief. There is no danger of injury, death, or hearing impairment from the exposure to these noise levels. These numbers represent approximately 7, 3, 18, 0.4, 0.3, and 0.7 percent of the populations for these species, respectively.

In addition, bottlenose dolphins, common dolphins, killer whales, harbor porpoises, harbor seals, and gray seals could also be taken by Level B harassment as a result of the deepwater LNG port project. The numbers of estimated take of these species are not available because they are rare in the project area. The population estimates of these marine mammal species and stock in the west North Atlantic basin are 81,588, 120,743, 89,700, 99,340, and 195,000 for bottlenose dolphins, common dolphins, harbor porpoises, harbor seals, and gray seals, respectively (Waring *et al.*, 2007). No population estimate is available for the North Atlantic stock of killer whales, however, their occurrence within the proposed project area is rare. Since the Massachusetts Bay represents only a small fraction of the west North Atlantic basin where these animals occur, and these animals do not congregate in the vicinity of the project area, NMFS believes that only relatively small numbers of these marine mammal species would be potentially affected by the Northeast Gateway LNG deepwater project. From the most conservative estimates of both marine mammal densities in the project area and the size

of the 120-dB zone of (noise) influence (ZOI), the calculated number of individual marine mammals for each species that could potentially be harassed annually is small relative to the overall population size.

Potential Impact on Habitat

Operation of the Port and Pipeline Lateral will result in long-term effects on the marine environment, including alteration of seafloor conditions, continued disturbance of the seafloor, regular withdrawal of sea water, and regular generation of underwater noise. A small area (0.14 acre) along the Pipeline Lateral will be permanently altered (armored) at two cable crossings. In addition, the structures associated with the Port will occupy 4.8 acres of seafloor. An additional area of the seafloor of up to 38 acres will be subject to disturbance due to chain sweep while the buoys are occupied. The benthic community in the up-to 38 acres of soft bottom that may be swept by the anchor chains while EBRVs are docked will have limited opportunity to recover, so this area will experience a long-term reduction in benthic productivity.

Each EBRV will require the withdrawal of an average of 4.97 million gallons per day of sea water for general ship operations during its 8-day stay at the Port. As with hydrostatic testing, plankton associated with the sea water will not likely survive this activity. Based on densities of plankton in Massachusetts Bay, it is estimated that sea water use during operations will consume, on a daily basis, about 3 200 × 1,010 phytoplankton cells (about several hundred grams of biomass), 6.5 × 10⁸ zooplankters (equivalent to about 1.2 kg of copepods), and on the order of 30,000 fish eggs and 5,000 fish larvae. Also, the daily removal of sea water will reduce the food resources available for planktivorous organisms. However, the removal of these species is minor relative to the overall area they occupy and unlikely to measurably affect the food sources available to marine mammals.

Monitoring, Mitigation, and Reporting Measures

All individuals onboard the EBRVs responsible for the navigation and lookout duties on the vessel must receive training prior to assuming navigation and lookout duties, a component of which will be training on marine mammal sighting/reporting and vessel strike avoidance measures. Crew training of EBRV personnel will stress individual responsibility for marine mammal awareness and reporting.

If a marine mammal is sighted by a crew member, an immediate notification will be made to the Person-in-Charge on board the vessel and the Northeast Port Manager, who will ensure that the required reporting procedures are followed.

Vessel Strike Avoidance

(1) All EBRVs approaching or departing the port will comply with the Mandatory Ship Reporting (MSR) system to keep apprised of right whale sightings in the vicinity. Vessel operators will also receive active detections from the passive acoustic array prior to and during transit through the northern leg of the Boston TSS where the buoys are installed.

(2) In response to active right whale sightings (detected acoustically or reported through other means such as the MSR or SAS), and taking into account safety and weather conditions, EBRVs will take appropriate actions to minimize the risk of striking whales, including reducing speed to 10 knots or less and alerting personnel responsible for navigation and lookout duties to concentrate their efforts.

(3) EBRVs will maintain speeds of 12 knots or less while in the TSS until reaching the vicinity of the buoys (except during the seasons and areas defined below, when speed will be limited to 10 knots or less). At 1.86 miles (3 km) from the NEG port, speed will be reduced to 3 knots, and to less than 1 knot at 1,640 ft (500 m) from the buoy.

(4) EBRVs will reduce transit speed to 10 knots or less (unless hydrographic, meteorological, or traffic conditions dictate an alternative speed to maintain the safety or maneuverability of the vessel) from March 1 – April 30 in all waters bounded by straight lines connecting the following points in the order stated below. This area is also known as the Off Race Point Seasonal Management Area (SMA).

42°30'N 70°30'W
42°30'N 69°45'W
41°40'N 69°45'W
41°40'N 69°57'W
42°04.8'N 70°10'W
42°12'N 70°15'W
42°12'N 70°30'W
42°30'N 70°30'W

(5) EBRVs will reduce transit speed to 10 knots or less (unless hydrographic, meteorological, or traffic conditions dictate an alternative speed to maintain the safety or maneuverability of the vessel) from April 1 – July 31 in all waters bounded by straight lines connecting the following points in the order stated below. This area is also

known as the Great South Channel SMA.

42°30'N 69°45'W
42°30'N 67°27'W
42°09'N 67°08.4'W
41°00'N 69°05'W
41°40'N 69°45'W
42°30'N 69°45'W

(6) EBRVs are not expected to transit Cape Cod Bay. However, in the event transit through Cape Cod Bay is required, EBRVs will reduce transit speed to 10 knots or less (unless hydrographic, meteorological, or traffic conditions dictate an alternative speed to maintain the safety or maneuverability of the vessel) from January 1 – May 15 in all waters in Cape Cod Bay, extending to all shorelines of Cape Cod Bay, with a northern boundary of 42°12'N latitude.

(7) In such cases where speeds in excess of the ten knot speed maximums as described above are required, the reasons for the deviation, the speed at which the vessel is operated, the area, and the time and duration of such deviation will be documented in the logbook of the vessel and reported to the NMFS Northeast Region Ship Strike Coordinator.

Passive Acoustic Monitoring (PAM) Program

An array of Auto-detection Buoys (ABs) have been installed in the Boston TSS that meets the criteria specified in the recommendations developed by NOAA through consultation with the USCG under the National Marine Sanctuary Act (NMSA). The system will be monitored during the LNG Port operations and will provide near real-time information on the presence of vocalizing whales in the shipping lanes.

An archival array of acoustic recording units (ARUs), or “pop-ups,” has been installed around the port site that meets the criteria specified in the program developed by NOAA in consultation with the USCG under the National Marine Sanctuary Act (NMSA). The ARUs will be in place for 5 years following initiation of operations to monitor the actual acoustic output of port operations and alert NOAA to any unanticipated adverse effects of port operations, such as large-scale abandonment of the area.

Reporting

The Project area is within the Mandatory Ship Reporting Area (MSRA), so all vessels entering and exiting the MSRA would report their activities to WHALESNORTH. During all phases of the Northeast Gateway LNG Port operation, sightings of any injured or dead marine mammals would

be reported immediately to the USCG or NMFS, regardless of whether the injury or death is caused by project activities.

An annual report on marine mammal monitoring and mitigation would be submitted to NMFS Office of Protected Resources and NMFS Northeast Regional Office within 90 days after the expiration of the IHA. The annual report should include data collected for each distinct marine mammal species observed in the project area in the Massachusetts Bay during the period of LNG facility operation. Description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to operation activities shall also be included in the annual report.

ESA

On February 5, 2007, NMFS concluded consultation with MARAD and the USCG, under section 7 of the ESA, on the proposed construction and operation of the Northeast Gateway LNG facility and issued a biological opinion. The finding of that consultation was that the construction and operation of the Northeast Gateway LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales and Kemp's ridley, loggerhead, green or leatherback sea turtles. An incidental take statement (ITS) was issued following NMFS' issuance of the IHA.

On November 15, 2007, Northeast Gateway and Algonquin submitted a letter to NMFS requesting an extension for the LNG Port construction into December 2007. Upon reviewing Northeast Gateway's weekly marine mammal monitoring reports submitted under the previous IHA, NMFS recognized that the potential take of some marine mammals resulting from the LNG Port and Pipeline Lateral by Level B behavioral harassment likely had exceeded the original take estimates. Therefore, NMFS Northeast Region (NER) reinitiated consultation with MARAD and USCG on the construction and operation of the Northeast Gateway LNG facility. On November 30, 2007, NMFS NER issued a revised biological opinion, reflecting the revised construction time period and including a revised ITS. This revised biological opinion concluded that the construction and operation of the Northeast Gateway LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin

whales, and is not likely to adversely affect sperm, sei, or blue whales. NMFS has concluded that issuance of this IHA renewal would not have impacts beyond what was analyzed in the November 30, 2007, biological opinion, so additional consultation is not required.

NEPA

MARAD and the USCG released a Final EIS/Environmental Impact Report (EIR) for the proposed Northeast Gateway Port and Pipeline Lateral. A notice of availability was published by MARAD on October 26, 2006 (71 FR 62657). The Final EIS/EIR provides detailed information on the proposed project facilities, construction methods and analysis of potential impacts on marine mammal.

NMFS was a cooperating agency (as defined by the Council on Environmental Quality (40 CFR 1501.6)) in the preparation of the Draft and Final EISs. NMFS has reviewed the Final EIS and has adopted it. Therefore, the preparation of another EIS or EA is not warranted.

Determinations

NMFS has determined that the impact of operation of the Northeast Gateway Port Project may result, at worst, in a temporary modification in behavior of small numbers of certain species of marine mammals that may be in close proximity to the Northeast Gateway LNG facility and associated pipeline during its operation. These activities are expected to result in some local short-term displacement only of the affected species or stocks of marine mammals. Taking these two factors together, NMFS concludes that the activity will have no more than a negligible impact on the affected species or stocks, as there will be no expected effects on annual rates of survival and reproduction of these species or stocks. This determination is further supported by the required mitigation, monitoring, and reporting measures described in this document and in NMFS' Biological Opinion on this action.

As a result of implementation of the described mitigation and monitoring measures, no take by injury or death would be requested, anticipated or authorized, and the potential for temporary or permanent hearing impairment is very unlikely due to the relatively low noise levels (and consequently small zone of impact).

While the number of marine mammals that may be harassed will depend on the distribution and abundance of marine mammals in the vicinity of the LNG Port facility, the estimated numbers of marine mammals

to be harassed is small relative to the affected species or stock sizes.

Authorization

NMFS has issued an IHA to Northeast Gateway for conducting LNG Port facility operations in Massachusetts Bay, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 15, 2008.

Helen Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.
[FR Doc. E8-11417 Filed 5-20-08; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability of the Draft Supplemental Programmatic Environmental Impact Statement for Army Growth and Force Structure Realignment To Support Operations in the Pacific Theater

AGENCY: Department of the Army, DOD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army announces the availability of a Draft Supplemental Programmatic Environmental Impact Statement (DSPEIS) for the growth and realignment of the United States Army to support Operations in the Pacific Theater. The Department of the Army has prepared a DSPEIS that evaluates the potential environmental and socioeconomic effects associated with alternatives for implementing the growth, realignment, and transformation of the Army's forces to support Operations in the Pacific Theater. Potential impacts have been analyzed in the DSPEIS at installations that are capable of supporting operations in the Pacific Theater.

DATES: The public comment period will end 45 days after publication of a Notice of Availability in the **Federal Register** by the U.S. Environmental Protection Agency.

ADDRESSES: Send all written comments and suggestions concerning this DSPEIS to: Public Affairs Office, U.S. Army Environmental Command, Building E4460, Attention: IMAE-PA 5179 Hoadley Road, Aberdeen Proving Ground, MD 21010-5401. Comments may also be sent to: APGR-USAEC PublicComments@conus.army.mil.

FOR FURTHER INFORMATION CONTACT: Public Affairs Office at (410) 436-2556 or facsimile at (410) 436-1693 during

normal business hours 9 a.m. to 5 p.m. Eastern Daylight Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Army's Proposed Action and analysis within the DSPEIS covers those activities the Army may undertake from 2008 through 2013 to grow, realign, and transform its forces to support operations in the Pacific Theater. Implementation of the Proposed Action will ensure the proper capabilities exist to sustain operations and regional security in the Pacific Theater now and into the foreseeable future. The implementation of the Proposed Action will better meet military operational needs, national and regional security requirements, and the needs of the Army's Soldiers and their Families. To implement the Proposed Action, new units with critical military skills must be stationed at locations that are capable of supporting strategic deployment and mobilization requirements in the Pacific Theater. These stationing locations must be capable of accommodating unit training, garrison operations, maintenance activities, and the needs of Soldiers and their Families.

The current global security environment is turbulent, unpredictable, and rapidly changing. It has placed considerable demands on the nation's military, and highlighted the need for the Army to correct shortfalls in high-demand skills while reassessing its force capabilities. No one has felt the impacts of the recent demands of the modern security environment more than Soldiers and their Families. To meet the challenges of the 21st century security environment, the Army requires the growth and restructuring of its forces to support operations across the Pacific Theater to sustain the broad range of missions required to promote regional, national, and global stability.

The DSPEIS supplements the Army's Final Programmatic EIS for Army Growth and Force Structure Realignment (2007). The DSPEIS examines major Army training installations that were not in the 2007 PEIS, but are capable of supporting operations in the Pacific Theater and the ability of those installations to support new unit stationing actions. The DSPEIS includes analysis of specific actions that will need to be taken (such as the construction of housing and quality of life facilities, the construction of new training ranges and infrastructure, and changes in the intensity of use of maneuver land and firing ranges) to station new units as part of the Army's overall efforts to grow and realign the force.

The Army has considered a full range of sites for implementing the Proposed Action. Alternative stationing locations that the Army is considering for supporting the Proposed Action include the major training installations the Army considered in its 2007 programmatic EIS as well as four additional installations in Hawaii and Alaska. Additional installations include Schofield Barracks Military Reservation (SBMR), HI; Fort Shafter, HI; Fort Richardson, AK; and Fort Wainwright, AK. Each of these installations could receive additional Soldiers as part of alternatives being examined.

Alternatives in the DSPEIS include stationing of additional Combat Support (CS) or Combat Service Support (CSS) units or new support brigades. The following alternatives will be analyzed in the SPEIS: (1) Support operations in the Pacific Theater by implementing Army-wide modular force and transformation recommendations within U.S. Army Pacific. This alternative involves the stationing of approximately 1,500–2,000 Soldiers at Army installations in Hawaii and Alaska; (2) In addition to Army growth under Alternative 1, Alternative 2 includes growth and transformation of Army forces to support operations in the Pacific Theater by stationing additional Combat Support (CS) and Combat Service Support (CSS) units in locations capable of supporting these operations. The Army would station approximately 1,500–2,500 additional CS and CSS Soldiers beyond Alternative 1; (3) In addition to Army growth under Alternatives 1 and 2, as part of Alternative 3 the Army would grow, transform, and realign forces by stationing additional support brigades in locations capable of supporting operations in the Pacific Theater. Support brigades could include the stationing of an additional Maneuver Enhancement Brigade (570 Soldiers), a Combat Aviation Brigade (2,800 Soldiers), or a Field Artillery Brigade (approximately 1,500 Soldiers).

In addition to the above alternatives, the No Action Alternative will be considered and used as a baseline for comparison of alternatives. It is not a viable means for meeting the current and future strategic security and defense requirements of the nation. The No Action Alternative would retain U.S. Army forces in their current end strength and force structure. The No Action Alternative includes the implementation of stationing actions directed by Base Realignment and Closure legislation in 2005, Army Global Defense Posture Realignment, Army Modular Forces initiatives, and

Army Growth and Force Structure Realignment decisions published in January 2008.

The DSPEIS covers those activities required to implement unit stationing actions associated with Army growth and force structure realignment to support operations in the Pacific Theater. Actions the Army will take to support unit stationing include the construction of housing and quality of life facilities (i.e., gymnasiums, hospitals, shopping areas), the construction of new training ranges and infrastructure, and changes in the intensity of use of maneuver land and firing ranges associated with the increased frequency of training events.

The DSPEIS identifies the environmental and socioeconomic impacts associated with various unit stationing actions that could be implemented to support the Proposed Action. Decisions from the SPEIS will be tiered into sitespecific NEPA analysis at the installation level after stationing decisions are made.

The Army invites full public participation to promote open communication and better decision making. All persons and organizations that have an interest in the growth and realignment of the Army's forces and associated stationing actions are invited to participate in this NEPA evaluation process. Assistance will be provided upon request to anyone having difficulty understanding how to participate.

Written comments on the DSPEIS will be accepted for 45 days following the publication of a Notice of Availability in the **Federal Register** by the U.S. Environmental Protection Agency. Information on the DSPEIS will be posted on the U.S. Army Environmental Command's Web site, <http://www.aec.army.mil>, for public access during the public comment period.

Dated: May 14, 2008.

Addison D. Davis, IV,

*Deputy Assistant Secretary of the Army,
(Environment, Safety, and Occupational Health).*

[FR Doc. E8–11256 Filed 5–20–08; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Hold an Open Meeting of the North Dakota River Task Force Established by the Missouri River Protection and Improvement Act of 2000 (Title VII)

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of meeting.

SUMMARY: The duties of the Task Force are to prepare and approve a plan for the use of the funds made available under Title VII to promote conservation practices in the Missouri River watershed, control and remove the sediment from the Missouri River, protect recreation on the Missouri River from sedimentation, and protect Indian and non-Indian historical and cultural sites along the Missouri River from erosion.

DATES: North Dakota Missouri River Task Force established by the Missouri River Protection and Improvement Act of 2000 will hold a meeting on June 25, 2008, from 10:30 a.m. to 4:30 p.m.

ADDRESSES: The meeting will be held at the Best Western Doublewood Inn located at 1400 East Interchange Avenue in Bismarck, ND.

FOR FURTHER INFORMATION CONTACT: Laura Bentley at (402)–995–2714.

SUPPLEMENTARY INFORMATION: The objectives of the Task Force are to prepare and approve a plan for the use of the funds made available under Title VII, develop and recommend to the Secretary of the Army ways to implement critical restoration projects meeting the goals of the plan, and determine if these projects primarily benefit the Federal Government.

This meeting is open to the public. Any interested person may attend, appear before, or file statements with the task force; however, statements and questions should be submitted in advance. For additional information, contact Laura Bentley, U.S. Army Corps of Engineers, 106 South 15th Street, Omaha, NE 68102–1618, 402–995–2714.

David B. Olson,

Federal Register Liaison Officer, U.S. Army Corps of Engineers.

[FR Doc. E8–11406 Filed 5–20–08; 8:45 am]

BILLING CODE 3710–62–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 21, 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 15, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of English Language Acquisitions

Type of Review: New.

Title: Foreign Language Assistance Program for Local Educational Agencies: Annual Performance Report.

Frequency: Semi-Annually.

Affected Public:

Individuals or household; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 127.

Burden Hours: 6,350.

Abstract: The purpose is to implement a data collection process for a new semi-annual reporting for Government Performance and Results Act (GPRA) purposes for the Foreign Language Assistance Program (FLAP) for Local Educational Agencies (LEAs). These data are necessary to assess the performance of the FLAP for LEAs in meeting its stated goals and objectives and report to ED's Budget Service.

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 3021. 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. E8-11348 Filed 5-20-08; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION**Notice of Proposed Information Collection Requests**

AGENCY: Department of Education.

ACTION: Notice of Proposed Information Collection Requests.

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: An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507 (j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of Management and Budget (OMB) has been requested by June 12, 2008.

ADDRESSES: Written comments regarding the emergency review should be addressed to the Office of Information and Regulatory Affairs, Attention: Bridget Dooling, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395-6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (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 this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. 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. ED 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 respondents, including through the use of information technology.

Dated: May 15, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title: Student Assistance General Provisions—Subpart K—Cash Management.

Abstract: These regulations comprise the existing provisions of the Student Assistance General Provisions guidance regarding cash management. Information collection under these regulations relates to cash management requirements and practices for institutions participating in the Title IV, Higher Education Act (HEA), programs. This request is for approval of reporting and recordkeeping requirements contained in the attached final regulations related to the administrative requirements of the Regulations Governing the Student Assistance General Provisions as revised by the TEACH Grant final regulations. The information collection requirements in these regulations are necessary to determine eligibility to receive program benefits and to prevent fraud and abuse of program funds.

Additional Information: The U.S. Department of Education (the Department) requests that OMB grant an emergency clearance of 1845–0038. This emergency clearance is necessary due to new burden created from regulatory changes resulting from 34 CFR 668.165, the new regulations for the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program. 34 CFR 668.165 requires institutions to notify recipients of when and the amount of their Teach Grant disbursements, in addition to their right to cancel or reduce their grant amount, as well as procedures the institution has adopted for the recipient to contact their school about cancellation or grant reduction. The associated information collection provisions relating to these requirements are accounted for in 1845–0038. These regulatory changes resulted from public comments in response to the Notice of Proposed Rulemaking published in the **Federal Register** on March 21, 2008 (73 FR 15336). The Department requests emergency clearance by June 12, 2008 so it can implement procedures to make Teach Grants available by the statutory effective date of July 1, 2008.

Frequency: On Occasion.

Affected Public: Businesses or other for-profit; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 108,834.
Burden Hours: 978,333.

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 3691. 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 the Internet address 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. E8–11350 Filed 5–20–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of Proposed Information Collection Requests.

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: An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507 (j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of Management and Budget (OMB) has been requested by June 12, 2008.

ADDRESSES: Written comments regarding the emergency review should be addressed to the Office of Information and Regulatory Affairs, Attention: Bridget Dooling, Desk Officer, Department of Education, Office of Management and Budget; 725 17th Street, NW., Room 10222, New

Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (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 this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. 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. ED 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 respondents, including through the use of information technology.

Dated: May 15, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: New.

Title: Teacher Education Assistance for College and Higher Education Grant Eligibility Regulations.

Abstract: Eligible and participating institutions of higher education who participate in the TEACH Grant program, operate the program consistent with these regulations. Information is necessary to make determinations

regarding compliance with the implementing regulations. This request is for approval of reporting and recordkeeping requirements contained in the attached proposed regulations related to the TEACH Grant administrative requirements for the Title IV, HEA programs. The information collection requirements in these proposed regulations are necessary to determine eligibility to receive program benefits and to prevent fraud and abuse of program funds.

Additional Information: The U.S. Department of Education (the Department) requests that OMB grant an emergency clearance of the proposed regulations governing the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program. Sections 420L through 420O of the Higher Education Act of 1965, as amended, (the HEA) provides for TEACH Grants to eligible students at eligible and participating institutions of higher education. The TEACH Grant Program was established under the HEA by the College Cost Reduction and Access Act of 2007 (the CCRAA). In accordance with section 420O of the CCRAA, the effective date for the TEACH Grant Program is July 1, 2008. The Department is requesting an emergency clearance of these TEACH Grant regulations because the regular clearance process would not enable us to make an OMB-approved TEACH Grant available to participants by the statutory effective date for the TEACH Grant Program. The Department requests emergency clearance of the proposed regulations by June 12, 2008, in order to obtain an OMB Control Number to be used in the TEACH Grant Final Regulations which are being prepared for submission.

Frequency: On Occasion; Annually.

Affected Public: Individuals or household; Businesses or other for-profit; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 2,276,504.

Burden Hours: 468,267.

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 3615. 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 the Internet address 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. E8-11351 Filed 5-20-08; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Office of International Regimes and Agreements; Proposed Subsequent Arrangement

AGENCY: Department of Energy.

ACTION: Notice of proposed subsequent arrangement.

SUMMARY: This notice is being issued under the authority of Section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160). The Department is providing notice of a proposed "subsequent arrangement" under the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States and Argentina.

This subsequent arrangement requests to downblend material subject to an earlier subsequent arrangement—published in the **Federal Register** July 9, 2004 (69 FR 41460)—to a different level than previously approved. Under the 2004 subsequent arrangement, Comision Nacional de Energia Atomica (CNEA) was approved to downblend material from 89.79% enriched into low-enriched uranium (LEU). Under a contract with DOE's Global Threat Reduction Initiative program, CNEA has submitted the attached request to downblend 304 g of that material to 58% weight of isotope U²³⁵ rather than to LEU as originally approved. The material will be fabricated into test plates in Argentina and sent to Idaho National Laboratory for testing and irradiation. The material will remain in the United States after irradiation.

In accordance with Section 131 of the Atomic Energy Act of 1954, as amended, we have determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

For the Department of Energy.

Richard S. Goorevich,

Director, Office of International Regimes and Agreements.

[FR Doc. E8-11432 Filed 5-20-08; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP06-5-008]

Empire Pipeline Inc.; Notice of Application

May 14, 2008.

Take notice that on April 30, 2008, Empire Pipeline, Inc. (EPI), 6363 Main Street, Williamsville, New York 14221, filed in Docket No. CP06-5-008, an application under section 7 of the Natural Gas Act (NGA), to amend its certificate of public convenience and necessity issued by the Commission on December 21, 2006. EPI requests authorization to amend its certificate to remove the 1.34 mile "Lift and Lay" segment, retain the original pipeline, clarify the capacity of its existing and authorized facilities, and make three corrections to its *pro forma* tariff. The application is on file with the Commission and open to public inspection. This filing may also be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, call (202) 502-8659 or TTY, (202) 208-3676.

Any questions regarding this petition should be directed to David W. Reitz, Attorney for Empire Pipeline, Inc., 6363 Main Street, Williamsville, NY 14221, at (716) 857-7949, by fax at (716) 857-7206, or at reitzd@natfuel.com.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the

completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

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

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

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the

Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment Date: June 4, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-11335 Filed 5-20-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF08-10-000]

Atmos Pipeline and Storage, LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed Fort Necessity Gas Storage Project, Request for Comments on Environmental Issues

May 14, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will address the environmental impacts of the Fort Necessity Gas Storage Project (project) proposed by Atmos Pipeline and Storage, LLC (Atmos). The Commission will use the EA in its decision-making process to determine whether or not to authorize the project. This notice explains the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help us determine the issues that need to be evaluated in the EA. Please note that the scoping period will close on June 13, 2008.

This notice is being sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. We encourage government representatives to notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by an Atmos representative about the acquisition of an easement to construct, operate, and maintain the proposed project facilities. The pipeline company

would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the FERC, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility on My Land? What Do I Need To Know?" is available for viewing on the FERC Internet Web site (<http://www.ferc.gov>). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the FERC's proceedings.

Summary of the Proposed Project

Atmos proposes to develop a natural gas storage facility within the Fort Necessity salt dome near Winnsboro, Franklin Parish, Louisiana. The proposed storage design would have the capacity to store 15 Bcf of working gas and 9.75 Bcf of cushion gas, an average daily injection rate of 375 MMscfd, a maximum daily injection rate of 500 MMscfd, and a maximum daily withdrawal rate of 750 MMscfd. Project facilities would also include interconnections to existing interstate natural gas transmission systems. *The proposed project includes:*

- A new natural gas storage facility consisting of three 7.1 million barrel, or 8.25 billion cubic feet (Bcf), each with a cavern well and well pad;
- A 42,300 horsepower (hp) compressor station consisting of nine 4,700 hp reciprocating compressors (five would be driven by electric motors and four would be driven by natural gas motors with emission controls), and ancillary facilities;
- And electric substation;
- A dehydration facility rated for 500 million standard cubic feet per day (MMscfd);
- A leaching plant with associated pumps, tanks, and piping;
- About 0.02 mile of 24-inch-diameter interconnecting gas pipeline and a metering station to tie into an existing 30-inch-diameter Tennessee Gas Pipeline (TGP) pipeline;
- About 0.9 mile of 36-inch-diameter interconnecting gas pipeline and a metering station to tie into the existing 30- and 36-inch-diameter Columbia Gulf Transmission (CGT) pipelines;
- About 6.5 miles of 30-inch-diameter interconnecting gas pipeline and a metering station to tie into the existing 30- and 36-inch-diameter ANR Pipeline Company (ANR) pipeline;

- About 0.9 mile of gas pipeline from the compressor station to the three cavern wells (about 0.1 mile of 24-inch-diameter pipeline and about 0.8 mile of 30-inch-diameter pipeline);

- About 0.3 mile of 2-inch-diameter instrument air pipeline from the leaching plant to the three solution-mining wells;

- About 0.3 mile of 2-inch-diameter diesel injection pipeline from the leaching plant to the three solution-mining wells;

- Four water supply wells and well pads;

- About 0.4 mile of water supply pipeline from the water supply wells to the leaching plant including about 0.1 mile of 10-inch-diameter pipeline, 0.2 mile of 12-inch-diameter, and 0.1 mile of 20-inch-diameter pipeline;

- About 0.3 mile of 20-inch-diameter pipeline to return brine from the solution-mining wells to the leaching plant;

- Four or five brine disposal wells;

- About 2.2 miles of brine disposal pipeline from the leaching plant to the brine disposal wells including about 1.4 miles of 16-inch-diameter, 0.2 mile of 12-inch-diameter, and 0.6 mile of 8-inch-diameter pipeline;

- Appurtenant facilities including delivery piping, line heaters, pressure vessels, and valves; and

- About 5.5 miles of access roads, 1.8 miles of which would be new roads.

Atmos states that the project would provide new storage capacity for interstate commerce. It would interconnect with the existing interstate pipelines operated by TGP, CGT, and ANR. Atmos proposes beginning construction in 2009 and to have Cavern No. 1 in service by 2011, Cavern No. 2 in service by 2013, and Cavern No. 3 in service by 2015.

The general location of the proposed pipeline and associated facilities are shown in the figure included as Appendix 1.¹

Nonjurisdictional Facilities

In addition to the facilities proposed by Atmos, the proposed project has associated facilities that do not come under the jurisdiction of the Commission. The local electricity

provider, Entergy Corporation, would construct an electric power line to Atmos's proposed electric substation. We² have determined that these nonjurisdictional facilities will be addressed in the EA.

Land Requirements for Construction

As proposed, construction of the project would require about 168.6 acres. Of this total, about 30.6 acres would be required permanently for aboveground facilities (including the compressor station, leaching plant, meter stations, wells, and electrical substation), and 5.6 acres would be required for permanent access roads. Atmos would construct the storage facilities within three parcels of land: a 254-acre parcel Atmos would own and two parcels totaling about 989 acres that are privately owned.

Atmos would use a 100-foot-wide construction right-of-way to construct the proposed 24-inch-diameter TGP interconnect gas pipeline, the 36-inch-diameter CGT interconnect gas pipeline, and the 30-inch-diameter ANR interconnect gas pipeline. The permanent right-of-way width for these pipelines would be 50 feet. Atmos would require about 78.7 acres to construct these facilities and would require about 39.4 acres for their operation. Atmos would use a common 125-foot-wide right-of-way for the access roads and pipelines to each of the three cavern storage wells. The pipeline from the water supply wells to the leaching plant, and the cavern gas pipeline between the compressor station and the leaching plant would require a common 125-foot-wide construction right-of-way and a 75-foot-wide easement for operation. The brine pipelines would require a 75-foot-wide construction right-of-way and a 50-foot-wide operational easement. About 4.4 acres of additional temporary workspace would be required at the crossings of roads, waterbodies, and wetlands. At this time, Atmos has identified one 1.3-acre area within the storage field that it would use for construction staging.

Based on preliminary information, construction of the proposed project facilities would affect a total of about 168.6 acres of land (including construction right-of-ways and aboveground facilities). This does not include land that would be disturbed by lay down areas, which is still being determined. Following construction, about 67.2 acres would be maintained as permanent right-of-way, about 30.6 acres of land would be maintained as

new aboveground facility sites, and about 5.6 acres would be used for access roads. The remaining 56.2 acres of temporary construction rights-of-way and any other additional areas required for extra workspaces, pipe storage or contractor yards would be restored and allowed to revert to its former use.

After the storage caverns are developed, Atmos anticipates that it would abandon the leaching plant, water supply wells, brine disposal wells, and related water and brine pipelines. Atmos would file an application with the FERC to abandon these facilities when appropriate.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action when it considers whether or not an interstate natural gas pipeline should be approved. The FERC will use the EA to consider the environmental impact that could result if Atmos's project is authorized under section 7 of the Natural Gas Act. NEPA also requires us to discover and address concerns the public may have about proposals to be considered by the Commission. This process is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. With this Notice of Intent, the Commission staff is requesting public comments on the scope of the issues to be addressed in the EA. All comments received will be considered during preparation of the EA.

Our independent analysis of the issues will be included in the EA. We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on affected resources.

The EA will be mailed to federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; affected landowners; commentors; other interested parties; local libraries and newspapers; and the FERC's official service list for this proceeding. To ensure that your comments are considered, please follow the instructions in the Public Participation section of this notice.

Although no formal application has been filed, the FERC staff has already initiated its NEPA review under its Pre-filing Process. The purpose of the Pre-filing Process is to encourage the early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC.

¹ The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than Appendix 1 (maps), are available on the Commission's Web site at the "eLibrary" link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502-8371. For instructions on connecting to eLibrary refer to the Public Participation section of this notice. Copies of the appendices were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to Atmos.

² "We," "us," and "our" refer to the environmental staff of the FERC's Office of Energy Projects.

With this notice, we are asking federal, state, and local governmental agencies with jurisdiction and/or special expertise with respect to environmental issues, to express their interest in becoming cooperating agencies for the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating status should follow the instructions for filing comments provided below (see *Public Participation*).

Currently Identified Environmental Issues

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project. We have already identified several issues that we think deserve attention based on a preliminary review of the project site and the facility information provided by Atmos. This preliminary list of issues may be changed based on your comments and our analysis.

- Potential impacts due to construction of the storage caverns by salt leaching.
- Temporary and permanent impacts on wetlands and development of appropriate mitigation.
- Native American and tribal concerns.
- Potential impacts to fish and wildlife habitat, including waterbird nesting areas and migrating birds.
- Potential effect on federally and state-listed species.
- Potential impacts to existing land uses.
- Potential visual effects of the aboveground facilities on surrounding areas.
- Potential impacts and potential benefits of construction workforce on local housing, infrastructure, public services, and economy.
- Potential impacts to local air and noise quality associated with construction and operation.
- Alternative alignments for the pipeline routes and alternative sites for the aboveground facilities.
- Public safety and potential hazards associated with the transport of natural gas and the proposed compressor facilities.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the proposed project. By becoming a commentor, your concerns will be addressed in the EA and considered by

the Commission. Your comments should focus on the potential environmental effects, reasonable alternatives (including alternative facility sites and pipeline routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please carefully follow these instructions:

- *Send an original and two copies of your letter to:* Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.
- Label one copy of your comments for the attention of Gas Branch 2.
- Reference Docket No. PF08–10–000 on the original and both copies.
- Mail your comments so that they will be received in Washington, DC on or before June 13, 2008.

Please note that the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. See 18 Code of Federal Regulations 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at <http://www.ferc.gov> under the link to "Documents and Filings" and "eFiling." eFiling is a file attachment process and requires that you prepare your submission in the same manner as you would if filing on paper, and save it to a file on your hard drive. New eFiling users must first create an account by clicking on "Sign up" or "eRegister." You will be asked to select the type of filing you are making. This filing is considered a "Comment on Filing." In addition, there is a "Quick Comment" option available, which is an easy method for interested persons to submit text only comments on a project. The Quick-Comment User Guide can be viewed at <http://www.ferc.gov/docs-filing/efiling/quick-comment-guide.pdf>. Quick Comment does not require a FERC eRegistration account; however, you will be asked to provide a valid e-mail address. All comments submitted under either eFiling or the Quick Comment option are placed in the public record for the specified docket or project number(s).

Once Atmos formally files its application with the Commission, you may want to become an official party to the proceeding known as an "intervenor." Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a Commission proceeding by filing a

request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the "e-filing" link on the Commission's web site. Please note that you may not request intervenor status at this time. You must wait until a formal application is filed with the Commission.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within distances defined in the Commission's regulations of certain aboveground facilities.

If you received this notice, you are on the environmental mailing list for this project. If you do not want to send comments at this time, but still want to remain on our mailing list, please return the Information Request (Appendix 3). If you do not return the Information Request, you will be removed from the Commission's environmental mailing list.

Availability of Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC (3372) or on the FERC Internet Web site (<http://www.ferc.gov>) using the "eLibrary link." Click on the eLibrary link, select "General Search" and enter the project docket number excluding the last three digits (*i.e.*, PF06–21) in the "Docket Number" field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at 1–866–208–3676, or TTY, contact (202) 502–8659. The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

In addition, the FERC now offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to <http://www.ferc.gov/esubscribenow.htm>.

Site visits will be posted on the Commission's calendar located at

<http://www.ferc.gov/EventCalendar/EventsList.aspx> along with other related information.

Finally, Atmos has established an Internet Web site for this project at www.atmosenergy.com/fortnecessity. The Web site includes a description of the project, a map of the proposed storage facility and pipeline routes, and answers to frequently asked questions. You can also request additional information or provide comments directly to Atmos at 1-(888) 877-4006 or fortnecessity@atmosenergy.com.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-11331 Filed 5-20-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Filings

May 15, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP08-377-000.

Applicants: Vectren Energy Delivery of Ohio, Inc.

Description: Vectren Energy Delivery of Ohio, Inc.'s Petition for Waivers of Regulations and Policy, In Support of Its Ohio Retail Unbundling and Open Access Program.

Filed Date: 05/13/2008.

Accession Number: 20080514-5068.

Comment Date: 5 p.m. Eastern Time on Monday, May 26, 2008.

Docket Numbers: RP08-378-000.

Applicants: Eastern Shore Natural Gas Company.

Description: Eastern Shore Natural Gas Company submits Interruptible Revenue Sharing Report for the period 4/1/07 through 3/31/08.

Filed Date: 05/14/2008.

Accession Number: 20080515-0274.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 27, 2008.

Docket Numbers: CP06-398-001.

Applicants: MoBay Storage Hub LLC.

Description: MoBay Storage Hub LLC submits the revised tariff sheets listed in Appendix A hereto supplement its Exhibit P pro forma FERC Gas Tariff.

Filed Date: 05/09/2008.

Accession Number: 20080514-0198.

Comment Date: 5 p.m. Eastern Time Friday, May 23, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of

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

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

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

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

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8-11327 Filed 5-20-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12622-001]

Black River Felts Mills LLC; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

May 14, 2008.

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 12622-001.

c. *Date Filed:* April 2, 2008.

d. *Submitted By:* Black River Felts Mills LLC.

e. *Name of Project:* Felts Mills Hydroelectric Project.

f. *Location:* On the Black River, in Jefferson County, New York. No federal lands would be occupied by the project works.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Keith Silliman, Black River Felts Mills, LLC, c/o Brookfield Power U.S. Holdings America Co., 225 Greenway Parkway, Suite 201, Liverpool, NY 13088; (315) 413-2715; e-mail—keith.silliman@brookfieldpower.com.

i. *FERC Contact:* John Costello at (202) 502-6119; or e-mail at john.costello@ferc.gov.

j. Black River Felts Mills LLC filed its request to use the Traditional Licensing Process on April 2, 2008. Black River Felts Mills LLC provided public notice of its request on April 8, 2008. In a letter dated May 13, 2008, the Director of the Office of Energy Projects approved Black River Felts Mills LLC request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the New York State Historic Preservation Officer, as required by Section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Black River Felts Mills LLC as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act, section 305

of the Magnuson-Stevens Fishery Conservation and Management Act, and section 106 of the National Historic Preservation Act.

m. Black River Felts Mills LLC filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (<http://www.ferc.gov>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCONlineSupport@ferc.gov or toll-free at 1-866-208-3676, or for TTY, (202) 502-8659. A copy is also available for inspection and reproduction at the address in paragraph h.

o. Register online at <http://ferc.gov/esubscribenow.htm> to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-11333 Filed 5-20-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12623-001]

Black River Felts Mills LLC; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

May 14, 2008.

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 12623-001.

c. *Dated Filed:* April 2, 2008.

d. *Submitted By:* Black River Felts Mills LLC.

e. *Name of Project:* Great Bend Hydroelectric Project.

f. *Location:* On the Black River, in Jefferson County, New York. No federal lands would be occupied by the project works.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Keith Silliman, Black River Felts Mills, LLC, c/o Brookfield Power U.S. Holdings

America Co., 225 Greenway Parkway, Suite 201, Liverpool, NY 13088; (315) 413-2715; e-mail—keith.silliman@brookfieldpower.com.

i. *FERC Contact:* John Costello at (202) 502-6119; or e-mail at john.costello@ferc.gov.

j. Black River Felts Mills LLC filed its request to use the Traditional Licensing Process on April 2, 2008. Black River Felts Mills LLC provided public notice of its request on April 8, 2008. In a letter dated May 13, 2008, the Director of the Office of Energy Projects approved Black River Felts Mills LLC request to use the Traditional Licensing Process.

k. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the New York State Historic Preservation Officer, as required by Section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Black River Felts Mills LLC as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act, section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, and section 106 of the National Historic Preservation Act.

m. Black River Felts Mills LLC filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (<http://www.ferc.gov>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCONlineSupport@ferc.gov or toll-free at 1-866-208-3676, or for TTY, (202) 502-8659. A copy is also available for inspection and reproduction at the address in paragraph h.

o. Register online at <http://ferc.gov/esubscribenow.htm> to be notified via e-mail of new filing and issuances related to this or other pending projects. For

assistance, contact FERC Online Support.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-11334 Filed 5-20-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12603-002]

Energy Recycling Company; Notice of Surrender of Preliminary Permit

May 14, 2008.

Take notice that Energy Recycling Company, permittee for the proposed Klamath County Pump Storage Project, has requested that its preliminary permit be terminated. The permit was issued on December 21, 2005, and would have expired on November 30, 2008.¹ The project would have been located two miles southwest of the town of Lorella, in Klamath County, Oregon.

The permittee filed the request on April 29, 2008, and the preliminary permit for Project No. 12603 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, part-day holiday that affects the Commission, or legal holiday as described in section 18 CFR 385.2007, in which case the effective date is the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-11332 Filed 5-20-08; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-8568-4]

Availability of FY 07 Grantee Performance Evaluation Reports for the Eight States of EPA Region 4 and 15 Local Agencies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of Clean Air Act, section 105 grantee performance evaluation reports.

SUMMARY: EPA's grant regulations (40 CFR 35.115) require the Agency to

¹ Energy Recycling Company, 113 FERC ¶ 62,225.

evaluate the performance of agencies which receive grants. EPA's regulations for regional consistency (40 CFR 56.7) require that the Agency notify the public of the availability of the reports of such evaluations. EPA performed end-of-year evaluations of eight state air pollution control programs (Alabama Department of Environmental Management; Florida Department of Environmental Protection; Georgia Department of Natural Resources; Commonwealth of Kentucky Department for Environmental Protection; Mississippi Department of Environmental Quality; North Carolina Department of Environment and Natural Resources; South Carolina Department of Health and Environmental Control; and Tennessee Department of Environment and Conservation) and 15 local programs (City of Huntsville Division of Natural Resources, AL; Jefferson County Department of Health, AL; Broward County Environmental Protection Department, FL; City of Jacksonville Environmental Quality Division, FL; Hillsborough County Environmental Protection Commission, FL; Miami-Dade County Air Quality Management Division, FL; Palm Beach County Health Department, FL; Pinellas County Department of Environmental Management, FL; Forsyth County Environmental Affairs Department, NC; Mecklenburg County Land Use and Environmental Services Agency, NC; Western North Carolina Regional Air Quality Agency, NC; Chattanooga-Hamilton County Air Pollution Control Bureau, TN; Memphis-Shelby County Health Department, TN; Knox County Department of Air Quality Management, TN; and Metropolitan Government of Nashville and Davidson County Public Health Department, TN). The 23 evaluations were conducted to assess the agencies' FY 07 performance under the grants awarded by EPA under authority of section 105 of the Clean Air Act. EPA Region 4 has prepared reports for each agency identified above and these reports are now available for public inspection. The evaluation for the remaining local government of Louisville Metro Air Pollution Control District will be published at a later date.

ADDRESSES: The reports may be examined at the EPA's Region 4 office, 61 Forsyth Street, SW., Atlanta, Georgia 30303, in the Air, Pesticides and Toxics Management Division. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Marie Persinger (404) 562-9048 for information concerning the state and

local agencies of Alabama and Kentucky; Miya Smith (404) 562-9091 for the state and local agencies of Florida; Sean Flynn (404) 562-9093 for the state agency of Mississippi; Mary Echols (404) 562-9053 for the state agency of Georgia, and for the state and local agencies of North Carolina; and Marilyn Sabadaszka (404) 562-9001 for the state agency of South Carolina and for the state and local agencies of Tennessee. They may be contacted at the above Region 4 address.

Dated: May 12, 2008.

Russell L. Wright, Jr.,

*Acting Regional Deputy Administrator,
Region 4.*

[FR Doc. E8-11382 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2007-1019; FRL-8364-3]

Nicotine Reregistration Eligibility Decision; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's Reregistration Eligibility Decision (RED) for the pesticide nicotine. The Agency's risk assessments and other related documents are available in the nicotine Docket. The sole remaining nicotine registration, a restricted use insecticide registered for use only on greenhouse ornamentals and effective against adult whiteflies, aphids, and thrips, is being voluntarily cancelled by the registrant. EPA has reviewed nicotine through the reregistration eligibility decision-making process, which is used by the Agency to ensure that all pesticides meet current health and safety standards.

FOR FURTHER INFORMATION CONTACT: Jill Bloom, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-8019; fax number: (703) 308-7070; e-mail address: bloom.jill@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

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**.

II. Background

A. What Action is the Agency Taking?

Under section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is reevaluating existing pesticides to ensure that they meet current scientific and regulatory standards. EPA has completed a RED for the pesticide nicotine under section 4(g)(2)(A) of FIFRA. The sole remaining nicotine registration is a restricted use insecticide registered for use only on greenhouse ornamentals and effective against adult whiteflies, aphids, and thrips. It is not registered for use on food.

EPA has determined that the data base to support nicotine is incomplete. The Agency has relied primarily on information available from the open literature to assess the risks associated with the use of nicotine. Although there is considerable information, particularly toxicity information, available in the literature, very little of it is appropriate for the routes of exposure relevant to the pesticidal use of nicotine, and much of it relates to derivatives of nicotine not present in the pesticide. Data on worker and residential exposures are also very limited. The data gaps create a substantial amount of uncertainty in the Agency's risk assessment, and risk estimates derived from the available data exceed the Agency's level of concern in certain areas. The RED identifies data that would be needed to refine the risk assessment for nicotine. Rather than develop the data needed to refine the assessment, the registrant has requested the cancellation of its nicotine registration, effective December 31, 2013.

The Agency has made its risk management decision for nicotine, and has determined that the phase-out as requested by the registrant is warranted due to the extremely low volume of nicotine use and the benefits associated with its use in production of greenhouse ornamentals. In light of the risk estimates derived from the available data, the Agency is requiring implementation of label amendments designed to reduce the potential for

exposure and reduce risk during the phase-out period, including prohibiting the use of nicotine on plants grown for cut flowers, prohibiting use in non-commercial greenhouses, and restricting consumers' access to treated greenhouses for 24 hours following the last application of the nicotine product and until ventilation criteria have been met.

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."

List of Subjects

Environmental protection, Pesticides and pests.

Dated: May 8, 2008.

Peter Caulkins,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8-11395 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[FRL-8569-2]

EPA Board of Scientific Counselors; Notice of Charter Renewal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of charter renewal.

The Charter for the Environmental Protection Agency's (EPA) Board of Scientific Counselors (BOSC) will be renewed for an additional two-year period, as a necessary committee which is in the public interest, in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. app.2 section 9(c). The purpose of BOSC is to counsel the Assistant Administrator for Research and Development (AA/ORD), on the operation of ORD's research program. It is determined that BOSC is in the public interest in connection with the performance of duties imposed on the Agency by law.

Inquiries may be directed to Ms. Lorelei Kowalski, Designated Federal Officer, BOSC, U.S. EPA, Office of

Research and Development (mail code 8104-R), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Telephone (202) 564-3408 or kowalski.lorelei@epa.gov.

Dated: May 15, 2008.

George Gray,

Assistant Administrator for Research and Development.

[FR Doc. E8-11412 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-8569-3]

Disallowing Management Fees in EPA Assistance Agreements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The term "management fees or similar charges" refers to expenses added to the direct costs in order to accumulate and reserve funds for ongoing business expenses, unforeseen liabilities, or for other similar costs which are not allowable under EPA assistance agreements. EPA will not, as a matter of policy, allow recipients of EPA financial assistance to charge management fees to their agreements with the Agency. Recipients will have actual notice of EPA's policy prohibiting management fees through a term and condition and competitive solicitation announcements.

EPA funds for financial assistance are limited. The Agency has decided that, in the absence of contrary statutory direction, the public's interest in supporting projects that promote environmental protection is best served by ensuring that EPA financial assistance is used only to pay for costs that are allocable to the specific project receiving EPA financial assistance, and are reasonable and necessary for the performance of the project. Management fees or similar charges may not be used to improve or expand the capacity of organizations carrying out EPA funded projects, except to the extent authorized by the terms of the agreement as a direct cost of carrying out the scope of work. EPA's "no management fee" policy is consistent with OMB Circular A-122, as codified at 2 CFR Part 230. According to 2 CFR Part 230, Appendix B, Item 9, contributions to contingency reserves for unforeseen events are unallowable. Therefore, management fees or similar charges in excess of the direct costs and approved indirect rates are not

allowable under EPA assistance agreements.

FOR FURTHER INFORMATION CONTACT:

Brian Hanlon, 202-564-2865.

Dated: May 15, 2008.

Howard Corcoran,

Director, Office of Grants and Debarment.

[FR Doc. E8-11409 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-8568-6; Docket ID No. EPA-HQ-ORD-2008-0058]

Draft Toxicological Review of Carbon Tetrachloride: In Support of the Summary Information in the Integrated Risk Information System (IRIS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: EPA is announcing a public comment period for the external review draft document titled, "Toxicological Review of Carbon Tetrachloride: In Support of Summary Information on the Integrated Risk Information System (IRIS)" (EPA/635/R-08/008A). The EPA intends to consider comments and recommendations from the public and the expert panel meeting, which will be scheduled at a later date and announced in the **Federal Register**, when EPA finalizes the draft document. The public comment period will provide opportunities for all interested parties to comment on the document. EPA intends to forward public comments submitted in accordance with this notice to the external peer-review panel prior to the meeting for their consideration.

EPA is releasing this draft document solely for the purpose of pre-dissemination public review under applicable information quality guidelines. This document has not been formally disseminated by EPA. It does not represent and should not be construed to represent any Agency policy or determination.

The draft document and EPA's peer-review charge are available via the Internet on NCEA's home page under the Recent Additions and the Data and Publications menus at <http://www.epa.gov/ncea>. When finalizing the draft document, EPA intends to consider any public comments that EPA receives in accordance with this notice.

DATES: The public comment period begins May 21, 2008, and ends July 21, 2008. Technical comments should be in writing and must be received by EPA by

July 21, 2008. EPA intends to submit comments from the public received by this date for consideration by the external peer review panel.

ADDRESSES: The draft "Toxicological Review of Carbon Tetrachloride: In Support of Summary Information on the Integrated Risk Information System (IRIS)" is available via the Internet on the National Center for Environmental Assessment's (NCEA) home page under the Recent Additions and the Data and Publications menus at <http://www.epa.gov/ncea>. A limited number of paper copies are available from NCEA's Technical Information Staff, telephone: 703-347-8561; facsimile: 703-347-8691. If you are requesting a paper copy, please provide your name, mailing address, and the document title.

Comments may be submitted electronically via <http://www.regulations.gov>, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: For information on the public comment period, contact the Office of Environmental Information Docket; telephone: 202-566-1752; facsimile: 202-566-1753; or e-mail: ORD.Docket@epa.gov.

If you have questions about the document, contact Susan Rieth, IRIS Staff, National Center for Environmental Assessment, (8601P), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone: 703-347-8582; facsimile: 703-347-8689; or e-mail: rieth.susan@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Summary of Information About the Integrated Risk Information System (IRIS)

IRIS is a database that contains potential adverse human health effects information that may result from chronic (or lifetime) exposure to specific chemical substances found in the environment. The database (available on the Internet at <http://www.epa.gov/iris>) contains qualitative and quantitative health effects information for more than 540 chemical substances that may be used to support the first two steps (hazard identification and dose-response evaluation) of a risk assessment process. When supported by available data, the database provides oral reference doses (RfDs) and inhalation reference concentrations (RfCs) for chronic health effects, and oral slope factors and inhalation unit risks for carcinogenic effects. Combined with specific exposure information,

government and private entities can use IRIS data to help characterize public health risks of chemical substances in a site-specific situation and thereby support risk management decisions designed to protect public health.

II. How To Submit Technical Comments to the Docket at <http://www.regulations.gov>

Submit your comments, identified by Docket ID No. EPA-HQ-ORD-2008-0058 by one of the following methods:

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

- E-mail: ORD.Docket@epa.gov.

- Fax: 202-566-1753.

- Mail: Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The phone number is 202-566-1752.

- Hand Delivery: The OEI Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202-566-1744. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

If you provide comments by e-mail or hand delivery, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA-HQ-ORD-2008-0058. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked "late," and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at <http://www.regulations.gov>, including any personal information provided, unless a comment includes information claimed to be confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is

an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

Dated: April 24, 2008.

Rebecca Clark,

Deputy Director, National Center for Environmental Assessment.

[FR Doc. E8-11379 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2007-0328; FRL-8362-3]

Pesticides; Final Guidance for Pesticide Registrants on Environmental Hazard General Labeling Statements on Outdoor Residential Use Products; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Agency is announcing the availability of a Pesticide Registration Notice (PR Notice) entitled

"Environmental Hazard General Labeling Statements on Outdoor Residential Use Products." This PR Notice was issued by the Agency on May 9, 2008 and is identified as PR Notice 2008-1. PR Notices are issued by the Office of Pesticide Programs (OPP) to inform pesticide registrants and other interested persons about important policies, procedures, and registration related decisions, and serve to provide guidance to pesticide registrants and OPP personnel. This particular PR Notice provides guidance to the registrant concerning new environmental hazard statements that are designed to replace language created for agricultural products with statements that are easier for consumers to understand. The new environmental hazard statements are divided by product type (e.g., liquid ready-to-use, broadcast granular), and recommends specific language for each product type to minimize risks to the human health and the environment, with emphasis on reducing risks to water. Revisions to product labels using these new statements may be made by notification.

FOR FURTHER INFORMATION CONTACT: Jim Roelofs, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-2964; fax number: (703) 308-1850; e-mail address: roelofs.jim@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who are required to register, regulate or label pesticides, 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 information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2007-0328. 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 Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S.

Crystal Dr., 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 Facility telephone number is (703) 305-5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr>.

II. What Guidance Does this PR Notice Provide?

This final PR Notice provides guidance to the registrant concerning new environmental hazard statements that are designed to replace language created for agricultural products with statements that are easier for consumers to understand. The new environmental hazard statements are divided by product type (e.g., liquid ready-to-use, broadcast granular), and recommends specific language for each product type to minimize risks to the human health and the environment, with emphasis on reducing risks to water. Revisions to product labels using these new statements may be made by notification.

III. Do PR Notices Contain Binding Requirements?

The PR Notice discussed in this notice is intended to provide guidance to EPA personnel and decisionmakers and to pesticide registrants. While the requirements in the statutes and Agency regulations are binding on EPA and the applicants, this PR Notice is not binding on either EPA or pesticide registrants, and EPA may depart from the guidance where circumstances warrant and without prior notice. Likewise, pesticide registrants may assert that the guidance is not appropriate generally or not applicable to a specific pesticide or situation.

List of Subjects

Environmental protection, Administrative practice and procedure, Environmental hazard statements, Pesticides and pests, Residential.

Dated: May 9, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E8-11293 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2008-0410; FRL-8568-5]

Proposed Approval of the Central Characterization Project's Remote-Handled Waste Characterization Program at Savannah River Site

AGENCY: Environmental Protection Agency.

ACTION: Notice of availability; opening of public comment period.

SUMMARY: The Environmental Protection Agency (EPA or we) is announcing the availability of, and soliciting public comments for 45 days on, the proposed approval of the radioactive, remote-handled (RH), transuranic (TRU) waste characterization program implemented by the Central Characterization Project (CCP) at Savannah River Site (SRS). This waste, which originated from the Battelle Columbus Laboratory (BCL), is intended for disposal at the Waste Isolation Pilot Plant (WIPP) in New Mexico.

In accordance with the WIPP Compliance Criteria, EPA evaluated the characterization of RH TRU debris waste from SRS-CCP during a baseline inspection (and follow-up inspections) conducted the weeks of July 17-19, 2007, July 31-August 2, 2007, and December 4-5, 2007. Using the systems and processes developed as part of the U.S. Department of Energy's (DOE's) Carlsbad Field Office (CBFO) program to characterize RH TRU waste, EPA verified whether DOE could adequately characterize RH TRU waste consistent with the Compliance Criteria. The results of EPA's evaluation of the SRS-CCP program and its proposed approval are described in the Agency's inspection report, which is available for review in the public dockets listed in **ADDRESSES**. We will consider public comments received on or before the due date mentioned in **DATES**.

This notice summarizes the waste characterization processes evaluated by EPA and EPA's proposed approval. As required by the 40 CFR 194.8, at the end of a 45-day comment period EPA will evaluate public comments received, and if appropriate, finalize the reports responding to the relevant public comments, and a final report and approval letter to DOE.

DATES: Comments must be received on or before July 7, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2008-0410, by one of the following methods:

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

- E-mail: to a-and-r-docket@epa.gov.
- Fax: 202-566-1741.
- Mail: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Instructions: Direct your comments to Attn: Docket ID No. EPA-HQ-OAR-2008-0410. The Agency's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at <http://www.regulations.gov>. As provided in EPA's regulations at 40 CFR Part 2, and in accordance with normal EPA docket procedures, if hard copies of any docket

materials are requested, a reasonable fee may be charged for photocopying.

FOR FURTHER INFORMATION CONTACT:

Rajani Joglekar or Ed Feltcorn, Radiation Protection Division, Center for Federal Regulations, Mail Code 6608J, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC, 20460; telephone number: 202-343-9601; fax number: 202-343-2305; e-mail address: joglekar.rajani@epa.gov or feltcorn.ed@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. **Submitting CBI.** Do not submit this information to EPA through <http://www.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:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- 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.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

- Make sure to submit your comments by the comment period deadline identified.

II. Background

DOE is developing the WIPP, near Carlsbad in southeastern New Mexico, as a deep geologic repository for disposal of TRU radioactive waste. As defined by the WIPP Land Withdrawal Act (LWA) of 1992 (Pub. L. No. 102-579), as amended (Pub. L. No. 104-201), TRU waste consists of materials that have atomic numbers greater than 92 (with half-lives greater than twenty years), in concentrations greater than 100 nanocuries of alpha-emitting TRU isotopes per gram of waste. Much of the existing TRU waste consists of items contaminated during the production of nuclear weapons, such as rags, equipment, tools, and sludges.

TRU waste is itself divided into two categories, based on its level of radioactivity. Contact-handled (CH) TRU waste accounts for about 97 percent of the volume of TRU waste currently destined for the WIPP. It is packaged in 55-gallon metal drums or in metal boxes and can be handled under controlled conditions without any shielding beyond the container itself. The maximum radiation dose at the surface of a CH TRU waste container is 200 millirems per hour. CH waste primarily emits alpha particles that are easily shielded by a sheet of paper or the outer layer of a person's skin.

Remote-handled (RH) TRU waste emits more radiation than CH TRU waste and must therefore be both handled and transported in shielded casks. Surface radiation levels of unshielded containers of remote-handled transuranic waste exceed 200 millirems per hour. RH waste primarily emits gamma radiation, which is very penetrating and requires concrete, lead, or steel to block it.

On May 13, 1998, EPA announced its final compliance certification decision to the Secretary of Energy (published May 18, 1998, 63 FR 27354). This decision stated that the WIPP will comply with EPA's radioactive waste disposal regulations at 40 CFR part 191, subparts B and C.

The final WIPP certification decision includes conditions that (1) prohibit shipment of TRU waste for disposal at WIPP from a site until EPA has approved the procedures developed to comply with the waste characterization requirements of § 194.22(c)(4) (Condition 3 of appendix A to 40 CFR part 194). The EPA's approval process for waste generator sites is described in § 194.8 (revised July 2004).

Condition 3 of the WIPP Certification Decision requires EPA to conduct independent inspections at DOE's waste generator/storage sites of their TRU waste characterization capabilities before approving their program and the waste for disposal at the WIPP. EPA's inspection and approval process gives EPA (a) discretion in establishing technical priorities, (b) the ability to accommodate variation in the site's waste characterization capabilities, and (c) flexibility in scheduling site WC inspections.

As described in section 194.8(b), EPA's baseline inspections evaluate each WC process component (equipment, procedures, and personnel training/experience) for its adequacy and appropriateness in characterizing TRU waste destined for disposal at WIPP. During an inspection, the site demonstrates its capabilities to characterize TRU waste(s) and its ability to comply with the regulatory limits and tracking requirements under § 194.24. A baseline inspection may describe any limitations on approved waste streams or waste characterization processes [§ 194.8(b)(2)(iii)]. In addition, a baseline inspection approval must specify what subsequent WC program changes or expansion should be reported to EPA [§ 194.8(b)(4)]. The Agency is required to assign Tier 1 (T1) and Tier 2 (T2) to the reportable changes depending on their potential impact on data quality. A T1 designation requires that the site must notify EPA of proposed changes to the approved components of an individual WC process (such as radioassay equipment or personnel), and EPA must also approve the change before it can be implemented. A WC element with a T2 designation allows the site to implement changes to the approved components of individual WC processes (such as visual examination procedures) but requires EPA notification. The Agency may choose to inspect the site to evaluate technical adequacy before approval. EPA inspections conducted to evaluate T1 or T2 changes are follow-up inspections under the authority of § 194.24(h). In addition to the follow-up inspections, if warranted, EPA may opt to conduct continued compliance inspections at TRU waste sites with a baseline approval under the authority of § 194.24(h).

The site inspection and approval process outlined in § 194.8 requires EPA to issue a **Federal Register** notice proposing the baseline compliance decision, docket the inspection report for public review, and seek public comment on the proposed decision for a period of 45 days. The report must

describe the WC processes EPA inspected at the site, as well as their compliance with § 194.24 requirements.

EPA previously issued a preliminary approval of DOE's general framework for characterizing RH waste on March 26, 2004 (Docket A-98-49, Item II-B2-21). This approval requires DOE to provide site-specific RH waste characterization plans and characterization procedures for EPA approval prior to implementing them for characterizing RH waste.

III. Proposed Baseline Compliance Decision

EPA has performed a baseline inspection of RH TRU waste characterization activities at SRS-CCP (EPA Inspection No. EPA-SRS-CCP-RH-7.07-8). The purpose of EPA's inspection was to verify that the RH waste characterization program implemented at SRS-CCP for characterizing RH TRU, retrievably-stored, debris waste is adequate. The waste characterized by the SRS-CCP is RH debris waste from the demolition of a hot cell laboratory at Battelle Columbus Laboratory (BCL) that was shipped to SRS for characterization prior to disposal at WIPP. EPA evaluated whether this RH waste meets the regulatory characterization requirements at 40 CFR 194.24.

The inspection's sole focus was to evaluate the records that had been assembled to document RH TRU waste characterization activities, including recently performed modeling, interpretation, and additional calculations based on previously generated measurement data for Battelle Columbus Laboratory Demolition Project (BCLDP) RH debris Waste Stream No. SR-RL-BCLDP.001. Like the RH debris waste in 16 canisters from LANL that EPA approved in February 2008 (see Air Docket No. A-98-49, II-A4-89), this is a discrete waste stream. There will be no further waste generation and characterization activities relative to this waste. This proposed approval, hence, is directed to a discrete set of 87 drum liners within this RH debris waste stream that are currently stored at SRS, as supported by the documentation the EPA inspection team evaluated during this inspection.

Although these wastes are currently stored at SRS, the waste generation and characterization activities covered by this proposed approval were performed at the BCLDP, as stated previously. This proposed approval is limited to RH debris waste from BCLDP only. Note that this is a retrospective approval of the RH debris waste from BCLDP, and no additional RH debris waste from

BCLDP remains to be characterized for WIPP disposal. Any BCLDP-related RH waste that SRS-CCP may characterize upon the approval of WC activities discussed in this report will require EPA approval as a Tier 1 (T1) change. Upon approval of the RH TRU waste characterization processes discussed in this report, if SRS-CCP embarks on characterizing RH waste other than that generated at BCLDP for WIPP disposal, a separate baseline inspection and approval will be necessary. That is, any SRS RH waste destined for WIPP disposal characterized by SRS-CCP or another program remains subject to EPA's baseline inspection and approval.

The purpose of the SRS-CCP RH WC inspection was to evaluate the adequacy of the site's WC programs for 87 drum liners in a single RH debris waste stream for disposal at WIPP. The 87 drum liners of RH debris in this waste stream were generated from the decontamination and decommissioning (D&D) of the Building JN-1 Hot Cell Laboratory at the Jefferson North facility, which operated from 1955 until D&D began in 1988, under the BCLDP. (See page 8 for additional details of the waste generation in Section 8.0 of the inspection report found in EPA Docket ID EPA-HQ-OAR-2008-0410.)

The EPA inspection team identified one finding during the July 2007 inspection (see Attachment A of the inspection report found in EPA Docket ID EPA-HQ-OAR-2008-0410). SRS-CCP revised specific documents to address the finding and submitted them for EPA review following the initial July inspection. The EPA inspection team reviewed the revised documents and subsequently met with SRS-CCP personnel in December 2007 to discuss the changes to WC documents addressing the EPA finding and examine additional objective evidence. Upon completing their reviews, the EPA inspection team determined that the revised documents adequately addressed all aspects of the EPA finding. Accordingly, EPA has determined that the records documenting SRS-CCP's RH WC program represented activities that were technically adequate and the finding has been resolved. EPA, therefore, is proposing to approve the SRS-CCP RH WC program for the 87 RH TRU drum liners in SRS RH Waste Stream No. SR-RL-BCLDP.001 evaluated during this baseline inspection that is described and documented in the accompanying baseline inspection report. This approval includes the following:

(1) The acceptable knowledge (AK) process for the 87 drum liners of RH retrievably-stored TRU debris in the

waste stream designated Waste Stream No. SRS-RL-BCLDP.001 currently stored at the TRU storage pads in the E Area of SRS.

(2) The radiological characterization (RC) process using dose-to-curve (DTC) and modeling-derived scaling factors, supported by radionuclide data from the analysis of 69 swipe samples, for assigning radionuclide values to 87 drum liners of RH retrievably-stored TRU debris in one waste stream, designated as SRS-RL-BCLDP.001, that is documented in CCP-AK-LANL-501, Revision 2, and detailed in the inspection report found in EPA Docket ID EPA-HQ-OAR-2008-0410.

(3) The visual examination (VE) process to identify Waste Material Parameters and the physical form of the waste.

(4) The WIPP Waste Information System (WWIS) to submit data for both characterization and certification to WWIS for RH TRU waste.

(5) The attainment of pertinent Data Quality Objectives (DQOs).

Since no additional WC activities are expected to occur relative to the 87 drum liners of RH debris waste, no changes to the WC activities evaluated during the baseline inspection are anticipated. EPA, therefore, does not expect SRS-CCP to make additional revisions to the documents that were reviewed as part of this inspection and proposed approval limited to the WC processes specific to the 87 drum liners evaluated during the July, August, and December 2007 inspections. In the event that SRS-CCP makes changes to the WC components proposed for approval or implements them to characterize additional waste from the BCLDP activity (e.g., solids or soil/gravel) associated with D&D activities at Building JN-1 at the Battelle Columbus Laboratory, EPA will consider changes that have the potential to affect WC activities to be Tier 1 (T1) changes, as stated above. The inspection report does not list specific T1 or Tier 2 (T2) designations relative to these 87 waste liners and the WC components proposed for the approval at this time.

IV. Availability of the Baseline Inspection Report for Public Comment

EPA has placed the report discussing the results of the Agency's inspection of SRS-CCP in the public docket as described in **ADDRESSES**. In accordance with 40 CFR 194.8, EPA is providing the public 45 days to comment on these documents. The Agency requests comments on the proposed approval decision, as described in the inspection report. EPA will accept public comment on this notice and supplemental

information as described in Section 1.B. above. EPA will not make a determination of compliance before the 45-day comment period ends. At the end of the public comment period, EPA will evaluate all relevant public comments and revise the inspection report as necessary. If appropriate, the Agency will then issue a final approval letter and inspection report, both of which will be posted on the WIPP Web site.

Information on the certification decision is filed in the official EPA Air Docket, Docket No. A-93-02 and is available for review in Washington, DC, and at three EPA WIPP informational docket locations in Carlsbad, Santa Fe, and Albuquerque, New Mexico. The dockets in New Mexico contain only major items from the official Air Docket in Washington, DC, plus those documents added to the official Air Docket since the October 1992 enactment of the WIPP LWA.

Dated: May 9, 2008.

Elizabeth Cotsworth,

Director, Office of Radiation and Indoor Air.

[FR Doc. E8-11381 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2004-0340; FRL-8364-7]

Disulfoton; Notice of Receipt of Requests to Voluntarily Amend to Terminate Uses of Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by the registrant to amend their registrations to terminate certain uses of products containing the pesticide disulfoton. The request would terminate disulfoton use in or on barley and wheat. The request would also terminate the use of the 15% granular formulation of disulfoton, Di-Syston 15G, (EPA Reg. No. 264-723) on broccolis and ornamentals (commercial uses). Additionally, the request would terminate the use of Di-Syston 15G and the emulsifiable concentrate formulation of disulfoton, Di-Syston 8 EC, (EPA Reg. No. 264-734) on potatoes. The registrant's request includes amending the disulfoton technical product registration (EPA Reg. No. 264-725) to terminate potato, barley, and

wheat uses. The request would not terminate the last disulfoton products registered for use in the United States. EPA intends to grant this request at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the request, or unless the registrant withdraws the request within this period. Upon acceptance of this request, any sale, distribution, or use of products listed in this notice will be permitted only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before June 20, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2004-0340, 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.

Instructions: Direct your comments to docket ID number EPA-HQ-OPP-2004-0340. 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 www.regulations.gov or e-mail. The www.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 www.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 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, 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 Dr., 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 Facility telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT: Eric Miederhoff, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 347-8028; fax number: (703) 308-7070; e-mail address: miederhoff.eric@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 on the Receipt of Request to Amend Registrations to Terminate Uses

This notice announces receipt by EPA of a request from Bayer CropSciences to amend three disulfoton product registrations to terminate certain uses. In a letter dated November 8, 2007,

Bayer CropSciences confirmed their intention to cancel Di-Syston 15G (EPA Reg. No. 264-723) use on broccoli. The 2002 disulfoton Reregistration Eligibility Decision (RED) determined that disulfoton uses on barley, wheat, and potatoes were ineligible for reregistration and were to be phased out by June 2005. Additionally, the Di-Syston 15G use on ornamentals (commercial use) was to be phased out by June 2005. These phase outs were necessary to mitigate drinking water, occupational, and ecological risks. This notice and subsequent order will finalize these phase-outs. These uses have been removed from their respective end-use product labels and Bayer CropSciences acknowledged their cancellation in letters dated November 16, 2007 and January 24 and February 5, 2008. Bayer CropScience disulfoton products that had been registered for use on barley, wheat, and potatoes included Di-Syston 15G (EPA Reg. No. 264-723), Di-Syston 8 EC (EPA Reg. No. 264-734), and the disulfoton technical product (EPA Reg. No. 264-725). The termination of the subject uses for this Notice will not terminate the last disulfoton end-use products registered in the United States.

III. What Action is the Agency Taking?

This notice announces receipt by EPA of a request from a registrant to amend product registrations to terminate certain uses of disulfoton. The affected products and the registrant making the request are identified in Tables 1 and 2 of this unit.

Under section 6(f)(1)(A) of FIFRA, registrants may request, at any time, that their pesticide registrations be canceled or amended to terminate one or more pesticide uses. Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, section 6(f)(1)(C) of FIFRA requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or
2. The Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

Bayer CropSciences, the disulfoton technical registrant, has requested that EPA waive the 180-day comment period. EPA will provide a 30-day comment period on the proposed requests.

Unless a request is withdrawn by the registrant within 30 days of publication of this notice, or if the Agency determines that there are substantive comments that warrant further review of this request, an order will be issued canceling and amending the affected registrations.

TABLE 1. — DISULFOTON PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT

Registration Number	Product Name	Delete From Label	Company
264-723	Di-Syston 15G	Broccoli, Potato, Wheat, Barley, Ornamentals (commercial uses)	Bayer CropSciences
264-734	Di-Syston 8 EC	Potato, Wheat, Barley	Bayer CropSciences
264-725	Di-Syston Technical	Potato, Wheat, Barley	Bayer CropSciences

Table 2 of this unit includes the name and address of record for the registrant of the products listed in Table 1 of this unit.

TABLE 2. — REGISTRANT REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS

EPA Company Number	Company Name and Address
264	Bayer CropSciences, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709

IV. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

V. Procedures for Withdrawal of Request and Considerations for Reregistration of Disulfoton

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked before June 20, 2008. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the product(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

VI. Provisions for Disposition of Existing Stocks

In response to this request for termination of certain uses, the Agency proposes to issue an order which would include the following provisions for the treatment of any existing stocks of the products identified or referenced in Table 1. If the request for voluntary termination of certain uses is granted as discussed in unit 3, the Agency intends to issue a cancellation order that would allow the registrant to sell and distribute such existing stocks for six months from the date of the cancellation order and allow persons other than the registrant to continue to sell and/or use existing stocks of products with previously approved labeling that includes the discontinued uses, until such stocks are exhausted, provided that such use is consistent with the terms of the previously approved labeling on, or that accompanied, the associated products. Generally, orders effecting requested cancellations permit a registrant to sell or distribute existing stocks for one year after the date the cancellation request was received. In this case however, the Agency has determined that six months will allow sufficient time for the registrant to sell or distribute existing stocks. The decision to phase out disulfoton usage on wheat, barley, and potatoes by 2005 was announced in the 2002 RED. The technical registrant initially announced their voluntary cancellation of Di-Syston 15G use on broccoli in a letter dated September 30, 2004. Given the amount of time that has elapsed since these events, the Agency has determined it is unnecessary to provide the registrant one year to sell or distribute existing stocks. Consequently, the cancellation order will permit the registrant to sell or distribute existing stocks for six months after the date the cancellation order is issued. This policy is in accordance with the Agency's

statement of policy as prescribed in the **Federal Register** of June 26, 1991 (56 FR 29362) (FRL-3846-4). Exceptions to this general rule will also be made if a product poses a risk concern, or is in noncompliance with reregistration requirements, or is subject to a data call-in. In all cases, product-specific disposition dates will be given in the cancellation orders. The Agency intends to publish the final cancellation order in the **Federal Register**.

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Unless the provisions of an earlier order apply, existing stocks already in the hands of dealers or users can be distributed, sold, or used legally until they are exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product. Exception to these general rules will be made in specific cases when more stringent restrictions on sale, distribution, or use of the products or their ingredients have already been imposed, as in a Special Review action, or where the Agency has identified significant potential risk concerns associated with a particular chemical.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: May 13, 2008.

Peter Caulkins,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8-11325 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2008-0075; FRL-8350-7]

Notice of Withdrawal of 14 Tolerance Petitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is withdrawing 14 pesticide petitions because the petitioners either voluntarily withdrew their petitions, or the petitions were administratively withdrawn by EPA.

FOR FURTHER INFORMATION CONTACT: Kathleen Martin, Registration Division (7505P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,

Washington, DC 20460-0001; telephone number: (703) 308-2857; fax number: (703) 305-0599; e-mail address: martin.kathleen@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

Although this action only applies to the registrants in question, it is directed to the public in general. Since various individuals or entities may be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding this action, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2008-0075. 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 Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., 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 Facility telephone number is (703) 305-5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr>.

II. What Action is the Agency Taking?

EPA is announcing that 10 petitioners representing 14 petitions, B2E Corporation (7E4907); BASF Corporation (3E4216); Conn and Smith, Inc. (7E4794); Ecolab Inc. (9E5081, 9E5086, 9E6014); Falcon Lab LLC (3E6789); Firmenich Incorporated (6E4759); Hercon Environmental Corporation (7E4918); Huntsman Corporation (8E4992); Keller and Heckman LLP (4E6861, 5E6907, 5E6952); and Synagro Technologies (6E4732), have withdrawn their petitions to amend 40 CFR part 180 to exempt residues of inert ingredients, as provided for under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a.

1. *PP 3E4216* (Blankophor BBH). In 2007, the petitioner now BASF Corporation, P.O. Box 13528, Research

Triangle Part, NC 27709-3528, requested that *PP 3E4216* be withdrawn without prejudice. EPA issued a notice in the **Federal Register** of May 16, 1997 (62 FR 27025) (FRL-5717-8), which announced American Cyanamid Company, Agricultural Research Division, P.O. Box 400, Princeton, NJ 08543-0400, submission of a pesticide petition (*PP 3E4216*). This petition requested that EPA amend 40 CFR part 180 exempting the residues of 2,2'-(1,2-ethenediyl)bis[5-[[4-bis(2-hydroxyethyl)amino]-6-phenylamino]-1,3,5-triazin-2-yl]amino]-benzenesulfonate from the requirement of a tolerance when used as an inert ingredient (adjuvant and UV absorber/protectant) in pesticide formulations applied to growing crops.

2. *PP 3E6789* (ammonium nonanoate). Falcon Lab LLC, requested that *PP 3E6789* be withdrawn. EPA issued a notice in the **Federal Register** of March 17, 2004 (69 FR 12670) (FRL-7343-5), which announced Falcon Lab LLC, 1103 Norbee Drive, Wilmington, DE 19803, submission of a pesticide petition (*PP 3E6789*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for ammonium nonanoate in or on all raw agricultural commodities.

3. *PP 4E6861* (amphoteric surfactant). In 2007, Keller and Heckman LLP, 1001 G St., NW., Suite 500, Washington, DC 20001, on behalf of Tomah3, requested that *PP 4E6861* be withdrawn without prejudice. EPA issued a notice in the **Federal Register** of February 10, 2005 (70 FR 7103) (FRL-7695-9), which announced Tomah3 Products, Inc., 337 Vincent St., P.O. Box 388, Milton, WI 53563-0388, submission of a pesticide petition (*PP 4E6861*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for the use of any member of the class of amphoteric surfactant inert ingredients described as [beta-alanine, N-(2-carboxyethyl)-N-[3-polyoxaalkylalkoxy)propyl]-, (mono- or disodium salt) and polyalkoxy, a-[3-bis(2-carboxyethyl)amino]propyl]-w-alkoxy, (mono- or disodium salt), containing 0 to 20 repeating alkoxy/polyalkoxy units (methoxy-, ethoxy-, propoxy-, butoxy-) and 6 to 21 carbons in an n-alkyloxy-, isoalkyloxy- or branched alkyloxy- chain; also known as alkyl ether amine dicarboxyethyl sodium salts in or on all raw agricultural commodities and food.

4. *PP 5E6907* (aluminum-magnesium hydroxy carbonate). In 2007, Keller and Heckman LLP, 1001 G St., NW., Suite 500, Washington, DC 20001, on behalf

of Selective Micro Technologies, LLC, requested that *PP 5E6907* be withdrawn. EPA issued a notice in the **Federal Register** of April 20, 2005 (70 FR 2054) (FRL-7703-9), which announced Keller and Heckman LLP's submission of a pesticide petition (*PP 5E6907*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for aluminum-magnesium hydroxy carbonate (CAS No. 85585-93-9) when used in the formulation process for antimicrobial pesticides used on food-contact surfaces and in water that contacts raw agricultural commodities postharvest.

5. *PP 5E6952* (ether amines). In 2007, Keller and Heckman LLP, 1001 G St., NW., Suite 500, Washington, DC 20001, on behalf of Tomah3, requested that *PP 5E6952* be withdrawn without prejudice. EPA issued a notice in the **Federal Register** of July 20, 2005 (70 FR 41726) (FRL-7722-2), which announced Tomah3 Products, Inc.'s, 337 Vincent St., P.O. Box 388, Milton, WI 53563-0388, submission of a pesticide petition (*PP 5E6952*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for the use of any member of the class of alkoxyated surfactant inert ingredients described as 1-propanamine, N,N-polyoxaalkyl-, [3-(X-alkyloxy)polyoxaalkyl (derivs.); polyalkoxy, [alpha], [alpha]'- (imino)bis[[omega]-hydroxy-, N-3-[(X-alkyloxy)polyoxaalkyl]propyl (derivs.); polyalkoxy, [alpha]-[3-N,N-bis(polyoxaalkyl)]amino]propyl]-[omega]-hydroxy-monoalkyl ethers; or polyalkoxy, [alpha]-[3-bis(hydroxyalkyl)amino]propyl]-[omega]-hydroxy-, ether with [alpha]-hydro-[omega]-hydroxypolyalkoxy (1:2), monoalkyl ethers containing 0 to 20 internal repeating alkoxy units (methoxy-, ethoxy-, propoxy-, or acetoxy-); 1 to 14 terminal repeating alkoxy units (ethoxy- or propoxy-); and 6 to 22 carbons in an n-alkyloxy-, isoalkyloxy- or branched alkyloxy-chain, in or on the all raw agricultural commodities and food.

6. *PP 6E4732* (granulite). In 2007, the petitioner now Synagro Technologies, Inc., 3501 Asiatic Avenue, Baltimore, MD 21226, requested that *PP 6E4732* be withdrawn. EPA issued a notice in the **Federal Register** of April 29, 1998 (63 FR 23438) (FRL-5783-4), which announced Wheelabrator Water Technologies, Inc.'s, 8201 Eastern Boulevard, Baltimore, MD 21224, submission of a pesticide petition (*PP 6E4732*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the

requirement of a tolerance for biosolids in or on the raw agricultural commodity granulate.

7. *PP 6E4759* (ethyl methyl phenyl). Firmenich Incorporated has requested that *PP 6E4759* be withdrawn. EPA issued a notice in the **Federal Register** of December 20, 2000 (65 FR 79834) (FRL-6751-9), which announced Firmenich Incorporated's, P.O. 5880, Princeton, NJ 08543, submission of a pesticide petition (*PP 6E4759*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for ethyl methylphenylglycidate when used as an inert ingredient in the pesticide formulations applied to growing crops or to raw agricultural commodities after harvest under 40 CFR 180.1001(c) and applied to animals under 40 CFR 180.1001(e).

8. *PP 7E4794* (pentaerythritol stearates). In 2007, Conn and Smith, Inc., requested on behalf of their client Walker Silicones Corporation, that *PP 7E4794* be withdrawn without prejudice. EPA issued a notice in the **Federal Register** of December 17, 1997 (62 FR 66091) (FRL-5760-5), which announced Wacker Silicones Corporation's, Wacker-Chemie, 3301 Sutton Road, Adrian, MI 49221-9397, submission of a pesticide petition (*PP 7E4794*). This petition requested that EPA amend 40 CFR part 180 by revising the exemption from the requirement of a tolerance established under 40 CFR 180.1001(c) for the residues of pentaerythritol stearates (CAS. No. 85116-93-4) from 25 parts per million (ppm) to 500 ppm.

9. *PP 7E4907* (2-HAP). In 2007, B2E Corporation requested that *PP 7E4907* be withdrawn. EPA issued a notice in the **Federal Register** of October 8, 1997 (62 FR 52552) (FRL-5745-9), which announced B2E Corporation's, 16 School St., Rye, NY 10580, submission of a pesticide petition (*PP 7E4907*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for 2-hydroxyacetophenone (2-HAP) in or on the raw agricultural commodity.

10. *PP 7E4918* (TOTM). In 2007, Hercon Environmental Corporation requested that *PP 7E4918* be withdrawn. EPA issued a notice in the **Federal Register** of March 19, 1998 (63 FR 13404) (FRL-5776-6), which announced Hercon Environmental Corporation's, Aberdeen Road, P.O. Box 467, Emigsville, PA 17318-0467, submission of a pesticide petition (*PP 7E4918*). This petition requested that EPA amend 40 CFR part 180 by establishing an

exemption from the requirement of a tolerance for trioctyl trimellitate (TOTM) as an inert ingredient under 40 CFR 180.1001(c).

11. *PP 8E4992* (butylene carbonate). In 2006, Huntsman Corporation requested that *PP 8E4992* be withdrawn. EPA issued a notice in the **Federal Register** of December 30, 1998 (63 FR 71920) (FRL-6050-1), which announced Huntsman Corporation's, 8600 Gosling Road, The Woodlands, TX 77381, submission of a pesticide petition (*PP 8E4992*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for propylene carbonate and butylene carbonate (4-(methyl and ethyl)-(1,3-dioxolan-2-one)) when used in accordance with good agricultural practice as an inert ingredient in pesticide formulations applied to growing crops or to raw agricultural commodities after harvest.

12. *PP 9E5081* (HEDP). In 2004, EPA withdrew *PP 9E5081* without prejudice, for administrative reasons there was a regulatory change. EPA issued a notice in the **Federal Register** of September 1, 1999 (64 FR 47791) (FRL-6090-8), which announced Ecolab Inc.'s, 370 N. Wabasha St., St. Paul, MN 55102, submission of a pesticide petition (*PP 9E5081*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for hydroxyethylidene-1,1-diphosphonic acid (HEDP) in or on the raw agricultural commodities, in processed commodities, and in or on meat and meat byproducts of cattle, sheep, hogs, goats, horses, and poultry, milk, and dairy products, eggs, seafood and shellfish, and fruit and fruits and vegetables when such residues result from the use of HEDP as a component of a food contact surface sanitizing solution up to 34 ppm for use in food handling establishments. In a July 2004 letter, EPA informed Ecolab that because of a regulatory change (April 28, 2004, 69 FR 23113), HEDP (up to prescribed limits, depending on how HEDP was used) was now covered by an exemption for a tolerance under 40 CFR 180.940.

13. *PP 9E5086* (acetic acid). In 2004, EPA withdrew *PP 9E5086* without prejudice, for administrative reasons there was a regulatory change. EPA issued a notice in the **Federal Register** of September 1, 1999 (64 FR 47791) (FRL-6090-8), which announced Ecolab Inc.'s, 370 N. Wabasha St., St. Paul, MN 55102, submission of a pesticide petition (*PP 9E5086*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from

the requirement of a tolerance for acetic acid in or on the raw agricultural commodities, in processed commodities, and in or on meat and meat byproducts of cattle, sheep, hogs, goats, horses, and poultry, milk, and dairy products, eggs, seafood and shellfish, and fruit and fruits and vegetables when such residues result from the use of acetic acid as a component of a food contact surface sanitizing solution for use in food handling establishments. In a July 2004 letter, EPA informed Ecolab that because of a regulatory change (April 28, 2004, 69 FR 23113), acetic acid (up to prescribed limits, depending on how acetic acid was used) was now covered by an exemption for a tolerance under 40 CFR 180.940.

14. *PP 9E6014* (phosphoric acid). In 2004, EPA withdrew *PP 9E6014* without prejudice, for administrative reasons there was a regulatory change. EPA issued a notice in the **Federal Register** of September 1, 1999 (64 FR 47791) (FRL-6090-8), which announced Ecolab Inc.'s, 370 N. Wabasha St., St. Paul, MN 55102, submission of a pesticide petition (*PP 9E6014*). This petition requested that EPA amend 40 CFR part 180 by establishing an exemption from the requirement of a tolerance for residues of phosphoric acid in or on raw agricultural commodities, in processed commodities, and in or on meat and meat byproducts of cattle, sheep, hogs, goats, horses, and poultry, milk, and dairy products, eggs, seafood and shellfish, and fruit and fruits and vegetables when such residues result from the use of phosphoric acid as a component of a food contact surface sanitizing solution for use in food handling establishments. In a July 2004 letter, EPA informed Ecolab that because of a regulatory change (April 28, 2004, 69 FR 23113), phosphoric acid was now covered by an exemption for a tolerance under 40 CFR 180.940.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: May 7, 2008.

Deborah McCall,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E8-11393 Filed 5-20-08; 8:45 am]

BILLING CODE 6560-50-S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Emergency Review by the Office of Management and Budget

May 15, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. 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 20, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, (202) 395–5887, or via fax at 202–395–5167 or via internet at

Nicholas_A._Fraser@omb.eop.gov and to Judith-B.Herman@fcc.gov, Federal Communications Commission, or an e-mail to PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page <http://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, and (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 Judith B. Herman at 202–418–0214 or via the Internet at Judith-B.Herman@fcc.gov.

SUPPLEMENTARY INFORMATION: The Commission is requesting emergency OMB review and approval by June 13, 2008.

OMB Control Number: 3060–XXXX.

Title: DTV Retailer Site Visit Program.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents: 1,450 respondents; 1,450 responses.

Estimated Time Per Response: .25 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary.

Total Annual Burden: 325 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: No sensitive information is requested. There is no need for confidentiality.

Needs and Uses: The Commission will submit this information collection (IC) to the OMB a new collection in which we request emergency OMB review and approval by June 13, 2008. On February 19, 2008, the Commission adopted a Report and Order in MB Docket No. 07–148, FCC 08–56, concerning the DTV Consumer Education Initiative. The Report and Order noted that many retailers have agreed to participate in the National Telecommunications and Information Agency (NTIA) digital-to-analog converter box coupon program. Those retailers claim to have undertaken significant employee training initiatives regarding the converter box program and the digital television transition. Among other things, the Report and Order offered the Commission's assistance to the NTIA to assess those training efforts. In this regard, the Commission's Enforcement Bureau field agents will regularly visit participating retailer stores across the country. They will conduct on-the-spot interviews with retail managers to ascertain whether retailers who participate in the converter box coupon box program are

fulfilling their commitment to engage in extensive employee training on the DTV transition and converter box program. The interview will consist of a series of questions to assess employee training and whether the retailer's objectives are being met at stores. The interview will not be part of an official investigation and no penalty would result from the interview. The information collected will be forwarded to FCC Headquarters to be consolidated into an aggregated report that will then be forwarded to NTIA for its review and appropriate action.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–11378 Filed 5–20–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Revision Under Delegated Authority, Comments Requested

May 14, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. Sections 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a current valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before July 21, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of

time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit all PRA comments by e-mail or U.S. mail. To submit your comments by e-mail, send them to PRA@fcc.gov. To submit your comments by U.S. mail, send them to Leslie F. Smith, Federal Communications Commission, Room 1-C216, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Leslie F. Smith via the Internet at PRA@fcc.gov or call (202) 418-0217.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0515.

Title: Section 43.21(c), Miscellaneous Common Carrier Annual Letter Filing Requirement.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit.

Number of Respondents and Responses: 27 respondents; 27 responses.

Estimated Time per Response: 1 hour.

Obligation To Respond: Mandatory (47 CFR 43.21(c)).

Frequency of Response: Annual reporting requirement.

Total Annual Burden: 27 hours.

Annual Cost Burden: \$0.00.

Privacy Act Impact Assessment: No impacts.

Nature of Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR Section 0.459 of the Commission's rules.

Needs and Uses: Section 43.21(c) requires each miscellaneous common carrier with operating revenues for a calendar year in excess of the indexed threshold, as defined in 47 CFR Section 32.9000, to file with the Chief, Wireline Competition Bureau (formerly the Common Carrier Bureau) a letter showing its operating revenues for that year and the value of its total communications plant at the end of that year. The letter must be filed no later than April 1 of the following year. The information is used by the FCC staff for regulatory or compliance purposes and by the public to analyze the industry.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8-11390 Filed 5-20-08; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

May 13, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501-3520. 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 20, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, (202) 395-5887, or via fax at 202-395-5167 or via internet at

Nicholas_A_Fraser@omb.eop.gov and to Judith-B.Herman@fcc.gov, Federal Communications Commission, or an e-mail to PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page <http://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, and (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 Judith B. Herman at 202-418-0214 or via the Internet at Judith-B.Herman@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0999.

Title: Section 20.19, Hearing Aid-Compatible Mobile Handsets (Hearing Aid-Compatibility Act).

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 925 respondents; 950 responses.

Estimated Time Per Response: 13.2 hours average burden per response.

Frequency of Response: On occasion and annual reporting requirements and third party disclosure requirement (labeling/posting requirements).

Obligation to Respond: Required to obtain or retain benefits.

Total Annual Burden: 12,600 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Information requested in the reports may include confidential information. However, covered entities would be allowed to request that such materials submitted to the Commission be withheld from public inspection (see 47 CFR 0.459 of the Commission's rules).

Needs and Uses: The Commission will submit this information collection (IC) to the OMB as a revision during this comment period to obtain the full three-year clearance from them. This information collection was pre-approved by the Office of Management and Budget (OMB) when the Commission adopted the Notice of Proposed Rulemaking on 12/27/07.

[Previously approved was a Report and Order adopted in 2003 in which the Commission modified the exemption for telephones used with public mobile services from the requirements of the Hearing Aid Compatibility Act of 1988 (HAC Act). The Order required digital wireless phone manufacturers and service providers to make certain digital wireless phones capable of effective use with hearing aids. As part of that Order, manufacturers and service providers

were required to label certain phones they sold with information about their compatibility with hearing aids, and also to report to the Commission (at first every six months, then on an annual basis) on the number and types of hearing aid-compatible phones they were producing or offering to the public.]

Now, the Commission has adopted and released a *Report and Order*, FCC 08–68, which updated several of the performance benchmarks for manufacturers and service providers, instituted new requirements for manufacturers to refresh their product lines and for service providers to offer hearing aid-compatible handset models with differing levels of functionality, adopted a new version of the technical standard for measuring hearing aid compliance, and addressed the application of the rules to phones that operate in multiple frequency bands or air interfaces. To assist the Commission in monitoring the implementation of the new requirements and to provide information to the public, the *Report and Order* also requires manufacturers and service providers to continue to file annual reports on the status of their compliance with these requirements, and requires manufacturers and service providers that maintain public Web sites to publish up-to-date information on those Web sites regarding their hearing aid-compatible handset models. The annual reports required in this *Order* contain different and additional information than in previous versions of this information collection (see above). Those requirements, along with the requirement to post certain information on Web sites, are intended to give consumers the information they need to navigate a technically complex and rapidly changing world of hearing aid-compatible wireless phones, and to allow the Commission to monitor compliance with its new regulations. Finally, in order to avoid potential consumer confusion over technical capabilities, the *Order* modified the product labeling requirements slightly.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–11399 Filed 5–20–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

May 12, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. 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 July 21, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, (202) 395–5887, or via fax at 202–395–5167 or via internet at

Nicholas_A._Fraser@omb.eop.gov and to *Judith-B.Herman@fcc.gov*, Federal Communications Commission, or an e-mail to *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, and (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, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1094.

Title: Licensing, Operation, and Transition of the 2495–2690 MHz Band.
Form Nos.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 2,500 respondents; 12,726 responses.

Estimated Time Per Response: 3.334 hours (average burden per response) and adds .50 hours for the new requirement for wireless service providers (see paragraph one of the supporting statement that will be submitted to OMB after this 60 day comment period).

Frequency of Response: On occasion and one time reporting requirement, recordkeeping requirement, third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits.

Total Annual Burden: 8,457 hours.

Total Annual Cost: \$266,666.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: In a Fourth Memorandum Opinion and Order, FCC 08–83, adopted on March 20, 2008, the Commission adopted Wireless Communications Association International, Inc.'s (WCA) modified proposal regarding the formula used to calculate height benchmarking and clarifying how non-contiguous licensees calculate their height benchmark. Because licensees are now required under 47 CFR 27.1221(f) to provide the geographic coordinates, the height above ground level of the center of radiation for each transmit and receive antenna, and the date transmissions commenced for each of the base stations in its geographic service area (GSA) within 30 days of receipt of a request from a co-channel, neighboring Broadband Radio Service/Educational Broadband Service (BRS/EBS) licensee(s).

The Commission is revising this information collection to add the

requirement referenced above from the 4th MO&O and to eliminate the requirement for Multichannel Video Programming Distributors (MVPD) Opt-Out (Waiver Requests) that sunset on April 30, 2007. That option is no longer available and is being removed from this information collection.

The information will be used to notify third parties and to prevent harmful interference to licensees' BRS/EBS operations.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

[FR Doc. E8-11402 Filed 5-20-08; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget, Comments Requested

May 15, 2008.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). 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 will 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. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB 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 that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before June 20, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your comments to Nicholas A. Fraser, Office of Management and Budget (e-mail address: nfraser@omb.eop.gov), and to the Federal Communications Commission's PRA mailbox (e-mail address: PRA@fcc.gov). Include in the e-mails the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below or, if there is no OMB control number, the Title as shown in the **SUPPLEMENTARY INFORMATION** section. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information contact Leslie F. Smith via e-mail at PRA@fcc.gov or at (202) 418-0217. To view or obtain a copy of an information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA 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, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of the ICR you want to view (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0823.

Title: Part 64, Pay Telephone Reclassification.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and

Responses: 400 respondents; 16,820 responses.

Estimated Time per Response: 2.66 hours (average).

Obligation to Respond: Mandatory, as required by 47 U.S.C. Section 276.

Frequency of Response: On occasion and monthly reporting requirements; third party disclosure requirement.

Total Annual Burden: 44,700 hours.

Total Annual Cost: \$620,000.00.

Privacy Act Impact Assessment: No impact.

Nature and Extent of Confidentiality: The Commission is not requesting that

the respondents submit Confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR Section 0.459 of the Commission's rules.

Needs and Uses: The Commission's Common Carrier Bureau adopted and released a Memorandum Opinion and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 *et al.*, CC Docket No. 96-128, DA 98-481, on March 9, 1998, which clarified the requirements established in the *Payphones Orders* for the provision of payphone-specific coding digits and for tariffs that local exchange carriers (LECs) must file pursuant to the *Payphone Orders*. The Commission also granted a waiver of Part 69 of the Commission's rules so that LECs can establish rate elements to recover the costs of implementing FLEX-ANI (a type of switch software) to provide payphone specific coding digits for per-call compensation. The Commission is required to implement section 276 of the Act, which it has done in the *Payphone Orders*.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

[FR Doc. E8-11404 Filed 5-20-08; 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.: 011960-002.

Title: The New World Alliance Agreement.

Parties: American President Lines, Ltd.; APL Co. Pte, Ltd.; Hyundai Merchant Marine Co., Ltd.; and Mitsui O.S.K. Lines, Ltd. ("MOL").

Filing Party: Robert B. Yoshitomi, Esq.; Nixon Peabody LLP; Gas Company Tower; 555 West Fifth Street 46th Floor; Los Angeles, CA 90013.

Synopsis: The amendment would authorize MOL to subchapter space to

the Evergreen Line Joint Service Agreement in trades between the Far East and the U.S. West and East Coasts.

Agreement No.: 012043.

Title: MOL / APL / HMM Japan / USWC Slot Charter Agreement.

Parties: American President Lines, Ltd.; APL Co. Pte. Ltd.; and Mitsui O.S.K. Lines, Ltd.

Filing Party: Robert B. Yoshitomi, Esq.; Nixon Peabody, LLP; Gas Company Tower; 555 West Fifth St., 46th Floor; Los Angeles, CA 90013.

Synopsis: The agreement authorizes the parties to exchange slots in the trade between U.S. West Coast and Japan.

Agreement No.: 201181.

Title: Marine Terminal Services Agreement between Port of Houston Authority ("PHA") and Evergreen Shipping Agency (America) Corporation.

Parties: Port of Houston Authority and Evergreen Shipping Agency (America) Corporation.

Filing Party: Erik A. Eriksson, Esq.; General Counsel; Port of Houston Authority; 111 East Loop North; Houston, TX 77029.

Synopsis: The agreement authorizes PHA to establish discounted rates and charges for Evergreen's container vessels calling at the port.

Agreement No.: 201182.

Title: Marine Terminal Services Agreement between Port of Houston Authority ("PHA") and OOCL (USA) Inc.

Parties: Port of Houston Authority and OOCL (USA) Inc.

Filing Party: Erik A. Eriksson, Esq.; General Counsel; Port of Houston Authority; 111 East Loop North; Houston, TX 77029.

Synopsis: The agreement authorizes PHA to establish discounted rates and charges for OOCL's container vessels calling at the port.

Agreement No.: 201183.

Title: Marine Terminal Services Agreement between Port of Houston Authority ("PHA") and Hamburg Sud.

Parties: Port of Houston Authority and Hamburg Sud.

Filing Party: Erik A. Eriksson, Esq.; General Counsel; Port of Houston Authority; 111 East Loop North; Houston, TX 77029.

Synopsis: The agreement authorizes PHA to establish discounted rates and charges for Hamburg Sud's container vessels calling at the port.

Agreement No.: 201184.

Title: Marine Terminal Services Agreement between Port of Houston Authority ("PHA") and Mediterranean Shipping Co. S.A.

Parties: Port of Houston Authority and Mediterranean Shipping Co. S.A.

Filing Party: Erik A. Eriksson, Esq.; General Counsel; Port of Houston Authority; 111 East Loop North; Houston, TX 77029.

Synopsis: The agreement authorizes PHA to establish discounted rates and charges for Mediterranean Shipping's container vessels calling at the port.

Agreement No.: 201185.

Title: Marine Terminal Services Agreement between Port of Houston Authority ("PHA") and Zim American Integrated Shipping Services Co., Inc.

Parties: Port of Houston Authority and Zim American Integrated Shipping Services Co., Inc.

Filing Party: Erik A. Eriksson, Esq.; General Counsel; Port of Houston Authority; 111 East Loop North; Houston, TX 77029.

Synopsis: The agreement authorizes PHA to establish discounted rates and charges for Zim's container vessels calling at the port.

Dated: May 16, 2008.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8-11392 Filed 5-20-08; 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 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

World Export & Logistics, Inc., 8600 NW 64th Street, Miami, FL 33168.

Officers: Roberto Acevedo, Secretary, (Qualifying Individual) Celia Leon, President.

LCL Logistic LLC, 18411 Crenshaw Blvd., Torrance, CA 90504. Officers: Van T. Phung, Secretary, (Qualifying Individual), Christopher T. Le, President.

Aramex International Courier, Ltd. dba Aramex, 147-29 182nd Street, Jamaica, NY 11413. Officers: Pedro Freire, Vice President (Qualifying Individual).

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicant

Richard Murray & Company, Inc. dba Plainsman Shipping Co., 109 N. Conception Street, Suite 100, Mobile, AL 36602. Officer: Edward F. Murray, Jr., President (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicant

Planet Freight Services, Inc., 1744 NW 82nd Avenue, Doral, FL 33126, Officer: Marco A. Oliveira, President (Qualifying Individual),

Dated: May 16, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8-11389 Filed 5-20-08; 8:45 am]

BILLING CODE 6730-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Solicitation for Nominations for Members of the U.S. Preventive Services Task Force

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Solicits nominations for new members.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) invites nominations of individuals qualified to serve as members of the U.S. Preventive Services Task Force (USPSTF).

The USPSTF, a standing, independent panel of outside experts that makes evidence-based recommendations regarding the provision of clinical preventive services, is composed of members appointed to serve for four year terms with an option for reappointment. New members are selected each year to replace approximately one fourth of the USPSTF members, i.e., those who are completing their appointments. Individuals nominated but not appointed in previous years, as well as those newly nominated, are considered in the annual selection process.

USPSTF members meet three times a year for two days in the Washington, DC area. Between meetings, member duties include reviewing and preparing comments (off site) on systematic

evidence reviews prior to discussing and making recommendations on preventive services, drafting final recommendation documents, and participating in workgroups on specific topics or methods.

AHRQ particularly encourages nominations of women, members of minority populations, and persons with disabilities. Interested individuals can self nominate. Organizations and individuals may nominate one or more persons qualified for membership on the USPSTF.

Qualification Requirements: The mission of the USPSTF is to produce evidence-based recommendations on the appropriate screening, counseling, and provision of preventive medication for asymptomatic patients seen in the primary care setting. Therefore, in order to qualify for the USPSTF, an applicant or nominee must demonstrate the following:

1. Knowledge and experience in the critical evaluation of research published in peer reviewed literature and in the methods of evidence review;
2. Understanding and experience in the application of synthesized evidence to clinical decision-making and/or policy;
3. Expertise in disease prevention and health promotion;
4. Ability to work collaboratively with peers; and,
5. Clinical expertise in the primary health care of children and/or adults, and/or expertise in counseling and behavioral interventions for primary care patients.

Some USPSTF members without primary health care clinical experience may be selected based on their expertise in methodological issues such as medical decision making, clinical epidemiology, behavioral medicine, and health economics.

Consideration will be given to individuals who are recognized nationally for scientific leadership within their field of expertise. Applicants must have no substantial conflicts of interest that would impair the scientific integrity of the work of the USPSTF including financial, intellectual, or other conflicts.

DATES: All nominations submitted in writing or electronically, and received by Friday, June 20, 2008, will be considered for appointment to the USPSTF.

Nominated individuals will be selected for the USPSTF on the basis of their qualifications (in particular, those that address the required qualifications, outlined above) and the current expertise needs of the USPSTF. It is

anticipated that three individuals will be invited to serve on the USPSTF beginning in January, 2009. All individuals will be considered; however, strongest consideration will be given to individuals with expertise in family medicine, behavioral medicine, and obstetrics/gynecology. AHRQ will retain and consider for future vacancies the nominations of those not selected during this cycle.

ADDRESSES: Submit your responses either in writing or electronically to: Gloria Washington, ATTN: USPSTF Nominations, Center for Primary Care, Prevention, and Clinical Partnerships, Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland 20850, Gloria.Washington@ahrq.hhs.gov.

Nomination Submissions

Nominations may be submitted in writing or electronically, but must include (1) the applicant's current curriculum vitae and contact information, including mailing address, e-mail address, and telephone number and (2) a letter explaining how this individual meets the qualification requirements and how he/she would contribute to the USPSTF. The letter should also attest to the nominee's willingness to serve as a member of the USPSTF.

AHRQ will later ask persons under serious consideration for membership to provide detailed information that will permit evaluation of possible significant conflicts of interest. Such information will concern matters such as financial holdings, consultancies, and research grants or contracts.

Nomination Selection

Nominations for the USPSTF will be selected on the basis of qualifications as outlined above (see Qualification Requirements) and the current expertise needs of the USPSTF.

Arrangement for Public Inspection

Nominations and applications are kept on file at the Center for Primary Care, Prevention, and Clinical Partnerships, AHRQ, and are available for review during business hours. AHRQ does not reply to individual responses, but considers all nominations in selecting members. Information regarded as private and personal, such as a nominee's social security number, home and e-mail addresses, home telephone and fax numbers, or names of family members will not be disclosed to the public. This is in accord with AHRQ confidentiality policies and Department of Health and Human Services regulations (45 CFR 5.67).

FOR FURTHER INFORMATION CONTACT: Gloria Washington at Gloria.washington@ahrq.hhs.gov.

SUPPLEMENTARY INFORMATION:

Background

Under Title IX of the Public Health Service Act, AHRQ is charged with enhancing the quality, appropriateness, and effectiveness of health care services and access to such services. 42 U.S.C. 299(b). AHRQ accomplishes these goals through scientific research and promotion of improvements in clinical practice, including prevention of diseases and other health conditions, and improvements in the organization, financing, and delivery of health care services. See 42 U.S.C. 299(b).

The USPSTF is a panel of outside experts that makes independent evidence-based recommendations regarding the provision of clinical preventive services. The USPSTF was first established in 1984 under the auspices of the U.S. Public Health Service. Currently, the USPSTF is convened by the Director of AHRQ, and AHRQ provides ongoing administrative, research and technical support for the USPSTF's operation. The USPSTF is charged with rigorously evaluating the effectiveness, cost-effectiveness and appropriateness of clinical preventive services and formulating or updating recommendations for primary care clinicians regarding the appropriate provision of preventive services. See 42 U.S.C. 299b4(a)(1). Current USPSTF recommendations and associated evidence reviews are available on the Internet (<http://www.preventiveservices.ahrq.gov>).

Dated: May 8, 2008.

Carolyn M. Clancy,
Director.

[FR Doc. E8-11191 Filed 5-20-08; 8:45 am]

BILLING CODE 4160-90-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Public Health Informatics

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following committee meetings:

Name: Board of Scientific Counselors, National Center for Public Health Informatics.

Times and Dates: 10 a.m.–5 p.m., June 5, 2008. 8:30 a.m.–12:30 p.m., June 6, 2008.

Place: Auditorium A, Global Communications Center, Building 19, 1600 Clifton Road, NE., Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available.

Please Note: Due to current security measures, a valid government issued identification card with photo is required for admittance into the Roybal facility. Non-U.S. citizens wishing to attend should contact: Thomas G. Savel, M.D., telephone, (404) 498–2475. The deadline for notification of attendance is May 22, 2008.

Purpose: The board provides advice to the Secretary, HHS, and the Director, CDC, on strategies and goals for the programs and research within the national center; conducts peer-review of scientific programs; and monitors the overall strategic direction and focus of the national center. The board also performs second-level peer review of applications for grants-in-aid for research and research training activities, cooperative agreements, and research contract proposals relating to the broad areas within the national center.

Matters to be Discussed: The agenda will include an overview of the National Center for Public Health Informatics (NCPHI), including its mission, scope and goals. Participants will give detailed presentations of select intramural and extramural NCPHI activities. NCPHI intramural activity topics include biosurveillance, electronic laboratory reporting, and health information exchanges; extramural NCPHI activities include those involving its five Centers of Excellence in Public Health Informatics. Discussions focusing on future NCPHI program activities are also planned.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Thomas G. Savel, M.D., Designated Federal Official, National Center for Public Health Informatics, CDC, 1600 Clifton Road, NE.,

Mail Stop E–78, Atlanta, Georgia 30333; Telephone, (404) 498–2475.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: May 9, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–11328 Filed 5–20–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[OMB No.: 0970–0288]

Proposed Information Collection Activity; Comment Request

Proposed Projects: Title: Evaluation of the Improving Child Welfare Outcome through Systems of Care Grant Program.

Description: The 1994 Amendments to the Social Security Act (SSA) authorize the U.S. Department of Health and Human Services to review State child and family service programs to ensure conformance with the requirements in titles IV–B and IV–E of SSA. Under the Final Rule, which took effect March 25, 2000, States are assessed for substantial conformity with certain Federal requirements for child-welfare services. The Child and Family Service Reviews (CFSR), administered by the Children's Bureau, are designed

to ensure conformity with Federal child-welfare requirements and, ultimately, to help States improve child-welfare services and outcomes, specifically safety, permanency and well-being outcomes for child-welfare-involved children and their families. States determined not to have achieved substantial conformity in any of the areas assessed are required to develop and implement Program Improvement Plans (PIP) addressing the areas of nonconformity.

The Systems of Care grant cluster, from which these data are proposed to be collected, is designed to encourage public child-welfare agencies to address the issues identified in their State's CFSR. The data collected from these demonstration sites will allow the Children's Bureau to test whether this approach can help States reach the goals stated in their PIP and explore how child welfare can benefit from being part of a system of care. Data will be collected via interviews, forms completed by project staff, surveys, focus groups and case-file reviews. Data also will be collected to determine the extent to which the Technical Assistance (TA) provided, brokered or contracted by the TA and Evaluation Center is meeting the needs of the grantees, and how.

Respondents: Systems of Care Project Directors (members of the Systems of Care collaborative may include representatives from mental health, juvenile justice, education, health, among others); child-welfare agency supervisors and caseworkers; partner agency caseworkers; and families who have been involved with the child-welfare system.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Stakeholder Survey	270	1	.5	135
Child-Welfare Agency Survey	600	1	1	600
Supervisor Interviews	90	1	1	90
Stakeholder Interviews	90	1	1	90
Project Director Interviews	23	1	1	23
Case Study Interviews	25	1	1.5	37.5
Focus Group with Family Members	102	1	1.5	153
Parent Partner Interviews	24	1	1	24
Child-Welfare Agency and Partner Agency Focus Groups	280	1	1.5	420
Community Description Form	9	1	2.5	22.5
Organizational Structure Form for Case Study Sites	3	1	2	6
Organizational Structure Form for Non-Case Study Sites	20	1	1	20
Collaborative Membership Form	23	1	1.5	34.5
Major Activities Form	23	1	1.5	34.5
Training and Technical Assistance Quality Assurance Assessment	23	1	1	23
Training and Technical Assistance Conference Call Feedback Forms	10	12	.25	30

Estimated Total Annual Burden Hours: 1,743.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: infocollection@acf.hhs.gov. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: May 14, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8-11188 Filed 5-20-08; 8:45 am]

BILLING CODE 4184-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[OMB No.: 0970-0177]

Submission for OMB Review; Comment Request

Title: OCSE-157 Child Support Enforcement Program Annual Data Report.

Description: The information obtained from this form will be used to: (1) Report Child Support Enforcement activities to the Congress as required by law; (2) calculate incentive measures performance and performance indicators utilized in the program; and (3) assist the Office of Child Support Enforcement in monitoring and evaluating State Child Support programs.

Respondents: State, Local or Tribal Government.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE-157	54	1	7	378.0

Estimated Total Annual Burden Hours: 378.0

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 378.0 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: infocollection@acf.hhs.gov.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202-395-6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: May 14, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8-11190 Filed 5-20-08; 8:45 am]

BILLING CODE 4184-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2008-D-0263]

Draft Guidance for Industry: Requalification Method for Reentry of Blood Donors Deferred Because of Reactive Test Results for Antibody to Hepatitis B Core Antigen (Anti-HBc); Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled "Guidance for Industry: Requalification Method for Reentry of Blood Donors Deferred Because of Reactive Test Results for Antibody to Hepatitis B Core Antigen (Anti-HBc)" dated May 2008. The draft guidance document provides recommendations to establishments that collect human blood or blood components for a requalification method or process to reenter deferred donors into a donor pool based on a determination that the previous tests that were repeatedly reactive for anti-

HBc were falsely positive and that there is no evidence of infection with Hepatitis B virus (HBV).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by August 19, 2008.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM-40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852-1448. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1-800-835-4709 or 301-827-1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit written comments on the draft guidance to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit

electronic comments to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Paul E. Levine, Center for Biologics Evaluation and Research (HFM-17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852-1448, 301-827-6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled "Guidance for Industry: Requalification Method for Reentry of Blood Donors Deferred Because of Reactive Test Results for Antibody to Hepatitis B Core Antigen (Anti-HBc)" dated May 2008. FDA is providing recommendations to establishments that collect human blood or blood components for a requalification method or process for the reentry of deferred donors into the donor pool based on a determination that previous tests that were repeatedly reactive for anti-HBc were falsely positive and that there is no evidence of infection with HBV. Due to the availability of this licensed HBV nucleic acid test and the improved specificity of anti-HBc assays, we are recommending a reentry algorithm for donors deferred due to a falsely positive repeatedly reactive test for anti-HBc in this guidance. Until now FDA has not recommended a requalification method or process for reentry of donors deferred due to reactive test results for hepatitis B core antigen (anti-HBc) due to the lack of licensed tests that could be recommended for use in a suitable algorithm for this purpose.

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirement of the applicable statutes and regulations.

II. Comments

The draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the draft guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified

with the docket number found in the brackets in the heading of this document. A copy of the draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA 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>.

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either <http://www.fda.gov/cber/guidelines.htm> or <http://www.regulations.gov>.

Dated: May 12, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8-11433 Filed 5-20-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2008-F-0290]

**Lubrizol Advanced Materials, Inc.;
Filing of Food Additive Petition**

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Lubrizol Advanced Materials, Inc., has filed a petition proposing that the food additive regulations be amended to provide for the safe use of cassia gum as a stabilizer in frozen dairy desserts, and to improve texture and water retention in cheeses, meat products, and poultry products.

FOR FURTHER INFORMATION CONTACT: Raphael A. Davy, Center for Food Safety and Applied Nutrition (HFS-265), Food and Drug Administration, 5100 Paint Branch Pkwy, College Park, MD 20740-3835, 301-436-1272.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 8A4772) has been filed by Lubrizol Advanced Materials, Inc., c/o Keller & Heckman LLP, 1001 G St., NW., suite 500 West, Washington, DC 20001.

The petition proposes to amend the food additive regulations in part 172, Food Additives Permitted for Direct Addition to Food for Human Consumption (21 CFR part 172) to provide for the safe use of cassia gum as a stabilizer in frozen dairy desserts, and to improve texture and water retention in cheeses, meat products, and poultry products.

The agency has determined under 21 CFR 25.32(k) 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.

Dated: May 13, 2008.

Laura M. Tarantino,

*Director, Office of Food Additive Safety,
Center for Food Safety and Applied Nutrition.*

[FR Doc. E8-11279 Filed 5-20-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

**Request for Public Comment: 60-Day
Proposed Information Collection:
Indian Health Service Loan Repayment
Program**

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, which requires 60 days for public comment on proposed information collection projects, the Indian Health Service (IHS) is publishing for comment a summary of a proposed information collection to be submitted to the Office of Management and Budget (OMB) for review.

Proposed Collection: Title: 0917-0014, "Indian Health Service Loan Repayment Program." *Type of Information Collection Request:* Extension, without revision, of currently approved information collection, 0917-0014, "Indian Health Service Loan Repayment Program." *Form(s):* The IHS Loan Repayment Program Information Booklet contains the instructions and the application formats. *Need and Use of Information Collection:* The IHS Loan Repayment Program (LRP) identifies health professionals with pre-existing financial obligations for education expenses that meet program criteria and who are qualified and willing to serve at, often remote, IHS health care facilities. Under the program, eligible health professionals sign a contract under which the IHS agrees to repay

part or all of their indebtedness for professional training time in IHS health care facilities. This program is necessary to augment the critically low health professional staff at IHS health care facilities.

Any health professional wishing to have their health education loans repaid may apply to the IHS Loan Repayment Program. A two-year contract obligation is signed by both parties, and the individual agrees to work at an IHS location and provide health services to

Native American and Alaska Native individuals.

The information collected from individuals is analyzed and a score is given to each applicant. This score will determine which applicants will be awarded each fiscal year. The administrative scoring system assigns a score to the geographic location according to vacancy rates for that fiscal year and also considers whether the location is in an isolated area. When an applicant takes employment at a

location, they in turn "pick-up" the score of that location. *Affected Public:* Individuals and households. *Type of Respondents:* Individuals.

The table below provides: Types of data collection instruments, Estimated number of respondents, Number of responses per respondent, Annual number of responses, Average burden hour per response, and Total annual burden hour(s).

ESTIMATED BURDEN HOURS

Data collection instrument	Estimated number of respondents	Responses per respondent	Average burden hour per response	Total annual burden hours
Section I	510	1	18/60	153.0
Section II	510	1	30/60	255.0
Section III	510	4	15/60	128.0
Contract	510	1	20/60	170.0
Affidavit	510	1	10/60	85.0
Lender's Certification	2,000		15/60	500.0
Total	4,650			1,282.0

There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

Request for Comments: Your written comments and/or suggestions are invited on one or more of the following points: (a) Whether the information collection activity is necessary to carry out an agency function; (b) whether the agency processes the information collected in a useful and timely fashion; (c) the accuracy of public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information); (d) whether the methodology and assumptions used to determine the estimates are logical; (e) ways to enhance the quality, utility, and clarity of the information being collected; and (f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Send Comments and Requests for Further Information: Send your written comments, requests for more information on the proposed collection, or requests to obtain a copy of the data collection instrument(s) and instructions to: Ms. Chria Rouleau, IHS Reports Clearance Officer, 801 Thompson Avenue, TMP 450, Rockville, MD 20852-1627; call non-toll free (301) 443-5938; send via facsimile to (301) 594-0899; or send your e-mail requests, comments, and return address to: Christina.Rouleau@ihs.gov.

Comment Due Date: Your comments regarding this information collection are best assured of having full effect if received within 60 days of the date of this publication.

Dated: May 13, 2008.

Robert G. McSwain,
Director, Indian Health Service.

[FR Doc. E8-11184 Filed 5-20-08; 8:45 am]

BILLING CODE 4165-16-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the

Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852-3804; telephone: 301/496-7057; fax: 301/402-0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Synthetic Analogs of Juxtamembrane Domain of IGF-1 Receptor as Anti-Cancer Agents

Description of Technology: Insulin-like growth factor receptor type one (IGF-1R), part of the receptor tyrosine kinase (RTKs) family, is integral to cancer cell growth and metastasis. Juxtamembrane domains (JM) of RTKs are located in the cytoplasm between the transmembrane and kinase domains. JMs play a crucial role in the inhibition of the regulation of receptor activity. Studies on other small molecules tyrosine kinase inhibitors (TKIs) indicate non-specific binding with the insulin receptor which has high homology with IGF-1R.

The current invention describes synthetic analogs of IGF-1R JM which were found to be potent inhibitors of IGF-1-mediated cell signaling and cancer cell growth. These analogs provide more binding specificity with less likelihood of significant toxic effects.

Applications and Modality:

New inhibitors can be used to treat many types of tumors.

IGR-1R inhibition may be useful as an anti-aging agent.

IGR-1R plays an inhibitory role in regulation of skin development and differentiation. IGF-1R inhibitors may have revitalizing and rejuvenating effect on skin and may stimulate wound healing.

Market:

An estimated 1,444,920 new cancer diagnoses in the U.S. in 2007.

600,000 deaths caused by cancer in the U.S. in 2006.

Cancer is the second leading cause of death in the U.S.

Cancer drug market will likely double to \$50 billion in 2010 from \$25 billion in 2006.

Development Status: The technology is currently in the preclinical stage of development.

Inventors: Nadya I. Tarasova and Sergey G. Tarasov (NCI).

Patent Status: U.S. Provisional Application No. 61,040,203 filed 28 Mar 2008 (HHS Reference No. E-129-2008/0-US-01).

Licensing Status: Available for exclusive and non-exclusive licensing.

Licensing Contact: Adaku Nwachukwu, J.D.; 301-435-5560; madua@mail.nih.gov.

Protein-Tyrosine Phosphatase Inhibitors as Inhibitors of Human Tyrosyl-DNA Phosphodiesterase (Tdp1) and Methods of Treating Disorders

Description of Technology: Tyrosyl-DNA phosphodiesterase (Tdp1) is an enzyme that repairs topoisomerase I (Top1)-mediated DNA damage induced by chemotherapeutic agents (such as camptothecins) and ubiquitous DNA lesions that interfere with transcription and replication. Tdp1 is a relevant target for anticancer therapies due to its role in repairing Top1-mediated DNA damage and DNA damage associated with DNA strand breaks. Tdp1 inhibitors are expected to be effective in cancer treatment when used in combination with Top1 inhibitors.

The current invention is Me-3,4 dephostatin, and more generally protein-tyrosine phosphatase inhibitors, which is a Tdp1 inhibitor. Me-3,4 dephostatin could potentiate the pharmacological action of Top1 inhibitors.

Applications and Modality:

It is anticipated that Tdp1 inhibitors in association with Top1 inhibitors can have selective activity toward tumor tissues.

Tdp1 inhibitors may exhibit antitumor activity by themselves because tumors have excess free radicals.

Market:

An estimated 1,444,920 new cancer diagnoses in the U.S. in 2007.

600,000 deaths caused by cancer in the U.S. in 2006.

Cancer is the second leading cause of death in the U.S.

Cancer drug market will likely double to \$50 billion in 2010 from \$25 billion in 2006.

Development Status: The technology is currently in the pre-clinical stage of development.

Inventors: Yves Pommier (NCI) *et al.*

Relevant Publication: S Antony *et al.* Novel high-throughput electrochemiluminescent assay for identification of human tyrosyl-DNA phosphodiesterase (Tdp1) inhibitors and characterization for furamidine (NSC 305831) as an inhibitor of Tdp1. *Nucleic Acid Res.* 2007;35(13):4474-4484.

Patent Status: U.S. Provisional Application No. 61,040,203 filed 28 Mar 2008 (HHS Ref. No. E-121-2008/0-US-01).

Licensing Status: Available for exclusive and non-exclusive licensing.

Licensing Contact: Adaku Nwachukwu, J.D.; 301-435-5560; madua@mail.nih.gov.

Method of Inhibiting ABCG2 and Related Treatments

Description of Technology: The technology is directed to a method of inhibiting ABCG2, which is a multidrug resistance (MDR) protein. It is believed that ABCG2 plays a role in the development of resistance of cancer cells to chemotherapeutics. Therefore, inhibition of ABCG2 would allow chemotherapeutics to be more effective in killing cancer cells, thereby treating cancer. Five compounds were identified in the provisional application that inhibit ABCG2. These compounds are known in the literature and are part of the NCI Developmental Therapeutics Program (DTP).

Applications: Cancer therapeutics; Research tools to study function of ABCG2 proteins.

Advantages: Valuable tools to further developing understanding or normal and cancer cells; Augment efficacy of drugs that are ABCG2 substrates.

Development Status: Early stage.

Market: Cancer is the second leading cause of death in America, after heart disease. Multiple drug resistance is a significant impediment in the treatment of cancers resulting in a poor prognosis. The market for effective cancer treatments is very large.

Inventors: Curtis J. Henrich (SAIC/NCI), Heidi R. Bokesch (SAIC/NCI), Susan E. Bates (NCI), Robert W. Robey

(NCI), Suneet Shukla (NCI), Suresh V. Ambudkar (NCI), Michael C. Dean (NCI), and James B. McMahon (NCI).

Patent Status: U.S. Provisional Application No. 60/986,155 filed 07 Nov 2007 (HHS Reference No. E-316-2007/0-US-01).

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: John Stansberry, Ph.D.; 301-435-5236; stansbej@mail.nih.gov.

Collaborative Research Opportunity: The National Cancer Institute Molecular Targets Development Program is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize Method of Inhibiting ABCG2 and Related Treatments. Please contact John D. Hewes, Ph.D. at 301-435-3121 or hewesj@mail.nih.gov for more information.

Method of Inducing Memory B Cell Development and Terminal Differentiation

Description of Technology: Cytokines exert their respective biochemical and physiological effects by binding to specific receptor molecules, which then stimulate signal transduction pathways. Interleukin-21 (IL-21) is a type I cytokine whose receptor is expressed on T, B, and NK cells.

This invention specifically relates to the use of IL-21 to induce differentiation of immature B cells into memory B cells and plasma cells. This invention includes claims of methods for inducing differentiation of a B cell progenitor into memory B cells and/or plasma cells. It also includes claims for enhancing an immune response, treating subjects that lack memory B cells and plasma cells and methods for increasing or decreasing the number of B cells. This invention could conceivably be used in treating or preventing inflammatory disorders, autoimmune diseases, allergies, transplant rejection, cancer, and other immune system disorders.

Inventors: Peter E. Lipsky (NIAMS) *et al.*

Patent Status: U.S. Patent Application No. 11/197,221 filed 03 Aug 2005, allowed (HHS Reference No. E-120-2003/2-US-01).

Licensing Contact: Jennifer Wong; 301-435-4633; wongje@mail.nih.gov.

The Use of an Inducible Plasmid Vector Encoding for Active TGF- β for the Treatment of Autoimmune Diseases

Description of Technology: This application describes a composition and method for treating inflammatory bowel disease or other autoimmune diseases.

The composition utilizes a vector which contains a first promoter which controls the expression of a regulatory transcription factor and a second inducible promoter which controls the expression of the gene of interest. The preferred gene of interest encodes an isoform of TGF- β such as TGF- β_1 or TGF- β_3 . The isoform of TGF- β does not have to be hTGF- β and can be a latent or active isoform of TGF- β . The preferred inducible promoter is TRE-CMV which can be induced using doxycycline. The usefulness of the composition for treating autoimmune diseases is demonstrated in the application in a murine model of inflammatory bowel disease in which intestinal inflammation was abrogated by the administration of a plasmid vector encoding active TGF- β . The composition may be administered by a variety of delivery systems and intranasal delivery is exemplified.

Inventors: Warren Strober *et al.* (NIAID).

Patent Status: U.S. Patent Application No. 10/258,109 filed 30 Jun 2003 (HHS Reference No. E-096-2000/0-US-03).

Licensing Contact: Jennifer Wong; 301-435-4633; wongje@mail.nih.gov.

Inhibition of Cell Motility, Angiogenesis and Metastasis

Description of Technology: The present invention relates to potent, highly selective antagonists of Grb2 Src homology-2 (SH2) domain binding. Grb2, through its SH2 domain, mediates growth factor driven cell motility *in vitro* and angiogenesis *in vivo*. These synthetic, small molecule antagonists have been shown to block cell motility stimulated by hepatocyte growth factor (HGF), fibroblast growth factor (FGF), epidermal growth factor (EGF), and vascular endothelial cell growth factor (VEGF). They also potentially inhibit HGF- and VEGF-stimulated morphogenesis and angiogenesis, respectively, in several model systems. HGF stimulates mitogenesis, motogenesis and morphogenesis in a wide range of cellular targets during development and adulthood, and its signaling pathway is frequently over-activated in human cancers, including colon, gastric, breast, lung, thyroid and renal carcinomas, melanoma, several sarcomas as well as glioblastoma. The ability of HGF to initiate a program of cell dissociation and increased cell motility coupled with increased protease production promotes aggressive cellular invasion and is frequently linked to tumor metastasis.

Metastasis, the primary cause of death in most forms of cancer, is a multistep process whereby cells from the primary tumor spread systemically and colonize

distant new sites. Blocking critical steps in this process could potentially inhibit tumor metastasis and dramatically improve cancer survival rates. The small, synthetic Grb2 SH2 domain antagonists described in this invention have been shown to inhibit the induced and spontaneous metastasis of melanoma- and prostate cancer-derived tumor cells in mice. These results establish a critical role for Grb2 SH2 domain-mediated interactions in the metastatic process and support the potential efficacy of this class of compound in reducing the metastatic spread of primary solid tumors in humans.

Applications and Modality: Inhibition of cell motility-dependent processes, including angiogenesis and metastasis, in several types of cancer such as prostate, colon, gastric, breast, lung, thyroid and renal carcinomas, melanoma and various sarcomas.

Market:

An estimated 1,444,920 new cancer cases were diagnosed in the U.S. in 2007.

600,000 deaths caused by cancer in the U.S. in 2006.

Cancer is the second leading cause of death in the U.S.

The cancer drug market will likely double to \$50 billion in 2010 from \$25 billion in 2006.

Development Status: *In vivo* and *in vitro* studies have been conducted on this technology.

Inventors: Donald P. Bottaro *et al.* (NCI);

Relevant Publications:

1. Atabey N, Breckenridge D, Yao Z-J, Gao Y, Soon L, Soriano JV, Burke TR, Bottaro DP. Potent blockade of Hepatocyte Growth Factor-stimulated cell motility, invasion, and tubulogenesis by antagonists of Grb2-c-Met interaction. *J Biol Chem.* 2001 Apr 27;276(17):14308-14314.

2. Shi Z-D, Wei C-Q, Wang X, Lee K, Liu H, Zhang M, Vasselli J, Bottaro DP, Linehan WM, Yang D, Burke TR Jr. Macrocyclization in the design of tetrapeptide mimetics that display potent inhibition of Grb2 SH2 domain binding in whole cell systems. In: *Peptide Revolution: Genomics, Proteomics Therapeutics*. Chorev, M and Sawyer, TK, Eds. American Peptide Society, pp 515-517, 2003.

3. Soriano JV, Lui N, Gao Y, Yao Z-J, Ishibashi T, Underhill C, Burke TR Jr, Bottaro DP. Grb2 SH2 domain binding antagonists inhibit angiogenesis *in vitro* and *in vivo*. *Mol Cancer Ther.* 2004 Oct;3(10):1289-1299.

4. Shi Z-D, Karki RG, Worthy KM, Bindu LK, Dharmawardana PG, Nicklaus MC, Bottaro DP, Fisher RJ,

Burke TR Jr. Utilization of a nitrobenzoxadiazole (NBD) fluorophore in the design of a Grb2 SH2 domain binding peptide mimetic. *Bioorg Med Chem Lett.* 2005 Mar 1;15(5):1385-1388.

5. Kang S-U, Shi, Z-D, Karki RG, Worthy KM, Bindu LK, Dharmawardana PG, Choyke SJ, Bottaro DP, Fisher RJ, Burke TR Jr. Examination of phosphoryl-mimicking functionalities within a macrocyclic Grb2 SH2 domain-binding platform. *J Med Chem.* 2005 Jun 16;48(12):3945-3948.

6. Shi Z-D, Peruzzi B, Dharmawardana PG, Leech T, Appella E, Worthy KM, Bindu LK, Fisher RJ, Bottaro DP, Burke TR Jr. Synthesis and use of C-terminally biotinylated peptidomimetics with high Grb2 SH2 domain-binding affinity. In: *Understanding Biology Using Peptides*, Blondelle SE (Ed), American Peptide Society, pp 208-209, 2005.

7. Dharmawardana PG, Peruzzi B, Giubellino A, Bottaro DP. Molecular targeting of Grb-2 as an anti-cancer strategy. *Anti-Cancer Drugs* 2006 Jan;17(1):13-20.

8. Liu F, Worthy KM, Bindu L, Giubellino A, Bottaro DP, Fisher RJ, Burke TR Jr. Utilization of achiral alkenyl amines for the preparation of high affinity Grb2 SH2 domain-binding macrocycles by ring-closing metathesis. *Org Biomol Chem.* 2007 Jan 21;5(2):367-372.

9. Giubellino A, Gao Y, Lee S, Lee M-J, Vasselli JR, Medepalli S, Trepel JB, Burke TR Jr, Bottaro DP. Inhibition of tumor metastasis by a Grb-2 SH2 domain binding antagonist. *Cancer Res.* (Priority Report) 2007 Jul 1;67(13):6012-6016.

Patent Status: PCT Patent Application No. PCT/US2007/078494 filed 14 Nov 2007 (HHS Reference No. E-265-1999/2-PCT-02).

Licensing Status: Available for exclusive and non-exclusive licensing.

Licensing Contact: Adaku Nwachukwu, J.D.; 301-435-5560; madua@mail.nih.gov.

Collaborative Research Opportunity: The Urologic Oncology Branch of the National Cancer Institute is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize Grb2 SH2 domain antagonists as anti-cancer drugs. Please contact John D. Hewes, Ph.D. at 301-435-3121 or hewesj@mail.nih.gov for more information.

Dated: May 15, 2008.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E8-11317 Filed 5-20-08; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

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

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

Name of Committee: Center for Scientific Review Special Emphasis; Panel Bacterial Pathogenesis.

Date: May 30, 2008.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Marian Wachtel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892, 301-435-1148, wachtelm@csr.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.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group: Molecular Genetics A Study Section.

Date: June 5-6, 2008.

Time: 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance M Street Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

Contact Person: Michael M. Sveda, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1114, MSC 7890, Bethesda, MD 20892, 301-435-3565, svedam@csr.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.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group: Genetics of Health and Disease Study Section.

Date: June 9-10, 2008.

Time: 8 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Fisherman's Wharf, 1300 Columbus Avenue, San Francisco, CA 94133.

Contact Person: Cheryl M. Corsaro, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, (301) 435-1045, corsaroc@csr.nih.gov.

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group: Virology—A Study Section.

Date: June 12, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Carlyle Suites Hotel, 1731 New Hampshire Avenue, NW., Washington, DC 20009.

Contact Person: Joanna M. Pyper, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, (301) 435-1151, pyperj@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Fellowships.

Date: June 12-13, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: John Bishop, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5180, MSC 7844, Bethesda, MD 20892, (301) 435-1250, bishopj@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Member Conflicts: Psychopathology and Health Psychology.

Date: June 12, 2008.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Estina E. Thompson, MPH, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, 301-496-5749, thompsons@mail.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Bacterial Pathogenesis.

Date: June 17, 2008.

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

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1000 29th Street, NW., Washington, DC 20007.

Contact Person: Marian R. Wachtel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892, 301-435-1148, wachtelm@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Eukaryotic Pathogens.

Date: June 19, 2008.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Soheyla Saadi PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3211, MSC 7808, Bethesda, MD 20892, 301-435-0903, saadisoh@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Developmental Disabilities, Communication and Science Education.

Date: June 23, 2008.

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

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301-435-2309, pluded@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Drug Therapy.

Date: June 25, 2008.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Manzoor Zarger PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, (301) 435-2477, zargerma@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Electromagnetic Devices.

Date: June 25, 2008.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Antonio Sastre, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5215, MSC 7412, Bethesda, MD 20892, 301-435-2592, sastrea@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: F07 Immunology Fellowships and AREA.

Date: June 26, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Paek-Gyu Lee, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4201, MSC 7812, Bethesda, MD 20892, 301-435-1277, leepg@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Member Conflict: Influences on Behavior, Thought Processes, and Mental Health.

Date: June 26, 2008.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Karen Lechter, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3128, MSC 7759, Bethesda, MD 20892, 301-496-0726, lechterm@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel: Small Business: Psychopathology and Adult Disorders.

Date: June 27, 2008.

Time: 8:30 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1000 29th Street, NW., Washington, DC 20007.

Contact Person: Estina E. Thompson, MPH, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, 301-496-5749, thompsones@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 13, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-11187 Filed 5-20-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following 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 Heart, Lung, and Blood Institute Special Emphasis Panel; Vascular Disease Program Project.

Date: June 9, 2008.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Crystal City, 2399 Jefferson Davis Hwy., Arlington, VA 22202.

Contact Person: Shelley S. Sehnert, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7206, Bethesda, MD 20892-7924, 301-435-0303, ssehnert@nhlbi.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 13, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-11186 Filed 5-20-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Notice of Public Process for the Expansion of the ClinicalTrials.gov Registry and Availability for Public Comment of Preliminary Information Related to the Establishment of a Basic Results Database

SUMMARY: Section 801 of the Food and Drug Administration Amendments Act of 2007 (FDAAA; Pub. L. 110-85) mandates the expansion of the existing ClinicalTrials.gov registry and the establishment of a clinical trial results database. This notice announces our intent to implement the expanded registry and the basic results database via rulemaking and to post for public comment on the website identified below preliminary materials related to the basic results database. Comments received on the preliminary basic results materials will be considered in the development of an operational version of the basic results database and in the drafting of the associated regulation and any necessary guidance

documents. The regulation will be subject to a separate public comment process.

ADDRESSES: Comments may be submitted using an electronic form available on the public Web site <http://prsinfo.clinicaltrials.gov/fdaaa.html>. They may also be submitted by e-mail to the address: register@prs.clinicaltrials.gov. E-mail entries should include the words "Comment on FDAAA Basic Results" in the subject line.

DATES: Basic results materials will be made available for comment as they become available. New and revised materials will be posted on the NIH Web site <http://prsinfo.clinicaltrials.gov/fdaaa.html> several times between May 2008 and September 30, 2008. Specific comment periods will be identified for each item as they are posted. Comments must be received on or before the posted deadlines in order to ensure their consideration in the development of the operational version of the basic results database and in preparation of the planned regulation and any necessary guidance documents.

FOR FURTHER INFORMATION CONTACT:

Tony Tse, Ph.D., National Library of Medicine, National Institutes of Health, MSC 3828, 9000 Rockville Pike, Bethesda, MD 20894, 301-402-0650 (not toll-free).

SUPPLEMENTARY INFORMATION:

Section 801 of the Food and Drug Administration Amendments Act of 2007 mandates expansion of the existing ClinicalTrials.gov registry to include additional information about Applicable Clinical Trials of drugs, biologics, and devices (as defined in the law). It also mandates establishment of a clinical trial results database and requires, beginning not later than 12 months after enactment (i.e., by September 27, 2008), the inclusion of the basic results information described in the law. Additional statutory provisions outline processes for adding information about serious and frequent adverse events observed in a trial and for further expanding the registry and results database.

We plan to provide clarification of the requirements for the expanded clinical trial registry and the basic results database via rulemaking. The Notice of Proposed Rulemaking (NPRM) for the expanded registry is expected to be published for public comment in Fall 2008. A separate NPRM for the basic results database will be issued for public comment at a later date. Prior to the issuance of the NPRM for the basic results database, NIH will post for comment on the public Web site

<http://prsinfo.clinicaltrials.gov/fdaaa.html> preliminary versions of the data entry and display formats for the results database, as well as related descriptive information. Comment periods will be specified each time an item is posted. Public comments received on these preliminary materials will be considered by the agency and will inform development of an operational basic results database and preparation of the NPRM for basic results information that will be published for public comment at a later date. NIH intends to begin posting new materials in May 2008; additional or revised materials will be posted several times before September 30, 2008. Interested members of the public may elect to receive electronic notification when new draft materials are posted and available for comment. Instructions for subscribing to these alerts will be posted on the public Web site.

Dated: May 8, 2008.

Lana R. Skirboll,

Director, Office of Science Policy, National Institutes of Health (NIH).

[FR Doc. E8-11042 Filed 5-20-08; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG-2007-0180]

Collection of Information Under Review by Office of Management and Budget: OMB Control Numbers: 1625-0001, 1625-0013, and 1625-0096

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the U.S. Coast Guard is forwarding three Information Collection Requests (ICRs), abstracted below, to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) requesting an extension of their approval for the following collections of information: (1) 1625-0001, Marine Casualty Information & Periodic Chemical Drug and Alcohol Testing of Commercial Vessel Personnel; (2) 1625-0013, Plan Approval and Records for Load Lines, and (3) 1625-0096, Report of Oil or Hazardous Substance Discharge; and Report of Suspicious Maritime Activity. Our ICRs describe the information we seek to collect from the public. Review

and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before June 20, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG-2007-0180] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) or to OIRA. To avoid duplication, please submit your comments by only one of the following means:

(1) *Electronic submission.* (a) To Coast Guard docket at <http://www.regulation.gov>. (b) To OIRA by e-mail to: nlessor@omb.eop.gov.

(2) *Mail or hand delivery.* (a) DMF (M-30), DOT, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Hand deliver between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard.

(3) *Fax.* (a) To DMF, 202-493-2251. (b) To OIRA at 202-395-6566. To ensure your comments are received in time, mark the fax to the attention of Mr. Nathan Lesser, Desk Officer for the Coast Guard.

The DMF maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room W12-140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at <http://www.regulations.gov>.

Copies of the complete ICRs are available through this docket on the Internet at <http://www.regulations.gov>. Additionally, copies are available from Commandant (CG-611), U.S. Coast Guard Headquarters, (Attn: Mr. Arthur Requina), 2100 2nd Street, SW., Washington, DC 20593-0001. The telephone number is 202-475-3523.

FOR FURTHER INFORMATION CONTACT: Mr. Arthur Requina, Office of Information Management, telephone 202-475-3523 or fax 202-475-3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202-366-9826, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on whether

this information collection request should be granted based on it being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR addressed. Comments to Coast Guard must contain the docket number of this request, [USCG 2007-0180]. For your comments to OIRA to be considered, it is best if they are received on or before June 20, 2008.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to <http://www.regulations.gov>. They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the paragraph on DOT's "Privacy Act Policy" below.

Submitting comments: If you submit a comment, please include the docket number [USCG-2007-0180], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them 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 the documents supporting this collection of information or even the underlying requirements in view of them. The Coast Guard and OIRA will consider all comments and material received during the comment period.

Viewing comments and documents: Go to <http://www.regulations.gov> to

view documents mentioned in this notice as being available in the docket. Enter the docket number [USCG-2007-0180] in the Search box, E464 and click, "Go>>." You may also visit the DMF in room W12-140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in 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 Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or by visiting <http://DocketsInfo.dot.gov>.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (73 FR 201, January 2, 2008) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments.

Information Collection Request

1. **Title:** Marine Casualty Information & Periodic Chemical Drug and Alcohol Testing of Commercial Vessel Personnel.

OMB Control Number: 1625-0001.

Type of Request: Extension of currently approved collection.

Affected Public: Vessel owners and operators.

Abstract: 46 U.S.C. 6101, as delegated by the Secretary of the Department of Homeland Security to the Commandant, authorizes the Coast Guard to prescribe regulations for the reporting of marine casualties involving death, serious injury, material loss of property, material damage affecting the seaworthiness of a vessel, or significant harm to the environment. It also requires information on the use of alcohol be included in a marine casualty report. 46 U.S.C. 7503 authorizes the Coast Guard to deny the issuance of licenses, certificates of registry, and merchant mariners' documents (seamen's papers) to users of dangerous drugs. Similarly, 46 U.S.C. 7704 requires the Coast Guard to revoke such papers when a holder of the same has been shown to be a drug user, unless the holder provides satisfactory proof stating the holder is cured.

Burden Estimate: The estimated burden has decreased from 18,876 hours to 15,753 hours a year.

2. **Title:** Plan Approval and Records for Load Lines.

OMB Control Number: 1625-0013.

Type of Request: Extension of a currently approved collection.

Affected Public: Owners and operators of vessels.

Abstract: 46 U.S.C. 5101 to 5116 provides the Coast Guard with the authority to enforce provisions of the International Load Line Convention, 1966. Subchapter E of 46 CFR chapter I, contains the relevant load line regulations.

Burden Estimate: The estimated burden has increased from 1,681 hours to 1,699 hours a year.

3. **Title:** Report of Oil or Hazardous Substance Discharge; and Report of Suspicious Maritime Activity.

OMB Control Number: 1625-0096.

Type of Request: Extension of currently approved collection.

Affected Public: Persons-in-charge of a vessel or onshore/offshore facility, owners or operators of vessels, or facilities required to have security plans; and the public.

Abstract: 33 CFR 153.203, 40 CFR 263.30/264.56, and 49 CFR 171.15 mandate the National Response Center (NRC) to be the central place for the public to report all pollution spills. 33 of CFR 101.305 mandates owners/operators of vessels or facilities to have security plans and report activities or breaches that may result in a Transportation Security Incident (TSI) to the NRC. Voluntary reports are also accepted.

Burden Estimate: The estimated burden has increased from 9,105 hours to 13,017 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: May 2, 2008.

D.T. Glenn,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. E8-11361 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I-290B, Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form I-290B, Notice of Appeal to the Office of Administrative Appeals; OMB Control No. 1615-0095.

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 21, 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 add the OMB Control Number 1615-0095 in the subject box.

During this 60-day period USCIS will be evaluating whether to revise the Form I-290B. Should USCIS decide to revise the Form I-290B it will advise the public when it publishes the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30-days to comment on any revisions to the Form I-290B.

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 an existing information collection.

(2) *Title of the Form/Collection:* Notice of Appeal to the Office of Administrative Appeals

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* I-290B, 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 collection required on the Form I-290B is necessary in order for USCIS to make a determination that the appeal or motion to reopen or reconsider meet eligibility requirements, and for the Administrative Appeals Office to adjudicate the merits of the appeal or motion to reopen or reconsider.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 30,000 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 15,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: <http://www.regulations.gov/search/index.jsp>.

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 16, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.
[FR Doc. E8-11385 Filed 5-20-08; 8:45 am]

BILLING CODE 9111-97-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection

Activities: Form I-360, Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form I-360, Petition for Amerasian, Widow, or Special Immigrant. OMB Control Number 1615-0020.

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 21, 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 add the OMB Control Number 1615-0020 in the subject box.

During this 60-day period USCIS will be evaluating whether to revise the Form I-360. Should USCIS decide to revise the Form I-360 it will advise the public when it publishes the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30-days to comment on any revisions to the Form I-360.

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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

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

Overview of this Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Petition for Amerasian, Widow or Special Immigrant.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-360. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as brief abstract:* Primary: Individuals or households. This information collection is used by several prospective classes of aliens who intend to establish their eligibility to immigrate to the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 13,684 responses at 2 hours per response and 5,000 responses at 3 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 42,368 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: <http://www.regulations.gov/search/index.jsp>.

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 16, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8-11387 Filed 5-20-08; 8:45 am]

BILLING CODE 9111-97-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5188-N-07]

Notice of Proposed Information Collection: Comment Request; Annual Progress Reports for Empowerment Zones

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is

soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 21, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian L. Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4176, Washington, DC 20410; telephone: 202-708-2374, (this is not a toll-free number) or e-mail Ms. Deitzer at Lillian.L.Deitzer@HUD.gov for a copy of the proposed form and other available information.

FOR FURTHER INFORMATION CONTACT: Judy Mize, Office of Community Renewal, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 402-4167 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (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; (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 collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of proposal: Annual Progress Reports for Empowerment Zones.

OMB Control Number: 2506-0148.

Description of the need for the information and proposed use: This is an information collection for reporting requirements of 30 Urban Empowerment Zones (EZs). HUD will regularly evaluate the progress of implementation of the strategic plan in each designated Empowerment Zone (Rounds I, II and III) as required by HUD's regulations (24 CFR 597.400 and 24 CFR 598.415). The information submitted will enable HUD to assess performance of designees and the effectiveness of the Empowerment Zone Initiative.

Agency form numbers, if applicable:

Members of Affected Public: State or local governments.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

Paperwork requirement	Number of respondents	Frequency of response	Annual responses	Hours per response	Burden hours
Annual Reports:					
Round I EZs	7	2	7	10	70
Round II EZs	15	15	15	10	150
Round III EZs	8	2	8	10	80
Response to a Letter of warning	0	2		4	8
Total	30		30		308

Frequency of Submission: Periodically and Annually.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: May 12, 2008.

Nelson R. Bregón,

General Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. E8-11319 Filed 5-20-08; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5188-N-06]

Notice of Proposed Information Collection: Comment Request, HUD-Administered Small Cities Program Performance Assessment Report

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 21, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Pam Williams, Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 7234, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Eva Fontheim at (202) 402-3461 (this is not a toll free number) for copies of the proposed forms and other available documents:

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (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; (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 collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: HUD-Administered Small Cities Program Performance Assessment Report.

OMB Control Number, if applicable: 2506-0020.

Description of the need for the information and proposed use: The information collected from grant recipients participating in the HUD-administered CDBG program provides HUD with financial and physical development status of each activity funded. These reports are used to determine grant recipient performance.

Agency form numbers, if applicable: The Housing and Community Development Act of 1974, as amended, requires grant recipients that receive CDBG funding to submit a Performance Assessment Report (PAR), Form 4052, on an annual basis to report on program progress; and such records as may be necessary to facilitate review and audit by HUD of the grantee's administration of CDBG funds (Section 104 (e)(1)).

Members of affected public: This information collection applies solely to local governments in New York State that have HUD-administered CDBG grants that remain open or continue to generate program income.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated number of respondents is 65. The proposed frequency of the response to the collection of information is annual. Annual recordkeeping is estimated at 260 hours for approximately 65 grant recipients.

Status of the proposed information collection: Revision of a currently approved collection, and a request for OMB renewal for three years. The current OMB approval will expire in July 2008.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: May 13, 2008.

Nelson R. Bregón,

General Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. E8-11323 Filed 5-20-08; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5191-N-04]

Notice of Proposed Information Collection: Comment Request; FHA-Insured Mortgage Loan Servicing Involving the Loss Mitigation Programs

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 21, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail Lillian_L_Deitzer@HUD.gov or telephone (202) 402-8048.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708-1672 x2419 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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; (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 the use of appropriate automated

collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: FHA-Insured Mortgage Loan Servicing Involving the Loss Mitigation Programs.

OMB Control Number, if applicable: 2502-NEW.

Description of the need for the information and proposed use: FHA insurance is an important source of mortgage credit for low and moderate-income borrowers and neighborhoods. Providing assistance, as needed, to enable families to cure their delinquencies and retain their homes stabilizes neighborhoods that might otherwise suffer from deterioration and problems associated with vacant and abandoned properties. Avoidance of foreclosure and the resultant costs also serve to further stabilize the mortgage insurance premiums charged by FHA and the Federal budget receipts generated from those premiums.

The information collection request for OMB review seeks to combine the requirements of several existing OMB collections under one collection; they are as follows OMB collections 2502-0301, 0464 and 0523.

Agency form numbers, if applicable: HUD-1 Settlement Statement, HUD-27011 Single Family Application for Insurance Benefits, HUD-90035 Information/Disclosure, HUD-90041 Request for Variance, Pre-foreclosure sale procedure, HUD-90045 Approval to Participate, HUD-90051 Sale Contract Review, HUD-90052 Closing Worksheet, HUD-92068 F Request for Financial Information, HUD-PA-426 How to Avoid Foreclosure.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 777,494, the number of respondents is 83,110, the number of responses is 508,883, the frequency of response is on occasion, and the burden hour per response is from 15 minutes to 4 hours depending upon the activity.

Status of the proposed information collection: This is a new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Date: May 16, 2008.

Frank L. Davis,

General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner.

[FR Doc. E8-11413 Filed 5-20-08; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**[Docket No. FR-5191-N-18]****Notice of Proposed Information Collection: Comment Request; FHA-Insured Mortgage Loan Servicing of Delinquent, Default, and Foreclosure With Service Members Act****AGENCY:** Office of the Assistant Secretary for Housing, HUD.**ACTION:** Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 21, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail Lillian.L.Deitzer@HUD.gov or telephone (202) 402-8048.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 402-2419 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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; (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 the use of appropriate automated

collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: FHA-Insured Mortgage Loan Servicing of Delinquent, Default, and Foreclosure with Service Members Act.

OMB Control Number, if applicable: 2502-XXX.

Description of the need for the information and proposed use: FHA insurance is an important source of mortgage credit for low and moderate-income borrowers and their neighborhoods. It is essential that FHA maintain a healthy mortgage insurance fund through premiums charged the borrower by FHA along with Federal budget receipts generated from those premiums to support HUD's goals. Providing policy and guidance to the single family housing mortgage industry regarding changes in FHA's program is essential to protect the fund. The OMB information requests referred to below provide HUD's policy and guidance. This information collection request for OMB review seeks to combine the requirements of two existing OMB collections under this collection. The OMB collections are as follows; OMB collections 2502-0060 "Single Family Delinquent Loan Reporting" and 2502-0565 "Service-member Civil Relief".

Agency form numbers, if applicable: HUD-PA 426, Avoiding Foreclosure Pamphlet, HUD-9539, Request for Occupied Conveyance, HUD-27011, Single Family Application for Insurance Benefits, HUD-50012, Mortgagees Request for Extension of Time Requirements, HUD-92070, Service-members Civil Relief Act Notice Disclosure.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 5,456,245, the number of respondents is 223, the number of responses is 69,178,200, the frequency of response is on occasion, and the burden hour per response is from 15 minutes to 4 hours depending upon the activity.

Status of the proposed information collection: This is new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: May 16, 2008.

Frank L. Davis,

General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner.

[FR Doc. E8-11414 Filed 5-20-08; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****[FWS-R9-FHC-2008-N0124]; [94300-1122-0000-Z2]****Wind Turbine Guidelines Advisory Committee; Announcement of Public Meeting****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Notice of public meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), will host a Wind Turbine Guidelines Advisory Committee (Committee) workshop, on June 18, 2008. The workshop is open to the public. The workshop agenda will include the discussion and clarification of objectives to guide the Committee in its development of recommendations to the Secretary of the Interior.

DATES: The meeting will take place on June 18, 2008, from 8 a.m. to 4:30 p.m.

ADDRESSES: USFWS Mountain-Prairie Regional Office, 134 Union Blvd., Lakewood, Colorado 80228. For more information, see "Meeting Location Information" under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Rachel London, Division of Habitat and Resource Conservation, U.S. Fish and Wildlife Service, Department of the Interior, (703) 358-2161.

SUPPLEMENTARY INFORMATION:**Background**

On March 13, 2007, the Department of the Interior (Interior) published a notice of establishment of the Committee and call for nominations in the **Federal Register** (72 FR 11373). The Committee's purpose is to provide advice and recommendations to the Secretary of the Interior (Secretary) on developing effective measures to avoid or minimize impacts to wildlife and their habitats related to land-based wind energy facilities. The Committee is expected to exist for 2 years. Its continuation is subject to biennial renewal. The Committee will meet approximately four times per year. All Committee members serve without compensation. In accordance with the Federal Advisory Committee Act (5

U.S.C. App.), a copy of the Committee's charter has been filed with the Committee Management Secretariat, General Services Administration; Committee on Environment and Public Works, U.S. Senate; Committee on Natural Resources, U.S. House of Representatives; and the Library of Congress. The Secretary appointed 22 individuals to the Committee on October 24, 2007, representing the varied interests associated with wind energy development and its potential impacts to wildlife species and their habitats. The USFWS has held Committee meetings in February and April 2008. All Committee meetings are open to the public. The public will have an opportunity to comment at all Committee meetings.

Meeting Location Information

Please note that the USFWS Mountain-Prairie Regional Office is accessible to wheelchair users. If you require additional accommodations, please notify us by June 11, 2008.

If you plan on attending the meeting, please register at http://www.fws.gov/habitatconservation/windpower/wind_turbine_advisory_committee.html by June 11, 2008. While this meeting is open to the public, seating is limited due to room capacity. We will give preference to registrants based on date and time of registration. There will be standing room available if seats are filled.

Dated: May 8, 2008.

David J. Stout,

Wind Turbine Guidelines Advisory Committee Designated Federal Officer.

[FR Doc. E8-11347 Filed 5-20-08; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F 14856-A, F-14856-A2; AK-965-1410-KC-P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving the surface and subsurface estates in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Emmonak Corporation. The lands are in the vicinity of Emmonak, Alaska, and are located in:

Seward Meridian, Alaska

T. 31 N., R. 79 W.,

Secs. 7, 17, 18, and 19;

Secs. 20, 29, and 30;

Sec. 31, lots 1 and 2;

Sec. 32, lots 1, 2, and 5;

Sec. 33.

Containing 5,672.68.

T. 31 N., R. 80 W.,

Secs. 1 and 2;

Sec. 3, lots 1, 2, 3, and 5;

Secs. 4 and 5;

Sec. 6, lot 1;

Sec. 7, lots 1, 5, and 6;

Secs. 8 and 9;

Sec. 10, lots 1 and 2;

Secs. 11 to 15, inclusive;

Sec. 16, lots 1 to 6, inclusive;

Secs. 17 to 20, inclusive;

Sec. 21, lots 1 and 3;

Secs. 22 to 30, inclusive;

Sec. 31, lots 1, 2, 4, 5, and 6;

Secs. 32 to 36, inclusive;

Containing 20,147.35 acres.

T. 33 N., R. 80 W.,

Sec. 19, lots 1, 2, 6, 8, and 9;

Secs. 28 to 33, inclusive.

Containing 4,259.97 acres.

T. 32 N., R. 81 W.,

Sec. 1, to 4, inclusive;

Sec. 5, lots 1, 2, and 3;

Sec. 6.

Containing 3,656.38 acres.

T. 33 N., R. 81 W.,

Secs. 23 to 27, inclusive;

Secs. 33 and 34;

Sec. 35, lot 1;

Sec. 36.

Containing 5,303.91 acres.

T. 32 N., R. 82 W.,

Secs. 1 and 2.

Containing 1,280 acres.

Aggregating 40,320.29 acres.

The subsurface estate in these lands will be conveyed to Calista Corporation when the surface estate is conveyed to Emmonak Corporation.

Notice of the decision will also be published four times in the Tundra Drums.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until June 20, 2008, to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513-7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907-271-5960, or by e-mail at ak.blm.conveyance@ak.blm.gov. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Robert Childers,

Land Law Examiner, Land Transfer Adjudication II.

[FR Doc. E8-11341 Filed 5-20-08; 8:45 am]

BILLING CODE 4310-JA-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY-100-08-1310-NB]

Call for Nominations for the Pinedale Anticline Working Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Call for nominations for membership to the Pinedale Anticline Working Group (PAWG) as part of the Adaptive Management program for the Pinedale Anticline Project Area in Southwestern Wyoming.

DATES: All nominations should be postmarked by 30 days from date of publication in the **Federal Register**. Final appointments will be made by the Secretary of the Interior.

ADDRESSES: Nominations should be sent to Caleb Hiner, Pinedale Anticline Working Group and Task Groups Coordinator, Bureau of Land Management (BLM), Pinedale Field Office, 1625 West Pine Street, P.O. Box 768, Pinedale, Wyoming 82941.

SUMMARY: On June 26, 2006, the Secretary of the Interior renewed the Charter for the PAWG and Task Groups. Representatives of (1) Sublette County, (2) the Town of Pinedale, (3) the oil and gas operators, (4) the environmental community, (5) the livestock operators, and (6) the adjacent landowner are being solicited. Individuals or groups interested in becoming a member of the PAWG should submit the specified information within 30 days of this Notice. Nomination forms may be found at http://www.blm.gov/wy/st/en/field_offices/Pinedale/pawg.html.

FOR FURTHER INFORMATION CONTACT:

Caleb Hiner, Pinedale Anticline Working Group and Task Groups Coordinator, Bureau of Land Management, Pinedale Field Office, 1625 West Pine Street, P.O. Box 768,

Pinedale, Wyoming 82941, telephone (307) 367-5352.

SUPPLEMENTARY INFORMATION: On June 26, 2006, the Secretary of the Interior renewed the Charter for the Pinedale Anticline Working Group and Task Groups (PAWG). Nine members representing interest groups, governmental agencies, and local interests are appointed to the PAWG to serve a 2-year term. Nominations are being taken to represent: (1) Sublette County, (2) the Town of Pinedale, (3) the oil and gas operators, (4) the environmental community, (5) the livestock operators and (6) the adjacent landowner. Additional information can be found at: http://www.blm.gov/wy/st/en/field_offices/Pinedale/pawg.html. The Charter established several membership selection criteria and operational procedures that were developed once the Working Group became active. These are listed as follows:

1. The PAWG is composed of nine members who reside in the State of Wyoming. The PAWG members will be appointed by and serve at the pleasure of the Secretary of the Interior.
2. Members to be selected to serve on the PAWG are as follows:
 - (1) Sublette County,
 - (2) The Town of Pinedale,
 - (3) The oil and gas operators,
 - (4) The environmental community,
 - (5) The livestock operators and
 - (6) The adjacent landowner.
3. All members should have demonstrated an ability to analyze and interpret data and information, evaluate proposals, identify problems, and promote the use of collaborative management techniques (such as, long term planning, management across jurisdictional boundaries, data sharing, information exchange, and partnerships), and a knowledge of issues involving oil and gas development activities.

4. The service of the PAWG members shall be as follows:

- a. PAWG members will be appointed to 2-year terms, subject to removal by the Secretary of the Interior. At the discretion of the Secretary of the Interior, members may be reappointed to additional terms.

- b. The Chairperson of the PAWG will be selected by the PAWG.

- c. The term of the Chairperson will not exceed 2 years.

Individuals, or representatives of groups, who wish to become members of the Pinedale Anticline Working Group should complete and submit the following information to the Pinedale Field Office within 30 days after publication in the **Federal Register**:

1. Representative Group to be considered for:
2. Nominee's Full Name:
3. Business Address:
4. Business Phone:
5. Home Address:
6. Home Phone:
7. Occupation/Title:
8. Qualifications (education including colleges, degrees, major field of study and/or training):
9. Career Highlights (significant related experience, civic and professional activities, elected offices, prior advisory committee experience, or career achievements related to the interest to be represented):
10. Experience in collaborative management techniques, such as long term planning, management across jurisdictional boundaries, data sharing, information exchange and partnerships:
11. Experience in data analysis and interpretation, problem identification and evaluation of proposals:
12. Knowledge of issues involving oil and gas development:
13. Indicate Specific Area of Interest to be Represented from the following:
 - (1) Sublette County,
 - (2) The Town of Pinedale,
 - (3) The oil and gas operators,
 - (4) The environmental community,
 - (5) The livestock operators, and
 - (6) The adjacent landowner
14. List any leases, licenses, permits, contracts or claims that you hold which involve lands or resources administered by the BLM:
15. Attach two or three Letters of Reference from interests or organization to be represented:
16. Nominated by: Include Nominator's name, address and telephone number(s)
17. Date of nomination:

Groups should nominate more than one person and indicate their preferred order of appointment selection.

James K. Murkin,

Acting Associate State Director.

[FR Doc. E8-11423 Filed 5-20-08; 8:45 am]

BILLING CODE 4310-22-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA-169-1220-PG]

Notice of Public Meeting, Carrizo Plain National Monument Advisory Committee

SUMMARY: In accordance with Federal Land Policy and Management Act of 1976 (FLPMA), the Federal Advisory Committee Act of 1972 (FACA), the

National Environmental Policy Act of 1969 (NEPA), and the Code of Federal Regulations (40 CFR 1501.7, 43 CFR 1610.2), the United States Department of the Interior, Bureau of Land Management (BLM), Carrizo Plain National Monument Advisory Committee will meet as indicated below:

DATES: The meeting will be held on Saturday, June 28, 2008, at the Carrisa Plain Elementary School, located approximately 2 miles northwest of Soda Lake Road on Highway 58. The meeting will begin at 10 a.m. and finish at 2 p.m. The meeting will discuss the resource management plan being developed and prior recommendations made by the Committee. There will be a public comment period from 11 a.m. to 12 p.m. Lunch will be available for \$8.

SUPPLEMENTARY INFORMATION: The nine-member Carrizo Plain National Monument Advisory Committee advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of public land issues associated with the public land management in the Carrizo Plain National Monument in Central California. At this meeting, Monument staff will present updated information of the progress on the draft Carrizo Plain National Monument Resource Management Plan and the Environmental Impact Statement (RMP/EIS). This meeting is open to the public. Depending on the number of persons wishing to comment, and the time available, the time allotted for individual oral comments may be limited. Individuals who plan to attend and need special assistance such as sign language interpretation or other reasonable accommodations should contact BLM as indicated below.

FOR FURTHER INFORMATION CONTACT:

Bureau of Land Management, Attention: Johna Hurl, Monument Manager, 3801 Pegasus Drive, Bakersfield, CA 93308. Phone at (661) 391-6093 or e-mail jhurl@blm.gov.

Dated: May 15, 2008.

John Skibinski,

Assistant Office Field Manager, Bureau of Land Management, Bakersfield Field Office.

[FR Doc. E8-11340 Filed 5-20-08; 8:45 am]

BILLING CODE 4310-40-P

DEPARTMENT OF THE INTERIOR**Bureau of Reclamation****Red Bluff Diversion Dam Fish Passage Improvement Project**

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of Availability of the Final Environmental Impact Statement/Environmental Impact Report (Final EIS/EIR).

SUMMARY: The Bureau of Reclamation (Reclamation) is the National Environmental Policy Act Federal lead agency. The Tehama Colusa Canal Authority (TCCA) is the California Environmental Quality Act State lead agency. Together, these agencies have prepared a Final EIS/EIR for the Red Bluff Diversion Dam Fish Passage Improvement Project (Project). The Project provides for improved fish passage at the Red Bluff Diversion Dam as called for by the Central Valley Project Improvement Act section 3406 (b)(10), while also providing for continued agricultural water deliveries to TCCA member districts.

The Notice of Availability of the Draft EIS/EIR was published in the **Federal Register** on September 6, 2002 (Volume 67, No. 173). The written comment period on the Draft EIS/EIR ended December 6, 2002. On January 30, 2007, Reclamation published a second Notice of Availability for the Draft EIS/EIR in the **Federal Register** (Volume 72, No. 19), which began an additional comment period lasting through March 16, 2007. The Final EIS/EIR contains responses to all comments received and changes made to the text of the Draft EIS/EIR as a result of those comments and any additional information received during the review period.

DATES: Reclamation will not make a decision on the proposed action until at least 30 days after release of the Final EIS/EIR. After the 30-day period, Reclamation will complete a Record of Decision (ROD). The ROD will state the action that will be implemented and will discuss all factors leading to the decision.

ADDRESSES: A compact disk of the Final EIS/EIR may be requested from Mr. Don Reck, by writing to the Bureau of Reclamation, 16349 Shasta Dam Boulevard, Shasta Lake, CA 96019–8400; by calling 530–275–1554; or by e-mailing dreck@mp.usbr.gov. The Final EIS/EIR is also accessible from the following Web site: <http://www.mp.usbr.gov>. See the Supplementary Information section for

locations where copies of the Final EIS/EIR are available for public review.

FOR FURTHER INFORMATION CONTACT: Mr. Don Reck, Bureau of Reclamation, at 530–275–1554 or dreck@mp.usbr.gov.

SUPPLEMENTARY INFORMATION: Since construction of the Red Bluff Diversion Dam, concern has been expressed regarding the dam's effect on both upstream and downstream fish migration. The dam was built with 11 movable gates. Raising the gates eliminates the dam's effect and allows the river to flow unimpeded. Lowering the dam gates allows for gravity diversion of water into canals and results in the creation of Lake Red Bluff.

Over the years, the dam gates have been raised for increasingly longer periods in an attempt to enhance fish passage. Therefore, the ability to divert irrigation water has been gradually decreased from year-round to the current 4-month (gates-in) operations from May 15 to September 14. During the remainder of the year, the dam gates are open, allowing a free flowing, unimpeded river. Detailed studies show the current design of the fish ladders and the operations of the dam gates do not adequately allow passage of all threatened and endangered fish species.

The Draft EIS/EIR evaluated the proposed project alternatives that could improve fish passage at Red Bluff Diversion Dam, while also providing for continued diversion of water for irrigation.

The Draft EIS/EIR documented the direct, indirect, and cumulative effects to the physical, natural, and socioeconomic environment that may result from implementation of one of the alternatives. Copies of the Final EIS/EIR are available for public review at the following locations:

- Bureau of Reclamation, Mid-Pacific Region, Regional Library, 2800 Cottage Way, Sacramento, California 95825.
- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, Colorado 80225.
- Natural Resources Library, U.S. Department of the Interior, 1849 C Street, NW., Main Interior Building, Washington, DC 20240–0001.

Before including your name, address, phone number, e-mail address, or other personal identifying information in any correspondence, you should be aware that your entire correspondence—including your personal identifying information—may be made publicly available at any time. While you can ask us in your correspondence to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: May 9, 2008.

Donald R. Glaser,

Regional Director, Mid-Pacific Region.

[FR Doc. E8–11349 Filed 5–20–08; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–648]

In the Matter of Certain Semiconductor Integrated Circuits Using Tungsten Metallization and Products Containing Same; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 18, 2008, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of LSI Corporation of Milpitas, California and Agere Systems Inc. of Allentown, Pennsylvania. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain semiconductor integrated circuits using tungsten metallization and products containing same that infringe claim 1 of U.S. Patent No. 5,227,335. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is 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., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at <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>.

FOR FURTHER INFORMATION CONTACT: Thomas S. Fusco, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205-2571.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2008).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on May 14, 2008, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain semiconductor integrated circuits using tungsten metallization or products containing same that infringe claim 1 of U.S. Patent No. 5,227,335, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are—

LSI Corporation, 1621 Barber Lane, Milpitas, California 95035
Agere Systems, Inc., 1110 American Parkway, NE, Allentown, Pennsylvania 18109

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served: United Microelectronics Corporation, No 3 Li-Hsin 2nd Road, Hsinchu Science Park, Hsinchu-Chu City, Taiwan.

Integrated Device Technology, Inc., 6024 Silver Creek Valley Road, San Jose, California 95138

AMIC Technology Corporation, No. 2 Li-Hsin 6th Road, Science-Based Industrial Park, Hsinchu, Taiwan
Cypress Semiconductor Corporation, 198 Champion Court, San Jose, California 95134

Elpida Memory, Inc., Sumitomo Seimei Yaesu Building, 3rd Floor 2-1 Yaesu 2-chome Chuo-ku, Tokyo 104-0028, Japan

Freescale Semiconductor, Inc., 6501 William Cannon Drive West, Austin, Texas 78735.

Grace Semiconductor Manufacturing Corporation, 1399 Zu Chong Zhi Road, Zhangjiang Hi-Tech Park, Shanghai 201203, China
Microchip Technology, Inc., 2355 West Chandler Boulevard, Chandler, Arizona 85224

Micronas Semiconductor Holding, AG, Technopark Technoparkstrasse 1, Zurich, 8005, Switzerland

National Semiconductor Corporation, 2900 Semiconductor Drive, Santa Clara, California 95052-8090

Nanya Technology Corporation, HWA Ya Technology Park, 669 Fu Hsing 3rd Road, Kueishan, Taoyuan County, Taiwan

NXP B.V., High Tech Campus 60, Eindhoven, 5656, Netherlands

ON Semiconductor Corporation, 5005 East McDowell Road, Phoenix, Arizona 85008

Powerchip Semiconductor Corporation, No 12 Li-Hsin Road, 1 Hsinchu Science-Based Industrial Park, Hsinchu, Taiwan

ProMOS Technologies, Inc., 19 Li-Hsin Road Hsinchu Science-Based, Industrial Park, Hsinchu, Taiwan
Spansion, Inc., 915 DeGuigne Drive, P.O. Box 3453, Sunnyvale, California 94088-3453

STMicroelectronics NV, 39 Chemin du Champ des Filles Plan-Les-Quates C P 21, Geneva, 1228, Switzerland

Vanguard International Semiconductor Corporation, Headquarter, Fab 1, 123 Park Avenue-3rd, Hsinchu Science Park, Hsinchu, Taiwan 30077

(c) The Commission investigative attorney, party to this investigation, is Thomas S. Fusco, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Carl C. Charneski is designated as the presiding administrative law judge.

The Commission notes that the patent at issue was the subject of earlier litigation which raises the issue of whether the complainants are precluded from asserting that patent. In instituting this investigation, the Commission has not made any determination as to whether the complainants are so precluded. Accordingly, the presiding administrative law judge may wish to consider this issue at an early date. Any such decision should be issued in the form of an initial determination (ID). The ID will become the Commission's final determination 45 days after the date of service of the ID unless the Commission determines to review the ID. Any petitions for review of the ID must be filed within ten (10) days after

service thereof. Any review will be conducted in accordance with Commission Rules 210.43, 210.44 and 210.45, 19 CFR 210.43, 210.44, and 210.45.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: May 15, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8-11308 Filed 5-20-08; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act of 1970, as Amended

Pursuant to 28 CFR 50.7, notice is hereby given that on May 6, 2008, a proposed consent decree in *United States v. Carmeuse Lime & Stone, Inc.*, Civil Action No. 2:08-CV-00081-WOB, was lodged with the United States District Court for the Eastern District of Kentucky.

This Consent Decree will resolve claims asserted by the United States against Carmeuse for civil penalties based on violations of its PSD/operating permit ("the Permit") and the PSD provisions of the Kentucky State Implementation Plan ("SIP") at Carmeuse's Black River plant ("the

Plant”) located in Butler, Pendleton County, Kentucky. The complaint alleges that Carmeuse violated the Permit by not implementing best available control technology (“BACT”) for two lime kilns at the Plant.

The proposed Consent Decree resolves these claims by requiring Carmeuse to pay a civil penalty in the amount of \$100,000 to the United States.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States v. Carmeuse Lime & Stone, Inc.*, D.J. Ref. #90-5-2-1-08832.

The consent decree may be examined at the Office of the United States Attorney for the Eastern District of Kentucky, 260 West Vine Street, Suite 300, Lexington, KY 40507-1671, and at U.S. EPA Region 4, Office of Regional Counsel, 61 Forsyth Street, Atlanta, GA 30303. During the public comment period, the consent decree may also be examined on the following Department of Justice Web site: http://www.usdoj.gov/enrd/Consent_Decrees.html. A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$3.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Henry Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8-11290 Filed 5-20-08; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on May 13, 2008, a Consent Decree in *United States*

of America v. the District of Columbia, Civil Action No. 1:08-cv-00825-RBW, was lodged with the United States District Court for the District of Columbia.

The consent decree resolves the claims of the United States under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. 9607(a), for reimbursement of its past response costs incurred in connection with EPA’s response to releases of mercury at two high schools in the District of Columbia. The first release of mercury occurred in and around Ballou High School in 2003 and second release of mercury occurred in and around Cardozo High School in 2005.

The consent decree obligates the District of Columbia to reimburse \$600,000 of the United States’ past response costs. In addition, the District of Columbia commits to verify that it is properly storing, removing and disposing of mercury and other hazardous substances in the District of Columbia public schools. Its verification will include conducting an audit of a representative number of schools. If the District discovers hazardous substances in the schools which are present or maintained in a manner inconsistent with its policies and procedures, the District commits to remove and dispose of such chemicals properly, or to store and inventory them properly.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to this proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, Attention: Nancy Flickinger (EES), and should refer to *United States of America v. the District of Columbia*, Civil Action No. 1:08-cv-00825-RBW, DOJ # 90-11-3-09036.

The proposed Consent Decree may be examined at the Office of the United States Attorney for the District of Columbia, Judiciary Center Building, 555 Fourth Street, NW., Washington, DC 20530. During the public comment period, the consent decree may also be examined on the following Department of Justice Web site, http://www.usdoj.gov/enrd/Consent_Decrees.html. A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a

request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$22.75 (25 cents per page reproduction cost for a full copy) payable to the U.S. Treasury.

Robert D. Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8-11309 Filed 5-20-08; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-60,703]

Thyssenkrupp Budd, EmploymentGiant LLC, Detroit, MI; 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 February 28, 2007, applicable to workers of Thyssenkrupp Budd, Detroit, Michigan. The notice was published in the **Federal Register** on March 14, 2007 (72 FR 11904).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of automotive exterior body stampings and assemblies.

New information shows that Thyssenkrupp Budd contracted to have the workers’ payroll managed through EmploymentGiant LLC, located in Warren, Michigan. Therefore, some of the workers separated from employment at the subject firm have had their wages reported under the Unemployment Insurance (UI) account for EmploymentGiant LLC.

Accordingly, the Department is amending this certification to include the workers of Thyssenkrupp Budd whose wages were reported as EmploymentGiant LLC.

The amended notice applicable to TA-W-60,703 is hereby issued as follows:

All workers of Thyssenkrupp Budd, EmploymentGiant LLC, Detroit, Michigan, who became totally or partially separated from employment on or after December 13, 2005 through February 28, 2009, 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 15th day of May, 2008.

Ricard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-11368 Filed 5-20-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-63,086]

K-Industries, USA, LLC; Including Workers Whose Wages Were Paid By Ultimate Staffing Service Riviera Beach, FL; 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 April 9, 2008, applicable to workers of K-Industries, USA, LLC, Riviera Beach, Florida. The notice was published in the **Federal Register** on April 23, 2008 (73 FR 21991).

At the request of a State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of injection-molded plastic parts.

New information provided to the Department shows that before January 2008, some workers of the subject firm were formerly from Ultimate Staffing Service, employed on-site, and sufficiently under control of K Industries USA to be considered leased workers. These workers had their wages reported under the Unemployment Insurance (UI) tax account for Ultimate Staffing Service.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of K-Industries, USA, LLC who were adversely affected by a shift in production to the Dominican Republic.

The amended notice applicable to TA-W-63,086 is hereby issued as follows:

All workers of K-Industries, USA, LLC, including workers who's wages were paid by Ultimate Staffing Service, Riviera Beach, Florida, who became totally or partially separated from employment on or after March 27, 2007, through April 9, 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 15th day of May 2008.

Richard Church

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-11373 Filed 5-20-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a)

of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than June 2, 2008.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than June 2, 2008.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C-5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 14th day of May 2008

Erin FitzGerald,

Acting Director, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 5/5/08 and 5/9/08]

TA-W	Subject firm (petitioners)	Location	Date of institution	Date of petition
63301	Quebecor World Northeast Graphics, Inc. (State).	North Haven, CT	05/05/08	05/02/08
63302	BCS Cuyahoga (Wkrs)	Solon, OH	05/05/08	05/02/08
63303	HCC Machining—Hermetic Seal (State)	El Monte, CA	05/05/08	04/15/08
63304	Kaspar and ESH, Inc. (Wkrs)	Long Island City, NY	05/05/08	04/30/08
63305	Dana Holding Corporation (USW)	Glasgow, KY	05/05/08	04/24/08
63306	Eastern Display (division of Art Guild, Inc.) (Comp).	Providence, RI	05/05/08	05/02/08
63307	Condor Products Co., Inc. (Comp)	Owosso, MI	05/05/08	04/30/08
63308	Sumitomo Bakelite North America (NA), Inc. (State).	Manchester, CT	05/05/08	05/02/08

APPENDIX—Continued

[TAA petitions instituted between 5/5/08 and 5/9/08]

TA-W	Subject firm (petitioners)	Location	Date of institution	Date of petition
63309	Tache Jewelry (Wkrs)	Long Island City, NY	05/05/08	05/02/08
63310	Rockwell Automation (State)	Eden Prairie, MN	05/05/08	05/02/08
63311	McKechnie Vehicle Components (Comp)	Newberry, SC	05/05/08	05/02/08
63312	Solon Manufacturing Company—Rhineland (Rep).	Rhineland, WI	05/06/08	04/29/08
63313	Simclar (North America), Inc. (Rep)	Winterville, NC	05/06/08	05/05/08
63314	MJ Wood Products, Inc. (Comp)	Morrisville, VT	05/06/08	05/05/08
63315	Performance Fibers Operations, Inc. (Comp) ...	Salisbury, NC	05/06/08	04/25/08
63316	Maxim Integrated Products (Comp)	Sunnyvale, CA	05/06/08	05/05/08
63317	Union Carbide Corporation a Subsid. of The Dow Chemical Co. (Wkrs).	South Charleston, WV	05/06/08	05/05/08
63318	Raytor Compounds (State)	Florence, MA	05/06/08	05/02/08
63319	Hood Industries (State)	Coushatta, LA	05/06/08	04/18/08
63320	Wyeth Company (State)	Andover, MA	05/06/08	05/05/08
63321	Valley Mills, Inc. (State)	Valley Head, AL	05/06/08	05/05/08
63322	ARP Manufacturing, LLC (Comp)	North Smithfield, RI	05/07/08	05/05/08
63323	J-Sport Company (Comp)	Millersburg, OH	05/07/08	05/05/08
63324	Americall Group, Inc. (Wkrs)	Hobart, IN	05/07/08	04/25/08
63325	Schott North America, Inc. (Comp)	Auburn, NY	05/07/08	05/02/08
63326	Dellway Sports, Inc. (Wkrs)	New York, NY	05/07/08	04/17/08
63327	Logistics Services, Inc. (Comp)	Fenton, MO	05/07/08	05/06/08
63328	ITT Leopold (IUPAT)	Zelienople, PA	05/07/08	05/05/08
63329	Maple Leaf Farms, Inc. (UFCW)	Franksville, WI	05/07/08	05/05/08
63330	Spectrum Yarns, Inc. (Comp)	Marion, NC	05/07/08	05/06/08
63331	Burlington Finishing Plant (Comp)	Burlington, NC	05/07/08	05/05/08
63332	Milwaukee Electric Tool Corporation (Comp) ...	Brookfield, WI	05/07/08	05/06/08
63333	LDI Composites (Wkrs)	Green Bay, WI	05/07/08	05/01/08
63334	Stearns/Coleman (State)	Sauk Rapids, MN	05/07/08	05/06/08
63335	Baumann Springs USA, Inc. (Comp)	Pineville, NC	05/07/08	04/18/08
63336	CHR Hansen (Wkrs)	Mahwah, NJ	05/07/08	05/06/08
63337	Adapt Identification (State)	Marlboro, NJ	05/08/08	05/07/08
63338	Crane Plumbing (Wkrs)	Dallas, TX	05/08/08	04/23/08
63339	Contact Systems, Inc. (Comp)	Danbury, CT	05/08/08	05/07/08
63340	S. Shamash and Sons (State)	Secaucus, NJ	05/08/08	05/07/08
63341	Baja Marine Corporation (Div. of Brunswick Corp) (Comp).	Bucyrus, OH	05/08/08	05/07/08
63342	Viking and Worthington Steel Enterprise, LLC (USW).	Valley City, OH	05/08/08	05/07/08
63343	Taylor King (Wkrs)	Taylorsville, NC	05/08/08	05/07/08
63344	General Motors Truck Plant (Wkrs)	Dayton, OH	05/08/08	05/07/08
63345	Hix Corporation (Wkrs)	Pittsburg, KS	05/08/08	05/02/08
63346	Tower Automotive (State)	Kendallville, IN	05/09/08	04/25/08
63347	R.L. Stowe Mills, Inc. (Comp)	Chattanooga, TN	05/09/08	05/08/08
63348	BASF Chemical Corporation of Aberdeen (Wkrs).	Aberdeen, MS	05/09/08	05/08/08
63349	Capel Incorporated (Comp)	Troy, NC	05/09/08	05/08/08
63350	Solon Manufacturing Company—Skowhegan (Rep).	Skowhegan, ME	05/09/08	04/29/08
63351	Ina Bearing (Schaeffler Group) (Wkrs)	Spartanburg, SC	05/09/08	05/08/08
63352	Carolina Furniture Manufacturers, Inc. (Comp)	Ramseur, NC	05/09/08	05/06/08
63353	Western Union Financial Services, Inc. (CWA)	Dallas, TX	05/09/08	05/07/08
63354	JBL Professional (Comp)	Northridge, CA	05/09/08	04/06/08
63355	E and L Garment Company (Wkrs)	San Francisco, CA	05/09/08	05/08/08
63356	TRG Customer Solutions (Wkrs)	Greensburg, PA	05/09/08	05/08/08
63357	Hanes Converting Company/Hanes Industries (Wkrs).	Conover, NC	05/09/08	05/07/08
63358	Rika Denshi America, Inc. (Comp)	Attleboro, MA	05/09/08	05/08/08
63359	Mania Technologie Production Systems, Inc. (State).	South Windsor, CT	05/09/08	05/08/08
63360	Motorola, Inc./Mobile Devices (Wkrs)	Fort Worth, TX	05/09/08	05/05/08
63361	H & R 1871, LLC (Comp)	Gardner, MA	05/09/08	05/07/08

[FR Doc. E8-11366 Filed 5-20-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR**Employment and Training
Administration**

[TA-W-63,154]

**Advantage Printing, Inc.; Hickory, NC;
Notice of Termination of Investigation**

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 8, 2008 in response to a petition filed by a company official on behalf of workers of Advantage Printing, Inc., Hickory, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 12th day of May 2008.

Richard Church,

*Certifying Officer, Division of Trade
Adjustment Assistance.*

[FR Doc. E8-11376 Filed 5-20-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR**Employment and Training
Administration**

[TA-W-63,366]

**Tetra Pak, Minneapolis, MN; Notice of
Termination of Investigation**

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on May 12, 2008 in response to a worker petition filed by a state agency representative on behalf of workers of Tetra Pak, Minneapolis, Minnesota.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 12th day of May 2008.

Richard Church,

*Certifying Officer, Division of Trade
Adjustment Assistance.*

[FR Doc. E8-11365 Filed 5-20-08; 8:45 am]

BILLING CODE 4510-FN-P

NATIONAL SCIENCE FOUNDATION**Agency Information Collection
Activities: Comment Request****AGENCY:** National Science Foundation.**ACTION:** Submission for OMB Review;
Comment Request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. The full submission may be found at: <http://www.reginfo.gov/public/do/PRAMain>. This is the second notice for public comment; the first was published in the **Federal Register** at 72 FR 59116, and no substantial comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725-17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to splimpto@nsf.gov. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission may be obtained by calling 703-292-7556.

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

SUPPLEMENTARY INFORMATION:

Title of Collection: Descriptive and Exploratory Study of the National Science Foundation's Small Grants for Exploratory Research Funding Mechanism.

OMB Number: 3145-NEW.

Abstract: The SGER funding mechanism was developed in 1989 by an external committee, and authorized by NSF Director Bloch for use beginning at the start of Fiscal Year 1990. The committee's charge was to recommend whether NSF as a whole should adopt a mechanism similar to one that had been piloted by the Engineering Directorate, known as Small Grants for Expedited Research. While that title emphasized award timeliness, the mechanism's purposes included funding innovative research ideas. The current formulation of SGER remains conceptually and administratively similar to its original purposes and practices. Over time, NSF has broadened award parameters (award ceiling and duration) and sharpened definitions of purposes (e.g., inserting the term Transformative Research). In at least one case the SGER mechanism was modified for a specific program purpose (the Nanoscale Exploratory Grants, which were externally reviewed).

All applicants will be asked about topics relating to the application process (how they found out about SGER, why this mechanism and not a standard proposal, etc.). Awardees will also be asked about activities resulting from their awards, such as follow-on proposals, involvement of graduate students, and testing of new instrumentation. Declinees will be asked, for example, what action they took concerning the declined proposal (wrote standard proposal to NSF or another agency, and whether that was awarded). All applicants will be asked about the guidelines and funding and mechanism, and how they can be improved, e.g., through changes in their design components, expected outcomes, proposal review criteria, etc.

The survey data collection will be done on the World Wide Web.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 30 minutes per response.

Respondents: Government grant holders—Individuals.

Estimated Number of Responses per Form: 3,778 for the awardee questionnaire and 580 for the non-awardee questionnaire for a total of 4,358.

Estimated Total Annual Burden on Respondents: Aggregate total of 1,430 hours.

Frequency of Response: Once.

Dated: May 16, 2008.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E8-11363 Filed 5-20-08; 8:45 am]

BILLING CODE 7555-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-295 and 50-304]

Notice of Consideration of Approval of Transfer of Facility Operating License for Zion Nuclear Power Station Units 1 and 2 and Conforming Amendment and Opportunity for a Hearing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of application for approval of a license transfer and conforming amendment and opportunity for a hearing and to provide written comments.

DATES: A request for a hearing must be filed by June 10, 2008.

FOR FURTHER INFORMATION CONTACT: John B. Hickman, Project Manager, Reactor Decommissioning Branch, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 415-3017; Fax number: (301) 415-5370; e-mail: jbh@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering the issuance of an Order under 10 CFR 50.80 approving the direct transfer of Facility Operating License Nos. DPR-39 and DPR-48 for Zion Nuclear Power Station Units 1 and 2 (Zion) currently held by Exelon Generation Company, LLC (Exelon), as owner and licensed operator of Zion. The transfer would be to ZionSolutions, LLC (ZS), a wholly owned subsidiary of EnergySolutions (ES). The Commission is also considering amending the license for administrative purposes to reflect the proposed transfer. Such amendment would replace references to Exelon in the license with references to ZS and remove references to a prior license transfer from ComEd to Exelon.

The application now being considered is dated January 25, 2008, and was filed by Exelon, ZS, and ES. According to the application, ZS would acquire ownership of the facility following approval of the proposed license

transfer, and ZS would possess, use and maintain the permanently shut down and defueled Zion Station. Exelon would retain title to the real estate upon which Zion is sited, ownership of the spent nuclear fuel and Class C radioactive waste, and other improvements specified in the Asset Sale Agreement. After the transfer, ZS intends to decommission the Zion units. The application for transfer does not propose any physical or operational changes to the Zion facility. An NRC administrative review, documented in a letter sent to Exelon on February 21, 2008, found the application acceptable to begin a more detailed technical review.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and Orders issued by the Commission pursuant thereto.

Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. An Environmental Assessment (EA) will not be performed because, pursuant to 10 CFR 51.22(c)(21), license transfer approvals and associated license amendments are categorically excluded from the requirements to perform an EA.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility which does no more than conform the license to reflect the transfer action involves no significant hazards consideration. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

II. Opportunity To Request a Hearing

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application

may request a hearing and intervention via electronic submission through the NRC E-filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C, "Rules of General Applicability: Hearing Requests, Petitions To Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings," of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)-(viii).

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing rule requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at HEARINGDOCKET@NRC.GOV, or by calling (301) 415-1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397-4209 or locally, (301) 415-4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-

class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include social security numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The formal requirements for documents contained in 10 CFR 2.304(c)-(e) must be met. If the NRC grants an electronic document exemption in accordance with 10 CFR 2.302(g)(3), then the requirements for paper documents, set forth in 10 CFR 2.304(b) must be met.

As indicated below, pursuant to 10 CFR 2.310(g), any hearing would be subject to the procedures set forth in 10 CFR part 2, subpart M.

III. Opportunity To Provide Written Comments

Within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice. Comments received after 30 days will be considered if practicable to do so, but only those comments received

on or before the due date can be assured consideration.

For further details with respect to this license transfer application, see the application dated January 25, 2008, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly-available records will be accessible electronically from the Agency-Wide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1-800-397-4209, or 301-415-4737 or by e-mail to pdrr@nrc.gov.

Dated at Rockville, Maryland, this 9th day of May 2008.

For the Nuclear Regulatory Commission.

Keith I. McConnell,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. E8-11353 Filed 5-20-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52-017-COL; ASLBP No. 08-863-01-COL-BD01]

Dominion Virginia Power; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Dominion Virginia Power

(North Anna Nuclear Power Station Unit 3)

This proceeding concerns (1) a Petition to Intervene and Request for Hearing submitted by the Blue Ridge Environmental Defense League and the People's Alliance for Clean Energy, and (2) a Request of the North Carolina Utilities Commission for an Opportunity

to Participate in any Hearing, both of which were submitted in response to a March 10, 2008, Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3 (73 FR 12,760), and an April 18, 2008, Supplement to Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3 (73 FR 21,162). The Petition to Intervene and Request for Hearing challenges the application filed by Dominion Virginia Power pursuant to Subpart C of 10 CFR Part 52 for a combined license for North Anna Unit 3, which would be located at the North Anna Power Station in Louisa County, Virginia.

The Board is comprised of the following administrative judges:

Ronald M. Spritzer, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001

Dr. Richard F. Cole, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001

Dr. Alice C. Mignerey, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001

Additionally, during the contention admissibility phase of this proceeding, Administrative Judge Alan S. Rosenthal shall function as the Board's Special Assistant pursuant to 10 CFR 2.322(a)(3).

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland, this 15th day of May 2008.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. E8-11339 Filed 5-20-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72-63; EA-08-144]

In the Matter of: FPL Energy Seabrook, LLC Seabrook Station; Independent Spent Fuel Storage Installation Order Modifying License (Effective Immediately)

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Issuance of Order for Implementation of Additional Security Measures and Fingerprinting for Unescorted Access to Seabrook Station

Independent Spent Fuel Storage Installation.

FOR FURTHER INFORMATION, CONTACT:

Kevin M. Witt, Project Manager, Rules, Inspections and Operations Branch, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards (NMSS), U.S. Nuclear Regulatory Commission (NRC), Rockville, MD 20852. Telephone: (301) 492-3323; fax number: (301) 492-3348; e-mail: Kevin.Witt@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to 10 CFR 2.106, NRC (or the Commission) is providing notice, in the matter of Seabrook Station Independent Spent Fuel Storage Installation (ISFSI) Order Modifying License (Effective Immediately).

II. Further Information

I

NRC has issued a general license to FPL Energy Seabrook, LLC (FPL) authorizing the operation of an ISFSI, in accordance with the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 CFR) part 72. This Order is being issued to FPL, which has identified near-term plans to store spent fuel in an ISFSI under the general license provisions of 10 CFR part 72. The Commission's regulations at 10 CFR 72.212(b)(5) and 10 CFR 73.55(h)(1) require FPL to maintain safeguards and contingency plan procedures to respond to threats of radiological sabotage and to protect the spent fuel against the threat of radiological sabotage, in accordance with 10 CFR part 73, appendix C. Specific safeguards requirements are contained in 10 CFR 73.51 or 73.55, as applicable.

Inasmuch as an insider has an opportunity equal to, or greater than, any other person, to commit radiological sabotage, the Commission has determined these measures to be prudent. Comparable Orders have been issued to all licensees that currently store spent fuel, or have identified near-term plans to store spent fuel, in an ISFSI.

II

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY, and Washington, DC, using large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees, to strengthen licensees'

capabilities and readiness to respond to a potential attack on a nuclear facility. On October 16, 2002, the Commission issued Orders to the licensees of operating ISFSIs, to place the actions taken in response to the Advisories into the established regulatory framework, and to implement additional security enhancements that emerged from NRC's ongoing comprehensive review. The Commission has also communicated with other Federal, State, and local government agencies and industry representatives to discuss and evaluate the current threat environment, to assess the adequacy of security measures at licensed facilities. In addition, the Commission has conducted a comprehensive review of its safeguards and security programs and requirements.

As a result of its consideration of current safeguards and security requirements, as well as a review of information provided by the intelligence community, the Commission has determined that certain additional security measures (ASMs) are required to address the current threat environment, in a consistent manner, throughout the nuclear ISFSI community. Therefore, the Commission is imposing requirements, as set forth in Attachments 1 and 2 of this Order, on all licensees of these facilities. These requirements, which supplement existing regulatory requirements, will provide the Commission with reasonable assurance that the public health and safety and common defense and security continue to be adequately protected in the current threat environment. These requirements will remain in effect until the Commission determines otherwise.

The Commission recognizes that FPL may have already initiated many of the measures set forth in Attachments 1 and 2 to this Order, in response to previously issued advisories, or on their own. It also recognizes that some measures may not be possible nor necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at FPL's facility, to achieve the intended objectives and avoid any unforeseen effect on the safe storage of spent fuel.

Although the ASMs already implemented by licensees in response to the Safeguards and Threat Advisories have been sufficient to provide reasonable assurance of adequate protection of public health and safety, the Commission concludes that these actions must be supplemented further because the current threat environment continues to persist. Therefore, it is appropriate to require certain ASMs,

and these measures must be embodied in an Order, consistent with the established regulatory framework.

To provide assurance that licensees are implementing prudent measures to achieve a consistent level of protection to address the current threat environment, licenses issued pursuant to 10 CFR 72.210 shall be modified to include the requirements identified in Attachments 1 and 2 to this Order. In addition, pursuant to 10 CFR 2.202, I find that, in light of the common defense and security circumstances described above, the public health, safety, and interest require that this Order be effective immediately.

III

Accordingly, pursuant to Sections 53, 103, 104, 147, 149, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Parts 50, 72, and 73, *it is hereby ordered, EFFECTIVE IMMEDIATELY, that your general license is modified as follows:*

A. FPL shall comply with the requirements described in Attachments 1 and 2 to this Order, except to the extent that a more stringent requirement is set forth in FPL's security plan. FPL shall immediately start implementation of the requirements in Attachments 1 and 2 to the Order and shall complete implementation no later than 180 days from the date of this Order, with the exception of the ASM B.4 of Attachment 1 ["Additional Security Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs)"], which shall be implemented no later than 365 days from the date of this Order. In any event, FPL shall complete implementation of all ASMs no later than 30 days before the first day that spent fuel is scheduled to be initially placed in the ISFSI.

B.1. FPL shall, within twenty (20) days of the date of this Order, notify the Commission: (1) If it is unable to comply with any of the requirements described in Attachments 1 and 2; (2) if compliance with any of the requirements is unnecessary, in its specific circumstances; or (3) if implementation of any of the requirements would cause FPL to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide FPL's justification for seeking relief from, or variation of, any specific requirement.

2. If FPL considers that implementation of any of the requirements described in Attachments

1 and 2 to this Order would adversely impact the safe storage of spent fuel, FPL must notify the Commission, within twenty (20) days of this Order, of the adverse safety impact, the basis for its determination that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives specified in the Attachment 1 and/or 2 requirements in question, or a schedule for modifying the facility, to address the adverse safety condition. If neither approach is appropriate, FPL must supplement its response, to Condition B.1 of this Order, to identify the condition as a requirement with which it cannot comply, with attendant justifications, as required under Condition B.1.

C.1. FPL shall, within twenty (20) days of this Order, submit to the Commission, a schedule for achieving compliance with each requirement described in Attachments 1 and 2.

2. FPL shall report to the Commission when it has achieved full compliance with the requirements described in Attachments 1 and 2.

D. All measures implemented or actions taken in response to this Order shall be maintained until the Commission determines otherwise.

FPL's response to Conditions B.1, B.2, C.1, and C.2, above, shall be submitted in accordance with 10 CFR 72.4. In addition, submittals that contain Safeguards Information shall be properly marked and handled, in accordance with 10 CFR 73.21.

The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, relax or rescind any of the above conditions, for good cause.

IV

In accordance with 10 CFR 2.202, FPL must, and any other person adversely affected by this Order may, submit an answer to this Order within 20 days of the date of the Order. In addition, FPL, and any other person adversely affected by this Order, may request a hearing on this Order, within 20 days of the date of the Order. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be made, in writing, to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which FPL relies and the reasons as to why the

Order should not have been issued. If a person other than FPL requests a hearing, that person shall set forth, with particularity, the manner in which his interest is adversely affected by this Order, and shall address the criteria set forth in 10 CFR 2.309(d).

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007, 72 FR 49139 (August 28, 2007) and codified in pertinent part at 10 CFR Part 2, Subpart B. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements associated with E-Filing, at least five (5) days before the filing deadline, the requestor must contact the Office of the Secretary, by e-mail, at Hearing.Docket@nrc.gov, or by calling (301) 415-1677, to request: (1) A digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any NRC proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding [even in instances when the requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate]. Each requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate is also available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, he/she can then submit a request for a hearing through EIE. Submissions should be in Portable Document Format (PDF), in accordance with NRC guidance available on the NRC public Web site at <http://>

www.nrc.gov/site-help/e-submittals.html. A filing is considered complete at the time the filer submits its document through EIE. To be timely, electronic filings must be submitted to the EIE system no later than 11:59 p.m. Eastern Time, on the due date. On receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, any others who wish to participate in the proceeding (or their counsel or representative) must apply for, and receive, digital ID certificates, before hearing requests are filed, so that they may obtain access to the documents via the E-Filing system.

A person filing electronically may seek assistance through the "Contact-Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html>, or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397-4209 or, locally (301) 415-4737.

Participants who believe that they have good cause for not submitting documents electronically must file motions, in accordance with 10 CFR 2.302(g), with their initial paper filings, requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail, addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete, by first-class mail, as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service on depositing the document with the provider of the service.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket, which is available to the public at <http://>

ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers, in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair-Use application, Participants are requested not to include copyrighted materials in their works.

If a hearing is requested by FPL or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), FPL may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the grounds that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions as specified in Section III shall be final twenty (20) days from the date of this Order, without further Order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions, as specified in Section III, shall be final when the extension expires, if a hearing request has not been received. AN ANSWER OR A REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland this 7th day of May 2008.

Michael F. Weber,

Director, Office of Nuclear Material Safety and Safeguards.

Attachment 1—Additional Security Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs) Contains Safeguards Information and Is Not Included in the Federal Register Notice

Attachment 2—Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations, Dated December 19, 2007

A. General Basis Criteria

1. These additional security measures (ASMs) are established to delineate an independent spent fuel storage installation (ISFSI) licensee's responsibility to enhance security measures related to authorization for unescorted access to the protected area of an ISFSI in response to the current threat environment.

2. Licensees whose ISFSI is collocated with a power reactor may choose to comply with the NRC-approved reactor access authorization program for the associated reactor as an alternative means to satisfy the provisions of sections B through G below. Otherwise, licensees shall comply with the access authorization and fingerprinting requirements of sections B through G of these ASMs.

3. Licensees shall clearly distinguish in their 20-day response which method they intend to use in order to comply with these ASMs.

B. Additional Security Measures for Access Authorization Program

1. The licensee shall develop, implement and maintain a program, or enhance their existing program, designed to ensure that persons granted unescorted access to the protected area of an ISFSI are trustworthy and reliable and do not constitute an unreasonable risk to the public health and safety or the common defense and security, including a potential to commit radiological sabotage.

a. To establish trustworthiness and reliability, the licensee shall develop, implement, and maintain procedures for conducting and completing background investigations, prior to granting access. The scope of background investigations must address at least the past 3 years and, as a minimum, must include:

i. Fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check (CHRC).

Where an applicant for unescorted access has been previously fingerprinted with a favorably completed CHRC (such as a CHRC pursuant to compliance with orders for access to safeguards information) the licensee may accept the results of that CHRC, and need not submit another set of fingerprints, provided the CHRC was completed not more than 3 years from the date of the application for unescorted access.

ii. Verification of employment with each previous employer for the most recent year from the date of application.

iii. Verification of employment with an employer of the longest duration during any calendar month for the remaining next most recent two years.

iv. A full credit history review.

v. An interview with not less than two character references, developed by the investigator.

vi. A review of official identification (e.g., driver's license, passport, government identification, state, province or country of birth issued certificate of birth) to allow comparison of personal information data provided by the applicant. The licensee shall maintain a photocopy of the identifying document(s) on file, in accordance with "Protection of Information," in Section G of these ASMs.

vii. Licensees shall confirm eligibility for employment through the regulations of the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), and shall verify and ensure to the extent possible, the accuracy of the provided social security number and alien registration number as applicable.

b. The procedures developed or enhanced shall include measures for confirming the term, duration, and character of military service for the past 3 years, and/or academic enrollment and attendance in lieu of employment for the past 5 years.

c. Licensees need not conduct an independent investigation for individuals employed at a facility who possess active "Q" or "L" clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

d. A review of the applicant's criminal history, obtained from local criminal justice resources, may be included in addition to the FBI CHRC, and is encouraged if the results of the FBI CHRC, employment check, or credit check disclose derogatory information. The scope of the applicant's local criminal history check shall cover all residences of record for the past 3 years from the date of the application for unescorted access.

2. The licensee shall use any information obtained as part of a CHRC solely for the purpose of determining an individual's suitability for unescorted access to the protected area of an ISFSI.

3. The licensee shall document the basis for its determination for granting or denying access to the protected area of an ISFSI.

4. The licensee shall develop, implement, and maintain procedures for updating background investigations for persons who are applying for reinstatement of unescorted access.

Licensees need not conduct an independent reinvestigation for individuals who possess active "Q" or "L" clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

5. The licensee shall develop, implement, and maintain procedures for reinvestigations of persons granted unescorted access, at intervals not to exceed 5 years. Licensees need not conduct an independent reinvestigation for individuals employed at a facility who possess active "Q" or "L" clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

6. The licensee shall develop, implement, and maintain procedures designed to ensure that persons who have been denied unescorted access authorization to the facility are not allowed access to the facility, even under escort.

7. The licensee shall develop, implement, and maintain an audit program for licensee and contractor/vendor access authorization programs that evaluate all program elements and include a person knowledgeable and practiced in access authorization program performance objectives to assist in the overall assessment of the site's program effectiveness.

C. Fingerprinting Program Requirements

1. In a letter to the NRC, the licensee must nominate an individual who will review the results of the FBI CHRCs to make trustworthiness and reliability determinations for unescorted access to an ISFSI. This individual, referred to as the "reviewing official," must be someone who requires unescorted access to the ISFSI. The NRC will review the CHRC of any individual nominated to perform the reviewing official function. Based on the results of the CHRC, the NRC staff will determine whether this individual may have access. If the NRC determines that the nominee may not be granted such

access, that individual will be prohibited from obtaining access.¹ Once the NRC approves a reviewing official, the reviewing official is the only individual permitted to make access determinations for other individuals who have been identified by the licensee as having the need for unescorted access to the ISFSI, and have been fingerprinted and have had a CHRC in accordance with these ASMs. The reviewing official can only make access determinations for other individuals, and therefore cannot approve other individuals to act as reviewing officials. Only the NRC can approve a reviewing official. Therefore, if the licensee wishes to have a new or additional reviewing official, the NRC must approve that individual before he or she can act in the capacity of a reviewing official.

2. No person may have access to SGI or unescorted access to any facility subject to NRC regulation if the NRC has determined, in accordance with its administrative review process based on fingerprinting and an FBI identification and CHRC, that the person may not have access to SGI or unescorted access to any facility subject to NRC regulation.

3. All fingerprints obtained by the licensee pursuant to this Order must be submitted to the Commission for transmission to the FBI.

4. The licensee shall notify each affected individual that the fingerprints will be used to conduct a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the "Right to Correct and Complete Information" in section F of these ASMs.

5. Fingerprints need not be taken if the employed individual (e.g., a licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.61, has a favorably adjudicated U.S. Government CHRC within the last five (5) years, or has an active federal security clearance. Written confirmation from the Agency/employer who granted the federal security clearance or reviewed the CHRC must be provided to the licensee. The licensee must retain this documentation for a period of three (3) years from the date the individual no longer requires access to the facility.

D. Prohibitions

1. A licensee shall not base a final determination to deny an individual

¹ The NRC's determination of this individual's unescorted access to the ISFSI, in accordance with the process is an administrative determination that is outside the scope of the Order.

unescorted access to the protected area of an ISFSI solely on the basis of information received from the FBI involving: An arrest more than one (1) year old for which there is no information of the disposition of the case, or an arrest that resulted in dismissal of the charge or an acquittal.

2. A licensee shall not use information received from a CHRC obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the licensee use the information in any way which would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

E. Procedures for Processing Fingerprint Checks

1. For the purpose of complying with this Order, licensees shall, using an appropriate method listed in 10 CFR 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop T-6E46, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking unescorted access to an ISFSI, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by calling (301) 415-5877, or by e-mail to forms@nrc.gov. Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

2. The NRC will review submitted fingerprint cards for completeness. Any Form FD-258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free resubmission must have the FBI Transaction Control Number reflected on the resubmission. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

3. Fees for processing fingerprint checks are due upon application. The licensee shall submit payment of the

processing fees electronically. In order to be able to submit secure electronic payments, licensees will need to establish an account with Pay.Gov (<https://www.pay.gov>). To request an account, the licensee shall send an e-mail to det@nrc.gov. The e-mail must include the licensee's company name, address, point of contact (POC), POC e-mail address, and phone number. The NRC will forward the request to Pay.Gov; who will contact the licensee with a password and user ID. Once licensees have established an account and submitted payment to Pay.Gov, they shall obtain a receipt. The licensee shall submit the receipt from Pay.Gov to the NRC along with fingerprint cards. For additional guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 415-7739. Combined payment for multiple applications is acceptable. The application fee (currently \$36) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will directly notify licensees who are subject to this regulation of any fee changes.

4. The Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks, including the FBI fingerprint record.

F. Right To Correct and Complete Information

1. Prior to any final adverse determination, the licensee shall make available to the individual the contents of any criminal history records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of notification.

2. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the

Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537-9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of a FBI CHRC after the record is made available for his/her review. The licensee may make a final access determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to an ISFSI, the licensee shall provide the individual its documented basis for denial. Access to an ISFSI shall not be granted to an individual during the review process.

G. Protection of Information

1. The licensee shall develop, implement, and maintain a system for personnel information management with appropriate procedures for the protection of personal, confidential information. This system shall be designed to prohibit unauthorized access to sensitive information and to prohibit modification of the information without authorization.

2. Each licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures, for protecting the record and the personal information from unauthorized disclosure.

3. The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining suitability for unescorted access to the protected area of an ISFSI. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have the appropriate need-to-know.

4. The personal information obtained on an individual from a criminal history record check may be transferred to another licensee if the gaining licensee receives the individual's written request to re-disseminate the information

contained in his/her file, and the gaining licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

5. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

[FR Doc. E8-11346 Filed 5-20-08; 8:45 am]

BILLING CODE 7590-01-P

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review, Request for Comments

Summary: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) is forwarding an Information Collection Request (ICR) to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) to request an extension of a currently approved collection of information: 3220-0034, Statement of Authority to Act for Employee. Our ICR describes the information we seek to collect from the public. Review and approval by OIRA ensures that we impose appropriate paperwork burdens.

The RRB invites comments on the proposed collection of information to determine (1) The practical utility of the collection; (2) the accuracy of the estimated burden of the collection; (3) ways to enhance the quality, utility and clarity of the information that is the subject of collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology. Comments to RRB or OIRA must contain the OMB control number of the ICR. For proper consideration of your comments, it is best if RRB and OIRA receive them within 30 days of publication date.

Under Section 5(a) of the Railroad Unemployment Insurance Act (RUIA), claims for benefits are to be made in accordance with such regulations as the Railroad Retirement Board (RRB) shall prescribe. The provisions for claiming sickness benefits as provided by Section 2 of the RUIA are prescribed in 20 CFR 335.2. Included in these provisions is the RRB's acceptance of forms executed by someone else on behalf of an employee if the RRB is satisfied that the employee is sick or injured to the extent of being unable to sign forms.

The RRB utilizes Form SI-10, Statement of Authority to Act for Employee, to provide the means for an individual to apply for authority to act on behalf of an incapacitated employee and also to obtain the information necessary to determine that the delegation should be made. Part I of the form is completed by the applicant for the authority and Part II is completed by the employee's doctor. One response is requested of each respondent. Completion is required to obtain a benefit. The RRB proposes no changes to Form SI-10.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (73 FR 13261 on March 12, 2008) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Statement of Authority to Act for Employee.

OMB Control Number: OMB 3220-0034.

Form(s) submitted: SI-10.

Type of request: Extension without change of a currently approved collection.

Affected public: Individuals or Households.

Abstract: Under 20 CFR 335.2, the Railroad Retirement Board (RRB) accepts claims for sickness benefits by other than the sick or injured employees, provided the RRB has the information needed to satisfy itself that the delegation should be made.

Changes Proposed: The RRB proposes no changed to Form SI-10.

The burden estimate for the ICR is as follows:

Estimated Completion Time for Form(s): Completion time for SI-10 is estimated at 6 minutes.

Estimated annual number of respondents: 400.

Total annual responses: 400.

Total annual reporting hours: 40.

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer at (312-751-3363) or Charles.Mierzwa@rrb.gov.

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611-2092 or Ronald.Hodapp@rrb.gov and to the OMB Desk Officer for the RRB, at the Office of Management and Budget,

Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,
Clearance Officer.

[FR Doc. E8-11322 Filed 5-20-08; 8:45 am]

BILLING CODE 7905-01-P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549-0213.

Extension:

Form S-4; OMB Control No. 3235-0324; SEC File No. 270-287.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form S-4 (17 CFR 239.25) is the registration form used to register securities issued in business combination transactions under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). The information collected is intended to ensure the adequacy of information available to investors in connection with business combination transactions. Form S-4 takes approximately 4,064 hours per response to prepare and is filed by 619 registrants annually. We estimate that 25% of the 4,064 hours per response (1,016 hours) is prepared by the registrant for an annual reporting burden of 628,904 hours (1,016 hours per response x 619 responses). The remaining 75% of the burden hours is prepared by outside counsel.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information

technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: PRA_Mailbox@sec.gov.

Dated: May 14, 2008.

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E8-11280 Filed 5-20-08; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549.

Extension:

Rule 17a-22; SEC File No. 270-202; OMB Control No. 3235-0196.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

- Rule 17a-22 (17 CFR 240.17a-22)—Supplemental Material of Registered Clearing Agencies

Rule 17a-22 under the Securities Exchange Act of 1934 ("Exchange Act")¹ requires all registered clearing agencies to file with the Commission three copies of all materials they issue or make generally available to their participants or other entities with whom they have a significant relationship. The filings with the Commission must be made within ten days after the materials are issued or made generally available. When the Commission is not the clearing agency's appropriate regulatory agency, the clearing agency must file one copy of the material with its appropriate regulatory agency.

The Commission is responsible for overseeing clearing agencies and uses the information filed pursuant to Rule 17a-22 to determine whether a clearing

agency is implementing procedural or policy changes. The information filed aides the Commission in determining whether such changes are consistent with the purposes of Section 17A of the Exchange Act. Also, the Commission uses the information to determine whether a clearing agency has changed its rules without reporting the actual or prospective change to the Commission as required under Section 19(b) of the Exchange Act.

The respondents to Rule 17a-22 are registered clearing agencies. The frequency of filings made by clearing agencies pursuant to Rule 17a-22 varies but on average there are approximately 200 filings per year per active clearing agency. The Commission staff estimates that each response requires approximately .25 hour (fifteen minutes), which represents the time it takes for a staff person at the clearing agency to properly identify a document subject to the rule, print and makes copies, and mail that document to the Commission. Thus, the total annual burden for all active clearing agencies is 300 hours (1,200 multiplied by .25 hour) and a total of 50 hours (1,200 responses multiplied by .25 hour, divided by 6 active clearing agencies) per year are expended by each respondent to comply with the rule.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to: R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: PRA_Mailbox@sec.gov. Comments must be submitted within 60 days of this notice.

Dated: May 14, 2008.

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E8-11281 Filed 5-20-08; 8:45 am]

BILLING CODE 8010-01-P

SMALL BUSINESS ADMINISTRATION

National Small Business Development Center Advisory Board Meeting

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time and agenda for the next meeting of the National Small Business Development Center (SBDC) Advisory Board.

DATES: The meeting will be held on Monday, June 9, 2008 at 2 p.m. EST.

ADDRESSES: This meeting will be held at the Small Business and Technology Development Center, 5 West Hargett Street, Suite 600, Raleigh, North Carolina.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) of the Federal Advisory Committee Act (5 U.S.C. Appendix 2), SBA announces the meeting of the National SBDC Advisory Board. This Board provides advice and counsel to the SBA Administrator and Associate Administrator for Small Business Development Centers.

The purpose of this meeting is to discuss following issues pertaining to the SBDC Advisory Board:

- Agenda for tour of North Carolina Small Business and Technology Development Center.
- Discussion on Board roles, responsibilities, and expectations.
- New Board nominations.
- SBA Update from AA/OSBDCs.
- White Paper discussion.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public however advance notice of attendance is requested. Anyone wishing to attend and/or make a presentation to the Board must contact Alanna Falcone by Tuesday, May 27, 2008, by fax or e-mail in order to be placed on the agenda. Alanna Falcone, Program Analyst, 409 Third Street, SW., Washington, DC 20416, Phone, 202-619-1612, Fax 202-481-0134, e-mail, alanna.falcone@sba.gov.

Additionally, if you need accommodations because of a disability or require additional information, please contact Alanna Falcone at the information above.

Cheryl H. Lebon,
Committee Management Officer.

[FR Doc. E8-11358 Filed 5-20-08; 8:45 am]

BILLING CODE 8025-01-P

¹ 15 U.S.C. 78a *et seq.*

DEPARTMENT OF STATE**[Public Notice 6214]****Certifications Pursuant to Section 609 of Public Law 101-162**

SUMMARY: On May 1, 2008, the Department of State certified, pursuant to Section 609 of Public Law 101-162 ("Section 609"), that 16 nations have adopted programs to reduce the incidental capture of sea turtles in their shrimp fisheries comparable to the program in effect in the United States. The Department also certified that the fishing environments in 24 other countries and one economy, Hong Kong, do not pose a threat of the incidental taking of sea turtles protected under Section 609. Shrimp imports from any nation not certified were prohibited effective May 1, 2008 pursuant to Section 609.

EFFECTIVE DATE: On Publication.**FOR FURTHER INFORMATION CONTACT:**

Clayton Stanger, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington, DC 20520-7818; telephone: (202) 647-2335.

SUPPLEMENTARY INFORMATION: Section 609 of Public Law 101-162 prohibits imports of certain categories of shrimp unless the President certifies to the Congress not later than May 1 of each year either: (1) That the harvesting nation has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States; or (2) that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. The President has delegated the authority to make this certification to the Department of State. Revised State Department guidelines for making the required certifications were published in the **Federal Register** on July 2, 1999 (Vol. 64, No. 130, Public Notice 3086).

On May 1, 2008, the Department certified 16 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Belize, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Madagascar, Mexico, Nicaragua, Nigeria, Pakistan, Panama, Suriname, and Venezuela.

The Department also certified 24 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have

shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Eight nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The eight nations and one economy are: the Bahamas, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru and Sri Lanka.

The Department of State has communicated the certifications under Section 609 to the Office of Field Operations of U.S. Customs and Border Protection.

In addition, this **Federal Register** Notice confirms that the requirement for all DS-2031 forms from uncertified nations must be originals and signed by the competent domestic fisheries authority. This policy change was first announced in a Department of State media note released on December 21, 2004. In order for shrimp harvested with Turtle Excluder Devices (TEDs) in an uncertified nation to be eligible for importation into the United States under the exemption: "Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States", the Department of State must determine in advance that the government of the harvesting nation has put in place adequate procedures to ensure the accurate completion of the DS-2031 forms. At this time, the Department has made such a determination only with respect to Brazil and Australia. Thus, the importation of TED-caught shrimp from any other uncertified nation will not be allowed. For Brazil, only shrimp harvested in the northern shrimp fishery are eligible for entry under this exemption. For Australia, shrimp harvested in the Exmouth, Northern Prawn Fishery and Torres Strait Fishery are eligible for entry under this exemption.

In addition, the Department has already made a determination with regard to wild-harvest shrimp harvested in the Spencer Gulf region in Australia. This product may be exported to the U.S. using a DS-2031 under the exemption for "shrimp harvested in a manner or under circumstances determined by the Department of State

not to pose a threat of the incidental taking of sea turtles." An official of the Government of Australia still also must certify the DS-2031.

Dated: May 2, 2008.

David A. Balton,

Deputy Assistant Secretary for Oceans and Fisheries, Department of State.

[FR Doc. E8-11380 Filed 5-20-08; 8:45 am]

BILLING CODE 4710-09-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 7, 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-2007-0084.

Date Filed: March 7, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 28, 2008.

Description:

Application of Colgan Air, Inc. requesting a certificate of public convenience and necessity to engage in scheduled foreign air transportation of persons, property and mail between (i) a point or points in the United States and a point or points in all countries with existing "Open Skies" Air Services Agreements with the United States ("U.S. open-skies partner"), via intermediate points and beyond; and (ii) a point or points in the United States and a point or points in all countries that in the future become U.S. open-skies partners, via intermediate points and beyond.

Renee V. Wright,

Program Manager, Docket Operations Federal Register Liaison.

[FR Doc. E8-11354 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****[Docket No. FAA-2008-0221]****Operating Limitations at Newark Liberty International Airport****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Order Limiting Scheduled Operations at Newark Liberty International Airport.

SUMMARY: In a proposed order published on March 18, 2008, the Federal Aviation Administration (FAA) tentatively identified the parameters of an order that would temporarily limit scheduled flight operations at Newark Liberty International Airport (EWR).¹ The FAA issued the proposal as a result of persistent congestion and delays at EWR during the peak operating hours, as well as a dramatic projected increase in flight delays at the airport during the summer of 2008 if proposed schedules were implemented as requested by carriers. After evaluating the written comment submitted to the public docket in this matter, the FAA is issuing this final Order, which will take effect at 6 a.m., Eastern Time, on June 20, 2008.

If you wish to review the background documents or comments received in this proceeding, you may go to <http://www.regulations.gov> at any time and follow the online instructions for accessing the electronic docket. You may also go to the U.S. Department of Transportation's Docket Operations in Room W12-140 on the ground floor of the West Building at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Gerry Shakley, System Operations Services, Air Traffic Organization; telephone—(202) 267-9424; e-mail—gerry.shakley@faa.gov.

SUPPLEMENTARY INFORMATION:**I. Background**

EWR has historically experienced a significant number of delays relative to the other airports in the domestic system. When ranked according to the proportion of delayed operations, EWR has frequently been the most delayed airport in the country. Moreover, EWR's on-time performance has deteriorated in recent years. The percent of on-time gate arrivals within 15 minutes of the scheduled time decreased from 70.66% in fiscal year (FY) 2000 to 63.97% in FY

2006 and to 61.71% in FY 2007. The average daily counts of arrival delays greater than one hour were 54 in FY 2000; 79 in FY 2006; and 93 in FY 2007, an increase of almost 18% in the last fiscal year alone.

One of the factors contributing to the EWR's declining performance has been the carriers' scheduling practices at the airport. Daily operations have been relatively stable while delays have continued to increase. In Fiscal Year (FY) 2000, there were 1,253 average daily operations. In FY 2007, there were 1,219 average daily operations, a decrease of about 3 percent. Demand during the most desirable peak hours, however, approached or exceeded the average runway capacity resulting in volume-related delays. The cumulative impact of such scheduling by all carriers can result in delays even under ideal weather conditions. However, the resulting delays become even more pronounced when weather or other operating conditions reduce the airport's capacity below optimal levels.

During the summer of 2007, in addition to the delays experienced at EWR, another New York-area airport, John F. Kennedy International Airport (JFK), also experienced significant congestion-related delays. Based on both airports' summer 2007 performance, and in the absence of any major capacity enhancing projects, the FAA designated the airports as Level 2, Schedules Facilitated Airports for the summer 2008 scheduling season, in accordance with the International Air Transport Association (IATA) Worldwide Scheduling Guidelines.² In designating the airports as IATA Level 2, Schedules Facilitated Airports, the FAA required all U.S. and foreign air carriers to report to the FAA their proposed summer 2008 scheduled operations at the airports during designated hours. With respect to EWR, the FAA specifically noted that it intended to work with carriers on the flight operations planned from 7 until 10 a.m. and from 2 until 10 p.m., Eastern Time.³ The FAA further specified that it was considering its options to "further address congestion and improve operational performance at EWR, including the timing of flights at the airport and their impact on the airport's operation."⁴

The information that U.S. and foreign air carriers reported to the FAA regarding their proposed operations at EWR reflected a significant increase in scheduled operations, especially during

the most oversubscribed hours when the airport routinely experienced delays. U.S. and foreign air carriers requested about 100 new operations, adding to the schedules that produced pronounced delays during summer 2007. The proposed schedules in the afternoon and evening period were of the greatest concern. For example, several consecutive hours would have had demand for arrivals or departures in the mid-90s and others in the upper 80s. By contrast, EWR's adjusted average airport capacity reflects that, from September 2006 through August 2007, the airport handled or was capable of handling an average of 83 operations per hour.

The FAA modeled the level of delays that passengers transiting EWR could expect if the carriers were to operate the summer 2008 schedules that they proposed. When compared with EWR's modeled baseline delays during the summer of 2007, the average arrival delays would have increased 38% to 35 minutes; the average number of arrival delays of at least one hour would have increased 50%; and the mean arrival delay would have reached almost 80 minutes by 7 p.m. The proposed schedules also would have negatively affected departures.⁵

In response to the U.S. and foreign air carriers' proposed summer 2008 schedules, the FAA held discussions with many of the carriers to validate their schedule requests and to ask them to reconsider their proposed timings in light of the airport's capacity limitations. Although there were some modest revisions to the proposed schedules, it was clear that demand would continue to exceed capacity without further action, as some carriers indicated that they would operate as proposed despite the FAA's concern about the impact on delays. In addition, the FAA anticipated that carriers might try to add still more operations at EWR when a forthcoming operational limitation took effect at nearby JFK,⁶ in effect shifting a portion of that problem to an already oversubscribed EWR. As a result, the FAA elected to modify EWR's IATA designation to a Level 3, Coordinated Airport for summer 2008.⁷ This designation provided notice, in accordance with international norms, that the FAA would focus proposed new operations at the airport on hours during which airport capacity is

⁵ As with previous aircraft queuing model runs produced for the FAA by the MITRE Corporation's Center for Advanced Aviation System Development, it was assumed that no scheduled operation was cancelled.

⁶ 73 FR 3,510 (Jan. 18, 2008) (order limiting scheduled operations at JFK).

⁷ 72 FR 73,418 (Dec. 27, 2007).

² 72 FR 54,317 (Sept. 24, 2007).

³ *Id.*, at 54,318.

⁴ *Id.*

¹ 73 FR 14,552 (Mar. 18, 2008).

available and to deny proposed new operations during oversubscribed hours. Some carriers, including Continental Airlines, the primary hub carrier at EWR, moved flights from historic peak hours to less congested times in order to assist with delay reduction. The FAA published in the appendix to the proposed order the results of the discussions with U.S. and foreign air carriers and our approved schedules reflecting very limited peak-hour growth.⁸ While the proposed order, through the appendix, provided the public with notice of the state of the FAA's discussions with carriers under the IATA Worldwide Scheduling Guideline process, the principal purpose of the proposed order was to describe and to raise for public comment a series of practical considerations that the FAA must address when it undertakes to place a temporary limit on operations at an airport.

II. Summary and Analysis of the Comments

As of May 1, 2008 the FAA received in the public docket 78 written comments on the FAA's proposed order. The vast majority of the commenters support the FAA's effort, as a general matter, to control congestion and delays at EWR. A small number of comments question certain aspects of the FAA's proposal.

One commenter—Virgin America, Inc.—expresses its preference that the FAA had followed a different process in limiting operations at EWR. Virgin America specifically would prefer that the FAA had conducted a scheduling reduction meeting for scheduled operations at EWR, as the FAA did in limiting scheduled operations at JFK.

The FAA holds a number of options in controlling congestion at a particular airport. As the FAA articulated when it requested the carriers' anticipated summer 2008 schedules involving EWR, the FAA considered them all in selecting its course with respect to EWR. There is no requirement that the FAA pursue a particular avenue in addressing airport congestion, and small differences in a particular airport's operations can argue for a slightly different solution. The FAA's election to improve the carriers' scheduling and EWR's performance through a combination of the IATA scheduling process and a voluntary drawing down of carriers' schedules during the oversubscribed hours was a rational method of addressing congestion-related delay at the airport. Moreover, and

equally important, it was both an expedient course and a permissible exercise of the FAA's discretion.

Nor is it apparent that conducting a scheduling reduction meeting like that held for JFK would have led to a different result than that expressed in the proposed order for EWR. The FAA published both JFK's and EWR's designation as IATA Level 2, Schedules Facilitated Airports in the same document.⁹ The starting point for the FAA's discussions with carriers at the subsequent scheduling reduction meeting for JFK was the proposed schedules that the carriers submitted pursuant to JFK's designation as an IATA Level 2, Schedules Facilitated Airport. Many carriers at JFK, including those with the largest presence at the airport, agreed to reduce flights during the most desirable hours in order to improve operational performance and to benefit all operators. At the same time, the FAA ensured that other carriers were restricted from adding new flights during the previously oversubscribed hours, which would have offset the delay reduction that the other carriers' schedule adjustments achieved. The FAA accommodated a few timely requested new operations during the hours of peak demand.

The FAA applied the same general policy approach at EWR, with the objective of preventing a further degradation in operational performance by keeping demand within the average available capacity. We recognize Virgin America's position that it did not take advantage of the IATA schedule submission requirement or the initial ensuing IATA schedule discussions regarding EWR. As a result, in consideration of Virgin America's newly advanced request for scheduled operations, the FAA attempted to accommodate Virgin America during the hours that are scheduled below the airport's adjusted average hourly capacity. The discussions leading to the FAA's proposed order, including the conversations with Virgin America, necessarily had the same tenor as a scheduling reduction meeting's discussions. If the FAA were to conduct a scheduling reduction meeting for EWR, we do not expect that the product would differ materially from the results published in the appendix to the proposed order.

⁹ Although Virgin America identified its intention to conduct operations at JFK during summer 2008, it filed no such intention in response to EWR's IATA Level 2 designation. After the FAA declared EWR an IATA Level 3, Fully Coordinated Airport, Virgin America indicated for the first time a desire to provide scheduled service there.

Virgin America and the Air Carrier Association of America also state that the proposed order diminishes the ability of new entrants to compete at EWR and strengthens the position of EWR's hub carrier. In particular, Virgin America notes the potential that more established carriers could abuse the proposed mechanisms of retiming operations and permitting operational growth at EWR. Virgin America and the Air Carrier Association of America recommend a periodic withdrawal and redistribution of Operating Authorizations to stimulate competition. We emphasize, however, that we intended the proposed order to describe a short-term vehicle to preserve realistic scheduling at EWR while longer term solutions are applied to relieve EWR's congestion and delay. The mechanisms that we identified to permit operational flexibility and growth within the airport's capacity, if applied fairly and without discrimination, should provide opportunities during the relatively brief duration of this final Order. While we anticipate that all carriers will conduct their transactions under this Order in a principled way, the FAA will closely monitor the operation of the airport and the application of the mechanisms for the trade and lease of Operating Authorizations while this Order remains in effect. If we detect unfair or anticompetitive behavior, we will not hesitate to take corrective action and to propose more stringent controls on such transactions in the future.

One commenter—Porter Airlines, Inc.—requests an amendment to the appendix of the proposed order to grant it fourteen total operations at EWR during the time periods that it originally requested of the FAA. Porter contends that it received an approved schedule from the EWR Terminal/Gate Schedules Facilitator and that the FAA should allow it to operate that schedule. Porter, as well as the Air Transport Association of Canada, also contends that the FAA's proposed allocations would violate the U.S.-Canada Open Skies Agreement. In a supplemental filing, Porter asks the FAA to reconsider the allocation of Operating Authorizations to Porter if any Operating Authorization becomes available in the future, such as by the revised operating plans of other carriers.¹⁰

¹⁰ Eos Airlines, for example, recently ceased operations after April 27, 2008. Eos does not have historic scheduled operations at EWR, and it has not commenced the operations it planned to conduct at EWR this summer and for which the FAA proposed to allocate Operating Authorizations. Because Eos has ceased to conduct scheduled

⁸ 73 FR at 14,558–65.

Throughout the process that led to the FAA's proposed order, the FAA's representatives were candid during and after the IATA Schedules Conference in November 2007 regarding the potential for restricted operations at EWR, particularly in the already oversubscribed afternoon and evening hours. The FAA expressly made Porter aware that it was not granting approval, based on runway capacity, for all Porter's proposed new operations during the peak hours, that the FAA was continuing to seek voluntary moves by carriers to retime schedule requests, and that any plans to conduct scheduled operations during those periods would be at Porter's own risk. Consistent with the FAA's preliminary assessment of the operational impact of the carriers' proposed schedules, the FAA determined that it was necessary to modify EWR's designation from Level 2 to Level 3 when it became clear that voluntary schedule adjustments by the carriers to avoid the overscheduling of EWR's peak hours were not achievable.

With respect to the FAA's proposed allocation of Operating Authorizations, the U.S.–Canada Open Skies Agreement requires the FAA to accord fair and equal, not preferential, treatment. Contrary to Porter Airlines' suggestion, the FAA's proposal treats Porter Airlines identically to all air carriers that are similarly situated at EWR. In addition, like all other carriers, Porter Airlines will retain the flexibility under this Order to trade, to lease, and to request retimings of its scheduled operations to enhance its competitive posture. Retiming of an approved Operating Authorization for any carrier, however, would be granted only if capacity exists, if the FAA determines that it does not diminish the efficiency of the airport's operations, and if it is otherwise consistent with the provisions and policies expressed in this Order.

Porter's request in its supplemental filing for an additional two Operating Authorizations in the 5 p.m. and 7 p.m. hours and its request to retime an approved arrival in the 9 p.m. half hour to the 8 p.m. hour are denied. Shifting a 9 p.m. half hour flight to the earlier, more problematic hours would increase congestion and would not be equitable to other carriers that are unable to make similar moves. As a carrier that did not have any historic operations at EWR but that timely indicated that it would provide summer 2008 service, Porter Airlines was permitted one new roundtrip during the airport's busiest

period, from 3 p.m. through 8:59 p.m. The FAA proposed similar allocations for two other new entrant carriers that timely indicated their intention to initiate service at EWR. By contrast, other carriers, including those with a limited existing presence at the airport, were not permitted to add new flights during those hours. In addition, other carriers either removed or rescheduled some historically conducted operations during that period to reduce delays. Adding even a few flights to that period diminishes the delay reduction benefits that the voluntary moves of other carriers have achieved. Accordingly, the FAA's manner of accommodating new entrant carriers at EWR is adopted as proposed.

Air Canada, the Air Transport Association of America, and American Airlines recommend adjustments to the FAA's proposed 80% usage requirement for Operating Authorizations. They request that the FAA consider an Operating Authorization as used if the carrier elects to cancel a flight due to a ground delay program. The Air Transport Association and American Airlines further request that the FAA consider an Operating Authorization used if the carrier elects to cancel a flight because a de-icing program is in effect.

For the present time, the FAA has decided not to amend the proposal to include categorical exclusions from the minimum usage requirement for flight cancellations for reasons such as ground delay or de-icing programs. In arriving at this conclusion, we understand that, during extreme conditions of extended delays or reduced capacity, carriers may find it necessary or practical to cancel a flight rather than conduct it several hours later. In such situations, carriers might accommodate passengers efficiently on other flights, permitting carriers to work on overall network recovery through a tactical use of flight cancellations. Moreover, under these circumstances, flight cancellations may deliver operational benefits to the National Airspace System, because delays would be even longer for all system users absent flight cancellations during reduced capacity conditions.

Nevertheless, we must balance these considerations against the overall efficient use of a scarce operational resource. The proposed minimum usage requirement permits carriers to suspend flights for operational reasons up to 20% of the time. Furthermore, the FAA may waive the usage requirement in the face of highly unusual and unpredictable conditions that are beyond the control of the carriers and that affect carrier operations for at least

five consecutive days. Under normal circumstances, this degree of flexibility should be sufficient to absorb the occasional cancellation of a scheduled operation and still permit carriers to meet the minimum usage threshold, if the planned usage is near 100%. Carriers that do not schedule operations for all their assigned authority increase the risk of falling below the minimum usage threshold, and it is not the FAA's intention to facilitate a carrier's underutilization of an Operating Authorization by granting additional usage exceptions.¹¹ While this Order is in effect, the FAA invites carriers to highlight specific instances in which the available measures appear insufficient. Such information may provide the good cause necessary to modify this Order.

The Air Transport Association and American Airlines submitted comments on the FAA's proposed termination of the Order on October 24, 2009. In their opinion, the FAA could avoid the lack of certainty that a potential series of short-term extensions would cause if the FAA would tie the Order's expiration date to the effective date of a replacement rule. They note that such an approach was effective in the FAA order capping scheduled operations at LaGuardia Airport.

The FAA originally considered whether the termination date of this Order should be open-ended, tied to the adoption of a replacement rule, or as proposed, identified as a date certain. We rejected the notion of leaving this Order open-ended or tying its expiration to the effective date of a replacement rule. This Order is constructed to provide short-term relief from the congestion that EWR would otherwise experience. We do not deem it appropriate as a longer-term structure for EWR's operations. Accordingly, we will retain the Order's proposed expiration date.

American Airlines suggests that the FAA's proposal to require carriers to use an Operating Authorization for 90 days before leasing or transferring it should be changed. Because Operating Authorizations were not previously assigned at EWR, American Airlines instead contends that a 90-day usage requirement in this context should look back to the period that carriers conducted the underlying historic

¹¹ We further note that, under this Order, carriers may return Operating Authorizations to the FAA on or before the seasonal deadline for the periods during which the carriers do not intend to use them. This allows carriers to adjust their seasonal allocation to match more precisely the carriers' known schedules at the time of the deadline. Additionally, this Order creates a secondary market for the transfer of Operating Authorizations to another carrier that is able to use them.

operations, the FAA is not allocating Operating Authorizations to Eos in the appendix to this final Order.

operations before the final Order takes effect. According to American Airlines, the market for Operating Authorizations would otherwise be suppressed for most of the summer 2008 scheduling season—a prospect that Porter Airlines also views negatively in its comments.

To facilitate the secondary market for Operating Authorizations during the summer of 2008, the FAA agrees that this limitation should be amended to permit an earlier lease or transfer of Operating Authorizations that correspond to historically conducted operations with one caveat. In particular, we remain concerned about a potential abuse here and in the future of the process under which the FAA arrives at the final allocations, whereby a carrier could accept Operating Authorizations to conduct new operations while also attempting to control via lease the operator of the carriers' historically conducted operations. This could serve as a disincentive for carriers to discuss their schedule plans in good faith, it is unfair to carriers that have concrete plans to serve the airport, and it could afford a carrier control over a greater share of the airport's operations than any portion that the carrier ever conducted there. Therefore, the FAA will amend the final Order to permit the lease or transfer of Operating Authorizations whenever the carrier can demonstrate that it operated the flight that corresponds to the Operating Authorization at least 80% of the 90-day period immediately preceding the lease or transfer. However, we will monitor the net effect of the carriers' lease transactions with respect to their newly allocated Operating Authorizations. If it is apparent that a carrier requested Operating Authorizations that it did not intend to utilize, the FAA may consider that circumstance in assessing the carrier's future representations with respect to its need for capacity at this or other airports.

Kalitta Air, LLC, comments that it is uniquely burdened by the proposed order due to its contract with the United States Postal Service (USPS) to carry mail for the U.S. military. It indicates that it regularly operates 10 or more departures from EWR each week but that the number and time of the flights may vary to meet the contractual requirements. Kalitta further notes that some periods of the year, such as the December holidays, have historically generated more flights and that it must operate additional flights to accommodate the mail during other times, as well. Kalitta cites as possible solutions a large pool of authority for day-of unscheduled operations, the use

of "extra section" authority, and a reduction in the hours when operational limits will apply at EWR. Kalitta also indicates it would like to revise its historic summer 2007 schedules to operate at different times.

The FAA understands that all carriers may need to revise their plans to conduct scheduled operations at EWR after this Order takes effect. The FAA intends to issue a proposal to institute a reservations system for unscheduled flights, and some of the issues that Kalitta raises regarding the availability of last-minute operations will be addressed in that context. A finite number of reservations are expected for unscheduled operations during the peak hours; however, there is a potential for additional reservations for last-minute unscheduled operations if operating and delay conditions permit. We expect that the ultimate structure for scheduled and unscheduled operations will accommodate the historic patterns of demand that cargo operators experience during particular times of year, such as the months of November and December, but some retiming of proposed schedules may be required.

The type of operational flexibility that Kalitta seeks to conduct operations during EWR's busiest hours is not practical, given the airport's limited capacity and trend toward congestion-related delays. The service that Kalitta provides to meet its USPS contract may be unique in its individual circumstances, but it does not materially differ as a practical matter from the limitations imposed on other operators. In some respects, cargo operations may have options that are not reasonably available to passenger-carrying and other operators, permitting flights at less-congested times. To this degree, it may be easier for a cargo operator to trade for or lease Operating Authorizations at favorable times than is the case for other carriers operating at EWR.

As with other carriers, the FAA will not accept changes from a cargo operator's historic operations if the net result would be increased congestion. For example, the FAA cannot approve Kalitta's request to move a flight from the 9 p.m. hour to the 7 p.m. hour. Nevertheless, the FAA will work with Kalitta—as it will continue to do with other carriers—on schedule adjustments, but those adjustments must recognize the limits under this Order.

A number of the commenters express opinions regarding the FAA's future allocation of Operating Authorizations at EWR. American Airlines advocates the FAA's long-term use of the IATA

Worldwide Scheduling Guidelines at all congested airports, whereas the Air Carrier Association of America opposes the FAA's reliance on the Worldwide Scheduling Guidelines. The Air Transport Association of America, the Air Transport Association of Canada, and American Airlines oppose the FAA's use of auctions to allocate new or returned capacity at EWR, and the Air Carrier Association of America identifies alternative market-based allocation concepts.

The FAA's principal purpose in issuing the proposed order was to curb the overscheduling that passengers transiting EWR would experience during the summer of 2008 if the FAA failed to intervene. This final Order will result in significantly better performance at the airport than would occur if carriers were to implement the schedules that they originally proposed. The manner in which the FAA will allocate operational authority to conduct scheduled operations after this Order expires will be the subject of a rulemaking proceeding in a separate docket. Carriers that wish to register an opinion regarding that proposal should file their responsive written comments in the public docket that the FAA will open for that proceeding.

Regarding the language in the proposed order that refers to a future auction of new and returned capacity at EWR while this final Order remains in effect, the FAA does not anticipate the immediate availability of a significant volume of new or returned capacity at EWR. However, the FAA expects that the need may arise to conduct an auction of new or returned capacity at EWR or JFK before the end of this calendar year. If this proves to be true, we anticipate that we would allocate such capacity for a 5- to 10-year term. The FAA has authority to lease real and personal property, including intangible property, to others. 49 U.S.C. 106(l)(6) and 106(n). Because the auction would address an FAA lease of Operating Authorizations awarded by the FAA under its leasing authority rather than under an administrative allocation, notice to the interested parties will be governed by applicable procurement law, rather than by the Administrative Procedure Act. The details regarding a potential auction will be disclosed when the FAA is ready to proceed with an auction. In accordance with the FAA's Acquisition Management System, the FAA will publicly announce its intention to conduct an auction on a particular date or over the course of a particular period of time. The FAA will also announce its proposed auction procedures and solicit comments on

those procedures. The FAA will consider the comments that it receives and then publish the final auction procedures. Any interested party will have an avenue to protest the procedures up until the date of the auction, in accordance with 49 U.S.C. 40110(d)(4) and 14 CFR Part 17.

The individual and non-airline organizational commenters express nearly universal support for the proposed limit on scheduled operations at EWR, primarily because they view it as an alternative to the delay reduction anticipated from New York-New Jersey-Philadelphia airspace redesign. The airspace redesign project to which they refer is an initiative that is independent of this temporary limitation on flights at EWR, and it will reduce congestion-related delay in that region over the long term. The FAA will implement elements of the airspace redesign over five years, and as a result, the full benefit of the redesign will be realized in stages. By contrast, this Order will provide temporary relief from the heightened delays that the region would experience as early as this summer if carriers were permitted to operate the schedules that they proposed. The FAA does not intend this Order to serve as a long-term solution to congestion-related delay at and around EWR.

Accordingly, with respect to scheduled flight operations at EWR, it is ordered that:

1. This Order assigns operating authority to conduct an arrival or a departure at EWR during the affected hours to the U.S. air carrier or foreign air carrier identified in the appendix to this Order. The FAA will not assign operating authority under this Order to any person or entity other than a certificated U.S. or foreign air carrier with appropriate economic authority and FAA operating authority under 14 CFR Part 121, 129, or 135. This Order applies to the following:

a. All U.S. air carriers and foreign air carriers conducting scheduled operations at EWR as of the date of this Order, any U.S. air carrier or foreign air carrier that operates under the same designator code as such a carrier, and any air carrier or foreign-flag carrier that has or enters into a codeshare agreement with such a carrier.

b. All U.S. air carriers or foreign air carriers initiating scheduled or regularly conducted commercial service to EWR while this Order is in effect.

c. The Chief Counsel of the FAA, in consultation with the Vice President, System Operations Services, is the final decision-maker for determinations under this Order.

2. This Order governs scheduled arrivals and departures at EWR from 6 a.m. through 10:59 p.m., Eastern Time, Sunday through Saturday.

3. This Order takes effect at 6 a.m., Eastern Time, on June 20, 2008, and expires at 11:59 p.m., Eastern Time, on October 24, 2009.

4. Under the authority provided to the Secretary of Transportation and the FAA Administrator by 49 U.S.C. 40101, 40103 and 40113, we hereby order that:

a. No U.S. air carrier or foreign air carrier initiating or conducting scheduled or regularly conducted commercial service at EWR may conduct such operations without an Operating Authorization assigned by the FAA.

b. Except as provided in the appendix to this Order, scheduled U.S. air carrier and foreign air carrier arrivals and departures will not exceed 81 per hour from 6 a.m. through 10:59 p.m., Eastern Time.

c. The Administrator may change the limits if he determines that capacity exists to accommodate additional operations without a significant increase in delays.

5. For administrative tracking purposes only, the FAA will assign an identification number to each Operating Authorization.

6. A carrier holding an Operating Authorization may request the Administrator's approval to move any arrival or departure scheduled from 6 a.m. through 10:59 p.m. to another half hour within that period. Except as provided in paragraph seven, the carrier must receive the written approval of the Administrator, or his delegate, prior to conducting any scheduled arrival or departure that is not listed in the appendix to this Order. All requests to move an allocated Operating Authorization must be submitted to the FAA Slot Administration Office, facsimile (202) 267-7277 or e-mail 7-AWA-Slotadmin@faa.gov, and must come from a designated representative of the carrier. If the FAA cannot approve a carrier's request to move a scheduled arrival or departure, the carrier may then apply for a trade in accordance with paragraph seven.

7. A carrier may lease or trade an Operating Authorization to another carrier for any consideration and for a period that does not exceed the duration of this Order. A carrier may not lease an Operating Authorization to another carrier unless it has actually used the authorization to conduct flights to or from Newark at least 80% of the time over the preceding 90-day period. The FAA may waive the 90-day usage requirement of the Operating

Authorization if the transferring carrier can demonstrate that it has operated the flight that corresponds to the Operating Authorization at least 80% of the time over the 90 days preceding the proposed transfer of the Operating Authorization. Notice of a trade or lease under this paragraph must be submitted in writing to the FAA Slot Administration Office, facsimile (202) 267-7277 or e-mail 7-AWA-Slotadmin@faa.gov, and must come from a designated representative of each carrier. The FAA must confirm and approve these transactions in writing prior to the effective date of the transaction. The FAA will approve transfers between carriers under the same marketing control up to five business days after the actual operation, but only to accommodate operational disruptions that occur on the same day of the scheduled operation.

8. A carrier may not buy, sell, trade, or transfer an Operating Authorization, except as described in paragraph seven.

9. Historical rights to Operating Authorizations and withdrawal of those rights due to insufficient usage will be determined on a seasonal basis and in accordance with the schedule approved by the FAA prior to the commencement of the applicable season.

a. For each day of the week that the FAA has approved an operating schedule, any Operating Authorization not used at least 80% of the time over the period authorized by the FAA under this paragraph will be withdrawn by the FAA for the next applicable season except:

i. The FAA will treat as used any Operating Authorization held by a carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Saturday in January.

ii. The Administrator of the FAA may waive the 80% usage requirement in the event of a highly unusual and unpredictable condition which is beyond the control of the carrier and which affects carrier operations for a period of five consecutive days or more.

b. Each carrier holding an Operating Authorization must forward in writing to the FAA Slot Administration Office a list of all Operating Authorizations held by the carrier and for each Operating Authorization. These reports must include:

i. The dates within each applicable season on which it intends to start and to cease scheduled operations.

A. For the Summer 2008 scheduling season, the report must be received by the FAA no later than June 20, 2008.

B. For the Winter 2008/2009 scheduling season, the report must be

received by the FAA no later than August 15, 2008.

C. For the Summer 2009 scheduling season, the report must be received by the FAA no later than January 15, 2009.

ii. The completed operations for each day of the applicable scheduling season:

A. Via an interim report filed no later than September 1 for the Summer scheduling season;

B. Via an interim report filed no later than January 15 for the Winter scheduling season.

iii. A final report of the completed operations for each day of the scheduling season within 30 days after the last day of the applicable scheduling season.

10. In the event that a carrier surrenders to the FAA any Operating Authorization assigned to it under this Order or if there are unallocated Operating Authorizations, the FAA will determine whether the unallocated Operating Authorizations should be reallocated. The FAA may temporarily allocate an Operating Authorization if it

determines that such allocation will not increase congestion at the airport. Such temporary allocations will not be entitled to historical status for the next applicable scheduling season under paragraph 9.

11. If the FAA determines that a reduction in the number of allocated Operating Authorizations is required to meet operational needs, such as reduced airport capacity, the FAA will conduct a weighted lottery to withdraw Operating Authorizations to meet a reduced hourly or half-hourly limit for scheduled operations. The FAA will provide at least 45 days' notice unless otherwise required by operational needs. Any Operating Authorization that is withdrawn or temporarily suspended will, if reallocated, be reallocated to the carrier from which it was taken, provided that the carrier continues to operate scheduled service at EWR.

12. The FAA will enforce this Order through an enforcement action seeking

a civil penalty under 49 U.S.C. 46301(a). A carrier that is not a small business as defined in the Small Business Act, 15 U.S.C. § 632, will be liable for a civil penalty of up to \$25,000 for every day that it violates the limits set forth in this Order. A carrier that is a small business as defined in the Small Business Act will be liable for a civil penalty of up to \$10,000 for every day that it violates the limits set forth in this Order. The FAA also could file a civil action in U.S. District Court, under 49 U.S.C. 46106, 46107, seeking to enjoin any air carrier from violating the terms of this Order.

13. The FAA may modify or withdraw any provision in this Order on its own or on application by any carrier for good cause shown.

Issued in Washington, DC, on May 15, 2008.

Robert A. Sturgell,

Acting Administrator, Federal Aviation Administration.

BILLING CODE 4910-13-P

Appendix									
Operating Limitations at Newark Liberty International Airport (EWR)									
Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
AAL - American Airlines	0600	Departure	2	2	2	2	2	2	2
AAL - American Airlines	0730	Departure	2	2	2	2	2	2	2
AAL - American Airlines	0830	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	0830	Departure	1	1	1	1	1	1	1
AAL - American Airlines	0900	Departure	2	2	2	2	2	2	2
AAL - American Airlines	0930	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1000	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1030	Arrival	2	2	2	2	2	2	2
AAL - American Airlines	1030	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1100	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1100	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1130	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1200	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1200	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1230	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1230	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1300	Departure	2	2	2	2	2	2	2
AAL - American Airlines	1330	Arrival	3	3	3	3	3	3	3
AAL - American Airlines	1400	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1400	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1500	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1500	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1530	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1600	Arrival	3	3	3	3	3	3	3
AAL - American Airlines	1630	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1630	Departure	2	2	2	2	2	2	2
AAL - American Airlines	1700	Departure	3	3	3	3	3	3	3
AAL - American Airlines	1730	Arrival	2	2	2	2	2	2	2
AAL - American Airlines	1800	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1830	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1830	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1900	Departure	1	1	1	1	1	1	1
AAL - American Airlines	1930	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	1930	Departure	2	2	2	2	2	2	2
AAL - American Airlines	2100	Arrival	2	2	2	2	2	2	2
AAL - American Airlines	2100	Departure	1	1	1	1	1	1	1
AAL - American Airlines	2130	Arrival	1	1	1	1	1	1	1
AAL - American Airlines	2230	Arrival	2	2	2	2	2	2	2
ABX-ABX	600	Arrival			1	1	1	1	1
ABX-ABX	2230	Departure		1	1	1	1	1	

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0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
ACA-Air Canada	600	Departure	1	1	1	1	1	1	1
ACA-Air Canada	730	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	800	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	830	Departure	2	2	2	2	2	2	2
ACA-Air Canada	1000	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	1030	Departure	1	1	1	1	1	1	1
ACA-Air Canada	1130	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	1230	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	1230	Departure	1	1	1	1	1	1	1
ACA-Air Canada	1300	Departure	1	1	1	1	1	1	1
ACA-Air Canada	1330	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	1430	Departure	1	1	1	1	1	1	1
ACA-Air Canada	1530	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	1600	Departure	1	1	1	1	1	1	1
ACA-Air Canada	1700	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	1730	Departure	1	1	1	1	1	1	1
ACA-Air Canada	1800	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	1930	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	1930	Departure	1	1	1	1	1	1	1
ACA-Air Canada	2000	Arrival	1	1	1	1	1	1	1
ACA-Air Canada	2000	Departure	1	1	1	1	1	1	1
ACA-Air Canada	2100	Departure	1	1	1	1	1	1	1
ACA-Air Canada	2200	Arrival	1	1	1	1	1	1	1
AFR-Air France	1530	Arrival	1	1	1	1	1	1	1
AFR-Air France	1900	Departure	1	1	1	1	1	1	1
AIC-Air India	1600	Arrival	1	1	1	1	1	1	1
AIC-Air India	2100	Departure	1	1	1	1	1	1	1
AIO-Elysair	1600	Arrival	1	1	1	1	1	1	1
AIO-Elysair	1900	Departure	1	1	1	1	1	1	1
AIO-Elysair	2000	Arrival	1	1	1	1	1	1	1
AIO-Elysair	2200	Departure	1	1	1	1	1	1	1
ASA-Alaska	730	Departure	1	1	1	1	1	1	1
ASA-Alaska	1700	Arrival	1	1	1	1	1	1	1
ASA-Alaska	1800	Departure	1	1	1	1	1	1	1
ASA-Alaska	2130	Arrival	1	1	1	1	1	1	1

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Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
ATN--Air Transport Intl	600	Arrival		1	1	1	1		
ATN--Air Transport Intl	630	Departure		1	1	1	1		
AZA-Alitalia	1530	Arrival	1	1	1	1	1	1	1
AZA-Alitalia	1730	Departure	1	1	1	1	1	1	1
BAW-British Airways	800	Departure	1	1	1	1	1	1	1
BAW-British Airways	1130	Arrival	1	1	1	1	1	1	1
BAW-British Airways	1730	Arrival	1	1	1	1	1	1	1
BAW-British Airways	1830	Departure	1	1	1	1	1	1	1
BAW-British Airways	2100	Departure	1	1	1	1	1	1	1
BAW-British Airways	2130	Arrival	1	1	1	1	1	1	1
CKS-Kalitta	1700	Arrival		1			1		
COA - Continental	0600	Arrival	4	4	4	4	4	4	4
COA - Continental	0600	Departure	9	9	9	9	9	9	9
COA - Continental	0630	Arrival	1	1	1	1	1	1	1
COA - Continental	0630	Departure	20	20	20	20	20	20	20
COA - Continental	0700	Arrival	6	6	6	6	6	6	6
COA - Continental	0700	Departure	15	15	15	15	15	15	15
COA - Continental	0730	Arrival	19	19	19	19	19	19	19
COA - Continental	0730	Departure	17	17	17	17	17	17	17
COA - Continental	0800	Arrival	14	14	14	14	14	14	14
COA - Continental	0800	Departure	16	16	16	16	16	16	16
COA - Continental	0830	Arrival	7	7	7	7	7	7	7
COA - Continental	0830	Departure	24	24	24	24	24	24	24
COA - Continental	0900	Arrival	6	6	6	6	6	6	6
COA - Continental	0900	Departure	21	21	21	21	21	21	21
COA - Continental	0930	Arrival	9	9	9	9	9	9	9
COA - Continental	0930	Departure	4	4	4	4	4	4	4
COA - Continental	1000	Arrival	10	10	10	10	10	10	10
COA - Continental	1000	Departure	7	7	7	7	7	7	7
COA - Continental	1030	Arrival	7	7	7	7	7	7	7
COA - Continental	1030	Departure	12	12	12	12	12	12	12
COA - Continental	1100	Arrival	18	18	18	18	18	18	18
COA - Continental	1100	Departure	6	6	6	6	6	6	6
COA - Continental	1130	Arrival	14	14	14	14	14	14	14
COA - Continental	1130	Departure	13	13	13	13	13	13	13
COA - Continental	1200	Arrival	14	14	14	14	14	14	14
COA - Continental	1200	Departure	18	18	18	18	18	18	18
COA - Continental	1230	Arrival	19	19	19	19	19	19	19
COA - Continental	1230	Departure	8	8	8	8	8	8	8
COA - Continental	1300	Arrival	10	10	10	10	10	10	10

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Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
COA - Continental	1300	Departure	18	18	18	18	18	18	18
COA - Continental	1330	Arrival	20	20	20	20	20	20	20
COA - Continental	1330	Departure	9	9	9	9	9	9	9
COA - Continental	1400	Arrival	17	17	17	17	17	17	17
COA - Continental	1400	Departure	5	5	5	5	5	5	5
COA - Continental	1430	Arrival	17	17	17	17	17	17	17
COA - Continental	1430	Departure	20	20	20	20	20	20	20
COA - Continental	1500	Arrival	17	17	17	17	17	17	17
COA - Continental	1500	Departure	21	21	21	21	21	21	21
COA - Continental	1530	Arrival	19	19	19	19	19	19	19
COA - Continental	1530	Departure	10	10	10	10	10	10	10
COA - Continental	1600	Arrival	11	11	11	11	11	11	11
COA - Continental	1600	Departure	11	11	11	11	11	11	11
COA - Continental	1630	Arrival	19	19	19	19	19	19	19
COA - Continental	1630	Departure	13	13	13	13	13	13	13
COA - Continental	1700	Arrival	13	13	13	13	13	13	13
COA - Continental	1700	Departure	18	18	18	18	18	18	18
COA - Continental	1730	Arrival	6	6	6	6	6	6	6
COA - Continental	1730	Departure	13	13	13	13	13	13	13
COA - Continental	1800	Arrival	16	16	16	16	16	16	16
COA - Continental	1800	Departure	15	15	15	15	15	15	15
COA - Continental	1830	Arrival	13	13	13	13	13	13	13
COA - Continental	1830	Departure	8	8	8	8	8	8	8
COA - Continental	1900	Arrival	20	20	20	20	20	20	20
COA - Continental	1900	Departure	17	17	17	17	17	17	17
COA - Continental	1930	Arrival	8	8	8	8	8	8	8
COA - Continental	1930	Departure	14	14	14	14	14	14	14
COA - Continental	2000	Arrival	18	18	18	18	18	18	18
COA - Continental	2000	Departure	26	26	26	26	26	26	26
COA - Continental	2030	Arrival	9	9	9	9	9	9	9
COA - Continental	2030	Departure	13	13	13	13	13	13	13
COA - Continental	2100	Arrival	8	8	8	8	8	8	8
COA - Continental	2100	Departure	17	17	17	17	17	17	17
COA - Continental	2130	Arrival	16	16	16	16	16	16	16
COA - Continental	2130	Departure	11	11	11	11	11	11	11
COA - Continental	2200	Arrival	11	11	11	11	11	11	11
COA - Continental	2200	Departure	6	6	6	6	6	6	6
COA - Continental	2230	Arrival	9	9	9	9	9	9	9
COA - Continental	2230	Departure	1	1	1	1	1	1	1
CSQ--CargoJet	800	Departure		1	1	1	1	1	
CSQ--CargoJet	2030	Arrival		1	1	1	1	1	

Appendix									
Operating Limitations at Newark Liberty International Airport (EWR)									
Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
DAL - Delta Air Lines	0600	Departure	2	2	2	2	2	2	2
DAL - Delta Air Lines	0700	Departure	2	2	2	2	2	2	2
DAL - Delta Air Lines	0730	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	0800	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	0900	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	0930	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1000	Departure	2	2	2	2	2	2	2
DAL - Delta Air Lines	1030	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1100	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1200	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1230	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1300	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1330	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1430	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1500	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1600	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1630	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1630	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1700	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1700	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1730	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1730	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1800	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1830	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	1900	Departure	1	1	1	1	1	1	1
DAL - Delta Air Lines	1930	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	2100	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	2130	Arrival	1	1	1	1	1	1	1
DAL - Delta Air Lines	2230	Arrival	1	1	1	1	1	1	1
DLH-Lufthansa	1100	Arrival	1	1	1	1	1	1	1
DLH-Lufthansa	1200	Arrival	1	1	1	1	1	1	1
DLH-Lufthansa	1530	Arrival	1	1	1	1	1	1	1
DLH-Lufthansa	1530	Departure	1	1	1	1	1	1	1
DLH-Lufthansa	1630	Departure	1	1	1	1	1	1	1
DLH-Lufthansa	1730	Departure	1	1	1	1	1	1	1
DLH-Lufthansa	1830	Arrival	1	1	1	1	1	1	1
DLH-Lufthansa	2000	Departure	1	1	1	1	1	1	1
ELY-EI Al	1430	Departure	1	1	1	1	1		

Appendix									
Operating Limitations at Newark Liberty International Airport (EWR)									
Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
EVA--Eva Airways	2130	Arrival		1		1			1
FDX-FedEx	600	Arrival			2	2	2	2	
FDX-FedEx	630	Arrival			1	1	1	1	2
FDX-FedEx	700	Arrival							1
FDX-FedEx	700	Departure			1	1	1	1	
FDX-FedEx	730	Arrival						1	
FDX-FedEx	730	Departure			1	1	1		1
FDX-FedEx	800	Departure	1						1
FDX-FedEx	830	Departure	1		2	2	2	2	2
FDX-FedEx	900	Arrival			1	1	1	1	
FDX-FedEx	900	Departure						1	
FDX-FedEx	1000	Arrival			1	1	1	1	
FDX-FedEx	1200	Arrival			1	1	1		
FDX-FedEx	1400	Arrival			1	1	1	1	1
FDX-FedEx	1400	Departure			1	1	1		
FDX-FedEx	1530	Departure			1	1	1	1	1
FDX-FedEx	1600	Arrival			1	1	1	1	1
FDX-FedEx	1600	Departure			1	1	1	1	
FDX-FedEx	1730	Arrival			1	1	1		
FDX-FedEx	1830	Arrival	1		1	1	1	1	1
FDX-FedEx	1900	Arrival	1		1	1	1	1	1
FDX-FedEx	1930	Arrival							1
FDX-FedEx	2000	Arrival	1						
FDX-FedEx	2030	Arrival	1						
FDX-FedEx	2130	Departure		1	1	1	1	1	
FDX-FedEx	2230	Arrival						1	1
FDX-FedEx	2230	Departure		3	3	3	4		
FJT-Silverjet	1300	Arrival	1	1	1	1	1	1	1
FJT-Silverjet	1930	Departure	1	1	1	1	1	1	1
FJT-Silverjet	2100	Arrival	1	1	1	1	1	1	1
FJT-Silverjet	2230	Departure	1	1	1	1	1	1	1
JAI-Jet Airways	1130	Arrival	1	1	1	1	1	1	1
JAI-Jet Airways	2000	Departure	1	1	1	1	1	1	1
JBU - JetBlue	0730	Departure	1	1	1	1	1	1	1
JBU - JetBlue	0800	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	0800	Departure	1	1	1	1	1	1	1
JBU - JetBlue	0900	Departure	2	2	2	2	2	2	2
JBU - JetBlue	1030	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	1100	Departure	1	1	1	1	1	1	1

Appendix									
Operating Limitations at Newark Liberty International Airport (EWR)									
Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
JBU - JetBlue	1200	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	1230	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	1230	Departure	1	1	1	1	1	1	1
JBU - JetBlue	1330	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	1330	Departure	1	1	1	1	1	1	1
JBU - JetBlue	1400	Departure	1	1	1	1	1	1	1
JBU - JetBlue	1430	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	1500	Departure	1	1	1	1	1	1	1
JBU - JetBlue	1600	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	1630	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	1630	Departure	1	1	1	1	1	1	1
JBU - JetBlue	1730	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	1730	Departure	1	1	1	1	1	1	1
JBU - JetBlue	1830	Departure	1	1	1	1	1	1	1
JBU - JetBlue	2030	Arrival	2	2	2	2	2	2	2
JBU - JetBlue	2100	Departure	2	2	2	2	2	2	2
JBU - JetBlue	2130	Arrival	1	1	1	1	1	1	1
JBU - JetBlue	2200	Arrival	1	1	1	1	1	1	1
LOT-LOT Polish Airlines	1630	Arrival	1	1	1	1	1	1	1
LOT-LOT Polish Airlines	1830	Departure	1	1	1	1	1	1	1
LOT-LOT Polish Airlines	2100	Arrival	1	1	1	1	1		1
MAS-Malaysia	1900	Arrival		1			1		1
MAS-Malaysia	2200	Departure		1			1		1
MEP - Midwest Airlines	0600	Departure	1	1	1	1	1	1	1
MEP - Midwest Airlines	1030	Arrival	1	1	1	1	1	1	1
MEP - Midwest Airlines	1100	Departure	1	1	1	1	1	1	1
MEP - Midwest Airlines	1430	Arrival	1	1	1	1	1	1	1
MEP - Midwest Airlines	1500	Departure	1	1	1	1	1	1	1
MEP - Midwest Airlines	1630	Arrival	1	1	1	1	1	1	1
MEP - Midwest Airlines	1700	Departure	1	1	1	1	1	1	1
MEP - Midwest Airlines	2000	Arrival	1	1	1	1	1	1	1
MEP - Midwest Airlines	2030	Departure	1	1	1	1	1	1	1
MEP - Midwest Airlines	2230	Arrival	1	1	1	1	1	1	1
NWA - Northwest	0600	Departure	2	2	2	2	2	2	2
NWA - Northwest	0630	Departure	1	1	1	1	1	1	1
NWA - Northwest	0700	Departure	1	1	1	1	1	1	1
NWA - Northwest	0800	Arrival	1	1	1	1	1	1	1
NWA - Northwest	0800	Departure	1	1	1	1	1	1	1
NWA - Northwest	0900	Departure	1	1	1	1	1	1	1
NWA - Northwest	1030	Arrival	1	1	1	1	1	1	1

Appendix									
Operating Limitations at Newark Liberty International Airport (EWR)									
Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
NWA - Northwest	1100	Departure	1	1	1	1	1	1	1
NWA - Northwest	1130	Arrival	1	1	1	1	1	1	1
NWA - Northwest	1200	Arrival	1	1	1	1	1	1	1
NWA - Northwest	1230	Departure	1	1	1	1	1	1	1
NWA - Northwest	1300	Arrival	1	1	1	1	1	1	1
NWA - Northwest	1300	Departure	1	1	1	1	1	1	1
NWA - Northwest	1400	Arrival	2	2	2	2	2	2	2
NWA - Northwest	1530	Arrival	1	1	1	1	1	1	1
NWA - Northwest	1530	Departure	1	1	1	1	1	1	1
NWA - Northwest	1600	Departure	1	1	1	1	1	1	1
NWA - Northwest	1630	Arrival	1	1	1	1	1	1	1
NWA - Northwest	1630	Departure	1	1	1	1	1	1	1
NWA - Northwest	1700	Departure	1	1	1	1	1	1	1
NWA - Northwest	1800	Arrival	1	1	1	1	1	1	1
NWA - Northwest	1800	Departure	1	1	1	1	1	1	1
NWA - Northwest	1900	Arrival	1	1	1	1	1	1	1
NWA - Northwest	1930	Departure	1	1	1	1	1	1	1
NWA - Northwest	2030	Departure	1	1	1	1	1	1	1
NWA - Northwest	2100	Arrival	2	2	2	2	2	2	2
NWA - Northwest	2230	Arrival	3	3	3	3	3	3	3
POE-Porter	630	Departure		1	1	1	1	1	
POE-Porter	800	Arrival		1	1	1	1	1	
POE-Porter	900	Departure		1	1	1	1	1	
POE-Porter	1030	Arrival		1	1	1	1	1	
POE-Porter	1130	Departure		1	1	1	1	1	1
POE-Porter	1230	Arrival		1	1	1	1	1	1
POE-Porter	1330	Departure		1	1	1	1	1	1
POE-Porter	1500	Arrival		1	1	1	1	1	1
POE-Porter	1600	Departure	1	1	1	1	1	1	
POE-Porter	2100	Arrival	1	1	1	1	1	1	
POE-Porter	2130	Departure	1	1	1	1	1	1	
POE-Porter	2200	Arrival	1	1	1	1	1	1	
QTR-Qatar	1830	Arrival	1	1	1	1	1	1	1
QTR-Qatar	2030	Departure	1	1	1	1	1	1	1
SAS-SAS	1300	Arrival	1	1	1	1	1	1	1
SAS-SAS	1430	Arrival	1	1	1	1	1	1	1
SAS-SAS	1700	Departure	1	1	1	1	1	1	1
SAS-SAS	1730	Departure	1	1	1	1	1	1	1
SAS-SAS	2100	Arrival		1			1	1	1
SIA-Singapore	1730	Arrival	1	1	1	1	1	1	1

Appendix									
Operating Limitations at Newark Liberty International Airport (EWR)									
Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
SWR-Swiss	2000	Arrival	1	1	1	1	1	1	
SWR-Swiss	2130	Departure	1	1	1	1	1	1	
TAP--Air Portugal	1400	Arrival	1		1	1		1	
TAP--Air Portugal	1430	Arrival	1	1	1	1	1	1	1
TAP--Air Portugal	1800	Departure	1	1	1	1	1	1	1
TAP--Air Portugal	2030	Departure	1		1	1		1	
TRS - Air Tran Airlines	0600	Departure	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1030	Arrival	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1100	Departure	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1130	Arrival	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1200	Departure	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1230	Arrival	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1330	Arrival	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1400	Departure	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1430	Departure	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1530	Arrival	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1630	Departure	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1900	Arrival	1	1	1	1	1	1	1
TRS - Air Tran Airlines	1930	Departure	1	1	1	1	1	1	1
UAL - United Airlines	0600	Departure	2	2	2	2	2	2	2
UAL - United Airlines	0630	Arrival	2	2	2	2	2	2	2
UAL - United Airlines	0700	Departure	1	1	1	1	1	1	1
UAL - United Airlines	0730	Departure	3	3	3	3	3	3	3
UAL - United Airlines	0900	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	0900	Departure	1	1	1	1	1	1	1
UAL - United Airlines	0930	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	1000	Departure	2	2	2	2	2	2	2
UAL - United Airlines	1200	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	1230	Departure	1	1	1	1	1	1	1
UAL - United Airlines	1330	Arrival	2	2	2	2	2	2	2
UAL - United Airlines	1430	Departure	2	2	2	2	2	2	2
UAL - United Airlines	1600	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	1630	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	1700	Departure	1	1	1	1	1	1	1
UAL - United Airlines	1730	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	1730	Departure	1	1	1	1	1	1	1
UAL - United Airlines	1800	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	1800	Departure	1	1	1	1	1	1	1
UAL - United Airlines	1830	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	1830	Departure	1	1	1	1	1	1	1

Appendix									
Operating Limitations at Newark Liberty International Airport (EWR)									
Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
UAL - United Airlines	1900	Arrival	1	1	1	1	1	1	1
UAL - United Airlines	1900	Departure	1	1	1	1	1	1	1
UAL - United Airlines	2000	Departure	1	1	1	1	1	1	1
UAL - United Airlines	2130	Arrival	2	2	2	2	2	2	2
UPS-UPS	600	Arrival	0	0	0	0	0	1	1
UPS-UPS	730	Arrival	0	0	1	1	1	1	0
UPS-UPS	730	Departure	0	1	0	0	0	0	0
UPS-UPS	800	Departure	0	0	3	3	3	2	0
UPS-UPS	830	Departure	0	0	1	1	1	1	1
UPS-UPS	930	Arrival	0	1	0	0	0	0	0
UPS-UPS	1000	Departure	0	0	0	0	0	0	1
UPS-UPS	1130	Departure	0	1	0	0	0	0	0
UPS-UPS	1700	Arrival	0	0	0	0	0	0	1
UPS-UPS	1730	Arrival	0	0	1	1	1	0	0
UPS-UPS	1800	Arrival	1	0	0	0	0	0	0
UPS-UPS	1830	Arrival	0	1	1	1	1	0	0
UPS-UPS	1930	Arrival	0	0	1	1	1	0	0
UPS-UPS	2100	Arrival	0	0	0	0	0	1	0
UPS-UPS	2200	Departure	0	1	1	1	1	1	0
UPS-UPS	2230	Departure	0	1	1	1	1	0	0
USA - US Airways	0600	Departure	1	1	1	1	1	1	1
USA - US Airways	0630	Departure	2	2	2	2	2	2	2
USA - US Airways	0730	Arrival	1	1	1	1	1	1	1
USA - US Airways	0800	Departure	1	1	1	1	1	1	1
USA - US Airways	0930	Arrival	1	1	1	1	1	1	1
USA - US Airways	1000	Arrival	1	1	1	1	1	1	1
USA - US Airways	1000	Departure	2	2	2	2	2	2	2
USA - US Airways	1030	Departure	1	1	1	1	1	1	1
USA - US Airways	1130	Arrival	1	1	1	1	1	1	1
USA - US Airways	1230	Departure	1	1	1	1	1	1	1
USA - US Airways	1300	Arrival	1	1	1	1	1	1	1
USA - US Airways	1330	Arrival	2	2	2	2	2	2	2
USA - US Airways	1400	Arrival	1	1	1	1	1	1	1
USA - US Airways	1430	Departure	2	2	2	2	2	2	2
USA - US Airways	1500	Departure	1	1	1	1	1	1	1
USA - US Airways	1630	Departure	1	1	1	1	1	1	1
USA - US Airways	1700	Arrival	2	2	2	2	2	2	2
USA - US Airways	1800	Arrival	1	1	1	1	1	1	1
USA - US Airways	1800	Departure	2	2	2	2	2	2	2
USA - US Airways	1830	Departure	1	1	1	1	1	1	1
USA - US Airways	1900	Arrival	1	1	1	1	1	1	1
USA - US Airways	2000	Arrival	2	2	2	2	2	2	2

Appendix									
Operating Limitations at Newark Liberty International Airport (EWR)									
Summer 2008									
0600-2259 Local Hours Only									
Seller Carrier	Period (LT)	Arr/Dep	SUN	MON	TUE	WED	THU	FRI	SAT
USA - US Airways	2100	Departure	1	1	1	1	1	1	1
USA - US Airways	2130	Arrival	1	1	1	1	1	1	1
VIR-Virgin Atlantic	800	Departure	1	1	1	1	1	1	1
VIR-Virgin Atlantic	1830	Arrival	1	1	1	1	1	1	1
VIR-Virgin Atlantic	2100	Arrival	1	1	1	1	1	1	1
VRD-Virgin America	630	Arrival	1	1	1	1	1	1	1
VRD-Virgin America	930	Departure	1	1	1	1	1	1	1
VRD-Virgin America	1000	Arrival	1	1	1	1	1	1	1
VRD-Virgin America	1030	Departure	1	1	1	1	1	1	1
VRD-Virgin America	1100	Arrival	1	1	1	1	1	1	1
VRD-Virgin America	1130	Departure	1	1	1	1	1	1	1
WJA-WestJet	1630	Arrival	1	1	1	1	1	1	1
WJA-WestJet	1800	Departure	1	1	1	1	1	1	1
End of Appendix									

FAA Newark Operation Limitations

Appendix

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration****Environmental Impact Statement:
Proposed Greeneville Bypass, From
US-11E (SR-34), West of Greeneville
to US-11E (SR-34) East of Greeneville;
Greene County, TN**

AGENCY: Federal Highway
Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The Federal Highway Administration (FHWA) is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed highway project in Greene County, Tennessee.

FOR FURTHER INFORMATION CONTACT: Mr. Charles J. O'Neill, Planning and Program Management Team Leader, Federal Highway Administration—Tennessee Division Office, 640 Grassmere Park Road, Suite 112, Nashville, TN 37211; 615-781-5772.

SUPPLEMENTARY INFORMATION: The FHWA in cooperation with the Tennessee Department of Transportation will prepare an Environmental Impact Statement (EIS) on a proposal to construct a bypass around the City of Greeneville.

Alternatives to be considered include: (1) No-build, (2) Transportation System Management (TSM) alternative, (3) Mass Transit, (4) one or more build alternatives that could include constructing a roadway on a new location, upgrading existing US-11E (SR-34), or a combination of both, and (5) other alternatives that may arise from public input. Public scoping meetings will be held for the project corridor. As part of the scoping process, federal, state, and local agencies and officials, private organizations, citizens, and interest groups will have an opportunity to identify issues of concern and provide input on the purpose and need for the project, range of alternatives, methodology, and the development of the Environmental Impact Statement. A Coordination Plan will be developed to include the public in the project development process. This plan will utilize the following outreach efforts to provide information and solicit input: Newsletters, an internet Web site, e-mail and direct mail, informational meetings and briefings, public hearings, and other efforts as necessary and appropriate. A public hearing will be held upon completion of the Draft Environmental Impact Statement and public notice will be given of the time and place of the hearing. The Draft EIS will be available

for public and agency review and comment prior to the public hearings.

To ensure that the full range of issues related to this proposed action are identified and taken into account, comments and suggestions are invited from all interested parties. Comments and questions concerning the proposed action should be directed to the FHWA contact person identified above at the address provided above.

(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 proposed program.)

Charles J. O'Neill,

*Planning and Program Management Team
Leader, Federal Highway Administration,
Nashville, TN.*

[FR Doc. E8-11342 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration****Notice To Rescind a Notice of Intent To
Prepare an Environmental Impact
Statement (EIS): Appalachian
Development Highway System
Corridor K (Relocated U.S. 64), From
West of the Ocoee River to State Route
68 Near Ducktown, Polk County, TN**

AGENCY: Federal Highway
Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The Federal Highway Administration (FHWA) is issuing this notice to advise the public that the Notice of Intent published on October 28, 1999 to prepare a Environmental Impact Statement (EIS) for the proposed Appalachian Development Highway System Corridor K (Relocated U.S. 64), From West of the Ocoee River to State Route 68 Near Ducktown, Polk County, Tennessee, is being rescinded.

FOR FURTHER INFORMATION CONTACT: Mr. Charles J. O'Neill, Planning and Program Management Team Leader, Federal Highway Administration—Tennessee Division Office, 640 Grassmere Park Road, Suite 112, Nashville, TN 37211. 615-781-5772.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Tennessee Department of Transportation, is rescinding the notice of intent to prepare a Draft Environmental Impact Statement (DEIS) on the Appalachian Development Highway System Corridor K (Relocated

U.S. 64) project, from West of the Ocoee River to State Route 68 near Ducktown, Polk County, Tennessee. The proposed project was proposed to construct a 20 mile segment of Corridor K of the Appalachian Highway System (ADHS) in Polk County, Tennessee.

The project as described in the September 15, 2003 Draft Environmental Impact Statement (DEIS) was proposed to improve the transportation system linkages in southeastern Tennessee; provide a highway that satisfies the design standards appropriate to a roadway on the ADHS and the National Truck Network; improve safety for vehicles and pedestrians; reduce travel delays for through traffic; and promote the mission of the U.S. Department of Agriculture, Forest Service's Scenic Byway Program.

Since the approval of the DEIS, a development and transportation study of the Corridor K Region was undertaken to further address the economic development need for this corridor. The study sponsored by the Appalachian Regional Commission, the Tennessee Department of Transportation and the Southeast Tennessee Development District was completed in February 2008 and concluded that there is a clear economic development need for an improved east-west transportation corridor to serve this region. A new Environmental Impact Statement will be prepared and will evaluate all reasonable alternatives, possibly including alignments not evaluated in the original DEIS. The original NOI is being rescinded and a new NOI will be published subsequent to this NOI.

To ensure that the full range of issues related to this proposed action are identified and taken into account, comments and suggestions are invited from all interested parties. Comments and questions concerning the proposed action should be directed to the FHWA contact person identified above at the address provided above.

(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 proposed program.)

Charles J. O'Neill,

*Planning and Program Management Team
Leader, Federal Highway Administration,
Nashville, TN.*

[FR Doc. E8-11345 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****Petition for Waiver of Compliance**

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Norfolk Southern Corporation

(Docket Number FRA-2008-0029)

The Norfolk Southern Corporation (NS), seeks a waiver of compliance from certain provisions of the Safety Appliance Standards, 49 CFR Part 231, that requires uncoupling levers on each end of freight cars. Specifically, this request to remove uncoupling levers on thirteen (13) NS owned special equipment cars in rail train service while loading or unloading continuous welded rail throughout the NS system by NS.

NS believes that these welded rail cars can be operated safely with the uncoupling levers removed and couplers immobilized. These welded rail trains are operated as units, and are not switched in yards as conventional freight cars. Due to the nature of moving welded rail, it is highly undesirable for cars to become uncoupled from a safety practice.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA-2008-0029) and may be submitted by any of the following methods:

Web site: <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Fax: 202-493-2251.

Mail: Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12-140, Washington, DC 20590.

Hand Delivery: 1200 New Jersey Avenue, SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.-5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at <http://www.regulations.gov>.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78).

Issued in Washington, DC, on May 15, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8-11360 Filed 5-20-08; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****Petition for Waiver of Compliance**

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Association of American Railroads

(Modification To Waiver Petition Docket Number FRA-1999-5104)

As a modification to the Association of American Railroads (AAR) permanent waiver of compliance with 49 CFR 213.137, AAR is seeking permission from FRA to modify the terms and conditions of its decision letter dated

June 27, 2000, pertaining to flange bearing frogs.

AAR, on behalf of its member railroads, received permission from FRA to install flange bearing frogs in its June 27, 2000, decision letter. FRA granted this relief conditionally, with a requirement for Equipment Inspections at all installations. In a decision letter dated May 3, 2006, AAR received further permission for CSX Transportation to specifically install a flange bearing frog in Shelby, Ohio.

With this petition, AAR is notifying FRA that it's Shelby, Ohio, flange bearing frog installation has been successful, and that the BNSF Railway Company (BNSF) will install 2 additional flange bearing frogs in Moorhead, Minnesota. AAR states, "This inspection requirement is costly and significantly delays the transportation of rail cars undergoing the inspections. In fact, it is because of this inspection requirement that the industry has been slow to install flange bearing frog crossing diamonds under the waiver." Therefore, AAR requests that FRA relieve BNSF of this condition requiring equipment inspections.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA-1999-5104) and may be submitted by any of the following methods:

Web site: <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Fax: 202-493-2251.

Mail: Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12-140, Washington, DC 20590.

Hand Delivery: 1200 New Jersey Avenue, SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular

business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at <http://www.regulations.gov>.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC, on May 15, 2005.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–11362 Filed 5–20–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Public Transportation on Indian Reservations Program; Tribal Transit Program

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Funding Availability: Solicitation of Grant Applications for FY 2008 Tribal Transit Program Funds.

SUMMARY: This notice announces the availability of Fiscal Year (FY) 2008 funds for the Public Transportation on Indian Reservations Program, a program authorized by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Section 3013 (c). This notice includes a national solicitation for Grant Applications for FY 2008 Tribal Transit Program (TTP) funds to be selected on a competitive basis; the grant terms and conditions that apply to this program; and grant application procedures and selection criteria for FY 2008 projects. The Federal Transit Administration (FTA) expects to have a total of \$12 million for FY 2008. For more information on the program and a list of projects currently funded go to http://www.fta.dot.gov/funding/grants/grants_financing_3553.html

ADDRESSES: This announcement is available on the FTA Web site at <http://www.fta.dot.gov>. FTA will post a synopsis of this announcement on the government-wide electronic grants Web site at: <http://www.grants.gov>.

Applicants may submit applications in one of three ways: delivering five hard copies to Federal Transit Administration, 1200 New Jersey Avenue, SE., Washington, DC, 20590 Attention: Lorna R. Wilson; sending by e-mail to fta.tribalprogram@dot.gov, or filing electronically through the grants.gov Web site at <http://www.grants.gov>. Applicants applying by e-mail must fax signature documents to 202–366–7951, Attention: Lorna Wilson. FTA will announce final selections on the Web site and in the **Federal Register**.

DATES: Applicants must submit completed applications by August 19, 2008. Anyone intending to apply electronically should initiate the process of registering on the grants.gov site immediately to ensure completion of registration before the deadline for submission. FTA will announce grant selections in the **Federal Register** when the competitive selection process is complete.

Applicants should be aware that materials sent through the U.S. Postal Service are subject to significant delays in delivery due to the security screening process. Use of courier or express delivery services is recommended.

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Tribal Liaison (Appendix B) for application-specific information. For general program information, contact Lorna R. Wilson, Office of Transit Programs, at (202) 366–2053, e-mail: Lorna.Wilson@dot.gov. A TDD is available at 1–800–877–8339 (TDD/FIRS).

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I. Overview

Section 3013 of SAFETEA–LU, [Pub. L. 109–59 (August 10, 2005)] amended 49 U.S.C. 5311(c) by establishing the Public Transportation on Indian Reservations Program (Tribal Transit Program). This program authorizes direct grants “under such terms and conditions as may be established by the Secretary” to Indian tribes for any purpose eligible under FTA’s Nonurbanized Area Formula Program, 49 U.S.C. 5311. The funding increases from \$8 million in FY 2006 to \$15 million in FY 2009. The Conference Report to SAFETEA–LU indicated that the funds set aside for Indian tribes in the TTP are not meant to replace or reduce funds that Indian tribes receive from States through FTA’s Nonurbanized Area Formula Program. The Catalog of Federal Domestic Assistance (CFDA) number for the program is 20.509.

II. Background

Prior to SAFETEA–LU, the Section 5311 program did not include a separate public transit program for tribes. Tribes were eligible under the Section 5311 program only as subrecipients. SAFETEA–LU authorized a TTP and authorized tribes to be direct recipients of Section 5311 Program funds. As expressed in the Conference Report for SAFETEA–LU Congress intended that the funds available for the TTP should not replace or reduce funds tribes receive from States under the Section 5311 program. FTA previously published Notices of Funding Availability for FY 2006 and FY 2007. For more information on the program and a list of projects currently funded go to http://www.fta.dot.gov/funding/grants/grants_financing_3553.html.

III. Funding Opportunity Description

A. Authorized Funding for FY 2008

Section 3013 of SAFETEA-LU established the TTP. The funds are to be apportioned for grants to Indian tribes for any purpose eligible under the Nonurbanized Area Formula Program (Section 5311 program). In FY 2008, \$12 million is available for allocation to projects selected through the process announced in this notice.

IV. Award Information

The number and size of awards will be determined through a competitive process. Funding is available for start-up services, enhancements or expansion of existing transit services, and for planning studies and operational planning. Planning grants will be limited to \$25,000 per applicant. Tribes may apply for FY 2008. Priority for FY 2008 funding will be given to continuation projects selected in FY 2006 and FY 2007 that are in an active status. All tribes seeking FY 2008 funds must submit grant applications to FTA by August 19, 2008.

V. Eligibility Information

A. Eligible Applicants

Eligible applicants include Federally-recognized Indian tribes or Alaska Native villages, groups, or communities as identified by the Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI). To be an eligible recipient, a tribe must have the requisite legal, financial and technical capabilities to receive and administer Federal funds under this program. A tribe may submit a copy of the most up-to-date **Federal Register** Notice published by DOI, BIA: Entities Recognized and Eligible to Receive Service from the United States Bureau of Indian Affairs.

B. Eligible Projects

Eligible recipients may use TTP funds for any purpose authorized under the Section 5311 program. This means that grants can be awarded to recipients located in rural and small urban areas with populations under 50,000 not identified as an urbanized area by the Bureau of the Census. The grants may be used for public transportation capital projects, operating costs of equipment and facilities for use in public transportation, planning, and the acquisition of public transportation services, including service agreements with private providers of public transportation services. Under Department of Transportation (DOT) Americans with Disabilities Act of 1990 (ADA) regulations, public fixed route

operators are required to provide ADA complementary paratransit service to individuals who cannot use the fixed route due to their disability. Coordinated human service transportation that primarily serves elderly persons and persons with disabilities, but that is not restricted from carrying other members of the public, is considered available to the general public if it is marketed as public transportation.

VI. Cost Sharing or Matching

No cost sharing is required for this program. However, FTA encourages tribes to leverage the program funds and demonstrate commitment to the project through in-kind contributions and use of other funding sources that are available to support public transportation service.

VII. Terms and Conditions

Section 3013 of SAFETEA-LU amended 49 U.S.C. 5311(c) by authorizing funds for the TTP "under such terms and conditions as may be established by the Secretary." Pursuant to this discretionary statutory authority in SAFETEA-LU, FTA published a **Federal Register** notice dated March 22, 2006 (71 FR 14618), "Public Transportation on Indian Reservations Program (49 U.S.C. 5311(c)(1)): Notice of Public Meetings, Proposed Grant Program Provisions," and proposed certain statutory and regulatory terms and conditions that should apply to grants awarded under the TTP.

FTA received a substantial number of comments from Indian tribes and other groups concerning certain proposed terms and conditions for the TTP. FTA addressed these comments in the **Federal Register** notice dated August 10, 2005, (71 FR 46878) and established appropriate grant requirements for the TTP.

The following terms and conditions apply to the TTP:

1. Common Grant Rule (49 CFR part 18), "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments." This is a government-wide requirement that applies to all Federal assistance programs.

2. Civil Rights Act of 1964, as amended (42 U.S.C. 2000d). Unless Indian tribes are specifically exempted from civil rights statutes, compliance with civil rights statutes is required, including compliance with equity in service. However, Indian tribes will not be required to comply with FTA program-specific guidance for Title VI and Title VII

3. Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and the Americans with Disabilities Act (ADA) requirements in 49 CFR parts 27, 37, and 38. These are government-wide requirements that apply to all Federal programs.

4. Drug and Alcohol Testing requirements (49 CFR part 655). FTA will apply this requirement because it addresses a national safety issue for operators of public transportation.

5. National Environmental Policy Act, as amended (42 U.S.C. 4321 et seq). This is a government-wide requirement that applies to all Federal programs.

6. Charter Service and School Bus transportation requirements in 49 CFR parts 604 and 605. The definition of "public transportation" in 49 U.S.C. 5302 specifically excludes school bus and charter service.

7. National Transit Database (NTD) Reporting requirement. Title 49 U.S.C. 5335 requires NTD reporting for recipients of Section 5311 funds. The TTP is a Section 5311 program that will provide funds directly to Indian tribes. Therefore, this reporting requirement applies.

8. Bus Testing requirements (49 CFR part 665). To ensure that vehicles acquired under this program will meet adequate safety and operational standards, this requirement will apply.

A comprehensive list and description for all of the statutory and regulatory terms and conditions that apply to the TTP are set forth in FTA's Master Agreement for the TTP available on FTA's Web site at: http://www.fta.dot.gov/17861_18441_ENG_HTML.htm. Selected

grantees are required to have a signed Certifications and Assurances for the FY in which they apply for a grant. The Certification and Assurances must be signed by a legal entity. FTA has provided information concerning Certifications and Assurances in Appendix A of this notice. Tribes are required to select categories 01 and 22 for the purpose of the Tribal Transit Program.

VIII. Guidelines for Preparing Grant Application

FTA will divide the applications into three categories for the purpose of reviewing and selecting projects to be funded:

- A. Start ups—applications for funding of new transit service;

- B. Existing transit services—applications for funding of enhancements or expansion of existing transit services (including continuation of funding for start-ups selected for FY 2008 funding); and

C. Planning—applications for funding of planning studies and operational planning.

The application should provide information on all items for which tribes are requesting funding in FY 2008, and indicate the specific category in which the tribe is applying.

IX. Application Content

A. Applicant Information

1. Name of Federally recognized tribe and, if appropriate, the specific tribal agency submitting the application.

2. Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number if available. (Note: If selected, applicant will be required to provide DUNS number prior to grant award, and DUNS number is required for submitting through grants.gov).

3. Contact information including: Contact name, title, address, fax and phone number, and e-mail address if available.

4. Description of public transportation services including areas currently served by tribe, if any.

5. Name of person (s) authorized to apply on behalf of tribe (signed transmittal letter should accompany application if the application is submitted in hard copy or e-mail).

B. Technical, Legal, and Financial Capacity to Implement the Proposed Project

Tribes that cannot demonstrate adequate capacity in technical, legal and financial areas will not be considered for funding. Every application must describe the tribe's technical, legal, and financial capacity to implement the proposed project.

1. *Legal Capacity:* Provide documentation or other evidence to show that the applicant is a Federally recognized tribe. Also, who is the authorized representative to execute legal agreements with FTA on behalf of the tribe? If currently operating transit service, does the tribe have appropriate Federal or State operating authority?

2. *Technical Capacity:* Give examples of the tribe's management of other Federal projects. What resources does the tribe have to implement a transit project?

3. *Financial Capacity:* Does the tribe have adequate financial systems in place to receive and manage a Federal grant? Describe the tribe's financial systems and controls.

C. Project Information

1. *Budget:* Provide the Federal amount requested for each purpose for which funds are sought and any funding from

other sources that will be provided. If applying for a multi-year project (not to exceed 2 years), show annual request for each year by budget line item.

2. *Project Description:* Indicate the category for which funding is requested; i.e., start-ups, enhancements or replacements of existing transit services or planning studies or operational planning grants. Provide a summary description of the proposed project and how it will be implemented (e.g., number and type of vehicles, service area, schedules, type of services, fixed route or demand responsive), route miles (if fixed route), major origins and destinations, population served, and whether the tribe provides the service directly or contracts for services and how will vehicles be maintained.

3. *Project Timeline:* Include significant milestones such as date of contract for purchase of vehicle(s), actual or expected delivery date of vehicles, and service start up dates.

D. Application Evaluation Criteria

Applications for funding of transit services should address the application criteria based on project to be funded (for more detail see section X).

1. *Criterion 1:* Project Planning and Coordination.
2. *Criterion 2:* Demonstration of Need.
3. *Criterion 3:* Benefits of Project.
4. *Criterion 4:* Financial Commitment and Operating Capacity.

Applications for planning grants should address the criteria in section X, C of this notice.

E. Intergovernmental Review

This program is not subject to Executive Order 12372, "Intergovernmental Review of Federal Programs."

F. Funding Restrictions

FTA will consider applications for funding only from eligible recipients for eligible activities (see section V). Due to funding limitations, applicants that are selected for funding may receive less than the amount requested. The application process will allow an Indian tribe to apply for multiple years of funding not to exceed two years. No more than \$25,000 in funding will be awarded per planning grant. The remaining funds will be made available for applications for funding of start-up or new systems, and enhancements or expansion of existing transit service. Current TTP grantees applying for FY 2008 projects must be in an active status to receive additional funding.

X. Application Review Process

A. Competitive Selection Process

FTA will divide applications into three categories. The three evaluation categories are as follows:

- Start-ups—Applications for funding of new transit service.
- Existing transit services—Applications for funding of enhancements or expansion of existing transit services.
- Planning—Applications for funding of transit planning studies and/or operational planning.

Applications will be grouped into their respective category for review and scoring purposes. Applications for planning will be evaluated using a pass/fail system, whereas start-up and existing transit services applications will be scored based on the evaluation criteria to determine rank for funding award determination purposes. An applicant can receive up to 25 points for each evaluation criterion, up to a total score of 100.

FTA intends to award the full amount of funding available in FY 2008 for the TTP. FTA encourages applicants to review the evaluation criteria and all other related application information prior to preparation of an application. Applicants may receive technical assistance for application development by contacting their FTA regional Tribal liaison, Tribal Transportation Assistance Program (TTAP) center, or the National Rural Transportation Assistance Program (RTAP) office. Contact information for technical assistance can be found in Appendix C.

B. Evaluation Criteria

1. Project Planning and Coordination (25 Points)

In this section, the applicant should describe how the proposed project was developed and demonstrate that there is a sound basis for the project and that it is ready to implement if funded. Information may vary depending upon whether the tribe has a formal plan that includes transit.

a. Applicants without a formal plan that includes transit are advised to consider and address the following areas:

- i. Provide a detailed project description including the proposed service, vehicle and facility needs, and other pertinent characteristics of the proposed service implementation.
- ii. Identify existing transportation services available to the tribe and discuss whether the proposed project will provide opportunities to coordinate service with existing transit services,

including human service agencies, intercity bus services, or other public transit providers.

iii. Discuss the level of support either by the community and/or tribal government for the proposed project.

iv. Describe the implementation schedule for the proposed project, such as time frame, staffing, and procurement.

b. Applicants with a formal transit plan are advised to consider and address the following areas:

i. Describe the planning document and/or the planning process conducted to identify the proposed project.

ii. Describe how the mobility and client-access needs of tribal human service agencies were considered in the planning process.

iii. Describe what opportunities for public participation were provided in the planning process and how the proposed transit service or existing service has been coordinated with transportation provided for the clients of human service agencies, with intercity bus transportation in the area, or with any other rural public transit providers.

iv. Describe how the proposed service complements rather than duplicates any currently available services.

v. Describe the implementation schedule for the proposed project, including time frame, staffing, procurement, etc.

vi. Describe any other planning or coordination efforts that were not mentioned above.

c. Based on the information provided as discussed in the above section, proposals will be rated on the following:

i. Is there a sound basis for the proposed project?

ii. Is the project ready to implement?

2. Demonstration of Need (25 Points)

In this section, the application should demonstrate the transit needs of the tribe and discuss how the proposed transit improvements will address the identified transit needs of the tribe. Applications may include information such as destinations and services not currently accessible by transit, need for access to jobs or health care, special needs of the elderly and individuals with disabilities, income-based community needs, or other mobility needs.

Based on the information provided, the proposals will be rated on the following:

a. Is there a demonstrated need for the project?

b. How well does the project fulfill the need?

3. Benefits of Project (25 Points)

In this section, applications should identify expected project benefits. Possible examples include increased ridership and daily trips, improved service, improved operations and coordination, and economic benefits to the community.

Benefits can be demonstrated by identifying the population of tribal members and non-tribal members in the proposed project service area and estimating the number of daily one-way trips the transit service will provide and or the number of individual riders. There may be many other, less quantifiable, benefits to the tribe and surrounding community from this project. Please document, explain or show the benefits in whatever format is reasonable to present them.

Based on the information provided proposals will be rated based on:

a. Will the project improve transit efficiency or increase ridership?

b. Will the project improve mobility for the tribe?

c. Will the project improve access to important destinations and services?

d. Are there other qualitative benefits?

4. Financial Commitment and Operating Capacity (25 Points)

In this section, the application should identify any other funding sources used by the tribe to support existing or proposed transit services, including human service transportation funding, Indian Reservation Roads, or other FTA programs such as Job Access and Reverse Commute (JARC), New Freedom, section 5311, section 5310, or section 5309 bus and bus facilities funding.

For existing services, the application should show how TTP funding will supplement (not duplicate or replace) current funding sources. If the transit system was previously funded under section 5311 through the State's apportionment, describe how requested TTP funding will expand available services.

Describe any other resources the tribe will contribute to the project, including in-kind contributions, commitments of support from local businesses, donations of land or equipment, and human resources, and describe to what extent the new project or funding for existing service leverages other funding.

The tribe should show its ability to manage programs by demonstrating the existing programs it administers in any area of expertise such as human services. Based upon the information provided, the proposals will be rated on the extent to which the proposal demonstrates that:

a. This project provides new services or complements existing service;

b. TTP funding does not replace existing funding;

c. The tribe has or will provide non-financial support to project;

d. The tribe has demonstrated ability to provide other services or manage other programs; and

e. Project funds are used in coordination with other services for efficient utilization of funds.

C. Proposals for Planning Grants

For planning grants, the application should describe, in no more than three pages, the need for and a general scope of the proposed study.

1. Criteria: Need for Planning Study

Based on the information provided, proposals will be rated pass/fail based on the following:

a. Is the tribe committed to planning for transit?

b. Is the scope of the proposed study for tribal transit?

D. Review and Selection Process

Each application will be screened by a panel of members, including FTA Headquarters and regional staff. Incomplete or non-responsive applications will be disqualified. FTA will make an effort to award grants to as many qualified applicants as possible.

E. Continuation Projects

If an applicant is proposing a continuation project, using FY 2008 funding, tribes must demonstrate that their project(s) are in an active status to receive additional funding. Along with the criteria listed in Section B, proposals should state that the applicant is a current TTP grantee and provide information on their transit project(s) status including services now being provided and how the new funding will complement the existing service. Please provide any extenuating data that would be helpful to project evaluators; i.e., ridership, increased service hours, extended service routes, stops, etc. If you received a planning grant in FY 2006 or in FY 2007, please indicate the status of your planning study and how this project relates to that study.

XI. Award Administration Information

FTA will award grants directly to federally recognized Indian tribes for the projects selected through this competition. Following publication of the selected recipients, projects, and amounts, FTA regional staff will assist the successful applicants in preparing electronic applications for grant awards. At that time, the tribe will be required

to sign the Certification and Assurances contained in Appendix A. The Master Agreement is available on FTA's Web site at http://www.fta.dot.gov/17861_18441_ENG_HTML.htm.

Applicants that are selected for grant awards under the TTP will be required to formally designate, by resolution or other formal tribal action, an authorized representative who will have the authority to execute grant agreements on behalf of the Indian tribe with FTA and who will also have the authority on behalf of the Indian tribe to execute FTA's Annual List of Certifications and Assurances.

FTA will notify all applicants, both those selected for funding and those not selected, when the competitive selection process is complete. Projects selected for funding will be published in a **Federal Register** notice.

XII. Other Information

A. Technical Assistance

Technical assistance regarding these requirements is available from each FTA regional office. The regional offices will contact those applicants selected for funding regarding procedures for making the required certifications and assurances to FTA before grants are made and will provide assistance in preparing the documentation necessary for the grant award.

B. Certifications and Assurances

Applicants that are selected for grant awards under the TTP will be required to formally designate, by resolution or other formal tribal action, an authorized representative who will have the authority to execute grant agreements on behalf of the Indian tribe with FTA and who will also have the authority on behalf of the Indian tribe to execute FTA's Annual List of Certifications and Assurances. The Annual List of Certifications and Assurances is attached in Appendix A for informational purposes only.

C. Reporting

Title 49 U.S.C. 5335 requires recipients, including tribes, of Section 5311 program funds to report data, as specified in 49 U.S.C. 5311(b)(4), to the National Transit Database (NTD). Specific procedures and data requirements for tribes are being developed and will be available on the NTD Web site. For technical assistance, contact Lauren Tuzikow at 703-462-5233, e-mail:

Lauren.tuzikow@TSPUSA.com. For NTD program information, contact Gary DeLorme at 202-366-1652. Annual progress reports and financial status reports will be required of all recipients.

D. Agency Contact(s)

Contact the appropriate FTA regional Tribal Liaison (Appendix B) for application specific information and issues. For general program information, contact Lorna R. Wilson, Office of Transit Programs, at (202) 366-2053, e-mail: Lorna.Wilson@dot.gov. A TDD is available at 1-800-877-8339 (TDD/FIRS).

Issued in Washington, DC, this 15th day of May, 2008.

James S. Simpson,
Administrator.

Appendix A. Federal Fiscal Year 2008 Certifications and Assurances for the Federal Transit Administration Public Transportation on Indian Reservation Program

Federal Fiscal Year 2008 Certifications and Assurances for Federal Transit Administration Assistance Programs

Preface

In accordance with 49 U.S.C. 5323(n), the following certifications and assurances have been compiled for Federal Transit Administration (FTA) assistance programs. FTA requests each Applicant to provide as many certifications and assurances as needed for all programs for which the Applicant intends to seek FTA assistance during Federal Fiscal Year 2008. Twenty-four (24) Categories of certifications and assurances are listed by numbers 01 through 24 in the TEAM-Web "Recipients" option at the "Cert's & Assurances" tab of "View/Modify Recipients." Category 01 applies to all Applicants. Category 02 applies to all applications for Federal assistance in excess of \$100,000. Categories 03 through 24 will apply to and be required for some, but not all, Applicants and projects. FTA's annual certifications and assurances permit the Applicant to select a single certification which can cover all the programs for which it anticipates submitting an application. FTA requests the Applicant to read each certification and assurance carefully and select all certifications and assurances that may apply to the programs for which it expects to seek Federal assistance.

FTA and the Applicant understand and agree that not every provision of these certifications and assurances will apply to every Applicant or every project for which FTA provides Federal financial assistance through a Grant Agreement or Cooperative Agreement. The type of project and the section of the statute authorizing Federal financial assistance for the project will determine which provisions apply. The terms of these certifications and assurances reflect applicable requirements of FTA's enabling legislation currently in effect.

The Applicant also understands and agrees that these certifications and assurances are special pre-award requirements specifically prescribed by Federal law or regulation and do not encompass all Federal laws, regulations, and directives that may apply to the Applicant or its project. A comprehensive

list of those Federal laws, regulations, and directives is contained in the current FTA Master Agreement MA(14) for Federal Fiscal Year 2008 at the FTA Web site <http://www.fta.dot.gov/documents/14-Master.pdf>. The certifications and assurances in this document have been streamlined to remove most provisions not covered by statutory or regulatory certification or assurance requirements.

Because many requirements of these certifications and assurances will require the compliance of the subrecipient of an Applicant, we strongly recommend that each Applicant, including a State, that will be implementing projects through one or more subrecipients, secure sufficient documentation from each subrecipient to ensure compliance, not only with these certifications and assurances, but also with the terms of the Grant Agreement or Cooperative Agreement for the project, and the Master Agreement or an alternative Master Agreement for its project, if applicable, incorporated therein by reference. Each Applicant is ultimately responsible for compliance with the provisions of the certifications and assurances applicable to itself or its project irrespective of participation in the project by any subrecipient.

01. Assurances Required for Each Applicant

Each Applicant for FTA assistance must provide all assurances in this Category "01." Except to the extent that FTA expressly determines otherwise in writing, FTA may not award any Federal assistance until the Applicant provides the following assurances by selecting Category "01."

A. Assurance of Authority of the Applicant and Its Representative

The authorized representative of the Applicant and the attorney who sign these certifications, assurances, and agreements affirm that both the Applicant and its authorized representative have adequate authority under applicable State, local, or Indian tribal law and regulations, and the Applicant's by-laws or internal rules to:

- (1) Execute and file the application for Federal assistance on behalf of the Applicant;
- (2) Execute and file the required certifications, assurances, and agreements on behalf of the Applicant binding the Applicant; and
- (3) Execute grant agreements and cooperative agreements with FTA on behalf of the Applicant.

B. Standard Assurances

The Applicant ensures that it will comply with all applicable Federal statutes and regulations in carrying out any project supported by an FTA grant or cooperative agreement. The Applicant agrees that it is under a continuing obligation to comply with the terms and conditions of the grant agreement or cooperative agreement issued for its project with FTA. The Applicant recognizes that Federal laws and regulations may be modified from time to time and those modifications may affect project implementation. The Applicant understands that Presidential executive orders and Federal directives, including Federal policies

and program guidance may be issued concerning matters affecting the Applicant or its project. The Applicant agrees that the most recent Federal laws, regulations, and directives will apply to the project, unless FTA issues a written determination otherwise.

C. Intergovernmental Review Assurance

Except if the Applicant is an Indian tribal government seeking assistance authorized by 49 U.S.C. 5311(c)(1), the Applicant ensures that each application for Federal assistance it submits to FTA has been submitted or will be submitted for intergovernmental review to the appropriate State and local agencies as determined by the State. Specifically, the Applicant ensures that it has fulfilled or will fulfill the obligations imposed on FTA by U.S. Department of Transportation (U.S. DOT) regulations, "Intergovernmental Review of Department of Transportation Programs and Activities," 49 CFR part 17. This assurance does not apply to Applicants for Federal assistance derived from FTA's Tribal Transit Program, 49 U.S.C. 5311(c)(1).

D. Nondiscrimination Assurance

As required by 49 U.S.C. 5332 (which prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity), by Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, and by U.S. DOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act," 49 CFR part 21 at 21.7, the Applicant ensures that it will comply with all requirements imposed by or issued pursuant to 49 U.S.C. 5332, 42 U.S.C. 2000d, and 49 CFR part 21, so that no person in the United States, on the basis of race, color, national origin, creed, sex, or age will be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any program or activity (particularly in the level and quality of transportation services and transportation-related benefits) for which the Applicant receives Federal assistance awarded by the U.S. DOT or FTA.

Specifically, during the period in which Federal assistance is extended to the project, or project property is used for a purpose for which the Federal assistance is extended or for another purpose involving the provision of similar services or benefits, or as long as the Applicant retains ownership or possession of the project property, whichever is longer, the Applicant ensures that:

(1) Each project will be conducted, property acquisitions will be undertaken, and project facilities will be operated in accordance with all applicable requirements imposed by or issued pursuant to 49 U.S.C. 5332, 42 U.S.C. 2000d, and 49 CFR part 21, and understands that this assurance extends to its entire facility and to facilities operated in connection with the project.

(2) It will promptly take the necessary actions to effectuate this assurance, including notifying the public that complaints of discrimination in the provision of transportation-related services or benefits may be filed with U.S. DOT or FTA. Upon

request by U.S. DOT or FTA, the Applicant ensures that it will submit the required information pertaining to its compliance with these provisions.

(3) It will include in each subagreement, property transfer agreement, third party contract, third party subcontract, or participation agreement adequate provisions to extend the requirements imposed by or issued pursuant to 49 U.S.C. 5332, 42 U.S.C. 2000d and 49 CFR part 21 to other parties involved therein including any subrecipient, transferee, third party contractor, third party subcontractor at any level, successor in interest, or any other participant in the project.

(4) Should it transfer real property, structures, or improvements financed with Federal assistance provided by FTA to another party, any deeds and instruments recording the transfer of that property shall contain a covenant running with the land assuring nondiscrimination for the period during which the property is used for a purpose for which the Federal assistance is extended or for another purpose involving the provision of similar services or benefits.

(5) The United States has a right to seek judicial enforcement with regard to any matter arising under the Act, regulations, and this assurance.

(6) It will make any changes in its Title VI implementing procedures as U.S. DOT or FTA may request to achieve compliance with the requirements imposed by or issued pursuant to 49 U.S.C. 5332, 42 U.S.C. 2000d, and 49 CFR part 21.

E. Assurance of Nondiscrimination on the Basis of Disability

As required by U.S. DOT regulations, "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance," at 49 CFR 27.9, the Applicant ensures that, as a condition to the approval or extension of any Federal assistance awarded by FTA to construct any facility, obtain any rolling stock or other equipment, undertake studies, conduct research, or to participate in or obtain any benefit from any program administered by FTA, no otherwise qualified person with a disability shall be, solely by reason of that disability, excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any program or activity receiving or benefiting from Federal assistance administered by the FTA or any entity within U.S. DOT. The Applicant ensures that project implementation and operations so assisted will comply with all applicable requirements of U.S. DOT regulations implementing the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, *et seq.*, and the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. 12101 *et seq.*, and implementing U.S. DOT regulations at 49 CFR Parts 27, 37, and 38, and any other applicable Federal laws that may be enacted or Federal regulations that may be promulgated.

F. U.S. Office of Management and Budget (OMB) Assurances

Consistent with OMB assurances set forth in SF-424B and SF-424D, the Applicant ensures that, with respect to itself or its project, the Applicant:

(1) Has the legal authority to apply for Federal assistance and the institutional, managerial, and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management, and completion of the project described in its application;

(2) Will give FTA, the Comptroller General of the United States, and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives;

(3) Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest or personal gain;

(4) Will initiate and complete the work within the applicable project time periods following receipt of FTA approval;

(5) Will comply with all applicable Federal statutes relating to nondiscrimination including, but not limited to:

(a) Title VI of the Civil Rights Act, 42 U.S.C. 2000d, which prohibits discrimination on the basis of race, color, or national origin;

(b) Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 through 1683, and 1685 through 1687, and U.S. DOT regulations, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 49 CFR part 25, which prohibit discrimination on the basis of sex;

(c) Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of disability;

(d) The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 through 6107, which prohibits discrimination on the basis of age;

(e) The Drug Abuse Office and Treatment Act of 1972, as amended, 21 U.S.C. 1101 *et seq.*, relating to nondiscrimination on the basis of drug abuse;

(f) The Comprehensive Alcohol Abuse and Alcoholism Prevention Act of 1970, as amended, 42 U.S.C. 4541 *et seq.*, relating to nondiscrimination on the basis of alcohol abuse or alcoholism;

(g) The Public Health Service Act of 1912, as amended, 42 U.S.C. 201 *et seq.*, relating to confidentiality of alcohol and drug abuse patient records;

(h) Title VIII of the Civil Rights Act, 42 U.S.C. 3601 *et seq.*, relating to nondiscrimination in the sale, rental, or financing of housing; and

(i) Any other nondiscrimination statute(s) that may apply to the project;

(6) To the extent applicable, will comply with, or has complied with, the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (Uniform Relocation Act) 42 U.S.C. 4601 *et seq.*, which, among other things, provide for fair and equitable treatment of persons displaced or persons whose property is acquired as a result of Federal or federally assisted

programs. These requirements apply to all interests in real property acquired for project purposes and displacement caused by the project regardless of Federal participation in any purchase. As required by sections 210 and 305 of the Uniform Relocation Act, 42 U.S.C. 4630 and 4655, and by U.S. DOT regulations, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs," 49 CFR 24.4, the Applicant ensures that it has the requisite authority under applicable state and local law to comply with the requirements of the Uniform Relocation Act, 42 U.S.C. 4601 *et seq.*, and U.S. DOT regulations, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs," 49 CFR part 24, and will comply with that Act or has complied with that Act and those implementing regulations, including but not limited to the following:

(a) The Applicant will adequately inform each affected person of the benefits, policies, and procedures provided for in 49 CFR part 24;

(b) The Applicant will provide fair and reasonable relocation payments and assistance as required by 42 U.S.C. 4622, 4623, and 4624; 49 CFR part 24; and any applicable FTA procedures, to or for families, individuals, partnerships, corporations, or associations displaced as a result of any project financed with FTA assistance;

(c) The Applicant will provide relocation assistance programs offering the services described in 42 U.S.C. 4625 to such displaced families, individuals, partnerships, corporations, or associations in the manner provided in 49 CFR part 24;

(d) Within a reasonable time before displacement, the Applicant will make available comparable replacement dwellings to displaced families and individuals as required by 42 U.S.C. 4625(c)(3);

(e) The Applicant will carry out the relocation process in such manner as to provide displaced persons with uniform and consistent services, and will make available replacement housing in the same range of choices with respect to such housing to all displaced persons regardless of race, color, religion, or national origin;

(f) In acquiring real property, the Applicant will be guided to the greatest extent practicable under state law, by the real property acquisition policies of 42 U.S.C. 4651 and 4652;

(g) The Applicant will pay or reimburse property owners for necessary expenses as specified in 42 U.S.C. 4653 and 4654, with the understanding that FTA will provide Federal financial assistance for the Applicant's eligible costs of providing payments for those expenses, as required by 42 U.S.C. 4631;

(h) The Applicant will execute such amendments to third party contracts and subagreements financed with FTA assistance and execute, furnish, and be bound by such additional documents as FTA may determine necessary to effectuate or implement the assurances provided herein; and

(i) The Applicant agrees to make these assurances part of or incorporate them by reference into any third party contract or subagreement, or any amendments thereto,

relating to any project financed by FTA involving relocation or land acquisition and provide in any affected document that these relocation and land acquisition provisions shall supersede any conflicting provisions;

(7) To the extent applicable, will comply with the Davis-Bacon Act, as amended, 40 U.S.C. 3141 *et seq.*, the Copeland "Anti-Kickback" Act, as amended, 18 U.S.C. 874, and the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. 3701 *et seq.*, regarding labor standards for federally assisted projects;

(8) To the extent applicable, will comply with the flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4012a(a), requiring the Applicant and its subrecipients in a special flood hazard area to participate in the program and purchase flood insurance if the total cost of insurable construction and acquisition is \$10,000 or more;

(9) To the extent applicable, will comply with the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4831(b), which prohibits the use of lead-based paint in the construction or rehabilitation of residence structures;

(10) To the extent applicable, will not dispose of, modify the use of, or change the terms of the real property title or other interest in the site and facilities on which a construction project supported with FTA assistance takes place without permission and instructions from FTA;

(11) To the extent required by FTA, will record the Federal interest in the title of real property, and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to ensure nondiscrimination during the useful life of the project;

(12) To the extent applicable, will comply with FTA provisions concerning the drafting, review, and approval of construction plans and specifications of any construction project supported with FTA assistance. As required by U.S. DOT regulations, "Seismic Safety," 49 CFR 41.117(d), before accepting delivery of any building financed with FTA assistance, it will obtain a certificate of compliance with the seismic design and construction requirements of 49 CFR part 41;

(13) To the extent applicable, will provide and maintain competent and adequate engineering supervision at the construction site of any project supported with FTA assistance to ensure that the complete work conforms with the approved plans and specifications, and will furnish progress reports and such other information as may be required by FTA or the state;

(14) To the extent applicable, will comply with any applicable environmental standards that may be prescribed to implement the following Federal laws and executive orders:

(a) Institution of environmental quality control measures under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 through 4335 and Executive Order No. 11514, as amended, 42 U.S.C. 4321 note;

(b) Notification of violating facilities pursuant to Executive Order No. 11738, 42 U.S.C. 7606 note;

(c) Protection of wetlands pursuant to Executive Order No. 11990, 42 U.S.C. 4321 note;

(d) Evaluation of flood hazards in floodplains in accordance with Executive Order No. 11988, 42 U.S.C. 4321 note;

(e) Assurance of project consistency with the approved state management program developed pursuant to the requirements of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 through 1465;

(f) Conformity of Federal actions to State (Clean Air) Implementation Plans under section 176(c) of the Clean Air Act of 1955, as amended, 42 U.S.C. 7401 through 7671q;

(g) Protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300f through 300j-6;

(h) Protection of endangered species under the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 through 1544; and

(i) Environmental protections for Federal transportation programs, including, but not limited to, protections for parks, recreation areas, or wildlife or waterfowl refuges of national, state, or local significance or any land from a historic site of national, State, or local significance to be used in a transportation project as required by 49 U.S.C. 303(b) and 303(c);

(j) Protection of the components of the national wild and scenic rivers systems, as required under the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. 1271 through 1287; and

(k) Provision of assistance to FTA in complying with section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470f; with the Archaeological and Historic Preservation Act of 1974, as amended, 16 U.S.C. 469 through 469c; and with Executive Order No. 11593 (identification and protection of historic properties), 16 U.S.C. 470 note;

(15) To the extent applicable, will comply with the requirements of the Hatch Act, 5 U.S.C. 1501 through 1508 and 7324 through 7326, which limit the political activities of State and local agencies and their officers and employees whose primary employment activities are financed in whole or part with Federal funds including a Federal loan, grant agreement, or cooperative agreement except, in accordance with 49 U.S.C. 5307(k)(2) and 23 U.S.C. 142(g), the Hatch Act does not apply to a nonsupervisory employee of a public transportation system (or of any other agency or entity performing related functions) receiving FTA assistance to whom that Act does not otherwise apply;

(16) To the extent applicable, will comply with the National Research Act, Public Law 93-348, July 12, 1974, as amended, 42 U.S.C. 289 *et seq.*, and U.S. DOT regulations, "Protection of Human Subjects," 49 CFR Part 11, regarding the protection of human subjects involved in research, development, and related activities supported by Federal assistance;

(17) To the extent applicable, will comply with the Laboratory Animal Welfare Act of 1966, as amended, 7 U.S.C. 2131 *et seq.*, and U.S. Department of Agriculture regulations, "Animal Welfare," 9 CFR subchapter A, parts 1, 2, 3, and 4, regarding the care, handling,

and treatment of warm blooded animals held or used for research, teaching, or other activities supported by Federal assistance;

(18) Will have performed the financial and compliance audits as required by the Single Audit Act Amendments of 1996, 31 U.S.C. 7501 *et seq.*, OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," Revised, and the most recent applicable OMB A-133 Compliance Supplement provisions for the U.S. DOT; and

(19) To the extent applicable, will comply with all applicable provisions of all other Federal laws, regulations, and directives governing the project, except to the extent that FTA has expressly approved otherwise in writing.

22. Tribal Transit Program

Each Applicant for Tribal Transit Program assistance must provide all certifications and assurance set forth below. Except to the extent that FTA determines otherwise in writing, FTA may not award any Federal assistance under the Tribal Transit Program until the Applicant provides these certifications and assurances by selecting Category "22."

In accordance with 49 U.S.C. 5311(c)(1) that authorizes the Secretary of Transportation to establish terms and conditions for direct grants to Indian tribal governments, the Applicant certifies and ensures as follows:

A. The Applicant ensures that:

(1) It has or will have the necessary legal, financial, and managerial capability to apply for, receive, and disburse Federal assistance authorized for 49 U.S.C. 5311; and to carry out each project, including the safety and security aspects of that project;

(2) It has or will have satisfactory continuing control over the use of project equipment and facilities;

(3) The project equipment and facilities will be adequately maintained; and

(4) Its project will achieve maximum feasible coordination with transportation service assisted by other Federal sources.

B. In accordance with 49 CFR 18.36(g)(3)(ii), the Applicant certifies that its procurement system will comply with the requirements of 49 CFR 18.36, or will inform FTA promptly that its procurement system does not comply with 49 CFR 18.36.

C. To the extent applicable to the Applicant or its Project, the Applicant certifies that it will comply with the certifications, assurances, and agreements in Category 08 (Bus Testing), Category 09 (Charter Bus Agreement), Category 10 (School Transportation Agreement), Category 11 (Demand Responsive Service), Category 12 (Alcohol Misuse and Prohibited Drug Use), and Category 14 (National Intelligent Transportation Systems Architecture and Standards) of this document.

D. If its application exceeds \$100,000, the Applicant agrees to comply with the certification in Category 02 (Lobbying) of this document.

Selection and Signature Page(s) follow

FEDERAL FISCAL YEAR 2008 CERTIFICATIONS AND ASSURANCES FOR FEDERAL TRANSIT ADMINISTRATION ASSISTANCE PROGRAMS

(Signature page alternative to providing Certifications and Assurances in TEAM-Web)

Name of Applicant:

The Applicant agrees to comply with applicable provisions of Categories 01-24.

OR

The Applicant agrees to comply with applicable provisions of the Categories it has selected:

	Category	Description
01	Assurances Required For Each Applicant.	
02	Lobbying	
03	Procurement Compliance.	
04	Protections for Private Providers of Public Transportation.	
05	Public Hearing	
06	Acquisition of Rolling Stock for Use in Revenue Service.	
07	Acquisition of Capital Assets by Lease.	
08	Bus Testing	
09	Charter Service Agreement.	
10	School Transportation Agreement.	
11	Demand Responsive Service.	
12	Alcohol Misuse and Prohibited Drug Use.	
13	Interest and Other Financing Costs.	
14	Intelligent Transportation Systems.	
15	Urbanized Area Formula Program.	
16	Clean Fuels Grant Program.	
17	Elderly Individuals and Individuals with Disabilities Formula Program and Pilot Program.	

	Category	Description
18	Nonurbanized Area Formula Program for States.	
19	Job Access and Reverse Commute Program.	
20	New Freedom Program.	
21	Alternative Transportation in Parks and Public Lands Program.	
22	Tribal Transit Program.	
23	Infrastructure Finance Projects.	
24	Deposits of Federal Financial Assistance to a State Infrastructure Banks.	

FEDERAL FISCAL YEAR 2008 FTA CERTIFICATIONS AND ASSURANCES SIGNATURE PAGE

(Required of all Applicants for FTA assistance and all FTA Grantees with an active capital or formula project)

AFFIRMATION OF APPLICANT

Name of Applicant:

Name and Relationship of Authorized Representative:

BY SIGNING BELOW, on behalf of the Applicant, I declare that the Applicant has duly authorized me to make these certifications and assurances and bind the Applicant's compliance. Thus, the Applicant agrees to comply with all Federal statutes, regulations, executive orders, and directives, and with the certifications and assurances as indicated on the foregoing page applicable to each application it makes to the Federal Transit Administration (FTA) in Federal Fiscal Year 2008.

FTA intends that the certifications and assurances the Applicant selects on the other side of this document, as representative of the certifications and assurances in this document, should apply, as provided, to each project for which the Applicant seeks now, or may later, seek FTA assistance during Federal Fiscal Year 2008.

The Applicant affirms the truthfulness and accuracy of the certifications and assurances it has made in the statements submitted herein with this document and any other submission made to FTA, and acknowledges that the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 *et seq.*, and implementing U.S. DOT regulations, "Program Fraud Civil Remedies," 49 CFR Part 31 apply to any certification, assurance or submission made to FTA. The criminal

fraud provisions of 18 U.S.C. 1001 apply to any certification, assurance, or submission made in connection with a Federal public transportation program authorized in 49 U.S.C. chapter 53 or any other statute. In signing this document, I declare under penalties of perjury that the foregoing certifications and assurances, and any other statements made by me on behalf of the Applicant are true and correct.

Signature _____

Date: _____

Name _____

Authorized Representative of Applicant

AFFIRMATION OF APPLICANT'S
ATTORNEY

For (Name of Applicant):

As the undersigned Attorney for the above named Applicant, I hereby affirm to the Applicant that it has authority under State, local, or tribal government law, as applicable, to make and comply with the certifications and assurances as indicated on the foregoing pages. I further affirm that, in my opinion, the certifications and assurances have been legally made and constitute legal and binding obligations on the Applicant.

I further affirm to the Applicant that, to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certifications and assurances, or of the performance of the project.

Signature _____

Date: _____

Name _____

Attorney for Applicant

Each Applicant for FTA financial assistance and each FTA Grantee with an active capital or formula project must provide an Affirmation of Applicant's Attorney pertaining to the Applicant's legal capacity. The Applicant may enter its signature in lieu of the Attorney's signature, provided the Applicant has on file this Affirmation, signed by the attorney and dated this Federal fiscal year.

Appendix B—FTA Regional Offices and Tribal Transit Liaisons

Region I—Massachusetts, Rhode Island, Connecticut, New Hampshire, Vermont and Maine.

Richard H. Doyle, FTA Regional Administrator, Volpe National Transportation Systems Center, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Phone: (617) 494–2055, Fax: (617) 494–2865. Regional Tribal Liaison: Judi Molloy.

Region II—New York, New Jersey.

Brigid Hynes-Cherin, FTA Regional Administrator, One Bowling Green, Room 429, New York, NY 10004–1415, Phone: (212) 668–2170, Fax: (212) 668–2136. Regional Tribal Liaison: Rebecca Reyes-Alicea.

Region III—Pennsylvania, Maryland, Virginia, West Virginia, Delaware, Washington, DC.

Letitia Thompson, FTA Regional Administrator, 1760 Market Street, Suite

500, Philadelphia, PA 19103–4124, Phone: (215) 656–7100, Fax: (215) 656–7260.

Region IV—Georgia, North Carolina, South Carolina, Florida, Mississippi, Tennessee, Kentucky, Alabama, Puerto Rico, Virgin Islands.

Yvette G. Taylor, FTA Regional Administrator, 230 Peachtree St., NW., Suite 800, Atlanta, GA 30303, Tel.: (404) 865–5600, Fax: (404) 865–5605. Regional Tribal Liaisons: Jamie Pfister and James Garland.

Region V—Illinois, Indiana, Ohio, Wisconsin, Minnesota, Michigan.

Marisol R. Simon, FTA Regional Administrator, 200 West Adams Street, Suite 320, Chicago, IL 60606–5232, Phone: (312) 353–2789, Fax: (312) 886–0351. Regional Tribal Liaisons: William Wheeler, Joyce Taylor.

Region VI—Texas, New Mexico, Louisiana, Arkansas, Oklahoma.

Robert Patrick, FTA Regional Administrator, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Phone: (817) 978–0550, Fax: (817) 978–0575. Regional Tribal Liaison: Lynn Hayes.

Region VII—Iowa, Nebraska, Kansas, Missouri.

Mokhtee Ahmad, FTA Regional Administrator, 901 Locust Street, Suite 404, Kansas City, MO 64106, Phone: (816) 329–3920, Fax: (816) 329–3921. Regional Tribal Liaisons: Joni Roeseler and Cathy Monroe.

Region VIII—Colorado, North Dakota, South Dakota, Montana, Wyoming, Utah.

Terry Rosapep, FTA Regional Administrator, 12300 West Dakota Avenue, Suite 310, Lakewood, CO 80228–2583, Phone: (720) 963–3300, Fax: (720) 963–3333. Regional Tribal Liaisons: Jennifer Stewart and David Beckhouse.

Region IX—California, Arizona, Nevada, Hawaii, American Samoa, Guam.

Leslie Rogers, FTA Regional Administrator, 201 Mission Street, Suite 1650, San Francisco, CA 94105–1831, Phone: (415) 744–3133, Fax: (415) 744–2726. Regional Tribal Liaison: Lorraine Lerman.

Region X—Washington, Oregon, Idaho, Alaska.

Richard Krochalis, FTA Regional Administrator, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Phone: (206) 220–7954, Fax: (206) 220–7959. Regional Tribal Liaisons: Bill Ramos and Annette Clothier.

Appendix C—Technical Assistance Contacts

Tribal Technical Assistance Program (TTAP) Centers

TTAP-Alaska

Alaska Tribal Technical Assistance Program, NW & AK TTAP, 329 Harbor Dr. #208, Sitka, AK 99835, Contact: Dan Moreno, Telephone: (800) 399–6376, Fax: (907) 747–5032, E-mail: dmoreno@mail.ewu.edu. Web: <http://www.ewu.edu/TTAP>.

TTAP-California

TTAP-California-Nevada, The National Center for American Indian Enterprise Development, 11138 Valley Mall, Suite 200, El Monte, CA 91731, Contact: Lee Bigwater, Telephone: (626) 350–4446, Fax: (626) 442–7115.

TTAP-Colorado

Tribal Technical Assistance Program at Colorado State University, Rockwell Hall, Rm. 321, Colorado State University, Fort Collins, CO 80523–1276, Contact: Ronald Hall, Telephone: (800) 262–7623, Fax: (970) 491–3502, E-mail: ronald.hall@colostate.edu. Web: <http://ttap.colostate.edu/>.

TTAP-Michigan

Tribal Technical Assistance Program, 301–E Dillman Hall, Michigan Technological University, 1400 Townsend Dr., Houghton, MI 49931–1295, Contact: Bernard D. Alkire, Telephone: (888) 230–0688, Fax: (906) 487–1834, E-mail: balkire@mtu.edu. Web: <http://www.ttap.mtu.edu>.

TTAP-North Dakota

Northern Plains Tribal Technical Assistance Program, United Tribes Technical College, 3315 University Drive, Bismarck, ND 58504, Contact: Dennis Trusty, Telephone: (701) 255–3285 ext. 1262, Fax: (701) 530–0635, E-mail: nddennis@hotmail.com or dtrusty@uttc.edu. Web: <http://www.uttc.edu/organizations/ttap/ttap.asp>.

TTAP-NW

Northwest Tribal Technical Assistance Program, Eastern Washington University Department of Urban Planning, Public & Health Administration, 216 Isle Hall, Cheney, WA 99004, Contact: David Frey, Telephone: (800) 583–3187, Fax: (509) 359–7485, E-mail: rrolland@ewu.edu. Web: <http://www.ewu.edu/TTAP>.

TTAP-Oklahoma

Tribal Technical Assistance Program at Oklahoma State University, Oklahoma State University, 5202 N. Richmond Hills Road, Stillwater, OK 74078–0001, Contact: James Self, Telephone: (405) 744–6049, Fax: (405) 744–7268, E-mail: jim.self@okstate.edu. Web: <http://ttap.okstate.edu>.

Additional Technical Assistance Resources

National RTAP (National Rural Transit Assistance Program), E-mail: nationalrtap@apwa.net. <http://www.nationalrtap.org/>. Dave Barr 202–218–6722.

Community Transportation Association of America, The Resource Center—800–891–0590. <http://www.ctaa.org/>.

[FR Doc. E8–11338 Filed 5–20–08; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF THE TREASURY**Fiscal Service****Surety Companies Acceptable on Federal Bonds: American Service Insurance Company, Inc.**

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 14 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: American Service Insurance Company, Inc. Business Address: 150 Northwest Point, Elk Grove Village, IL 60007-1018. Phone: (847) 472-6700. Underwriting limitation b/: \$3,625,000. Surety licenses c/: HI, IL, IN, IA, MO, OH, TX. Incorporated in: Illinois.

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: May 9, 2008.
Vivian L. Cooper,
Director, Financial Accounting and Services Division.
 [FR Doc. E8-11218 Filed 5-20-08; 8:45 am]
BILLING CODE 4810-35-M

DEPARTMENT OF THE TREASURY**Fiscal Service****Surety Companies Acceptable on Federal Bonds—Termination: Global Surety & Insurance Co.**

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 7 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: Notice is hereby given that the Certificate of Authority issued by the Treasury to the above-named company under 31 U.S.C. 9305 to qualify as acceptable surety on Federal bonds was terminated effective February 25, 2008. Federal bond-approving officials should annotate their reference copies of the Treasury Department Circular 570 ("Circular"), 2007 Revision, to reflect this change.

With respect to any bonds currently in force with this company, bond-approving officers may let such bonds run to expiration and need not secure new bonds. However, no new bonds should be accepted from this company, and bonds that are continuous in nature should not be renewed.

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: March 25, 2008.
Vivian L. Cooper,
Director, Financial Accounting and Services Division.
 [FR Doc. E8-11215 Filed 5-20-08; 8:45 am]
BILLING CODE 4810-35-M

DEPARTMENT OF VETERANS AFFAIRS**Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities; Notice of Meeting**

The Department of Veterans Affairs (VA) gives notice under Public Law 92-463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities will be held on June 26-27, 2008 in Room 442, Export-Import Bank, 811 Vermont Avenue, NW., Washington, DC. The June 26 session will be from 9 a.m. until 5 p.m., and the June 27 session will be from 8:30 a.m. until 12:30 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on matters of structural safety in the construction and remodeling of VA facilities and to recommend standards for use by VA in the construction and alteration of its facilities.

On June 26, the Committee will review developments in the fields of fire safety issues and structural design as they relate to seismic and other natural hazards impact on the safety of buildings. On June 27, the Committee will receive appropriate briefings and presentations on current seismic, natural hazards and fire safety issues that are particularly relevant to facilities owned and leased by the Department. The Committee will also discuss appropriate structural and fire safety recommendations for inclusion in VA's standards.

No time will be allocated for receiving oral presentations from the public. However, the Committee will accept written comments. Comments should be sent to Krishna K. Banga, Senior Structural Engineer, Facilities Quality Service, Office of Construction & Facilities Management (OOCFM1A), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Those wishing to attend should contact Mr. Banga at (202) 565-9370.

Dated: May 14, 2008.
 By Direction of the Secretary:
E. Philip Riggins,
Committee Management Officer.
 [FR Doc. E8-11249 Filed 5-20-08; 8:45 am]
BILLING CODE 8320-01-M

Corrections

Federal Register

Vol. 73, No. 99

Wednesday, May 21, 2008

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 242

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 100

[FWS-R7-EA-2007-0025; 70101-1335-0064L6]

RIN 1018-AV72

Subsistence Management Regulations for Public Lands in Alaska—2009–2010 and 2010–2011 Subsistence Taking of Fish and Shellfish Regulations

Correction

In proposed rule document E8-7841 beginning on page 20887 in the issue of

Thursday, April 17, 2008 make the following correction:

On page 20887, in the third column, under the **DATES** heading, in the first and second lines, “comments and proposals received” should read “comments received”.

[FR Doc. Z8-7841 Filed 5-20-08; 8:45 am]

BILLING CODE 1505-01-D



Federal Register

**Wednesday,
May 21, 2008**

Part II

Federal Communications Commission

47 CFR Parts 0, 1, 2, et al.

**Service Rules for the 698–746, 747–762
and 777–792 MHz Bands, Implementing a
Nationwide, Broadband, Interoperable
Public Safety Network in the 700 MHz
Band; Proposed Rule**

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 1, 2, 27, 90

[WT Docket No. 06–150; PS Docket No. 06–229; FCC 08–128]

Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In the *Second Further Notice of Proposed Rulemaking (Second FNPRM)*, the Commission seeks comment on clarifications or revisions to the rules governing the Public Safety Broadband Licensee and the Upper 700 MHz D Block licensee. The Commission seeks comment on whether to continue to require these licensees to enter into a 700 MHz Public/Private Partnership for the purpose of enabling the construction of a nationwide, interoperable broadband network, and if so, what clarifications or revisions to adopt to the rules governing the licensees and the 700 MHz Public/Private Partnership. Further, the Commission seeks comment on what rules to adopt if it determines that the public/private partnership obligation should not be retained. This *Second Further Notice* is another step in the Commission's ongoing efforts to develop a regulatory framework in which to meet current and future public safety communications needs.

DATES: Written comments are due on or before June 20, 2008, and reply comments are due on or before July 7, 2008.

ADDRESSES: You may submit comments, identified by WT Docket No. 06–150 and PS Docket No. 06–229, by any of the identified methods:

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

- Federal Communications Commission's Web Site: <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.

- Mail: Follow the instructions for paper filers below.

- People with Disabilities: Contact the Commission to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional

information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

Peter Trachtenberg at (202) 418–7369, at peter.trachtenberg@fcc.gov, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau; Jeffrey S. Cohen at (202) 418–0799, jeff.cohen@fcc.gov, Public Safety and Homeland Security Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Further Notice of Proposed Rulemaking*, WT Docket No. 06–150, PS Docket No. 06–229, adopted on May 14, 2008 and released May 14, 2008. The full text of the *Second Further Notice of Proposed Rulemaking* is available for public inspection on the Commission's Internet site at <http://www.fcc.gov>. It is also available for inspection and copying during regular business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The full text of this document also may be purchased from the Commission's duplication contractor, Best Copy and Printing Inc., Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20554; telephone (202) 488–5300; fax (202) 488–5563; e-mail FCC@BCPIWEB.COM.

Synopsis

In the *Second Report and Order*, 72 FR 48814, August 24, 2007, the Commission adopted rules for the establishment of a mandatory public/private partnership (the 700 MHz Public/Private Partnership) in the upper portions of the 698–806 MHz band (700 MHz Band) as the means for promoting the rapid construction and deployment of a nationwide, interoperable broadband public safety network that would serve public safety and homeland security needs. Specifically, the Commission required that the winning bidder of the commercial license in the Upper 700 MHz D Block (758–763/788–793 MHz) (D Block) enter into the 700 MHz Public/Private Partnership with the nationwide licensee of the public safety broadband spectrum (763–768/793–798 MHz) (Public Safety Broadband Licensee) to enable construction of this interoperable broadband network, which would span both the commercial D Block and public safety spectrum. In the recently concluded auction of commercial 700 MHz licenses, bidding for the D Block license did not meet the applicable reserve price of \$1.33 billion and, pursuant to the Commission's rules, there was no winning bid for that license. Accordingly, in this *Second FNPRM*, the Commission revisits its

decisions concerning the 700 MHz Public/Private Partnership—considering revisions to this partnership as well as alternative rules the Commission should adopt in the event the D Block licensee is no longer required to enter into a mandatory public/private partnership.

First, the Commission considers whether to adopt clarifications and revisions to the public safety component of the 700 MHz Public/Private Partnership to better promote its public interest goals. In particular, the Commission seeks comment regarding what entities are eligible under Section 337 of the Communications Act as amended and the Commission's rules to use the public safety spectrum in the shared wireless broadband network as public safety users rather than as commercial users, and whether such users should be required to use or subscribe to the shared network. The Commission also seeks comment on possible clarifications of or changes to the rules governing the structure and criteria of the Public Safety Broadband Licensee, whether to clarify further the requirement that the Public Safety Broadband Licensee must be a non-profit organization, what measures to adopt to provide adequate Commission oversight, whether providing a nationwide, interoperable broadband network might be more effectively and efficiently accomplished by allowing State governments to assume responsibility for coordinating the participation of the public safety providers in their jurisdictions, and whether the Commission should rescind the current Public Safety Broadband License and seek new applicants.

In addition, the Commission seeks comment on whether it remains in the public interest to require a public/private partnership between the nationwide D Block licensee and the Public Safety Broadband Licensee for the purpose of creating a nationwide, interoperable broadband network for both commercial and public safety network services. To ensure a thorough consideration of the Commission's options in the event that it does continue to require a public/private partnership between these licensees, the Commission seeks comment broadly on possible revisions to the 700 MHz Public/Private Partnership, including revisions regarding the respective obligations of the D Block licensee and the Public Safety Broadband Licensee. In particular, it seeks comment on the following issues: (1) The technical requirements of the shared wireless broadband network to be constructed by the D Block licensee, (2) the rules governing public safety priority access

to the D Block spectrum during emergencies, and whether the Commission should continue to require the D Block licensee to provide such access; (3) the D Block performance requirements and license term; (4) the respective roles and responsibilities of the D Block licensee and Public Safety Broadband Licensee in connection with the 700 MHz Public/Private Partnership and the shared wireless broadband network; (5) the various fees associated with the shared network; (6) the process for negotiating and establishing the Network Sharing Agreement, including the consequences of a failure to reach agreement; (7) certain auction-related issues, including whether to restrict who may participate in the new auction of the D Block license, whether and how to set any reserve price for such an auction, whether to adopt an exception to the impermissible material relationship rule for the determination of designated entity eligibility with respect to arrangements for the lease or resale (including wholesale) of the spectrum capacity of the D Block license, and whether the Commission should modify the auction default payment rules with respect to the D Block winning bidder; and (8) rules governing the relocation of the public safety narrowband operations. In this *Second FNPRM*, the Commission includes an appendix that serves as a possible framework for establishing the technical requirements for the 700 MHz Public/Private Partnership shared wireless broadband network. This appendix is intended to solicit detailed comment and result in a final set of technical requirements that will provide greater certainty for bidders for the D Block license while ensuring that the network meets public safety's needs; the appendix is not intended to prejudge any of the issues identified for comment in the *Second FNPRM*. Finally, the Commission seeks comment on any other revisions or clarifications that may be appropriate with regard to the 700 MHz Public/Private Partnership, including whether to license the D Block and public safety broadband spectrum on a nationwide or adopt a regional geographic service area basis such as Regional Economic Area Grouping (REAG).

In addition to considering possible revisions to the 700 MHz Public/Private Partnership, the Commission considers its options if the D Block is licensed without this 700 MHz Public/Private Partnership condition. For any circumstances where the Commission determines that the 700 MHz Public/Private Partnership condition on the D

Block should not be retained, it seeks comment on revisions to the rules that would be appropriate with respect to the D Block license as well as revisions with regard to the Public Safety Broadband License that would ensure the development and deployment of a nationwide interoperable broadband network for public safety users. With respect to the D Block, the Commission seeks comment in particular on the service rules that should apply in this event, including the appropriate geographic license area, performance requirements, technical limits, and whether to adopt alternate conditions, such as an open access or wholesale requirement. The Commission seeks comments on the appropriate revisions to the rules that would still enable the Commission to achieve the goal of a nationwide, interoperable public safety broadband network. For example, the Commission seeks comment on: (1) Whether the Commission should adopt, possibly with modifications, the approach proposed in the *Public Safety Ninth Notice of Proposed Rulemaking*, 72 FR 1201, January 10, 2007, which, among other aspects, would allow commercial providers to enter into voluntary arrangements with the Public Safety Broadband Licensee to provide public safety services through access to their commercial network infrastructure and/or through new network build-out in exchange for preemptible access to public safety spectrum; (2) whether to require the adoption of a common broadband standard, and permit regional, state and local entities to build public safety broadband networks built to that standard, either through a spectrum lease with the Public Safety Broadband Licensee or by reassigning the public safety broadband spectrum for regional, state, or local licensing; (3) whether the Commission, in the absence of the public/private partnership, should continue to obligate the D Block winner to fund the relocation of those public safety narrowband systems operating in the lower portion of the public safety spectrum; and (4) whether, in the absence of a public safety/private partnership, there are viable options for funding network construction.

The Commission initiates this *Second FNPRM* with the following principles and goals: (1) To identify concerns in the existing structure of the 700 MHz Public/Private Partnership to inform the Commission's decision making going forward; (2) to promote wireless innovation and broadband network penetration while meeting the communications needs of the first responder community in a

commercially viable manner; (3) to facilitate public safety access to a nationwide, interoperable broadband network in a timely manner; (4) to identify funding opportunities for the public safety community to realize the promise of a broadband communications infrastructure with a nationwide level of interoperability; and (5) to maximize the commercial and public safety benefits of this unique piece of 700 MHz spectrum. The Commission invites comment broadly on these principles and goals, as well as the other subjects discussed. While this *Second FNPRM* raises a number of specific questions, it should not be seen as providing any limitation on the issues that the Commission seeks comment upon. The Commission is interested in any and all perspectives from interested parties on how it can develop rules and procedures that will achieve the multiple goals enumerated above.

Discussion

I. Introduction

1. In the *Second Report and Order*, we adopted rules for the establishment of a mandatory public/private partnership ("the 700 MHz Public/Private Partnership") in the upper portions of the 698–806 MHz band ("700 MHz Band") as the means for promoting the rapid construction and deployment of a nationwide, interoperable broadband public safety network that would serve public safety and homeland security needs.¹ Specifically, we required that the winning bidder of the commercial license in the Upper 700 MHz D Block (758–763/788–793 MHz) ("D Block") enter into the 700 MHz Public/Private Partnership with the nationwide licensee of the public safety broadband spectrum (763–768/793–798 MHz)

¹ See Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, WT Docket No. 06–150, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94–102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01–309, Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03–264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06–169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06–229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96–86, Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, WT Docket No. 07–166, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (*Second Report and Order*) recon. pending.

("Public Safety Broadband Licensee") to enable construction of this interoperable broadband network, which would span both the commercial D Block and public safety spectrum. As essential components of this partnership, the D Block licensee would be chiefly responsible for the construction and operation of a state-of-the-art shared wireless broadband network that would be used by public safety users as well as commercial users. In exchange for taking on these responsibilities, the D Block licensee would gain access to the public safety broadband spectrum for use by its commercial customers on a secondary preemptible basis. In turn, public safety users, through the Public Safety Broadband Licensee, would benefit from obtaining access to a state-of-the-art broadband network on their 700 MHz spectrum that would incorporate their unique requirements, which would not otherwise be possible given the limited availability of public funding.² In Auction 73, the recently concluded auction of commercial 700 MHz licenses, bidding for the D Block license did not meet the applicable reserve price of \$1.33 billion and, pursuant to the Commission's rules, there was no winning bid for that license.³ In the *D Block Post-Auction Order* released shortly after the close of Auction 73, we determined not to re-offer the D Block license immediately in order to "provide additional time to consider options with respect to the D Block spectrum."⁴ Accordingly, in this Second FNPRM of Proposed Rulemaking ("Second FNPRM"), we revisit our decisions concerning the 700 MHz Public/Private Partnership—considering revisions to this partnership as well as alternative rules we should adopt in the event the D Block licensee is no longer required to enter into a mandatory public/private partnership.

2. First, we consider clarifications and revisions to the public safety component of the 700 MHz Public/Private Partnership that would better promote

our public interest goals.⁵ More specifically, we seek comment on whether, under Section 337 of the Communications Act of 1934, as amended ("Act"),⁶ and Section 90.523 of the Commission's rules,⁷ only entities that are providing public safety services, as defined in the Act, are eligible to use the public safety spectrum portion of the shared network established under the 700 MHz Public/Private Partnership, and whether such entities should be required to subscribe to the network. We also seek comment on whether to clarify the requirement that the Public Safety Broadband Licensee be a non-profit organization and specify that entities associated with the public safety component of the 700 MHz Public/Private Partnership, apart from outside advisors or counsel with no debt or equity relationship to the Public Safety Broadband Licensee, may not be for-profit entities. We seek comment on these and other clarifications or changes to the structure of the Public Safety Broadband Licensee and the criteria adopted in the *Second Report and Order*.

3. In addition, we seek comment on possible modifications to the various rules governing the D Block licensee and the Public Safety Broadband Licensee within the framework of the 700 MHz Public/Private Partnership (as revised or clarified). First, we seek comment on whether it remains in the public interest to require a public/private partnership between the nationwide D Block licensee and the Public Safety Broadband Licensee for the purpose of creating a nationwide, interoperable broadband network for both commercial and public safety network services. Next, to ensure a thorough consideration of the Commission's options in the event that we do continue to require a public/private partnership between these licensees, we seek comment on a broad set of possible revisions to the 700 MHz Public/Private Partnership, including revisions regarding the respective obligations of the D Block licensee and the Public Safety Broadband Licensee. In particular, we seek comment on the following issues: (1) The technical requirements of the shared wireless broadband network to be constructed by the D Block licensee, (2) the rules governing public safety priority access

to the D Block spectrum during emergencies; (3) the D Block performance requirements and license term; (4) the respective roles and responsibilities of the D Block licensee and Public Safety Broadband Licensee in connection with the 700 MHz Public/Private Partnership and the shared wireless broadband network, including whether the Public Safety Broadband Licensee may assume responsibilities akin to a "mobile virtual network operator"⁸; (5) the various fees associated with the shared network; (6) the process for negotiating and establishing the Network Sharing Agreement, including the consequences of a failure to reach agreement; (7) certain auction-related issues, including whether to restrict who may participate in the new auction of the D Block license, how to determine any reserve price for such an auction, whether to adopt an exception to the impermissible material relationship rule for the determination of designated entity eligibility with respect to arrangements for the lease or resale (including wholesale) of the spectrum capacity of the D Block license, and whether we should modify the auction default payment rules with respect to the D Block winning bidder; and (8) relocation of the public safety narrowband operations. Finally, we seek comment on other revisions or clarifications that may be appropriate with regard to the 700 MHz Public/Private Partnership, including whether to license the D Block and public safety broadband spectrum on a nationwide or adopt a regional geographic service area basis such as Regional Economic Area Grouping (REAG).⁹

4. In addition to considering possible revisions to the 700 MHz Public/Private Partnership, we consider our options if the D Block is licensed without this 700 MHz Public/Private Partnership condition. We note that there are several circumstances where such options might be relevant. First, we might determine that we should not re-auction the D Block with the 700 MHz Public/Private Partnership condition, and instead immediately conduct an auction to license the D Block without such a

² *Id.* at 15295 para. 13, 15431 para. 396.

³ The auction of these 700 MHz licenses, designated Auction 73, began on January 24, 2008, and concluded March 18, 2008. See http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73.

⁴ Auction of the D Block License in the 758–763 and 788–793 MHz Bands, AU Docket No. 07–157, *Order*, FCC 08–91, para. 3 (rel. Mar. 20, 2008) (*D Block Post-Auction Order*). In the *Second Report and Order*, the Commission decided that, if the reserve price for the D Block was not satisfied in the initial auction results, the Commission might either re-offer the license on the same terms in an immediate second auction, or re-evaluate the license conditions. See *Second Report and Order*, 22 FCC Rcd at 15404 para. 314.

⁵ We use the term "700 MHz Public/Private Partnership" to refer specifically to a mandatory public/private partnership between the D Block licensee and the Public Safety Broadband Licensee, along the general lines initially set forth in the *Second Report and Order*.

⁶ 47 U.S.C. 337.

⁷ 47 CFR 90.523.

⁸ A mobile virtual network operator is a non-facility-based mobile service provider that resells service to the public for profit. See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 05–71, *Tenth Report*, 20 FCC Rcd 15908, 15920 para. 27 (2005).

⁹ As licensing the D Block on a REAG basis would result in issuing multiple D Block licenses, references herein to "the" D Block license and licensee should be understood to incorporate reference to any of multiple D Block licenses or licensees and vice versa, as appropriate.

condition. In addition, we might conclude that, even if we should retain the 700 MHz Public/Private Partnership condition in the next D Block auction, the condition should be removed if the next D Block auction fails to produce a winning bidder, or the winning bidder defaults or fails to negotiate a successful Network Sharing Agreement with the Public Safety Broadband Licensee. Therefore, for any circumstances where we determine that the 700 MHz Public/Private Partnership condition on the D Block should not be retained, we seek comment on revisions to the rules that would be appropriate with respect to the D Block license as well as revisions with regard to the Public Safety Broadband License that would ensure the development and deployment of a nationwide interoperable broadband network for public safety users.

5. Finally, we note that, in adopting the *Second Report and Order*, we took an innovative approach to addressing a vitally important problem: Promoting interoperability, on a nationwide basis, for public safety communications. We intended that the mandatory public/private partnership model between two nationwide licensees—the commercial D Block licensee and the non-profit Public Safety Broadband Licensee—would facilitate access for public safety to a robust, advanced communications infrastructure and produce economies of scale inherent in a nationwide footprint. Importantly, we also found that this approach was the best means available to address the issue of funding for construction of a public safety communications infrastructure, which has proven a significant impediment to date. At the same time, however, we anticipated that the partnership would involve a balance between the commercial partner's obligation to construct a shared network infrastructure and the commercial partner's secondary access to the 700 MHz public safety broadband spectrum. By partnering these two spectrum assets, we intended to promote spectrum efficiency and innovation. Thus, we aimed to have the 700 MHz Public/Private Partnership between the D Block licensee and the Public Safety Broadband Licensee be complementary, and we designed this framework to strike the appropriate balance such that the maximum benefits accrued to both parties.

6. Although the initial sale of the D Block license did not result in a winning bidder, these goals remain. In reexamining our approach to the D Block following Auction 73, we continue to proceed with these objectives in mind. Accordingly, we

initiate this Second FNPRM with the following principles and goals:

- To identify concerns in the existing structure of the 700 MHz Public/Private Partnership to inform our decision making going forward;
- To promote wireless innovation and broadband network penetration while meeting the communications needs of the first responder community in a commercially viable manner;
- To facilitate public safety access to a nationwide, interoperable broadband network in a timely manner;
- To identify funding opportunities for the public safety community to realize the promise of a broadband communications infrastructure with a nationwide level of interoperability; and
- To maximize the commercial and public safety benefits of this unique piece of 700 MHz spectrum.

7. We invite comment broadly on these principles and goals, as well as the specific subjects discussed herein. While today's item raises a number of specific questions, it should not be seen as providing any limitation on the public safety issues that we seek comment upon. We are interested in any and all perspectives from interested parties on how the Commission can develop rules and procedures that will achieve the multiple goals enumerated above. Finally, before ultimately adopting final rules in response to this Second FNPRM, we plan to present for public comment, in a subsequent FNPRM of Proposed Rulemaking, a detailed proposal regarding the specific proposed rules.¹⁰

II. Background

8. In the *Second Report and Order*, released August 10, 2007, we adopted a band plan and service rules affecting the upper portions of the 700 MHz Band in order to promote the creation of a nationwide, interoperable broadband public safety network through the establishment of the 700 MHz Public/Private Partnership. Specifically, with regard to the public safety spectrum in the 700 MHz Band, we designated the lower half of this spectrum (the 763–768 MHz and 793–798 MHz bands) for public safety broadband communications, and we consolidated existing narrowband allocations to the upper half of the spectrum (the 769–775 MHz and 799–805 MHz bands).¹¹ We

also created a single nationwide license for the public safety broadband spectrum, and we specified the criteria, selection process, and responsibilities of the licensee assigned this spectrum, the Public Safety Broadband Licensee.¹² We required, for example, that no commercial interest may be held in the Public Safety Broadband Licensee, that no commercial interest may participate in the management of the licensee, and that the licensee must be a non-profit organization.¹³ With regard to the commercial spectrum in the 700 MHz Band, we designated one block—the D Block (the 758–763 MHz and 788–793 MHz bands) located adjacent to the public safety broadband spectrum block—for use as part of the 700 MHz Public/Private Partnership. As set forth in the *Second Report and Order*, we required the D Block licensee, working with the Public Safety Broadband Licensee in a public/private partnership, to construct and operate a nationwide network shared by both commercial and public safety users.¹⁴

9. *The 700 MHz Public/Private Partnership*. In the *Second Report and Order*, we determined that promoting commercial investment in the build-out of a shared network infrastructure for both commercial and public safety users through the 700 MHz Public/Private Partnership would address “the most significant obstacle to constructing a public safety network—the limited availability of public funding.”¹⁵ We concluded that providing for a shared infrastructure using the D Block and the public safety broadband spectrum would help achieve significant cost efficiencies. We noted that this would allow public safety agencies “to take advantage of commercial, off-the-shelf technology and otherwise benefit from commercial carriers’ investments in research and development of advanced wireless technologies.”¹⁶ We also stated that this approach could benefit the public safety community by providing it with access to an additional 10 megahertz of broadband spectrum during emergencies, when it is needed most. Most importantly, it was our view that this particular public/private partnership approach would provide all of these benefits on a nationwide basis and thus provide the most practical means of speeding deployment of a

the 768–769 MHz and 798–799 MHz bands located between the broadband and narrowband allocations. *Id.*

¹² See *id.*

¹³ See *id.* at 15421.

¹⁴ *Id.* at 15428.

¹⁵ *Id.* at 15431.

¹⁶ *Id.* (citing Sprint Nextel 700 MHz Further Notice Comments at 7–8).

¹⁰ In this subsequent Further Notice of Proposed Rulemaking, we plan to seek comment on an expedited basis, with comments due fourteen days after publication in the **Federal Register**, and reply comments due twenty-one days after such publication.

¹¹ See *Second Report and Order*, 22 FCC Rcd at 15406. We also created an internal guard band in

nationwide, interoperable, broadband network for public safety service that is designed to meet their needs in times of crisis. At the same time, we pointed out that the 700 MHz Public/Private Partnership would provide the D Block licensee with rights to operate commercial services in the 10 megahertz of public safety broadband spectrum on a secondary, preemptible basis, which would both help to defray the costs of build-out and ensure that the spectrum is used efficiently.¹⁷

10. We established various features of the 700 MHz Public/Private Partnership. First, we set forth the essential components of this partnership.¹⁸ In particular, we specified certain parameters for the shared wireless broadband network, including features relating to the technology platform, signal coverage, robustness and reliability, capacity, security, operational capabilities and control, and certain equipment specifications.¹⁹ With regard to the spectrum shared by the common network, we required that the Public Safety Broadband Licensee lease the public safety broadband spectrum for commercial use by the D Block licensee on a secondary, preemptible basis and provided that the public safety entities would have priority access to the D Block spectrum during emergencies.²⁰ We also established certain minimal performance requirements relating to construction and build-out of the shared 700 MHz Public/Private Partnership network.²¹

11. Next, we established that the terms of the 700 MHz Public/Private Partnership would be governed both by Commission rules and by a Network Sharing Agreement (“NSA”) to be negotiated by the winning bidder for the D Block license and the Public Safety Broadband Licensee.²² Throughout the *Second Report and Order* we identified certain elements that the parties were required to address in the NSA. These included, for instance, the details of certain mandatory network specifications established in the order and a detailed build-out schedule as jointly agreed upon by the Public Safety Broadband Licensee and the D Block licensee.²³ We also determined that the NSA should include, among other things, specification of all service fees that public safety entities would pay

with respect to access and use of the shared network, both in terms of fees applicable for normal network service and fees for priority access to the D Block spectrum in an emergency.²⁴

12. We established rules governing the establishment of the NSA to ensure timely completion of the negotiations and to resolve any disputes that may arise.²⁵ Among other rules, we required the winning bidder of the D Block license and the Public Safety Broadband Licensee to negotiate in good faith, and we provided that the D Block license application would not be granted until the parties obtained Commission approval of the agreement, executed, and then filed the NSA with the Commission.²⁶ We also required the negotiations to begin by a date certain and conclude within six months. Further, we specified rules to govern in the event of a negotiation dispute. Specifically, we provided that if, at the end of the six month negotiation period, or on their own motion at any time, the Chiefs of the Public Safety and Homeland Security Bureau (“PSHSB”) and the Wireless Telecommunications Bureau (“WTB”) found that negotiations had reached an impasse, they could take a variety of actions to resolve any disputes, including but not limited to issuing a decision on the disputed issues and requiring the submission of a draft agreement consistent with their decision.²⁷

13. *Narrowband Relocation.* In the *Second Report and Order*, we found that, in order to maximize the benefits of the 700 MHz Public/Private Partnership to deploy a nationwide, interoperable broadband communications network, the current 700 MHz narrowband public safety operations must be consolidated and cleared no later than the DTV transition date.²⁸ To effectuate the consolidation of the narrowband channels, we required the D Block licensee to pay the costs of relocating narrowband radios to the newly consolidated portion of the band and capped the disbursement amount for such relocation costs at \$10 million.²⁹ We also cautioned that any narrowband equipment deployed in the 764–770 MHz and 794–800 MHz bands (channels 63 and 68), or in the 775–776 MHz and 805–806 MHz bands (the upper one megahertz of channels 64 and 69), more than 30 days following the adoption date of the *Second Report and*

Order would be ineligible for relocation funding.³⁰ In addition, we prohibited authorization of any new narrowband operations in that spectrum, as of 30 days following the adoption date of the *Second Report and Order*.³¹

14. *Rules for an Auction to License the D Block.* In addition to adopting service rules for the 700 MHz commercial spectrum, including the D Block, we also made several determinations regarding the auction of the 700 MHz commercial licenses. In particular, we concluded that block-specific aggregate reserve prices should be established for each commercial license block—the A, B, C, D, and E Blocks—to be auctioned in Auction 73, and directed WTB to adopt and publicly disclose those reserve prices prior to the auction, pursuant to its existing delegated authority and consistent with our directions.³² For the D Block, we concluded that WTB should consider certain factors in setting the D Block reserve price, including the 700 MHz Public/Private Partnership conditions, which might suggest a reserve price of \$1.33 billion. We provided that, in the event that bids for the D Block license did not meet the reserve price, we would leave open the possibility of offering the license on the same terms or re-evaluating the D Block license conditions.³³

15. In an effort to encourage the widest range of potentially qualified applicants to participate in bidding for the D Block license, in the *Second Report and Order*, we enabled eligible applicants for this license to seek designated entity bidding credits for small businesses as a means to create incentives for investors to provide innovative small businesses with the capital necessary to compete for the D Block license at auction.³⁴ We subsequently decided to waive, on our own motion, the application of our “impermissible material relationship” rule³⁵ for purposes of determining an applicant’s or licensee’s designated entity eligibility solely with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the D Block license.³⁶ Given the unique characteristics of the regulations governing the D Block

³⁰ *Id.* at 15412.

³¹ *Id.*

³² *See id.* at 15400.

³³ *See id.* at 15404.

³⁴ 47 CFR 27.502.

³⁵ 47 CFR 1.2110(b)(3)(iv)(A).

³⁶ *See generally* Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission’s Rules for the Upper 700 MHz Band D Block License, *Order*, 22 FCC Rcd 20354 (2007) (*D Block Waiver Order*) *recon. pending*.

¹⁷ *Id.*

¹⁸ *Id.* at 15432.

¹⁹ *Id.* at 15432, 15433–44.

²⁰ *Id.* at 15432, 15434–43.

²¹ *Id.* at 15432, 15443–46.

²² *Id.* at 15432, 15447–49.

²³ *Id.* at 15448–49.

²⁴ *Id.* at 15448–49.

²⁵ *Id.* at 15448.

²⁶ *Id.* at 15448.

²⁷ *Id.* at 15465.

²⁸ *Id.* at 15410.

²⁹ *Id.* at 15412.

license, we concluded that a waiver of the impermissible material relationship rule served the public interest.³⁷

16. *Petitions for Reconsideration.* Ten parties filed petitions for reconsideration seeking review of various aspects of the *Second Report and Order*.³⁸ Three of the petitions sought reconsideration of the rules governing the 700 MHz Public/Private Partnership specifically,³⁹ and two petitioners sought reconsideration of the aggregate reserve prices set for the commercial license blocks, including the D Block.⁴⁰ These petitioners presented related arguments in the pre-auction process.⁴¹ After considering the arguments, WTB established reserve prices consistent with the direction of the *Second Report and Order*.⁴² Two other parties filed petitions seeking reconsideration of some or all of the requirements regarding public safety narrowband relocation, and also filed requests for waiver of some of these requirements.⁴³ All of the petitions remain pending.

³⁷ *Id.* at 20354.

³⁸ AT&T Inc. Petition for Reconsideration and Clarification, WT Docket No. 06–150; PS Docket No. 06–229 (filed Sept. 24, 2007); Blooston Rural Carriers Petition for Partial Reconsideration and/or Clarification (filed Sept. 24, 2007); Petition for Reconsideration of the Ad Hoc Public Interest Spectrum Coalition (filed Sept. 24, 2007); Cyren Call Communications Corporation Petition for Reconsideration and for Clarification (filed Sept. 24, 2007); Frontline Wireless, LLC Petition for Reconsideration (filed Sept. 24, 2007); Pierce Transit Petition for Reconsideration (filed Sept. 24, 2007); Rural Telecommunications Group, Inc. Petition for Reconsideration (filed Sept. 24, 2007); Commonwealth of Virginia Petition for Reconsideration (filed Sept. 24, 2007); NTCH, Inc. Petition for Partial Reconsideration (filed Sept. 21, 2007); MetroPCS Communications, Inc. Petition for Clarification and Reconsideration (filed Sept. 20, 2007).

³⁹ See AT&T Petition for Reconsideration; Cyren Call Petition for Reconsideration; Frontline Petition for Reconsideration. The Frontline September 20, 2007 Request also seeks changes to the rules governing the 700 MHz Public/Private Partnership. See Request to Further Safeguard Public Safety Service by Frontline Wireless, WT Docket No. 06–150 (filed Sept. 20, 2007) (Frontline September 20, 2007 Request).

⁴⁰ See Frontline Petition for Reconsideration; MetroPCS Petition for Reconsideration.

⁴¹ See Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, and other Procedures for Auctions 73 and 76, *Public Notice*, 22 FCC Rcd 18141, 18194–95 (2007) (*Auction 73/76 Procedures Public Notice*).

⁴² See *id.* at 18193–96.

⁴³ See Commonwealth of Virginia Petitions for Reconsideration; Pierce Transit Petition for Reconsideration. Pierce Transit and Virginia have been granted limited waiver relief. See Implementation of a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, PS Docket No. 06–229, WT Docket No. 96–86, *Order*, 22 FCC

17. *Auction 73.* The auction of 700 MHz Band licenses, designated Auction 73, commenced on January 24, 2008, and closed on March 18, 2008.⁴⁴ While the bids for licenses associated with the other 700 MHz Band blocks (the A, B, C, and E Blocks) exceeded the applicable reserve prices, bids for the D Block license did not meet the reserve price and there was no winning bid for that license.⁴⁵

18. *D Block Post-Auction Order.* On March 20, 2008, we determined that we would not proceed immediately to re-auction the D Block license.⁴⁶ We made this decision in order to provide additional time to consider our various options with respect to the D Block spectrum.⁴⁷

19. *Inspector General's Report.* On April 25, 2008, the Office of Inspector General (OIG) issued a report on its investigation relating to allegations relating to whether certain statements made by an advisor to the Public Safety Broadband Licensee to potential bidders for the D Block license in Auction 73, particularly those regarding the spectrum lease payments that the Public Safety Broadband Licensee would request from the D Block licensee for use of public safety spectrum, had the effect of deterring various companies from bidding on the D Block.⁴⁸ The OIG determined that the statements in question were “not the only factor in the companies’ decision not to bid on the D Block.” Rather, it concluded that “the uncertainties and risks associated with the D Block, including, but not limited to, the negotiation framework with [the Public Safety Broadband Licensee], the potential for default payment if negotiations failed, and the costs of the build-out and the operations of the network, taken together, deterred each of the companies from bidding on the D Block.”⁴⁹

Rcd 20290 (2007); Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Request for Waiver of Pierce Transit, PS Docket No. 06–229, WT Docket No. 96–86, *Order*, 23 FCC Rcd 433 (PSHSB 2008).

⁴⁴ See http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73.

⁴⁵ See *id.*; see also “Auction of 700 MHz Band Licenses Closes,” *Public Notice*, DA 08–595 (rel. Mar. 20, 2008) (700 MHz Auction Closing Public Notice).

⁴⁶ See *D Block Post-Auction Order* at para. 5.

⁴⁷ See *id.*

⁴⁸ See *Office of Inspector General Report*, from Kent R. Nilsson, Inspector General, to Chairman Kevin J. Martin (OIG rel. Apr. 25, 2008) (*OIG Report*).

⁴⁹ *OIG Report* at 2.

III. Discussion

20. In this Second FNPRM, we revisit our decisions concerning the public safety broadband spectrum, the 700 MHz Public/Private Partnership, and the shared wireless broadband network it is intended to create, as we move toward a new auction to license the D Block spectrum in the near future.⁵⁰

21. First, in reevaluating the 700 MHz Public/Private Partnership in light of the results of Auction 73, we find it appropriate to consider clarifications and revisions to the public safety component of the partnership that would better promote our public interest goals. More specifically, in section A, we seek comment on our proposed clarifications regarding the entities that are eligible to use the public safety spectrum in the shared wireless broadband network as public safety users rather than as commercial users. We also seek comment on possible clarifications of or changes to the rules governing the structure and criteria of the Public Safety Broadband Licensee,⁵¹ including whether to clarify further the requirement that the Public Safety Broadband Licensee must be a non-profit organization.

22. In section B, we seek comment on possible changes to the rules requiring and governing the 700 MHz Public/Private Partnership. As noted above, we seek comment on whether the 700 MHz Public/Private Partnership between the D Block licensee and the Public Safety Broadband Licensee, with appropriate revisions and clarifications, would best serve the public interest in ensuring the development of a nationwide, interoperable broadband network for public safety users. We therefore explore a variety of possible revisions to the 700 MHz Public/Private Partnership to provide greater assurance to potential bidders for the D Block license that the shared wireless broadband network will be commercially viable and to help ensure that this partnership will be successful in making a nationwide, interoperable, broadband network available to public safety users. We also seek comment on issues related to the negotiation of the Network Sharing Agreement. In addition, we request comment on select issues relating to auctioning the D Block license, including eligibility to participate in the

⁵⁰ As noted above, before ultimately adopting final rules in response to this Second FNPRM, we plan to present for public comment, in a subsequent FNPRM of Proposed Rulemaking, a detailed proposal regarding the specific proposed rules.

⁵¹ See 47 U.S.C. 316 (permitting the Commission to modify any license if, in the judgment of the Commission, such action will promote the public interest, convenience, or necessity).

auction, a reserve price, and potential default payments. Finally, we seek comment on issues relating to narrowband relocation and on whether to continue to license the D Block on a nationwide basis or adopt a regional geographic service area basis such as REAGs.

23. Finally, in section C, we examine our options in the event we decide not to condition the D Block on the establishment of the 700 MHz Public/Private Partnership with the Public Safety Broadband Licensee, either immediately in the next auction or if the next auction fails to produce a winning bidder. First, we seek comment on various revisions that might be appropriate with respect to the D Block spectrum. Then we invite comment on what additional revisions might be appropriate with regard to the Public Safety Broadband License in order to ensure the development and deployment of a nationwide interoperable broadband network for public safety users.

A. The Public Safety Broadband License

1. Eligible Users of the Public Safety Spectrum in the Shared Network

24. *Background.* To meet anticipated public safety and homeland security needs, we proposed a comprehensive plan in the *Second Report and Order* to promote the rapid deployment of a nationwide, interoperable, broadband public safety network. This plan was based on taking “a centralized and national approach to maximize public safety access to interoperable, broadband spectrum in the 700 MHz Band.”⁵² In particular, we required that a single, nationwide public safety broadband license be assigned to the Public Safety Broadband Licensee. That licensee would be responsible for negotiating a Network Sharing Agreement with the winning bidder of the D Block licensee, pursuant to which the D Block licensee would construct and operate a shared, nationwide 700 MHz interoperable broadband network that serves the public safety entities seeking access to the network, and the D Block licensee would, in turn, gain access to the 700 MHz public safety broadband spectrum for use by its commercial users on a secondary preemptible basis.⁵³

25. The eligibility rules for the 700 MHz public safety band, including both the narrowband and broadband segments, are contained in Section

90.523 of our rules.⁵⁴ By linking eligibility to the provision of statutorily-defined “public safety services,” Section 90.523 attempts to ensure compliance with the statutory mandate of Section 337(a)(1) of the Communications Act, which requires the Commission to allocate 24 megahertz of spectrum between 746 MHz and 806 MHz for “public safety services.”⁵⁵ The statutory definition of “public safety services,” which is set forth in Section 337(f) of the Act, provides as follows:

(f) Definitions

For purposes of this section:

(1) Public safety services

The term “public safety services” means services—

(A) The sole or principal purpose of which is to protect the safety of life, health, or property;

(B) That are provided—

(i) By State or local government entities; or

(ii) By nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) That are not made commercially available to the public by the provider.⁵⁶

26. The eligibility rules of Section 90.523 that apply to the narrowband band limit operations to the provision of public safety services, as defined in Section 337(f)(1). Thus, all such licensees are either state or local governmental entities⁵⁷ or authorized non-governmental organizations (NGOs),⁵⁸ which provide services that are not made commercially available to the public and are for the sole or principal purpose of protecting the safety of life, health, or property.⁵⁹

27. With respect to the broadband licensee—i.e., the Public Safety Broadband Licensee—the Commission crafted eligibility requirements that were also intended to limit operations to the statutorily defined public safety services in order to ensure that the band remained allocated to such services, as required by Section 337(a)(1), and to focus the Public Safety Broadband Licensee exclusively upon the needs of public safety entities that stand to benefit from the interoperable broadband network.⁶⁰ Specifically, we required that the Public Safety Broadband Licensee satisfy the following eligibility criteria: (1) No

commercial interest may be held in this licensee, and no commercial interest may participate in the management of the licensee, (2) the licensee must be a non-profit organization, (3) the licensee must be as broadly representative of the public safety radio user community as possible, including the various levels (e.g., state, local, county) and types (e.g., police, fire, rescue) of public safety entities, and (4) to ensure that the Public Safety Broadband Licensee is qualified to provide public safety services, an organization applying for the Public Safety Broadband License was required to submit written certifications from a total of at least ten geographically diverse state and local governmental entities, with at least one certification from a state government entity and one from a local government entity.⁶¹ The written certifications from these state and local governmental entities were required to verify that: (1) They have authorized the applicant to use spectrum at 763–768 MHz and 793–798 MHz to provide the authorizing entity with public safety services; and (2) the authorizing entities’ primary mission is the provision of public safety services.⁶²

28. *Discussion.* As a preliminary matter, our review of the eligibility provisions that apply to the narrowband licensees and those that apply to the Public Safety Broadband Licensee have led us to identify two elements of the statutory definition of “public safety services” that the rules do not appear to apply explicitly enough to the Public Safety Broadband Licensee: (a) The Section 337(f)(1)(A) element that requires the “sole or principal purpose [of the services to be for the] protect[ion of] the safety of life, health, or property,” and (2) the Section 337(f)(1)(C) element that bars such services from being “made commercially available to the public by the provider.”⁶³ In addition, there is some degree of ambiguity as to the applicability of the narrowband eligibility provisions in Sections 90.953(a)–(d) to the Public Safety Broadband Licensee. Accordingly, we seek comment on whether to make minor amendments to Section 90.523 to (a) clarify that the services provided by the Public Safety Broadband Licensee must conform to all the elements of the Section 337(f)(1) definition of “public safety services,” and (b) clearly delineate the differences and overlap in the respective eligibility requirements of

⁵⁴ 47 CFR 90.523.

⁵⁵ 47 U.S.C. 337(a)(1).

⁵⁶ 47 U.S.C. 337(f).

⁵⁷ See 47 CFR 90.523(a).

⁵⁸ See 47 CFR 90.523(b).

⁵⁹ See 47 CFR 90.523(a)–(d).

⁶⁰ *Second Report and Order*, 22 FCC Rcd at 15421.

⁶¹ See 47 CFR 90.523(e).

⁶² See 47 CFR 90.523(e)(i), (ii).

⁶³ 47 U.S.C. 337(f)(1)(A), (C).

⁵² See *Second Report and Order*, 22 FCC Rcd at 15419.

⁵³ See *id.* at 15419.

the narrowband licensees and the Public Safety Broadband Licensee.

29. As discussed in more detail below, it would appear that, under Section 337 of the Act and in furtherance of the policies that have led to the creation of the Public Safety Broadband Licensee, the eligible users of the public safety broadband network that are represented by the Public Safety Broadband Licensee should be restricted to entities that would be eligible to hold licenses under Section 90.523. Thus, only entities providing public safety services, as defined in the Act, would be eligible to use the public safety spectrum of the shared network of the 700 MHz Public/Private Partnership on a priority basis, pursuant to the representation of the Public Safety Broadband Licensee. Accordingly, we also seek comment on whether all other users of the shared network, including critical infrastructure users, should consequently be treated as commercial users who would obtain access to spectrum only through commercial services provided solely by the D Block licensee.

30. *Eligible Users of the Public Safety Broadband Network.* As the licensee of the broadband portion of spectrum within the 700 MHz public safety band, the Public Safety Broadband Licensee occupies a somewhat unique position insofar as it will not use its licensed spectrum to serve its own communications needs. Rather, the Public Safety Broadband Licensee will ensure the provision of public safety service by providing spectrum access to others via the nationwide shared public/private network.⁶⁴ Thus, the question of whether the Public Safety Broadband Licensee's service qualifies as a "public safety service" under Section 337(f)(1) will turn (in part) on the nature of the spectrum use by the entities that it permits to gain access to the network. To the extent that these entities are public safety entities that use this access to provide themselves with communications services in furtherance of their mission to protect the safety of life, health or property, the Public Safety Broadband Licensee's services related to the public safety broadband spectrum would fall well within the Section 337(f)(1) definition of "public safety services" and would comport with the Commission's obligation under Section 337(a)(1) to allocate a certain amount of spectrum to such services.

31. We note that, pursuant to the statutory definition, a service can still be considered a "public safety service"

even if its purpose is not solely for protecting the safety of life, health or property, so long as this remains its "principal" purpose.⁶⁵ Accordingly, the service provided by the Public Safety Broadband Licensee—providing public safety entities access to the spectrum for safety-of-life/health/property communications operations—could conceivably include the provision of spectrum access to public safety entities for uses that do not principally involve the protection of life, health or property, so long as it can be said that the principal purpose of the Public Safety Broadband Licensee's services is to protect the safety of life, health or property.

32. Taken to an extreme, this reasoning could even permit the Public Safety Broadband Licensee to provide spectrum access to small numbers of entities with no connection to public safety under the rationale that the bulk of the Public Safety Broadband Licensee's services would remain that of providing the public safety entities access to spectrum for use in safeguarding life, health or property. Moreover, the Public Safety Broadband Licensee could arguably leave entire pockets within its nationwide service area served only by such non-public safety entities, based on this same rationale that the small amount of non-public safety use—relative to the nature of the overall use across the country—does not alter the fact that the principal purpose of the service remains public safety. Such a result appears patently inconsistent with the spirit of Section 337(f)(1)(A), and we seek comment on whether, or to what degree, the Public Safety Broadband Licensee would be statutorily precluded by that subsection from representing and allowing any entity to use the network for services that are not principally for public safety purposes. We also seek comment on whether there are other grounds—specifically, the authorization requirement of Section 337(f)(1)(B)(ii) and policy reasons—for prohibiting the Public Safety Broadband Licensee from providing network access to non-public safety entities or from permitting public safety entities that it represents to use the network for services that do not have as their principal purpose the protection of the safety of life, health or property. With respect to Section 337(f)(1)(B)(ii), we observe that, in order for the Public Safety Broadband Licensee's services to meet the public safety services definition, the Public Safety Broadband Licensee, as a nongovernmental organization, must

receive authorization from "a governmental entity whose primary mission is the provision of [public safety] services." We believe it unlikely that the intended scope of the authorization from such governmental entity or entities would include providing spectrum access, even on an occasional or limited basis, to entities that provide no public safety services.⁶⁶ On the policy front, the finite amount of spectrum available to the public safety community—particularly for interoperability purposes—strongly argues against any provision of spectrum access by the Public Safety Broadband Licensee to entities the sole or principal purpose of which is not the protection of the safety of life, health, or property. For these reasons, we seek comment on whether the public interest would be served by prohibiting the Public Safety Broadband Licensee from providing an entity with access to the network if that entity fails to meet the eligibility requirements of Section 90.523 of our rules.

33. We seek comment on which types of public safety users can be expected to use the national public safety broadband network (rather than legacy or new local networks) and on what timeframes. Which public safety communication functions (e.g., voice, remote data access, video upload, video download, photo download) are likely to migrate to the new broadband network (in the short- and- or long-term) and which will remain on existing networks? What factors will local jurisdictions weigh when making such decisions?

34. We seek comment on the extent to which the public safety broadband network will or should be interoperable with existing voice and data networks. How can the Commission encourage interoperability with legacy public safety systems and should interoperability with existing voice and data networks be a mandatory feature of the new broadband network? Can the use of multi-mode handsets (that support legacy networks and the new public safety broadband network) enhance interoperability? How can the Commission encourage or mandate the development and use of such handsets? How would any proposed policies in this regard affect the cost of handsets and network construction/operation? How does the use of 10 or 20 megahertz of shared spectrum affect the throughput of the broadband network and the functions it can support? What throughput can reasonably be expected on a network with this amount of spectrum? What functionalities can only

⁶⁴ See Second Report and Order, 22 FCC Rcd at 15426.

⁶⁵ See 47 U.S.C. 337(f)(1)(A).

⁶⁶ 47 U.S.C. 337(f)(1)(B)(ii).

be supported on a network with additional spectrum?

35. We also seek comment on issues arising from the possibility that in some areas a local jurisdiction may not elect to make use of the public safety broadband network. How extensive are such areas likely to be in the short- and long-term? Should the D Block licensee be permitted to use the entire 20 megahertz of shared spectrum for commercial service in such areas? Should the local jurisdiction receive compensation in these instances? Could such compensation discourage local jurisdictions to ever make use of the public safety broadband network? Would restriction of such compensation to use in purchasing public safety equipment such as radios for the public safety broadband network be an appropriate policy? What incentives can the Commission give the D Block licensee to encourage and facilitate use of the broadband network by local jurisdictions?

36. *Potential Pool of Users of the Public Safety Broadband Network.* We seek comment on the number of public safety providers in the country that have no interoperable broadband network. What is the size of the potential pool of public safety providers that may work with the Public Safety Broadband Licensee? We also seek comment on the extent to which some public safety providers already have established interoperable broadband networks. We especially encourage comment from parties that may have an inventory or database that collects this information. Where have such networks been established, and under what types of arrangements? To what extent are current interoperable public safety systems able to obtain lower prices and/or superior quality for commercially available, off-the-shelf technologies? Have public safety and commercial operations been developed on shared/parallel systems, and if so, how have they addressed network security issues? We further seek comment on how previously developed systems have addressed issues such as network reliability, including hardening of the network, provisions for back up power, etc. How do such developed networks envision connecting to an interoperable, nationwide network? Finally, to the extent some public safety providers already have established interoperable broadband networks, might these providers have less incentive to participate with the Public Safety Broadband Licensee? If this is the case, how might the rules established in this proceeding help provide a nationwide, interoperable network?

37. *Mandatory Usage of the Public Safety Broadband Network.* While we seek comment above regarding what users of the network are eligible to receive service from the public safety spectrum, we also seek comment on whether such eligible public safety users should be required to subscribe to the network for service, at reasonable rates or be subject to some alternative obligation or condition promoting public safety network usage in order to provide greater certainty to the D Block licensee. For example, should we require the purchase of a minimum number of minutes and, if so, on whom and in what way would this obligation be imposed? We seek comment on whether any such obligation should be conditioned on the availability of government funding for access, for example, through interoperability grant money from the United States Department of Homeland Security, and whether we should require public safety users to pay for access with such money. We ask further questions below regarding whether and how we should regulate the fees charged to public safety users for network access. Would it be possible to ensure that small public safety providers pay a "Most Favored Nation" rate for broadband services, or for equipment? How should the Commission ensure that smaller public safety entities can participate in the network?

38. We note that the State of Arizona used a grant from the Department of Homeland Security ("DHS") to build a broadband network for both public safety and commercial purposes using WiFi technology.⁶⁷ This network serves a portion of the I-19 corridor running north of the Mexican border, a sparsely populated area that previously had little or no coverage for commercial or public safety communications.⁶⁸ We seek comment on this and similar programs, especially those instituted by State agencies, and by both large and small municipalities. What specifications (e.g., reliability of service, network hardening, etc.) have been required for this and similar projects to promote broadband communications for public safety providers?⁶⁹ What lessons have

been learned from these projects, and how might these lessons be applied to a variety of public safety providers, including those in very rural areas and those in urban areas? For example, do network congestion issues make sharing between commercial and public safety users more of a challenge in urban areas, and are such concerns lessened in rural areas?

2. Provisions Regarding the Public Safety Broadband Licensee

a. Non-Profit Status

39. *Background.* Among other criteria for eligibility to hold the Public Safety Broadband License that we established in the *Second Report and Order*, we provided that no commercial interest may be held in the Public Safety Broadband Licensee, that no commercial interest may participate in the management of the licensee, and that the licensee must be a non-profit organization.⁷⁰ We indicated, however, that, as part of its administration of public safety access to the shared wireless broadband network, the Public Safety Broadband Licensee might assess "usage fees to recoup its expenses and related frequency coordination duties."⁷¹

40. *Discussion.* With respect to the requirements that the Public Safety Broadband Licensee must be a non-profit organization, we seek comment on whether to clarify this non-profit requirement by specifying that the Public Safety Broadband Licensee and all of its members (in whatever form they may hold their legal or beneficial interests in the Public Safety Broadband Licensee) must be non-profit entities. We further seek comment on whether to clarify that the Public Safety Broadband Licensee may not obtain debt or equity financing from any source, whether debt or equity, unless such source is also a non-profit entity. We also seek comment more generally on whether the Commission should restrict the Public Safety Broadband Licensee's business relationships pre- and post-auction with commercial entities, and if so, what relationships should and should not be permitted.

41. We do anticipate that the Public Safety Broadband Licensee may contract with attorneys, engineers, accountants, and other similar advisors or service providers to fulfill its responsibilities to represent the interests of the public safety community, as required by the

⁶⁷ See http://www.dhs.gov/xnews/releases/press_release_0515.shtm (last visited May 12, 2008).

⁶⁸ See http://gita.state.az.us/tech_news/2006/7_19_06.htm (last visited May 12, 2008).

⁶⁹ We note, however, that use of Part 15 devices may not be appropriate for mission-critical public safety communications, in light of the requirement for Part 15 devices to accept interference from other Part 15 devices and from licensed operations. See, e.g., Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules, ET Docket No. 05-247,

Memorandum Opinion and Order, 21 FCC Rcd 13201, 13214 (2006).

⁷⁰ See *Second Report and Order*, 22 FCC Rcd at 15421.

⁷¹ *Id.* at 15426.

Commission. Under the approach on which we seek comment above, capital or operational funding mechanisms for the Public Safety Broadband Licensee involving private equity firms or other commercial or financial entities would not be permitted, unless they are non-profit entities and are controlled, if at all, by non-profit entities, in order to ensure that the financial considerations of the Public Safety Broadband Licensee remain aligned with serving the public safety community, and that no “for-profit” incentives inadvertently influence the Public Safety Broadband Licensee’s priorities. We seek comment on these restrictions. In particular, are the restrictions on financing warranted to ensure that the Public Safety Broadband Licensee is not unduly influenced by for-profit motives or outside commercial influences in carrying out its official functions within the 700 MHz Public/Private Partnership? If so, in what ways might we allow necessary financing while still ensuring the independence of the Public Safety Broadband Licensee? Specifically, should we allow working capital financing from commercial banks and, if so, should we restrict the assets of the Public Safety Broadband Licensee that can be pledged as security for such a loan? Are there other types of loans or alternative funding sources that we should allow the Public Safety Broadband Licensee to employ? How can the Commission establish incentive-compatible rules for the Public Safety Broadband Licensee and parties with which it may have a relationship, such as advisors, contractors, and investors?

42. More generally, we seek comment on the best way to fund Public Safety Broadband Licensee operations. For example, should the D Block licensee or license winner be required to pay the Public Safety Broadband Licensee’s administrative costs? If so, should we limit the D Block licensee’s maximum obligations in this regard, and what would be a reasonable cap or limitation on expenses? Assuming government-allocated funding were available, would this be the best solution for funding the Public Safety Broadband Licensee? In addition, we seek comment on the extent to which we can adopt incentive-compatible rules for the Public Safety Broadband Licensee and the public safety providers it represents. What set of rules would encourage most or all public safety providers to collaborate with the Public Safety Broadband Licensee to establish a nationwide, interoperable broadband network? Under what circumstances might some public safety providers choose not to

participate in a relationship with the Public Safety Broadband Licensee?⁷²

43. We seek comment on whether the Commission has legal authority to use the Universal Service Fund to support the Public Safety Broadband Licensee’s operational expenses.⁷³ If the Commission has legal authority to do so, should it exercise this authority? What degree of support would be appropriate? Similarly, can the Commission facilitate funding of the Public Safety Broadband Licensee’s operational expenses through entities such as the Telecommunications Development Fund?⁷⁴

44. We also seek comment on how any excess revenue generated by the fees or other sources of financing obtained by the Public Safety Broadband Licensee from non-profit entities should be used. First, we seek comment on whether any excess revenues should be permitted at all. If we do allow any excess revenue generation, should we limit this amount? How should we determine what that amount should be? Should we allow the Public Safety Broadband Licensee to hold a certain amount of excess income as a reserve against possible future budget shortfalls or should we require that excess income be used for the direct benefit of the public safety users of the network, such as for the purchase of handheld devices? Should we further specify what would be a “direct benefit” or permissible use of such funds? In this regard, we note that the quarterly financial accounting we required in the *Second Report and Order* will enable the Commission to continually monitor the finances of the Public Safety Broadband Licensee.⁷⁵

45. Finally, we seek comment on whether the Public Safety Broadband Licensee may legitimately incur certain reasonable and customary expenses incurred by a business, consistent with the constitution of the Public Safety Broadband Licensee and the nature of its obligations as established by the Commission.

b. Other Essential Components

46. *Background.* In the *Second Report and Order*, we instituted certain minimum criteria that the Public Safety Broadband Licensee must meet in order to ensure that it “focuses exclusively on the needs of public safety entities that stand to benefit from the interoperable

broadband network.”⁷⁶ To that end, we established certain criteria for the Public Safety Broadband Licensee eligibility, including a requirement that the Public Safety Broadband Licensee must be broadly representative of the public safety community.⁷⁷ Further, we required that the Public Safety Broadband Licensee be governed by a voting board consisting of eleven members, one each from the nine organizations representative of public safety, and two at-large members selected by the Public Safety and Homeland Security Bureau and the Wireless Telecommunications Bureau, jointly on delegated authority.⁷⁸ On reconsideration, we revised and expanded the voting board, and increased the at-large membership to four.⁷⁹

47. In the *Second Report and Order*, we further required that certain procedural safeguards be incorporated into the articles of incorporation and bylaws of the Public Safety Broadband Licensee.⁸⁰ For example, in the *Second Report and Order* we specified that the term of the Public Safety Broadband Licensee officers would be two years, and that election would be by a two-thirds majority vote. A two-thirds majority was also required for certain other Public Safety Broadband Licensee decisions, including amending the articles of incorporation or bylaws. In

⁷⁶ *Id.* at 15421–22.

⁷⁷ *Id.* at 15421–25.

⁷⁸ The nine organizations included: the Association of Public Safety Communications Officials (APCO); the National Emergency Number Association (NENA); the International Association of Chiefs of Police (IACP); the International Association of Fire Chiefs (IAFC); the National Sheriffs’ Association; the International City/County Management Association (ICMA); the National Governor’s Association (NGA); the National Public Safety Telecommunications Council (NPSTC); and the National Association of State Emergency Medical Services Officials (NASEMSO). *Second Report and Order*, 22 FCC Rcd at 15422–23.

⁷⁹ On reconsideration, we removed NPSTC and included the Forestry Conservation Communications Association (FCCA), the American Association of State Highway and Transportation Officials (AASHTO), and the International Municipal Signal Association (IMSA), and added two additional at-large positions. Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, WT Docket No. 96–86, *Order on Reconsideration*, 22 FCC Rcd 19935 (2007). The Chiefs of the Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau jointly appointed to the voting board the American Hospital Association (AHA), the National Fraternal Order of Police (NFOP), the National Association of State 9–1–1 Administrators (NASNA), and the National Emergency Management Association (NEMA). See “Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Announce the Four At-Large Members of the Public Safety Broadband Licensee’s Board of Directors,” *Public Notice*, 22 FCC Rcd 19475 (2007).

⁸⁰ *Second Report and Order*, 22 FCC Rcd at 15423–26.

⁷² See *Second Report and Order*, 22 FCC Rcd at 15454.

⁷³ See, e.g., 47 U.S.C. 254(c)(1), (h).

⁷⁴ See, e.g., 47 U.S.C. 614.

⁷⁵ *Second Report and Order*, 22 FCC Rcd at 15425.

addition, we recognized that Commission oversight in the affairs of the Public Safety Broadband Licensee would be necessary and appropriate in light of the nature of the public safety broadband spectrum licensed to the Public Safety Broadband Licensee as a national asset, and in furtherance of the Commission's role in ensuring the protection and efficient use of such asset for the benefit of the safety of the public.⁸¹ Meaningful oversight in this respect requires a level of transparency, and to that end we required the Public Safety Broadband Licensee to submit certain reports to the Commission, including quarterly financial disclosures.⁸²

48. *Discussion.* In light of the scope of the subjects discussed elsewhere herein addressing a number of aspects of the 700 MHz Public/Private Partnership between the D Block licensee and the Public Safety Broadband Licensee, we believe it appropriate to reexamine the structure of the Public Safety Broadband Licensee and the criteria adopted in the *Second Report and Order* to ensure they are most optimal for establishing and sustaining a partnership with a commercial entity, as well as efficiently and equitably conducting the business of the Public Safety Broadband Licensee. We seek comment on whether we should reevaluate any of these criteria, whether we should clarify or increase the Commission's oversight of the Public Safety Broadband Licensee, and, aside from retaining its nationwide scope, whether we should make other changes to the license or license eligibility criteria. We further seek comment on how the Commission can ensure an oversight role for Congress, both in the operations of the Public Safety Broadband Licensee and the 700 MHz Public/Private Partnership. Should Congress designate some of the Public Safety Broadband Licensee's board members?

49. *Articles of Incorporation and By-laws.* Specifically, with respect to the articles of incorporation and bylaws, we seek comment on the adequacy of the provisions specified. Should we require additional provisions, and if so, what should they be? Should we amend or eliminate any of the current requirements? Should we require a unanimous vote in certain instances? For example, should a unanimous vote be required for a major undertaking of the Public Safety Broadband Licensee? What would such an undertaking include? In the alternative, should we require a supermajority vote in such

instances instead of a unanimous vote? In addition, should we provide for Commission review of decisions requiring a unanimous or supermajority vote, or should the Commission make certain decisions for the Public Safety Broadband Licensee if unanimity or supermajority is not achieved?

50. With respect to the voting board, we seek comment on the composition of the board, and its size. Should we include additional or fewer entities? If so, what qualifications should we require of such entities? We also seek comment on whether we should eliminate altogether the requirement of inclusion of specific voting board members. If we eliminate this requirement, how should we ensure that broad representation of the public safety community is adequately addressed? With respect to the leadership of the board, should we revise the terms of the officers? Should we require a unanimous vote for appointment of officers? Should we require a rotating chairmanship among the voting board members? Should the Commission appoint a chairperson if unanimous consent cannot be attained?

51. *Commission oversight.* We also seek comment on how the Commission can better exercise oversight over the activities of the Public Safety Broadband Licensee and the commercial partner. Is quarterly financial reporting adequate, or are additional disclosures by the Public Safety Broadband Licensee or commercial partner necessary? What additional measures, if any, should the Commission take to ensure the appropriate level of oversight? For example, should Commission approval of certain activities be required before the Public Safety Broadband Licensee may undertake them? For example, should Commission approval be required before the Public Safety Broadband Licensee enters into contracts of a particular duration or cumulative dollar amount? Should we require or reserve the right to have Commission staff attend meetings of the voting board?

52. *Role of State Governments.* We seek comment on whether providing a nationwide, interoperable broadband network might be more effectively and efficiently accomplished by allowing State governments (or other entities that have or plan interoperable networks for the benefit of public safety) to assume responsibility for coordinating the participation of the public safety providers in their jurisdictions. To the extent commenters believe the State governments should assume such a role, we seek comment on the proper relationship between the State

governments and the Public Safety Broadband Licensee and on our authority to establish such a role for State governments. Should the Public Safety Broadband Licensee be authorized to choose a minimum standard for any public safety broadband operation, with the State governments given the responsibility to work with public safety providers to implement operations in their jurisdictions? Would such an approach allow State governments wanting higher-grade networks to implement separately these more-advanced systems, while those wanting networks at the minimum standard avoid what they may consider unnecessary expenses? Are State governments better situated to address implementation challenges that cross public safety jurisdictions (e.g., coordinating use by sheriffs departments in neighboring counties) as well as intra-jurisdictional challenges (e.g., coordinating use by the police versus fire departments)? On the other hand, if different jurisdictions chose different grades of networks, would there be a lack of economies of scale and thus higher equipment costs for all public safety users?

53. *Reissuance of the Public Safety Broadband License and selection process.* In light of the changes contemplated above and the corresponding changes contemplated with respect to the D Block, we seek comment on whether we should rescind the current 700 MHz Public Safety Broadband License and seek new applicants. If so, should we use the same procedures as before, i.e., delegating authority to the Chief, Public Safety and Homeland Security Bureau to solicit applications, specifying any changed criteria that may be adopted following this Second FNPRM, and having the Commission select the licensee? Are there considerations other than those above or previously considered that should be taken into account in selecting the licensee? Recognizing the need to identify the licensee quickly to enable the effective development of the 700 MHz Public/Private Partnership, what mechanism should the Commission use to assign the license if there is more than one qualified applicant?

B. Possible Revisions/Clarifications Relating to the 700 MHz Public/Private Partnership

54. As a preliminary matter, we seek comment on whether the public interest would best be served by the development of a nationwide, interoperable wireless broadband network for both commercial and public

⁸¹ *Id.* at 15426.

⁸² *Id.* at 15426.

safety services through the 700 MHz Public/Private Partnership between the D Block licensee and the Public Safety Broadband Licensee, and whether we should therefore continue to require that the D Block licensee and Public Safety Broadband Licensee enter into the 700 MHz Public/Private Partnership. Below, we consider in detail the Commission's options in the event that we continue this requirement. We seek comment on a broad set of possible revisions to the 700 MHz Public/Private Partnership, including revisions and/or clarifications with regard to the respective obligations of the D Block licensee and the Public Safety Broadband Licensee.

55. First, we address the terms of the 700 MHz Public/Private Partnership, including (1) what the D Block licensee is required to construct; and (2) the operational roles of the D Block licensee and Public Safety Broadband Licensee once the network is constructed. With regard to network construction requirements, we seek comment on (1) the technical specifications of the network; (2) whether to provide public safety users with access to D Block spectrum during emergencies and, if so, under what terms; and (3) the build-out obligations of the D Block licensee, and whether such obligations should be revised in conjunction with a modification to the D Block license term. Regarding operational roles, we seek comment on the respective roles and responsibilities of the D Block licensee and Public Safety Broadband Licensee with regard to the operation of the network, including the management of users on the network, and we seek comment regarding service or spectrum usage fees.

56. Next, we address the procedures by which the winning bidder of the D Block license will enter into a Network Sharing Agreement (NSA) with the Public Safety Broadband Licensee that will further define and govern the 700 MHz Public/Private Partnership. Specifically, we seek comment on possible revisions to the rules relating to both the negotiation of the NSA and the dispute resolution procedures applicable in the event the parties are unable to reach agreement on NSA terms. In particular, we seek comment on whether, following a default due to the failure of a winning bidder for the D Block license to execute an NSA with the Public Safety Broadband Licensee, we either should offer the license to the party with the next highest bid, in descending order, or promptly auction alternative license(s) for the D Block spectrum without the 700 MHz Public/Private Partnership conditions and subject to alternative service rules.

57. We then seek comment on a number of issues related to the auction of the D Block license, including (1) whether to restrict who may participate in the new auction of the D Block license; (2) how to determine any reserve price for such an auction; (3) whether to adopt an exception to the impermissible material relationship rule for the determination of designated entity eligibility with respect to arrangements for the lease or resale (including wholesale) of the spectrum capacity of the D Block license; and (4) whether we should modify the auction default payment rules with respect to the D Block winning bidder. We also seek comment on the rules governing the relocation of public safety narrowband operations and the D Block license winner's obligations to fund that relocation, and on any other revisions that may be appropriate with regard to the 700 MHz Public/Private Partnership. Finally, we seek comment on other revisions or clarifications that may be appropriate with regard to the 700 MHz Public/Private Partnership, including whether to license the D Block and public safety broadband spectrum on a nationwide or REAG basis.

1. The 700 MHz Public/Private Partnership

a. Network/System Requirements

58. Assuming that we determinate that we should continue to require the 700 MHz Public/Private Partnership, in this section, we seek comment on whether to adopt changes to the requirements of the network that the D Block licensee is required to construct, and whether to modify the required schedule for that construction.⁸³ We seek comment on what changes will best serve the Commission's goal of making a broadband, interoperable network available on a nationwide basis to public safety entities, which requires providing sufficient assurances to bidders for the D Block license that the required shared network will be commercially viable. We also are seeking comment below on the costs to build and operate such a broadband, interoperable network, including the specific costs necessary to meet public safety needs and the additional costs of covering remote areas.

(i) Technical Requirements for the Shared Wireless Broadband Network

59. *Background.* In the *Second Report and Order*, we found that in order to ensure a successful public/private partnership between the D Block

licensee and the Public Safety Broadband Licensee, with a shared nationwide interoperable broadband network infrastructure that meets the needs of public safety, we must adopt certain technical network requirements.⁸⁴ Accordingly, among other requirements, we mandated that the network incorporate the following technical specifications:

- Specifications for a broadband technology platform that provides mobile voice, video, and data capability that is seamlessly interoperable across agencies, jurisdictions, and geographic areas. The platform should also include current and evolving state-of-the-art technologies reasonably made available in the commercial marketplace with features beneficial to the public safety community (e.g., increased bandwidth).

- Sufficient signal coverage to ensure reliable operation throughout the service area consistent with typical public safety communications systems (i.e., 99.7 percent or better reliability).

- Sufficient robustness to meet the reliability and performance requirements of public safety. To meet this standard, network specifications must include features such as hardening of transmission facilities and antenna towers to withstand harsh weather and disaster conditions, and backup power sufficient to maintain operations for an extended period of time.

- Sufficient capacity to meet the needs of public safety, particularly during emergency and disaster situations, so that public safety applications are not degraded (i.e., increased blockage rates and/or transmission times or reduced data speeds) during periods of heavy usage. In considering this requirement, we expect the network to employ spectrum efficient techniques, such as frequency reuse and sectorized or adaptive antennas.

- Security and encryption consistent with state-of-the-art technologies.⁸⁵

60. We required that the parties determine more specifically what these technical specifications would be and implement them through the NSA. In addition, we required that the parties determine and implement other detailed specifications of the network that the D Block licensee would construct.⁸⁶ We determined that allowing the parties to determine specific details, including the technologies that would be used, subject to approval by the Commission, would provide the parties with flexibility to

⁸⁴ *Second Report and Order*, 22 FCC Rcd at 15433.

⁸⁵ *Id.*

⁸⁶ *Id.* at 15434.

⁸³ 47 CFR 27.1305, 27.14(m).

evaluate the cost and performance of all available solutions while ensuring that the shared wireless broadband network has all the capabilities and attributes needed for a public safety broadband network.⁸⁷

61. *Discussion.* We seek comment on whether we should clarify or modify any aspect of the technical network requirements adopted in the *Second Report and Order* or otherwise establish with more detail the technical requirements of the network. To guide the discussion that follows, and to enable more focused comment that better assists the Commission as we address these technical requirements, we attach as an appendix a possible technical framework ("Technical Appendix") that identifies in greater detail potential technical parameters for the shared wireless broadband network. We thus seek detailed comment on this Technical Appendix, as well as on the following discussion points.

62. Would clarifications in this regard provide appropriate additional certainty, prior to re-auction, regarding the obligations of the D Block licensee and the costs of the network that this licensee would be expected to construct? Would such specification enhance the abilities of the winning bidder of the D Block license and the Public Safety Broadband Licensee to negotiate the NSA? Would modifications provide greater assurance that the required network would be economically viable? Conversely, would greater specificity hinder the NSA negotiations or otherwise inadvertently impact the success of the 700 MHz Public/Private Partnership?

63. We seek comment on whether, as a general matter, maintaining parties' flexibility to negotiate most details of the network specifications would best serve the public interest goals of the partnership. We seek comment on what technical requirements should be specified in advance, rather than being left to be negotiated after the auction, and whether there are any critical aspects of the network, either in the existing requirements or beyond those already addressed, that it would be beneficial to specify or clarify in the rules in order to increase bidder certainty regarding the cost of the D Block obligations. In addition, are there network specifications that would be particularly difficult to negotiate in the absence of further clarification by the Commission?

64. Are any changes to requirements needed to reflect the practical differences between the architecture of

traditional local wireless public safety systems and the architecture of nationwide commercial broadband network systems? If so, we seek comment on what requirements, modifications, or clarifications we should adopt. Conversely, we seek comment on whether to require national standardization in the implementation of these network requirements, and the extent to which national standardization will help the network to achieve efficiency and economies of scale and scope.

65. We also welcome comments on other specifications we required of the network. These included:

- A mechanism to automatically prioritize public safety communications over commercial uses on a real-time basis and to assign the highest priority to communications involving safety of life and property and homeland security consistent with the requirements adopted in the *Second Report and Order*;
- Operational capabilities consistent with features and requirements specified by the Public Safety Broadband Licensee that are typical of current and evolving state-of-the-art public safety systems (such as connection to the PSTN, push-to-talk, one-to-one and one-to-many communications, etc.);
- Operational control of the network by the Public Safety Broadband Licensee to the extent necessary to ensure public safety requirements are met; and
- A requirement to make available at least one handset that would be suitable for public safety use and include an integrated satellite solution, rendering the handset capable of operating both on the 700 MHz public safety spectrum and on satellite frequencies.⁸⁸

66. Commenters with proposals should provide detailed information regarding their proposed technical network specifications, and the extent to which such proposals are typical of current wireless public safety or commercial systems. For example, with regard to any particular network requirement, are there any established public safety standards in the broadband context? To what extent have these standards been implemented in commercial networks? Commenters should also discuss how such proposals will ensure that the goals of the 700 MHz Public/Private Partnership are met, in particular by enabling the creation of

a viable commercial network that addresses the unique needs of the public safety community.

67. We seek comment on how the technical specifications of existing or anticipated future public safety networks differ from existing or anticipated commercial networks. Commenters are encouraged to be as specific as possible in answering these questions, providing detailed technical data where possible. How different are the technical specifications of existing or anticipated public safety networks from other public safety networks? How do the technical requirements of different public safety networks differ based upon factors such as intended user base and local morphology (e.g., urban vs. rural environments; fire, police, emergency medical service, and other first responders; in-building vs. outdoor usage; high-speed vehicular vs. pedestrian public safety users, etc.)? How do these technical requirements differ based upon factors such as type of use (mission-critical voice and data versus non-mission-critical communications)? What purposes, if any, do public safety users make of commercial wireless networks today for mission-critical and/or non-mission-critical communications? How distinct in practice is the line between mission-critical and non-mission-critical communications? How do network construction and operation costs vary among different types of public safety networks and between public safety and commercial networks? To what extent can a commercial provider make use of publicly-owned or leased property, and how could use of such facilities affect the cost of constructing and operating a public safety broadband network?

68. We seek comment on the payment and funding models employed by public safety users when building and operating dedicated public safety networks (e.g., construction and operation by municipal employees, construction and operation by private subcontractors). Similarly, we seek comment on the payment and funding models employed by public safety users when they rely upon commercial wireless services. Are fees assessed based on usage, number of users, or other factors? What provisions are typically made for unanticipated demand for services and how are these reconciled with fixed budgets? Again, commenters are encouraged to be as specific as possible in answering these questions, providing specific cost data or concrete numerical estimates where possible.

69. We note that the Public Safety Spectrum Trust ("PSST"), after it was

⁸⁸ *Id.* at 15433–34. We seek comment on the responsibilities of the D Block licensee with regard to the operation of the shared network elsewhere herein.

⁸⁷ *Id.* at 15426.

designated Public Safety Broadband Licensee by the Commission, released what it referred to as a Bidders Information Document ("BID"), which, it stated, was offered to provide "high-level information regarding the PSST's expectations of the D Block partner in building and operating the shared Public/Private network" and "to define and detail certain expectations that the PSST has for this partnership."⁸⁹ We emphasize that the BID has no formal legal role in the development of the nationwide, broadband public safety network under the existing rules and we express no view on the positions taken by the PSST as reflected in the BID. We take this opportunity, however, to seek comment on the impact of the BID on the previous auction, whether any particular aspects of the PSST's "expectations" were of particular concern to potential bidders or of particular importance to public safety entities, whether the release of the BID was helpful in clarifying costs, what role the BID played in pre-auction discussions and what formal role, if any, that a document similar to the BID such as a statement of requirements should play in establishing or clarifying the technical requirements of the nationwide, broadband public safety network under revised rules. We note, for example, that one commercial entity has suggested that the Public Safety Broadband Licensee should be required to release a statement of requirements before auction, and that the statement of requirements should constrain the elements that the Public Safety Broadband Licensee can require in the shared network.⁹⁰ We seek comment on this suggestion.

70. With these questions and issues in mind, we seek comment on whether the Commission should itself establish in a detailed and comprehensive fashion the technical obligations of the D Block licensee with regard to the network, and if so, what specifications it should adopt. For example, we seek comment on whether the attached Technical Framework could, following comment on its specific components, provide for establishing an appropriate set of requirements for the shared wireless broadband network. We also seek comment on a number of particular technical issues, as set forth below.

71. *Specification for broadband technology platform.* We seek comment on whether we should modify or further clarify any aspect of the broadband technology platform specifications provided in the *Second Report and Order*. Would clarifying that the D Block winning bidder has the right to make the final technical determinations with regard to the network platform serve the public interest? Should the Commission specify the precise public safety services and applications that must be carried or that need not be carried, beyond typical broadband applications (e.g., Internet access, video, multimedia), such as cellular telephony, dispatch voice service, push-to-talk, etc., and if so, what should they be? Should we establish limits on the obligation to accommodate applications similar to those established in the C Block? For example, should we provide that there is no obligation to carry customized applications where accommodating such applications would require modifying network infrastructure or back-office systems?⁹¹ What impact might any of these determinations have on the utility of the network for public safety purposes?

72. We ask commenters to provide detailed information regarding any proposed broadband platform solution. How can we establish a set of requirements that will meet public safety's needs while providing prospective bidders with sufficient certainty that it will be possible to construct a system that is economically viable? How can we best meet this objective without impeding flexibility regarding network design or inadvertently deterring potential bidders from participating in the auction?

73. *Reliability.* We seek comment on whether we should modify any aspect of the reliability standard established in the *Second Report and Order*. Should we eliminate the specific requirement of 99.7 percent network reliability and impose only the general requirement of "reliable operation throughout the service area consistent with typical public safety communications," leaving the specific level of reliability to negotiations? Should we specify a different level of reliability, such as 95 percent reliability over 95 percent of a defined area?⁹² Does the latter standard better reflect a typical level of reliability in public safety communications systems? Further, is the typical level of

reliability in public safety systems a relevant factor for cellularized broadband systems? Are there any real-world examples of reliability based on cellularized broadband systems used by public safety?

74. We also seek comment on whether, in the event we continue to require a specific level of reliability, we should nevertheless expressly provide that the parties have flexibility to mutually agree to a different level in particular geographic areas. Are there specific provisions related to reliability that would create unreasonable challenges in establishing the network? If so, what limitations should we establish? Finally, we seek comment on how the reliability standard impacts the performance requirement, e.g., might it effectively transform the population-based performance requirements into geographic benchmarks?

75. *Robustness and hardening.* We seek comment on whether to further specify or modify the requirements of the network regarding robustness and hardening. For example, should we further specify the particular environmental conditions (temperature range, wind, vibration, etc.) that the installations must be designed to withstand? Should we specify the minimal number of hours that base stations and network equipment must be capable of operating in the event of a power outage? Should we require an onsite power generator and a specific supply of fuel for each base station? Should we simply provide that the network must meet the same requirements regarding backup power applicable to commercial mobile radio service providers, given that these requirements were themselves established to meet homeland security and public safety goals?⁹³ Should we address whether and to what extent redundant infrastructure must be provided, such as provisions for overlapping cell sites that could provide backup coverage in an emergency, and if so, how would such provisions impact the viability of the system and its cost? Should we establish minimum obligations to have access to backup equipment and systems, such as cellular systems on wheels, or minimum timeframes for system restoration? Alternatively or additionally, should we establish ceilings on the extent of robustness and hardening that may be required of the D Block licensee?

⁸⁹ See Letter from Harlin R. McEwen, Chairman, Public Safety Spectrum Trust to Prospective D Block Bidders (Nov. 30, 2007) (available at http://www.psst.org/documents/BID2_0.pdf) at 3. The PSST released an initial version of this document on November 15, 2007, and released version 2.0, the final version, on November 30, 2007. See <http://www.psst.org/bids/summary.jsp>.

⁹⁰ See AT&T Petition for Reconsideration at 4–5.

⁹¹ See *Second Report and Order*, 22 FCC Rcd at 15371 n.502.

⁹² See Cyren Call Petition for Reconsideration at 8; Frontline Petition for Reconsideration at 23.

⁹³ See, e.g., Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, EB Docket No. 06–119, WC Docket No. 06–63, *Order on Reconsideration*, 22 FCC Rcd 18013 (2007).

76. We also seek comment on whether these requirements should be subject to variation. Should we specify circumstances in which the robustness and hardening obligations may vary, such as to account for local zoning restrictions, geography, or patterns of weather? Should we alternatively specify that the extent and circumstances of variation will be left to the parties to negotiate? Commenters advocating particular requirements relative to robustness and hardening should also explain how their proposals compare to the standards for current public safety wireless systems.

77. *Capacity, throughput, and quality of service.* As stated in the *Second Report and Order*, NPSTC contended that capacity is a key consideration, arguing that “the Commission should require a detailed capacity plan as one of the central elements in the negotiated agreement * * *.”⁹⁴ Should we further specify the minimum levels of capacity or throughput (*i.e.* data transmission rates), or ceilings on such levels, that the network must provide? If so, how should such levels be defined? Should they vary by geographic location, or other conditions? Should we establish other quality of service parameters, such as resource reservation and session control mechanisms? What means should be made available by the D Block licensee to enable public safety to monitor the quality of service in an unobtrusive way and without the addition of significant cost to the network? Should the means be nationally standardized and/or be limited to those provided by the D Block licensee? Is there a need for a formal process to address future increases in demand?

78. As we have emphasized throughout this Second FNPRM, one of the key elements of the 700 MHz Public/Private Partnership is the D Block licensee’s access to the public safety broadband spectrum on a secondary basis to defray the cost of building a nationwide network serving both commercial and public safety users. We thus invite comment as to whether there are any particular services or applications that might be too inefficient or far removed from typical public safety communications needs, or that may overburden or otherwise not be viable for a broadband network, such that they may frustrate this key element by excessively limiting or precluding the secondary access to this spectrum contemplated in the *Second Report and*

Order. For example, would it be appropriate to prohibit or restrict use of the network for continuous or routine video surveillance from fixed locations as being an inefficient or inappropriate use of the capacity of the shared wireless broadband network?⁹⁵ Would such use create undue uncertainty concerning network availability for either the D Block licensee or for public safety users? If there are such concerns, how else should they be addressed? Are other frequencies available to public safety users more appropriate for fixed video applications? Could such networks be made interoperable with the public safety broadband network using 700 MHz spectrum? What are the relative costs of using alternative frequencies? What cost savings, if any, would there be to incorporating video into the 700 MHz network as compared to allowing individual jurisdictions to develop their own fixed video wireless networks? Should we set certain parameters to determine or predict capacity needs of public safety users? We could, for example, base the capacity needs on the levels of authority within the public safety community, the existence or absence of an “emergency” (further discussed below), or type, time, or location of communication. Are there any technical, operational, or cost-based means to monitor or regulate capacity needs of certain public safety entities? Should we require the Public Safety Broadband Licensee to forecast public safety use on a regular basis (monthly, quarterly), or otherwise provide the assistance needed for the D Block licensee to make such predictions? Commenters proposing any limits to address such capacity concerns should provide detailed information on how such limitations could be implemented without compromising public safety. Would payment obligations of public safety users for network use be sufficient incentive for users to voluntarily limit use? Would a rate-of-return or cost-plus pricing mechanism provide the appropriate incentives? Alternatively, should we vary the obligations of the D Block licensee, its right to recover costs from public safety, or other terms of the NSA, based on the

extent to which the public safety broadband spectrum is available for commercial operations? Or is it sufficient to clarify that the parties may negotiate such variations?

79. *Security and encryption.* Should we provide greater specificity regarding what the D Block licensee must provide with regard to security and encryption, or establish an alternate requirement? Should we identify further what constitutes “state-of-the-art” security and encryption technology? Should we limit the requirement to technical network solutions or standards for security and encryption implemented on a nationwide basis? We seek comment on the costs and practical challenges of implementing such measures in the public/private network to be constructed by the D Block licensee, particularly in the event that we permit local variation in the security solutions and standards.

80. *Combined use of spectrum.* We seek comment on whether, in order to provide the D Block licensee with appropriate flexibility to achieve an efficient and effective implementation of the 700 MHz Public/Private Partnership obligations, we should amend our rules to clarify that the D Block licensee may construct and operate the shared wireless broadband network using the entire 20 megahertz of D Block spectrum and public safety broadband spectrum as a combined, blended resource. In particular, we seek comment on whether, in designing and operating the shared network, the 10 megahertz of D Block spectrum and the 10 megahertz of public safety broadband spectrum may be combined, in effect, into a single and integrated 20 megahertz pool of fungible spectrum that may be assigned to users without regard to whether a public safety user is being assigned frequencies in the D Block or a commercial user is being assigned frequencies in the public safety broadband spectrum, so long as the network provides commercial and public safety users with service that is consistent with the respective capacity and priority rights of the D Block licensee and Public Safety Broadband License and with our rules. For example, such a network would have to guarantee that public safety users have priority access to at least 10 megahertz of spectrum capacity consistent with the 10 megahertz associated with the Public Safety Broadband License, but, at any particular time, the network might be using frequencies associated with either the D Block license or the Public Safety

⁹⁵ See, *e.g.*, “DC OCTO Wireless Broadband Network Wins Police Chiefs’ Technology Award,” <http://newsroom.dc.gov/show.aspx?agency/octo/section/2/release/6342> (stating that the DC wireless broadband network is designed to provide, among other applications, “remote video surveillance”); see also http://govtsecurity.com/state_local_security/close_watch/ (stating, with regard to Baltimore, Maryland, video surveillance system, that “[m]any of the city’s surveillance cameras and all of its housing cameras are wireless” and that “[w]ireless camera signals from groups of cameras are brought back to a fiber node * * *”).

⁹⁴ *Second Report and Order*, 22 FCC Rcd at 15433 ¶ 404 (quoting NPSTC 700 MHz Further Notice Comments at 13).

Broadband License to provide that capacity.⁹⁶

81. We seek comment on whether permitting the combined use of spectrum in this fashion would provide for a more efficient and effective use of spectrum, whether it provides further flexibility to evaluate and use all available wireless broadband technologies to build and operate the network and thus promote our ultimate goal of making available a nationwide interoperable broadband network for public safety users. We also seek comment on whether such combined use would be consistent with the different rights and obligations associated with the D Block license and the Public Safety Broadband License, respectively, and whether, in light of these and other considerations, it would be in the public interest to allow such use. Commenters should also discuss whether permitting such combined use of the spectrum associated with these two licenses would be consistent with the requirements of Sections 337(a) and (f) and the Commission rules allotting specific frequencies for use by the Public Safety Broadband Licensee and the D Block licensee.

82. *Power flux density, and related notification, and coordination requirements.* In the text of the *Second Report and Order*, we indicated that we would not adopt any power flux density (PFD) limit requirement in the public safety broadband segment, based on the limited record received on this issue.⁹⁷ We also noted that, should additional facts be presented, we might revisit this issue.⁹⁸ The applicable rules adopted by the *Second Report and Order*, however, require the Public Safety Broadband Licensee to meet a PFD limit when operating base stations at power levels above 1 kW ERP.⁹⁹ In light of this discrepancy between the text of the order and the rules, we seek comment on whether we should retain this PFD requirement for the public safety broadband spectrum.¹⁰⁰ Further, we note that Verizon Wireless ("Verizon") filed a petition for reconsideration of the

*First Report and Order*¹⁰¹ with regard to certain of the notification and coordination obligations placed on commercial 700 MHz licensees.¹⁰² First, Verizon requests that we eliminate the PFD/notification requirement for Upper 700 MHz C and D Block licensees when operating base stations at power levels above 1 kW ERP in non-rural areas. And second, with respect to Upper 700 MHz C and D Block licensees operating in rural areas, Verizon requests that such licensees: (1) Should only have to coordinate with adjacent block licensees (*i.e.*, not all other 700 MHz licensees) when seeking to operate at power levels greater than 1 kW ERP; (2) should be permitted to use a power level of "1 kW ERP and 1 kW/MHz ERP" as the trigger for coordination instead of 1 kW ERP;¹⁰³ and finally, (3) should be subject to a PFD/notification requirement, rather than a coordination requirement, when operating base stations at power levels greater than 1 kW ERP and 1 kW/MHz ERP.¹⁰⁴ In light of this petition, we seek comment on whether to apply any or all of Verizon's proposed rule changes to the public safety broadband spectrum.

83. *Other technical requirements.* As noted above, we also seek comment on whether to establish, modify, or clarify the requirements with regard to any other critical aspect of the network that may significantly affect its commercial viability or its ability to meet the needs of public safety. For example, should we further specify the technical requirements and standards with regard to interoperability or network availability?

¹⁰¹ See Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, WT Docket No. 06–150, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94–102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01–309, Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03–264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06–169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06–229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96–86, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007) (*First Report and Order*).

¹⁰² Petition for Reconsideration of Verizon Wireless, WT Docket No. 06–150 (filed June 14, 2007) (Verizon Petition).

¹⁰³ Upper 700 MHz C and D Block licensees may operate base stations at power levels up to 2 kW/MHz ERP in rural areas.

¹⁰⁴ Verizon Petition at 8–12.

(ii) Priority Public Safety Access to Commercial Spectrum During Emergencies

84. *Background.* In addition to requiring that the network meet certain technical specifications, we also required that the D Block licensee provide the Public Safety Broadband Licensee with priority access, during emergencies, to the spectrum associated with the D Block license (in addition to the 700 MHz public safety broadband spectrum). At the same time, we noted that the potential disruption of commercial service in the D Block, while appropriate in an emergency situation, must be limited to the most serious occasions in order to avoid jeopardizing the commercial viability of the 700 MHz Public/Private Partnership. To balance these competing concerns, we thus required the parties to define "emergency" for purposes of priority access to D Block license spectrum as part of the NSA.¹⁰⁵ We also provided that in the event that the parties are unable to agree that an emergency situation requires priority access to the D Block license spectrum, especially in circumstances that do not clearly fall within the definition of "emergency" negotiated by the parties in the NSA, the Public Safety Broadband Licensee may request that the Commission declare, on an expedited basis, that particular circumstances warrant emergency priority access.¹⁰⁶

85. *Discussion.* We seek comment on whether we should continue to require that the D Block licensee provide the Public Safety Broadband Licensee with priority access, during emergencies, to the spectrum associated with the D Block license. We seek comment on whether this obligation is essential to ensure that the network capacity will meet public safety wireless broadband needs, or whether removing the obligation could significantly improve the chances that this proceeding will succeed in achieving our goal of making available to public safety users a nationwide, interoperable, broadband network that incorporates the greater levels of reliability, robustness, security, and other features required for public safety services.

86. If we continue to require that the D Block licensee provide the Public Safety Broadband Licensee with priority access, during emergencies, to the spectrum associated with the D Block license, we seek comment on whether

¹⁰⁵ *Second Report and Order*, 22 FCC Rcd at 15441–42 ¶ 426.

¹⁰⁶ *Id.* at 15442. We delegated authority to the Defense Commissioner to decide these requests. See 47 CFR 0.181.

⁹⁶ We note that, under current rules for the 700 MHz Public/Private Partnership, public safety users would be entitled in emergencies to the full combined 20 megahertz of capacity on a priority basis. Elsewhere in this Second Further Notice, we seek comment on whether to eliminate or clarify this requirement.

⁹⁷ See *id.*, 22 FCC Rcd at 15417 para. 358.

⁹⁸ *Id.*

⁹⁹ See 47 CFR. 90.542(a)(5), (b).

¹⁰⁰ This requirement had initially been imposed on Upper 700 MHz C and D Block licensees to protect public safety narrowband licensees from interference.

we should provide more clarity on the circumstances that would constitute an “emergency” for this purpose. If so, we ask whether any or all of the following events should define an “emergency”:

- The declaration of a state of emergency by the President or a state governor.
- The issuance of an evacuation order by the President or a state governor impacting areas of significant scope.
- The issuance by the National Weather Service of a hurricane or flood warning likely to impact a significant area.
- The occurrence of other major natural disasters, such as tornado strikes, tsunamis, earthquakes, or pandemics.
- The occurrence of manmade disasters or acts of terrorism of a substantial nature.
- The occurrence of power outages of significant duration and scope.
- The elevation of the national threat level, as determined by the Department of Homeland Security, to either orange or red for any portion of the United States, or the elevation of the threat level in the airline sector or any portion thereof, as determined by the Department of Homeland Security, to red.

87. Are there any other events, or modifications to the above, that would assist in removing uncertainty in reaching a definition of “emergency?” Would this proposed definition of “emergency” be too burdensome on the D Block licensee? If we adopted some or all of the above event-defining emergencies, should we permit the parties to the NSA to propose different or additional scenarios that should be considered emergencies? Further, should we make explicit that priority access in emergency situations be limited to the geographic and/or jurisdictional area directly affected by the emergency? Should we establish time limits on the duration of priority access? If so, how should such time limits be based? Alternatively, should we establish limits on the priority access given to the D Block spectrum capacity, for example by limiting public safety’s priority access to D Block spectrum capacity in emergencies to 50 percent?

(iii) Performance Requirements Relating to Construction of the Network

88. *Background.* In the *Second Report and Order*, we decided that the D Block license would be issued for a period of 10 years and imposed unique performance requirements for the D Block license in connection with the construction of the shared wireless

broadband network. Specifically, we required the D Block licensee to provide signal coverage and offer service to at least 75 percent of the population of the nationwide D Block license area by the end of the fourth year, 95 percent by the end of the seventh year, and 99.3 percent by the end of the tenth year.¹⁰⁷ We further specified that “the network and signal levels employed to meet these benchmarks be adequate for public safety use * * * and that the services made available be appropriate for public safety entities in those areas.”¹⁰⁸

89. Certain other requirements were imposed to further ensure coverage of highways and certain other areas such as incorporated communities with a population in excess of 3000.¹⁰⁹ We concluded that these build-out requirements “will ensure that public safety needs are met.”¹¹⁰ We also required, however, that, “to the extent that the D Block licensee chooses to provide commercial services to population levels in excess of the relevant benchmarks, the D Block licensee will be required to make the same level of service available to public safety entities.”¹¹¹

90. *Discussion.* We seek comment on whether we should revise the performance requirements that we imposed on the D Block licensee with regard to building out the nationwide, interoperable broadband network and, if so, how those requirements should be revised. We also invite comment on whether to extend the license term for that license, and possibly the Public Safety Broadband License, if we determine to provide for construction benchmarks that extend past the initial license term that we established for the D Block license.

91. We seek comment on whether we should retain the existing end-of-term population benchmark of 99.3 percent or whether instead we should adopt a lower population benchmark that is equal to or more aggressive than the 75 percent benchmark that is applicable to the C Block. We note that each of the top four nationwide carriers is currently providing coverage to approximately 90 percent or more of the U.S. population.¹¹² Given that existing commercial wireless infrastructure already covers approximately 90 percent of the population, we seek comment on

whether it is reasonable to expect that the D Block licensee would be able to meet at least a 90 percent of the population coverage requirement or more, or whether some other coverage requirement is appropriate.

92. Based on extrapolations from one estimate in the record, it appears that reducing the population coverage level from 99.3 to 98 percent would result in a potential cost savings for the D Block licensee of approximately \$3.1 billion in capital expenditures and reducing the coverage level to 95 percent would result in a potential cost savings of approximately \$6.1 billion in capital expenditures.¹¹³ Even assuming that a more reasonable estimate of potential cost savings may amount to around half these figures, reducing the coverage level to 98 percent would result in a potential cost savings of approximately \$1.6 billion and reducing the coverage level to 95 percent would result in a potential cost savings of around \$3.1 billion.¹¹⁴ We seek comment on these specific estimates, as well as any other estimates that commenters can provide relating to the incremental additional costs associated with covering each percentage (in whole or part) of the

¹¹³ See Frontline Petition for Reconsideration at 22 (stating that increasing the 10-year coverage requirement from 99 percent of the population to 99.3 percent added \$1 billion in costs to the network). Commission staff extrapolated from Frontline’s analysis to estimate potential cost savings associated with various coverage levels. First, Commission staff estimated Frontline’s implied network cost per square mile by taking the difference in square miles between CONUS population coverage at 99.3 percent and 99 percent (149,048 square miles), and then dividing Frontline’s \$1 billion cost savings by this difference in square miles. Using this methodology, Commission staff estimated Frontline’s implied network cost per square mile to be approximately \$6,700. In estimating the difference in square miles between population coverage at 99 percent and 99.3, Commission staff used U.S. Census-based population data by county, starting with the county that has the highest population density, and working down in counties to arrive at 99 and 99.3 percent of the U.S. population. Using the implied network cost per square mile derived from the Frontline data, Commission staff estimated that reducing the CONUS population coverage level from 99.3 to 98 percent would result in a reduction of 913,612 square miles covered by the network. This reduction in square miles is multiplied by the implied cost of \$6,700 to arrive at potential network cost savings for the D Block licensee of approximately \$3.1 billion. Similarly, Commission staff estimated that reducing the CONUS population coverage level from 99.3 to 95 percent would result in a reduction of 462,591 square miles covered by the network. This reduction in square miles is multiplied by the implied cost of \$6,700 to arrive at potential network cost savings for the D Block licensee of approximately \$6.1 billion.

¹¹⁴ By reducing this estimated implied network cost per square mile by 50 percent (from \$6,700 to \$3,350), Commission staff estimated a potential cost savings of approximately \$1.6 billion if the coverage level were reduced to 98 percent, and a potential cost savings of \$3.1 billion if the coverage level were reduced to 95 percent.

¹⁰⁷ *Second Report and Order*, 22 FCC Rcd at 15445.

¹⁰⁸ *Id.* at 15446.

¹⁰⁹ See *id.* at 15445, 15446.

¹¹⁰ *Id.* at 15445.

¹¹¹ *Id.* at 15446.

¹¹² UBS Warburg Investment Research, U.S. Wireless 411, at 17 (Mar. 18, 2008).

population above 95 percent. We also note that reducing the population coverage level for the end-of-term benchmark from 99.3 percent to 98 percent or 95 percent would also reduce the geographic area covered by the network. We estimate, for example, that under the current 99.3 percent end-of-term build-out benchmark, approximately 61 percent of the geographic area of the country would be covered by the network. By contrast, with a 95 percent end-of-term build-out benchmark, we estimate that approximately 40 percent of the geographic area of the country would be covered.¹¹⁵ We seek comment on these estimates, or on any related estimates.

93. More generally, we seek comment on how much a dedicated, nationwide, interoperable broadband network for public safety, built to the requirements outlined in the *Second Report and Order*, costs to build and operate. We seek as much detail on these costs as commenters can provide. How should the Commission balance the potential savings associated with adopting less stringent performance requirements with our goal of establishing a nationwide interoperable public safety network?

94. As we consider appropriate construction benchmarks for the D Block license, we note that for the 22 megahertz C Block we required licensees to provide signal coverage and offer service to at least 40 percent of the population in each EA of the license area within four years and to at least 75 percent of the population in each EA of the license area by the end of the ten-year license term.¹¹⁶ Given that the licenses in the C Block were successfully auctioned in Auction 73, and that at least one bidder has put together a nearly nationwide geographic footprint with these licenses, we assume that the D Block licensee should, at the very minimum, be able to meet these benchmarks with respect to its nationwide license. We seek comment on this assumption.

95. Depending on which performance benchmarks we may ultimately adopt, should we include benchmarks that extend beyond the end of the initial 10 year license term? If so, should we also extend the term of the D Block license accordingly? Would doing so make it easier for the D Block licensee to meet

the performance requirements the Commission adopted? If, for example, we were to adopt a 15 year license term, would such a modification increase the commercial viability of the required network while still meeting public safety needs? If we were to adopt a 15 year license term, how should the interim build-out benchmarks be modified? We could, for example, require the D Block licensee to provide signal coverage and offer service to at least 50 percent of the population of the nationwide license area by the end of the fifth year, 80 percent of the population of the nationwide license area by the end of the tenth year, and 95 percent of the population of the nationwide license area by the end of the fifteenth year. Would modifying the license term and performance requirements in this way, or similar way, serve the public interest? Alternatively, if we extend the overall license term, should we add additional interim benchmarks to reflect the longer deployment period? What potential impact would these revised terms and benchmarks have on the near-term and long-term needs of public safety? Would roaming be a possible solution to increased coverage needs?

96. We also seek comment on how making changes to the license term and performance requirements as described above would affect other aspects of the rules that we adopted, such as the requirement that the D Block licensee and Public Safety Broadband Licensee negotiate inclusion into the build-out schedule coverage of major highways and interstates, as well as incorporated communities with a population in excess of 3,000 people?¹¹⁷ In addition, we seek comment on whether any aspect of the renewal requirements for the D Block licensee should be revised. In the *Second Report and Order*, we determined that, at the end of the 10 year license term, the D Block licensee will be allowed to apply for license renewal that will be subject to its success in meeting the material requirements set forth in the NSA as well as all other license conditions, including meeting the performance benchmark requirements.¹¹⁸ Because the initial NSA term will expire at the same time, we also required the D Block

licensee to file a renewed or modified NSA for Commission approval at the time of its license renewal application.¹¹⁹ Should we make any changes to these requirements?

97. How will the possibility of NSA re-negotiation at some point in the future affect the incentives of public safety users to develop reliance on the public safety broadband network? What steps could provide public safety users with confidence that using the broadband network will remain attractive after potential changes to the NSA at renewal time?¹²⁰ What are the downsides to such an approach?

98. As discussed above, we are seeking comment on whether the license term of the D Block should be revised. In adopting the ten-year license term for the Public Safety Broadband Licensee, we sought to harmonize the license terms to facilitate the contemplated leasing arrangement and build out requirements. Accordingly, should we determine to extend the term of the D Block license, we seek comment on whether we also should extend the Public Safety Broadband Licensee term in a corresponding manner. Further, we determined in the *Second Report and Order* that the NSA was to have a term not to exceed 10 years from February 17, 2009, to coincide with the term of the D Block license. Thus, we also ask whether we should extend the term of the NSA to be co-extensive with any extended term we may adopt for the D Block.

99. We also seek comment on whether we should revise our rules to permit the D Block licensee to use Mobile Satellite Service to help it meet its build-out benchmarks. In the *Second Report and Order*, we found that satellite services can enable public safety users to communicate in rural and remote areas that terrestrial services do not reach. We also stated that satellite technology can provide the only means of communicating where terrestrial communications networks have been damaged or destroyed by wide-scale natural or man-made disasters.¹²¹ As a result, we required that the D Block licensee make available to public safety users at least one handset that includes a seamlessly integrated satellite solution.¹²² In addition, we strongly

¹¹⁵ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Twelfth Report*, 23 FCC Rcd 2241, at 5 (2008) (*Twelfth CMRS Competition Report*).

¹¹⁶ *Second Report and Order*, 22 FCC Rcd at 15351.

¹¹⁷ We do not revisit our decision to prohibit geographic partitioning and spectrum disaggregation for the D Block licensee in the context of the 700 MHz Public Private Partnership. We continue to find that such restriction is necessary to ensure the integrity of the public/private partnership and nationwide broadband network.

¹¹⁸ *Second Report and Order*, 22 FCC Rcd at 15450.

¹¹⁹ *Id.*

¹²⁰ See A New Proposal for a Commercially Run Nationwide Broadband System Serving Public Safety by Jon M. Peha, Associate Director, Center for Wireless and Broadband Networking, Professor of Electrical Engineering and Public, PS Docket No. 06-229, WT Docket No. 96-86 (filed Feb. 27, 2007), at 9.

¹²¹ *Second Report and Order* at 15452.

¹²² *Id.* at 15452.

encouraged the D Block licensee and the Public Safety Broadband Licensee to negotiate large-scale satellite service agreements that could be used to either expand or expedite build-out in rural areas and to replace terrestrial services where terrestrial facilities are damaged or destroyed.¹²³

100. In light of the potential for Mobile Satellite Services to supplement the D Block licensee's coverage, we seek comment in this Second FNPRM on whether it would serve the public interest to permit the D Block licensee to utilize Mobile Satellite Service as a way to meet, in part, its build-out requirements. We seek comment on whether this proposal could better enable the D Block licensee to meet its performance requirements by providing the licensee with additional means for ensuring that broadband public safety services are available in remote and rural areas. If the D Block licensee is able to make use of Mobile Satellite Service coverage, we seek comment on whether satellite coverage would make it easier to cover gaps in rural areas in the terrestrial 700 MHz public safety network. We seek comment on whether this additional flexibility in infrastructure deployment would serve to bolster the availability, robustness, and survivability of the public safety communications network. If we permit the D Block licensee to use Mobile Satellite Services to help it meet the build-out benchmarks, we seek comment on whether we should limit the extent to which it can rely upon such services and, if so, how its reliance on Mobile Satellite Services should be limited.

101. We also seek comment on whether the D Block licensee's obligation to meet its build-out requirements should be delayed or relaxed if the licensee ensures that handsets with terrestrial and mobile satellite components are available in areas that have not been built out with a terrestrial network, but are covered by a Mobile Satellite Service footprint. Alternatively, we seek comment on whether we should retain the terrestrial build-out requirement, but provide the D Block licensee with more flexibility if it makes terrestrial/mobile satellite handsets available for public safety use. We seek comment, for example, on whether the D Block licensee should be provided scaled flexibility based on the substitutability of the satellite offering for terrestrial services to be used by public safety users. Factors that we could consider in assessing such an offering might include: (1) The

capabilities of the satellite component (e.g., voice, data, video, interoperability, priority/preemption); (2) the availability of terrestrial/mobile satellite data devices, in addition to handheld voice devices; and (3) geographic coverage. To the extent we determine to lower the population coverage level for the end-of-term benchmark from 99.3 percent to 98 percent or 95 percent, is there some other way than Mobile Satellite Service to provide service to 99.3 percent of the population?

102. What would be the marginal cost to public safety entities of using Mobile Satellite Service-based communications services? To what extent would these marginal costs be comparable to the marginal cost of using the terrestrial component of the public safety broadband network? Is it reasonable to require the D Block licensee to ensure some degree of comparability of costs for public safety end users if the D Block licensee relies upon Mobile Satellite Service to fulfill a network build-out requirement? How could such comparability be defined and enforced?

103. We also seek comment on whether there are other terrestrial or non-terrestrial technologies or services that the D Block licensee may utilize to satisfy its performance requirements.¹²⁴ We reiterate the questions asked of Mobile Satellite Services above with regard to other such non-terrestrial technologies, and we seek comment on the costs and benefits of such technologies, particularly in comparison to Mobile Satellite Service, and whether permitting the use of such technologies to satisfy in part the D Block licensee's performance requirements would raise any other issues that should be addressed by the Commission.

104. We further seek comment on whether, to reduce the cost of meeting our build-out requirements, we should adopt rules to promote or facilitate access by the D Block licensee to public safety towers and/or rights of way, and

if so, what measures would be appropriate? We might, for example, obligate the licensees in the 700 MHz Public/Private Partnership to make "reasonable, good-faith efforts to obtain access" to both public safety towers and public safety rights of way, as earlier proposed by one party in this proceeding.¹²⁵ We seek comment on this option, and on whether measures should be adopted to provide public safety entities with some degree of obligation or incentive to provide such access. Commenters proposing such a measure should also discuss the Commission's authority to adopt it. Alternatively, should we clarify that the D Block licensee has flexibility to provide this type of incentive, such as by agreeing to reduced rates for services to public safety entities that provide access to their towers, and otherwise leave the issue to be negotiated between the two licensees and the relevant public safety entities? Are there impediments that might limit the ability of public safety entities to enter into such arrangements? If so, what steps can the Commission take to address such impediments that are within its authority and consistent with the public interest?

105. Finally, as an alternative approach for establishing construction requirements, we seek comment on whether we should employ a "two tiered" build out obligation, such that the D Block licensee would be allowed to incrementally enhance its network. Under this approach, the D Block licensee could satisfy its "first tier" build out requirement by meeting a subset, or some lower-cost aspects, of the technical requirements we adopt for the public-private partnership, and later enhance the network to meet public safety needs. The D Block licensee would then be required to satisfy a "second tier" requirement and fully upgrade portions of the network to meet all technical requirements adopted for the shared wireless broadband network based on certain temporal and/or public safety take-rate-based triggering mechanisms. Would adopting this two tiered performance requirement serve our goals to ensure a commercially viable opportunity for the D Block licensee to construct a shared wireless broadband network suitable for public safety use? If so, what "first tier" requirements or capabilities should the D Block be required to meet? When should the D Block licensee be required to fully upgrade to the entire set of

¹²⁴ See, e.g., Letter from Gerald Knoblach, CEO, Space Data Corporation, to Marlene H. Dortch, Secretary, FCC, AU Docket No. 07-157, ET Docket No. 04-186, *Ex Parte* (filed April 29, 2008) (arguing that wide area technologies such as Space Data's SkySite Platforms, which "create a wireless network consisting of transceivers on weather balloons that operate in near space from 60,000 to 100,000 feet," can "address issues associated with build-out and landmass coverage for the 700 MHz D Block. * * *"); Interoperable Communications: Hearing Before the H. Subcomm. on Telecommunications and the Internet, 110th Congress (2008) (statement of Robert F. Duncan, Rear Admiral, United States Coast Guard (ret.), Senior Vice President, Rivada Networks). See also Letter from Cheryl A. Tritt, Counsel to Space Data Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 96-86, 05-211, and 06-150, PS Docket No. 06-229, AU Docket No. 07-157, *Ex Parte Notice* (filed Oct. 24, 2007).

¹²⁵ See Notice by Frontline Wireless, LLC, WT Docket No. 06-150 and 06-169, PS Docket No. 06-229 (filed Mar. 27, 2007), Draft Rules at 5.

¹²³ *Id.* at 15453.

technical requirements? Should we specify a certain amount of time following each construction benchmark, or after a certain take-rate is achieved by public safety entities?

b. Respective Roles and Responsibilities of the D Block Licensee and Public Safety Broadband Licensee With Regard to Construction, Management, Operations, and Use of the Network

106. In adopting the 700 MHz Public/Private Partnership in the *Second Report and Order*, we sought to delineate the respective roles and responsibilities of the D Block licensee and the Public Safety Broadband Licensee in a manner that would ensure that the construction and operation of a shared, interoperable broadband network infrastructure that operated on the 20 megahertz of spectrum associated with the D Block license and the Public Safety Broadband Licensee and that served both the needs of commercial and public safety users.¹²⁶ Under this plan, the D Block licensee and its related entities would finance, construct, and operate the shared network,¹²⁷ while the Public Safety Broadband Licensee would represent the interests of public safety community and ensure that the shared network meets their needs.¹²⁸

107. In establishing the 700 MHz Public/Private Partnership, we determined that promoting commercial investment in the build-out of a shared network addressed the most significant obstacle to constructing a public safety network—the limited availability of public funding.¹²⁹ We concluded that providing for a shared infrastructure would help achieve significant cost efficiencies, provide the public safety community with priority access to commercial spectrum during emergencies, and speed deployment of a nationwide interoperable broadband network for public safety. At the same time, by providing the D Block licensee with rights to operate commercial services in the 10 megahertz of public safety broadband spectrum on a secondary, preemptible basis, this partnership would help defray the costs of build-out and ensure that the spectrum is used efficiently.¹³⁰

108. We stated that the D Block licensee would have the “exclusive right and obligation to build out the shared network,” using both the spectrum associated with the D Block license as well as the public safety broadband spectrum leased from the Public Safety Broadband Licensee.¹³¹ We determined that providing for “commercial operations” on the public safety broadband spectrum, on a secondary and preemptible basis, was “an integral part of a viable framework for enabling the 700 MHz Public/Private Partnership to finance construction of a nationwide, interoperable public safety broadband network.”¹³² We also afforded the D Block licensee “operational flexibility” in using the leased spectrum to provide “an appropriate balance between the commercial and public safety operations in the public safety broadband spectrum.”¹³³ We stated that the spectrum leasing component of the partnership “permits the D Block licensee to construct a network to serve its business needs, yet preserves the network infrastructure required for primary public safety use in the Public Safety Broadband Licensee’s band.”¹³⁴ We considered the D Block licensee’s commercial operations throughout the 20 megahertz band of spectrum, including operations on a secondary basis with regard to public safety spectrum, as a necessary condition in order to “harness private sector resources to facilitate construction of a nationwide interoperable public safety broadband network.”¹³⁵

109. Meanwhile, in the *Second Report and Order* we provided that the Public Safety Broadband Licensee’s responsibilities would center around directly representing the public safety interests with respect to the 700 MHz Public/Private Partnership, negotiating on their behalf with the winning bidder of D Block license and ensuring that their interests are met in the NSA.¹³⁶ Among other things, as discussed above, we provided that no commercial interest may be held in the Public Safety Broadband Licensee, that no

commercial interest may participate in the management of the licensee, and that the licensee must be a non-profit organization.¹³⁷ We assigned various general responsibilities that we considered in keeping with the Public Safety Broadband Licensee’s responsibilities, as discussed more fully below. We afforded the Public Safety Broadband Licensee “significant flexibility and control in connection with the construction and use of the nationwide broadband public safety network,” while at the same time we sought “to balance that discretion with the concurrent and separate responsibilities” of the D Block licensee.¹³⁸

110. Finally, we provided some guidance on the service fees that the D Block licensee could charge public safety users for their access to the shared network, both for “normal network service” using the public safety broadband spectrum and for priority access to the D Block spectrum.¹³⁹ We required that these fees, to be negotiated by the winning bidder of the D Block license and the Public Safety Broadband Licensee, be specified in the Network Sharing Agreement.¹⁴⁰ In addition, we indicated that the Public Safety Broadband Licensee, as part of its administration of public safety access to the shared wireless broadband network, might assess “usage fees to recoup its expenses and related frequency coordination duties.”¹⁴¹

111. Below, we seek comment on whether we should clarify or revise the roles and responsibilities relating to the D Block licensee and the Public Safety Broadband Licensee. We also seek comment on whether we should clarify or revise the guidance or requirements relating to fees, including both service fees and spectrum usage fees. Finally, we seek comment generally on whether additional revisions or clarifications regarding the construction, operation, management, or use of the shared network would help ensure that the goals of the 700 MHz Public/Private Partnership are achieved.

(i) Role and Responsibilities of the D Block Licensee

112. *Background.* As discussed above, the D Block licensee is generally responsible for financing, construction, and operation of the shared network, which will serve both commercial users and public safety users. Also as noted above, we considered the D Block

¹²⁶ See, e.g., 22 FCC Rcd at 15426 ¶ 383, 15431 ¶ 396.

¹²⁷ See, e.g., *id.* at 15428 ¶ 386, 15431 ¶¶ 395–96, 15432 ¶ 399, 15437 ¶ 415, 15441 ¶ 425, 15445–46 ¶¶ 437–43, 15450 ¶ 457, 15449 ¶ 452, 15467 ¶ 517.

¹²⁸ See, e.g., *id.* at 15421–25 ¶¶ 373–75, 15426–27 ¶ 383, 15433–34 ¶ 405, 15437–38 ¶ 416.

¹²⁹ *Id.* at 15431 ¶ 396.

¹³⁰ *Id.*

¹³¹ *Id.* at 15432 ¶ 399. See also, e.g., *id.* at 15450 ¶ 457; 47 CFR 27.1303.

¹³² *Id.* at 15437 ¶ 416.

¹³³ *Id.* at 15438 ¶ 417.

¹³⁴ *Id.*

¹³⁵ *Id.* at 15438 ¶ 419.

¹³⁶ *Id.* at 15437 ¶ 416 (role of the Public Safety Broadband Licensee “in ensuring that the public/private network established pursuant to the 700 MHz Public/Private Partnership serves the interests of public safety”), 15438 ¶ 417 (Public Safety Broadband Licensee, through its spectrum leasing arrangement with the D Block licensee, “has the regulatory means (and obligation) to preserve the fundamental public safety function of the band”).

¹³⁷ *Id.* at 15421–22 ¶¶ 373–374.

¹³⁸ *Id.* at 15426 ¶ 383.

¹³⁹ *Id.* at 15448–49 ¶¶ 450–52.

¹⁴⁰ *Id.* at 15448 ¶ 450.

¹⁴¹ *Id.* at 15426 ¶ 383.

licensee's "commercial operations" throughout the 20 megahertz band of spectrum as a necessary condition in order to "harness private sector resources to facilitate construction" of the network.¹⁴²

113. *Discussion.* We invite comment on whether additional clarity with regard to the role and responsibilities of the D Block licensee would be helpful to ensure that the 700 MHz Public/Private Partnership achieves its goal in creating a shared, interoperable broadband network. We further seek comment on the appropriate extent of the relationship between the D Block licensee and individual public safety entities with regard to either the establishment of service with those entities or ongoing customer care and billing, bearing in mind the role and responsibilities of the Public Safety Broadband Licensee, which we discuss below.

114. As we have indicated, the ability of the D Block licensee to finance construction of the shared network is critical. Have we established sufficient and appropriate incentives in the 700 MHz Public/Private Partnership that ultimately will enable the D Block licensee to finance and construct the shared network as contemplated? Are there additional steps we can take, or further clarifications, that would improve the likelihood of the success for this partnership?

115. With respect to management and operations of the network, we expect that the D Block licensee will establish a network operations system to support the network infrastructure that it deploys and uses to serve its commercial customers. Such network operations functions typically include a network operations/monitoring center, billing functions, customer care, and similar functions. Should these network operations functions be viewed, much like the build-out of a common network infrastructure, as responsibilities to be assumed solely by the D Block licensee for the benefit of both its commercial customers and the public safety users represented by the Public Safety Broadband Licensee? If the D Block licensee were to assume all traditional network service provider operations, would this better enable the Public Safety Broadband Licensee to administer access to the national public safety broadband network by individual public safety entities, coordinate frequency usage, assess usage fees, and exercise its sole authority to approve equipment and applications for use by public safety entities?

116. We also seek comment on the factors that will affect and determine the D Block licensee's commercial operations and anticipated profitability. Commenters are encouraged to be as specific as possible and to provide detailed projections and figures where possible. What types of commercial customers can the licensee be expected to serve (e.g., critical infrastructure industries, commercial wireless carriers seeking additional spectrum or roaming capacity, commercial wireless customers, automotive companies and service providers, large enterprise customers)? How might current trends and recent developments in the commercial wireless market and the general financial markets affect the D Block licensee's financial model?

(ii) Role and Responsibilities of the Public Safety Broadband Licensee

117. *Background.* As discussed above, the Public Safety Broadband Licensee generally is charged with representing the interests of the public safety community to ensure that the shared interoperable broadband network meets their needs. In the *Second Report and Order*, we assigned the following responsibilities to the Public Safety Broadband Licensee concerning its partnership with the D Block licensee:

- General administration of access to the national public safety broadband network by individual public safety entities, including assessment of usage fees to recoup its expenses and related frequency coordination duties.
- Regular interaction with and promotion of the needs of the public safety entities that would utilize the national public safety broadband network, within the technical and operational confines of the NSA.
- Use of its national level of representation of the public safety community to interface with equipment vendors on its own or in partnership with the D Block licensee, as appropriate, to achieve and pass on the benefits of economies of scale concerning network and subscriber equipment and applications.
- Sole authority, which cannot be waived in the NSA, to approve, in consultation with the D Block licensee, equipment and applications for use by public safety entities on the public safety broadband network.
- Responsibility to facilitate negotiations between the winning bidder of the D Block license and local and state entities to build out local and state-owned lands.¹⁴³

118. We also identified several other of the Public Safety Broadband Licensee's responsibilities, which included:

- Coordination of stations operating on public safety broadband spectrum with public safety narrowband stations, including management of the internal public safety guard band.
- Oversight and implementation of the relocation of narrowband public safety operations in channels 63 and 68, and the upper 1 megahertz of channels 64 and 69.
- Exercise of sole discretion, pursuant to Section 2.103 of the Commission's rules, whether to permit Federal public safety agency use of the public safety broadband spectrum, with any such use subject to the terms and conditions of the NSA.
- Responsibility for reviewing requests for wideband waivers and including necessary conditions or limitations consistent with the deployment and construction of the national public safety broadband network.¹⁴⁴

119. As noted above, we also provided that no commercial interest may be held in the Public Safety Broadband Licensee, that no commercial interest may participate in the management of the licensee, and that the licensee must be a non-profit organization.¹⁴⁵ We indicated, however, that, as part of its administration of public safety access to the shared wireless broadband network, the Public Safety Broadband Licensee might assess usage fees to recoup its expenses and related frequency coordination duties.¹⁴⁶

120. We afforded the Public Safety Broadband Licensee flexibility in overseeing the construction and use of the nationwide broadband public safety network, while seeking "to balance that discretion with the concurrent and separate responsibilities" of the D Block licensee.¹⁴⁷ In order to fulfill these obligations, we indicated that the Public Safety Broadband Licensee should have "operational control of the network to the extent necessary to ensure public safety requirements are met."¹⁴⁸

121. *Discussion.* As an initial matter, we seek comment on whether we should clarify that the Public Safety Broadband Licensee may not assume any additional responsibilities other than those specified by the Commission in this proceeding. We also seek

¹⁴² *Id.* at 15439 ¶ 419.

¹⁴³ *Id.* at 15427 ¶ 383.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 15421–22 ¶¶ 373–374.

¹⁴⁶ *Id.* at 15426 ¶ 383.

¹⁴⁷ *Id.* at 15426 ¶ 383.

¹⁴⁸ *Id.* at 15434 ¶ 405.

comment generally on whether we should clarify, revise, or eliminate any of the specific responsibilities listed above that the Public Safety Broadband Licensee must assume. We seek comment in particular on whether to clarify or revise the division of responsibility between the Public Safety Broadband Licensee and the D Block licensee regarding direct interaction with individual public safety entities in the establishment of service to such entities, the provision of service, customer care, service billing, or other matters. What division will best serve the interests of public safety and the goals of this proceeding?

122. In addressing these questions, we ask commenters to consider the unique role served by the Public Safety Broadband Licensee by virtue of holding the single nationwide public safety license, while not being an actual user of the network. As evidenced by many of the responsibilities given to the Public Safety Broadband Licensee, at a fundamental level, the Public Safety Broadband Licensee would in many respects function much like the way regional planning committees presently do in the 700 MHz and 800 MHz bands, yet with a nationwide scope. For example, like regional planning committees, the Public Safety Broadband Licensee would administer access to the spectrum, coordinate spectrum use, interact with and promote the needs of individual public safety agencies, and ensure conformance with applicable technical and operational rules. One important difference, however, is that unlike regional planning committees, the Public Safety Broadband Licensee is the licensee of the spectrum that it administers. Further, the Public Safety Broadband Licensee has distinct abilities, in that it may assess usage fees to recoup its costs, can use its national level of representation to pass on the benefits of economies of scale for subscriber equipment and applications, and holds sole authority to approve, in consultation with the D Block licensee, equipment and applications for public safety users, and to permit Federal public safety agency use.

123. In light of these similarities and differences, we ask whether it would add clarity to the Public Safety Broadband Licensee's role to specify how it is to carry out these responsibilities. For example, are there certain elements of the existing regional planning committee functions that we should adopt for the Public Safety Broadband Licensee? For those functions distinct from regional planning committees, should we adopt

specific rules to govern how the Public Safety Broadband Licensee is to carry out such functions? Other responsibilities listed above are more specific to the Public Safety Broadband Licensee's status as a partner with the D Block licensee. These include its role to facilitate negotiations between the D Block licensee and state and local agencies for local build-outs, oversight and implementation of narrowband relocation, and review of wideband waiver requests. Thus, while a number of the Public Safety Broadband Licensee responsibilities are in a frequency planning and coordination role, the Public Safety Broadband Licensee is at the same time an equal partner with the D Block licensee with respect to the overall partnership we envision. Accordingly, we seek comment on how the Public Safety Broadband Licensee's role as one half of the 700 MHz Public/Private Partnership should impact how we modify or clarify the respective responsibilities of the D Block licensee and the Public Safety Broadband Licensee.

124. While the Public Safety Broadband Licensee may need some discretion to carry out its partner-related responsibilities, there may need to be more specific limits on the nature of this role. For example, related to the Public Safety Broadband Licensee responsibilities discussed herein, we previously noted that among the shared wireless broadband network requirements we adopted in the *Second Report and Order* was that the network infrastructure incorporate operational control of the network by the Public Safety Broadband Licensee "to the extent necessary" to ensure public safety requirements are met.¹⁴⁹ As we have reiterated throughout this item, the underlying premise of the 700 MHz Public/Private Partnership is the responsibility of the D Block licensee for construction of a broadband network for shared commercial and public safety use. Thus, primary operational control of the network is inherently the responsibility of the D Block licensee (and its related entities), which would in turn generally provide the operations and services that enable the Public Safety Broadband Licensee to ensure public safety requirements are met. Conversely, allowing duplication of some or all of these operational functions may result in a structure more akin to a reseller of services, which could inject an inappropriate "business" or "profit" motive into the Public Safety Broadband Licensee structure, detracting from the intended

primary focus of the Public Safety Broadband Licensee. Accordingly, we seek comment on whether to clarify that none of the responsibilities and obligations of the Public Safety Broadband Licensee, either as previously adopted or as possibly revised pursuant to this Second FNPRM, would permit the Public Safety Broadband Licensee to assume or duplicate any of the network monitoring, operations, customer care, or related functions that are inherent in the D Block licensee's responsibilities to construct and operate the shared network infrastructure.

125. We further seek comment on whether to expressly provide that neither the Public Safety Broadband Licensee nor any of its advisors, agents, or service providers may assume responsibilities akin to a "mobile virtual network operator,"¹⁵⁰ because such a role would be contrary to the respective roles and responsibilities of the D Block licensee and Public Safety Broadband Licensee regarding construction, management, operations, and use of the shared wireless broadband network, may unnecessarily add to the costs of the 700 MHz Public/Private Partnership, and may otherwise permit "for profit" incentives to influence the operations of the Public Safety Broadband Licensee.

126. In addition, we seek comment on whether we should modify Section 2.103 of the Commission's rules to limit Federal public safety agency use of the public safety broadband spectrum to situations where such use is necessary for coordination of Federal and non-Federal activities. If so, should Commission approval be required? That would ensure that Federal public safety agencies will be able to interoperate with state and local public agencies in the use of 700 MHz public safety broadband services during incidents of mutual interest. In other situations, Federal public safety agencies would, of course, be able to purchase 700 MHz wireless broadband services from commercial service providers using the D Block, just as they purchase satellite service from commercial service providers. How does the proposed public safety broadband network for state and local users compare (on a technical level or in terms of functionality) with the planned Integrated Wireless Network ("IWN")

¹⁵⁰ A mobile virtual network operator is a non-facility-based mobile service provider that resells service to the public for profit. See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 05-71, *Tenth Report*, 20 FCC Rcd 15908, 15920 ¶ 27 (2005).

¹⁴⁹ *Id.*

for Federal users?¹⁵¹ What lessons can the Commission learn from the IWN program? To what extent should development of the public safety broadband network be coordinated with the agencies responsible for construction and planning of the IWN program?

(iii) Fees

127. *Background.* In the *Second Report and Order*, we provided guidance concerning the service fees that the D Block licensee could charge public safety users for their access to and use of the public safety broadband network and, in times of emergency, to the D Block spectrum.¹⁵² We also discussed the importance of the D Block licensee's ability to offer commercial services using the public safety broadband spectrum leased from the Public Safety Broadband Licensee.¹⁵³

128. We required that all service fees—including service fees that the D Block licensee would charge public safety users for normal network service using the public safety broadband spectrum and for their priority access to the D Block spectrum—be specified in the Network Sharing Agreement.¹⁵⁴ We stated our expectation, however, that the winning bidder of the D Block license and the Public Safety Broadband Licensee will negotiate a fee structure for priority access to the D Block in an emergency that will protect public safety users from incurring unforeseen (and unbudgeted) payment obligations in the event that a serious emergency necessitates preemption for a sustained period.¹⁵⁵ We also encouraged the parties to negotiate a fee agreement that incorporates financial incentives for the D Block licensee based on the number

of public safety entities and localities that subscribe to the service.¹⁵⁶ We noted that, for the negotiation of reasonable rates, typical commercial rates for analogous services may be useful as a guide, but that the negotiated rates may in fact be lower than typical commercial rates for analogous services.¹⁵⁷

129. In addition, we considered the D Block licensee's opportunity to provide commercial services using the public safety broadband spectrum (on a secondary, preemptible basis) to be “an integral part of a viable framework for enabling the 700 MHz Public/Private Partnership to finance construction of a nationwide, interoperable public safety broadband network.”¹⁵⁸ We also noted that permitting such access to this spectrum “will harness private sector resources to facilitate the construction” of the network.¹⁵⁹

130. We did not discuss the commercial fees that the D Block licensee might charge subscribers to the commercial services that it offers using the shared network. We left that to the marketplace. As discussed above, however, we seek comment in this Second FNPRM on whether all non-public safety users of the shared spectrum—including critical infrastructure users—should be treated as commercial users that gain access to the shared network through the commercial services provided by the D Block licensee.¹⁶⁰

131. *Discussion.* We seek comment on whether we should further clarify, revise, or specify the service fees that the D Block licensee may charge public safety users for access to the shared network. We also seek comment on whether we should provide any guidance on whether the Public Safety Broadband Licensee may assess spectrum usage fees for the leasing of the public safety broadband spectrum to the D Block licensee or the amount of any fee permitted. Is there any additional guidance that we could provide with regard to fees that the D Block licensee or Public Safety Broadband Licensee might assess that would be helpful in ensuring that the goals of the 700 MHz Public/Private Partnership are achieved?

132. *Network service fees.* We invite comment on whether we should reconsider any aspect of the rules regarding service fees to be paid by public safety users, including any applicable fees for normal network service and fees for priority access to the D Block in an emergency. Specifically, we seek comment on whether we should clarify any aspect of these service fees that was left to negotiations. Did we provide adequate guidance in the *Second Report and Order* to enable the parties to negotiate reasonable rates for all fees? Or should the Commission adopt a more detailed fee structure or formula to facilitate negotiations on this issue?¹⁶¹ For example, should we specify that the D Block licensee is entitled to charge rate-of-return or cost-plus rates, taking the incremental costs of public safety network specifications and other costs attributable uniquely to public safety users into account? Alternatively, would requiring public safety users to pay the same rates as commercial users be sufficient? Should we mandate that public safety users be entitled to receive the lowest rate that the D Block licensee offers to its commercial users for analogous service? Commenters suggesting that the Commission adopt a detailed fee structure should provide detailed information on their proposals and discuss how adopting such proposals would result in just and reasonable rates and strike the best balance among competing interests in determining fees. Would more clearly defining the circumstances that would constitute an “emergency,” as addressed elsewhere, impact how fees should be structured for priority access?

133. We also seek comment on whether particular uses of the public safety broadband network by public safety users should be free and others fee-based. On what bases can this distinction be made? Is it practical to use service- and context-based distinctions such as between voice and advanced data services, mission-critical and non-mission-critical communications, emergency and non-emergency events, priority and non-priority access, or similar metrics? Would it instead be preferable to rely on technical distinctions, such as a

¹⁵¹ The IWN is a collaborative effort by the U.S. Departments of Justice, Homeland Security, and the Treasury to provide a consolidated nationwide Federal wireless communications service that replaces stovepipe stand-alone component systems, and supports law enforcement, first responder, and homeland security requirements with integrated communications services (voice, data, and multimedia) in a wireless environment. The IWN will implement solutions to provide Federal agency interoperability with appropriate links to state, local, and tribal public safety, and homeland security entities. See <http://www.usdoj.gov/jmd/iwn>. On April 17, 2007, the Department of Justice announced that it has selected General Dynamics C4 Systems to implement wireless communications services to department field agents as part of the IWN program. See http://www.usdoj.gov/opa/pr/2007/April/07_jmd_256.html.

¹⁵² *Second Report and Order*, 22 FCC Rcd at 15448–49 ¶¶ 450–52.

¹⁵³ *Id.* at 15437–39 ¶¶ 414–19, 15441 ¶ 425.

¹⁵⁴ *Id.* at 15448 ¶ 450.

¹⁵⁵ *Id.* Elsewhere, we stated that this “[p]riority service, although provided to public safety, will still be commercial, and will not appreciably impair the D Block licensee's ability to provide commercial services to other parties.” *Id.* at 15437 ¶ 413.

¹⁵⁶ *Id.* at 15448 ¶ 450.

¹⁵⁷ *Id.* at 15449 ¶ 451.

¹⁵⁸ *Id.* at 15437 ¶ 416.

¹⁵⁹ *Id.* at 15439 ¶ 419. See also *id.* at 15438 ¶ 417 (stating that the requirement that the Public Safety Broadband Licensee lease the public safety broadband spectrum to the D Block licensee spectrum “permits the D Block licensee to construct a network to serve its business needs. * * *”).

¹⁶⁰ See *supra* discussion in section III.A.1.

¹⁶¹ See, e.g., Frontline September 20, 2007, Request at 3 (proposing a formula that would limit the amount public safety users could be charged to that necessary to recover (1) the amortized, incremental fixed costs of building the network to public safety standards, plus (2) ongoing operating expenses for maintaining the network to public safety standards, minus (3) the amortized value of secondary use of the Public Safety Broadband Licensee spectrum by commercial customers).

specified number of minutes or bits, a percentage of network capacity, or similar metrics? Would either approach give sufficient certainty to public safety users and/or the commercial D Block licensee?

134. *Spectrum leasing fees associated with the public safety broadband spectrum leasing arrangement.* In the *Second Report and Order*, we did not specifically address whether the Public Safety Broadband Licensee, when leasing access to the public safety broadband spectrum to the D Block licensee, may impose any spectrum usage fees for use of this spectrum. We seek comment on whether any aspect of the spectrum leasing arrangement should be clarified by the Commission, or whether spectrum usage fees might be considered reasonable or unreasonable given the role of the spectrum leasing arrangement in the 700 MHz Public/Private Partnership. When we provided guidance in the *Second Report and Order* on determining reasonable network service fees, we assumed that the network service and priority access fees may in fact be lower than typical commercial rates in part to reflect the value of the D Block licensee's access to the public safety spectrum through leasing. We seek comment on whether and how any spectrum usage fees might affect the reasonableness of service and emergency access fees discussed above. Should we prohibit any spectrum usage fees associated with the spectrum leasing arrangement? Is the D Block's responsibility for building the public safety broadband network sufficient in-kind contribution for use of the public safety spectrum? If we allow spectrum usage fees, should we require public safety users to pay commercial rates for their access to the shared network?

2. Negotiation of the Network Sharing Agreement

135. *Background.* To ensure the timely establishment and execution of an NSA that adequately safeguards the public interest, we provided rules to govern the process by which the winning bidder of the D Block license and the Public Safety Broadband Licensee would negotiate and establish the agreement.¹⁶² Under these rules, the parties were required to begin negotiations on the date that the D Block winning bidder filed its long form application and to conclude negotiations within six months.¹⁶³ Both the D Block winning bidder and the

Public Safety Broadband Licensee were required to negotiate in good faith, and were obligated to submit status reports during the negotiations period.¹⁶⁴ To ensure that the D Block winning bidder would not stall negotiations to avoid its obligations to public safety, we provided that the D Block license would not be issued until the parties filed an NSA that had been approved by the Commission and was subsequently executed by the parties.¹⁶⁵

136. If the parties successfully negotiated an agreement on all terms within the six month period, they were required to submit the NSA to the Commission for review and approval. In the event the parties did not reach agreement on all terms at the end of the six month negotiation period, or if they were found to have reached an impasse at any time, we delegated authority jointly to the Chiefs of PSHSB and WTB (the Bureaus) to take a variety of actions to resolve the disputes, including but not limited to: (1) Granting additional time for negotiation; (2) issuing a decision on the disputed issues and requiring the submission of a draft agreement consistent with their decision; (3) directing the parties to further brief the remaining issues in full for immediate Commission decision; and/or (4) immediate denial of the long-form application filed by the winning bidder for the D Block license, to be followed by either re-auction of the license or some other means of re-assignment.¹⁶⁶

137. After the release of the *Second Report and Order*, the Chiefs of PSHSB and WTB issued a public notice that, among other things, clarified how the Bureaus would exercise their authority to resolve disputes that arise in the NSA negotiations.¹⁶⁷ They stated: "We will not exercise our authority for immediate denial of the long-form application filed by the winning bidder for the D Block license, as a result of any dispute over the negotiation of the terms of the NSA, until we take one of two steps: (1) Issuing a decision on the disputed issues and requiring the submission of a draft agreement consistent with our decision; or (2) referring the issues to the Commission for an immediate decision and the Commission issues such a decision."¹⁶⁸ The Bureaus also

noted that "failure to comply with a decision by the Commission or the Bureaus on the disputed issues * * * will be deemed a default."¹⁶⁹

138. *Discussion.* We seek comment on whether and how to modify the rules governing the negotiation of the NSA, including dispute resolution, to provide bidders with greater certainty regarding their obligations while still protecting the interests and needs of public safety, and to ensure that both the D Block license winner and the Public Safety Broadband Licensee have incentives to engage in good faith negotiation and to reach terms that will reasonably protect the interests of both sides. In particular, we seek to provide a process that will give bidders confidence that the network the D Block licensee will be required to construct will be commercially viable, and provide assurance to state and local public safety entities that the resulting network will meet their needs for broadband wireless service.

139. To achieve these goals, we seek a process that provides incentives to both sides to make a maximum good faith effort to reach an agreement consistent with the important commercial and public safety interests at stake. As discussed elsewhere in this *Second FNPRM*, one way for the Commission to provide greater certainty regarding the terms of the NSA would be to further specify the requirements of the 700 MHz Public/Private Partnership in our rules. In this section, we seek comment on whether we should modify the NSA negotiation process itself.

140. Any party's incentives to make a maximum good faith effort in any negotiation process are framed by the consequences of failing to reach agreement. Below, we seek comment on whether we should maximize the incentives for a bidder winning the D Block license to reach agreement on an NSA with the Public Safety Broadband Licensee by providing that, if the parties do not reach agreement, we promptly will offer the license to the next highest bidder, in descending order.

Alternatively, we seek comment on whether we should maximize the incentives for both parties to reach agreement on an NSA by providing that, if the parties do not reach agreement, we promptly will offer in a subsequent auction the license(s) for the D Block spectrum without the 700 MHz Public/Private Partnership conditions and subject to service rules more typical of commercial wireless services licenses. Would either of these alternatives offer an appropriate balance of incentives for

¹⁶² See *Second Report and Order*, 22 FCC Rcd at 15463 ¶ 501, 15466 ¶ 512.

¹⁶³ See *id.* at 15464 ¶ 504.

¹⁶⁴ See *id.* at 15464–65 ¶¶ 505–506.

¹⁶⁵ See *id.* at 15463 ¶ 502.

¹⁶⁶ See *id.* at 15465 ¶ 508.

¹⁶⁷ See "Revised Procedure for Auctions 73 and 76: Additional Default Payment for D Block Set at Ten Percent of Winning Bid Amount; Disputed Issues in the Negotiation of Network Sharing Agreement," *Public Notice*, 22 FCC Rcd 19320 (2007) (*D Block Default Payments PN*).

¹⁶⁸ *Id.* at 19322 ¶ 7.

¹⁶⁹ See *id.* at 19322 n.11.

the negotiating parties to reach an agreement?

141. We also seek comment in this section on other related issues. First, we seek comment on whether, if the NSA process fails to produce an agreement between the parties, there are any circumstances in which we should relieve a defaulting D Block license winning bidder of its obligation to make default payments. We discuss later the distinct question of what amounts a defaulting D Block license winning bidder should be required to pay, if any, under these or other circumstances. Second, in the following subsections, we seek further comment on whether to modify the mechanisms for resolving any disputes that may arise during the negotiations or otherwise modify the negotiation process.

142. *Action subsequent to failure to negotiate an NSA.* Pursuant to the Commission's competitive bidding rules, in the event of a default by a winning bidder, the Commission, at its discretion, may either offer the licenses to the next highest bidders (in descending order) at their final bids or auction new licenses for the spectrum.¹⁷⁰ If the winning bidder does not execute an NSA with the Public Safety Broadband Licensee, that winning bidder will be in default and its license application will be dismissed. We seek comment on whether, following such a default, we should offer the license to the party with the next highest bid, in descending order. The next highest bidder would then have the option of paying the amount of its final bid, filing a long-form application, and entering into a negotiation process with the Public Safety Broadband Licensee. If that next highest bidder declined to exercise that option, the Commission could offer the license to the party with the next highest bid, in descending order, and so on. Under such circumstances, should the Commission provide for a shorter time period for a second attempt to negotiate an NSA, in light of the first effort? Or should each D Block bidder be entitled to the same amount of time to attempt to negotiate the terms of the NSA?

143. In the event of a failure to negotiate the NSA, we also seek comment on whether, in lieu of offering the license to the next highest bidder, we promptly should auction alternative license(s) for the D Block spectrum without the 700 MHz Public/Private

Partnership conditions and subject to different service rules. This option limits not only the winning bidder for the D Block license to one opportunity to negotiate an NSA but also limits the Public Safety Broadband Licensee to one opportunity. Does this limit create a better or worse set of incentives for the negotiators, given the public interest in producing a broadband network to serve the public safety users?

144. Under each of the foregoing alternatives, how should the Commission define a "failure" of the negotiation process? For instance, should we require adjudication of any dispute before deeming the negotiations a failure and the D Block winning bidder in default? Should such adjudication be binding? Or should we deem the negotiations a failure and the D Block winning bidder in default simply if negotiations are at an impasse after six months, or even sooner if the parties certify that an impasse exists? If the consequence of a failure of negotiations is the auction of the alternative D Block license(s), should we make additional provisions for resolving any impasse between the parties?

145. We further seek comment on whether there are any circumstances in connection with the failure to negotiate an NSA under which a winning bidder for the D Block license should be relieved from making default payments based on its winning bid. Commenters also should address the possibility that relieving the winning bidder from default obligations while offering the D Block license to the next highest bidder might create an incentive for the winning bidder to bargain with the next highest bidder and offer to default. Generally, if we do not adjudicate any impasse that arises in negotiation, should we automatically subject the D Block winning bidder to default payments when its license application is dismissed? Or should some finding of fault on the part of the winning bidder be a prerequisite of imposing a default payment? If so, how should such fault be determined? Should any other consequences, separate and apart from a default payment, be imposed on the defaulting D Block winning bidder under any of these circumstances?

146. Alternatively, if we provide for binding adjudication with respect to any negotiation impasse, should we subject the D Block license winning bidder to default payments if either party rejects the binding decision or only if it the D Block license winning bidder fails to comply? Should any other consequences, separate and apart from a default payment, be imposed on the

defaulting D Block winning bidder under any of these circumstances?

147. Elsewhere in this Second FNPRM, we seek comment on the rules we should adopt for the D Block, as well as the Public Safety Broadband License, if we offer the license(s) for the D Block without the 700 MHz Public/Private Partnership conditions. If we decide that such licenses should be offered after a failure to negotiate an NSA, should that affect the rules we otherwise might adopt for such license(s)? We likewise seek comment on whether any of our Part 1 competitive bidding rules or other auction procedures would be inappropriate or should be modified for an auction of D Block license(s) without the 700 MHz Public/Private Partnership conditions that is held subsequent to negotiations between a winning bidder and the Public Safety Broadband Licensee that do not produce an NSA.

148. If we provide that a failure of negotiations to produce an NSA will result in a subsequent auction of D Block license(s) without the 700 MHz Public/Private Partnership conditions, a winning bidder might have an incentive for those negotiations to fail so that it can bid on license(s) without the 700 MHz Public/Private Partnership conditions in the subsequent auction. We seek comment on whether this theoretical incentive is a practical concern and, if so, whether we should adopt either of two potential auction eligibility rules to mitigate any such concern.

149. First, we could prohibit a D Block license winning bidder and related parties from participating in any subsequent auction in which any licenses for the D Block are offered without the 700 MHz Public/Private Partnership conditions. We seek comment on this alternative, and on whether any such eligibility restriction should depend on whether the D Block license winning bidder is at fault for the failure of the 700 MHz Public/Private Partnership, e.g., if the D Block license winning bidder refused to comply with a Commission adjudication of a negotiation dispute. Further, should any such eligibility restriction extend to the winning bidder's controlling interests or other related parties? If so, how should such parties be defined?

150. Alternatively, we might lift any auction eligibility restrictions that made other parties ineligible for the prior auction of the D Block license with the 700 MHz Public/Private Partnership conditions. We seek comment in a later section of this Second FNPRM regarding whether to restrict parties already possessing significant access to 700 MHz spectrum from participating in

¹⁷⁰ See 47 CFR 1.2109(b), (c); see *Second Report and Order*, 22 FCC Rcd at 15465 ¶ 508 (noting that, after failure of the parties to negotiate an NSA, the Commission may reassign the license to the next highest bidder, citing 47 CFR 1.2109).

auctions of license(s) for the D Block. If such a restriction applied to an auction of the D Block license with the 700 MHz Public/Private Partnership conditions, we could lift the restriction in a subsequent auction of licenses without those conditions. Would doing so significantly alter the likelihood that the winning bidder in an initial auction could win the license again, and would this offset any potential incentive such a winning bidder might have for NSA negotiations to fail following the first auction?

151. *Potential modifications to dispute resolution mechanisms.* We also seek comment on whether we should eliminate the option of binding adjudication of disputed issues and provide that, in the event of an intractable dispute, so long as a D Block bidder has negotiated in good faith, the Commission will relieve the D Block winning bidder of its financial obligations in connection with the license. Although this option has been advanced by parties on reconsideration,¹⁷¹ we are concerned that it would be difficult for the Commission to determine when a disagreement was the product of “bad faith” negotiations and that this option may not provide sufficient incentive to the D Block winning bidder to meet the needs of public safety. We therefore invite commenters that advocate this option to discuss these concerns and how they might be addressed. For example, should we establish a specific standard for what will constitute an act of bad faith, similar to the standard incorporated at Section 76.65(b) of our rules?¹⁷²

¹⁷¹ See, e.g., AT&T Petition for Reconsideration at 8; Cyren Call Petition for Reconsideration at 6, 7; Frontline Petition for Reconsideration at 23.

¹⁷² See 47 CFR 76.65(b). Implementing the requirements of 47 U.S.C. 325(b)(3)(C), this section provides that television broadcast stations and multi-channel video programming distributors must negotiate the terms and conditions of retransmission consent agreements in good faith. It establishes the following standard for determining whether a party has violated its duty to negotiate in good faith:

(1) Standards. The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the “Negotiating Entity”) duty to negotiate retransmission consent agreements in good faith:

(i) Refusal by a Negotiating Entity to negotiate retransmission consent;

(ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent;

(iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;

(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;

152. We further seek comment on whether, instead of eliminating binding adjudication, we should modify its application or scope. For example, should we limit the issues of adjudication to the requirements specified in our rules? If so, what rules should apply to disputes regarding other terms? Alternatively, should we adopt a specific measure, such as a presumption that a D Block bidder proposal that otherwise satisfies the Commission's stated requirements should be upheld in adjudication? If so, what demonstration should we require of the Public Safety Broadband Licensee to rebut the presumption? Should we provide that we will require the parties to the adjudication to each submit their best offer and that we will then choose one submission or the other? Would this encourage the parties to make proposals that address each other's needs?

153. *Other modifications to the process for establishing the NSA.* We also seek comment on whether to adopt other measures relating to the process for establishing the NSA. We seek comment on whether there are any concerns inherent in the adjudication of NSA disputes by the Commission. If so, we seek comment on how such concerns could be addressed, and whether there are alternatives to Commission adjudication that will still achieve a final agreement in the event of a dispute.

154. This Second FNPRM generally seeks comment on whether we should further clarify or revise requirements relating to the network as well as the D Block licensee's and Public Safety Broadband Licensee's respective responsibilities with regard to the 700 MHz Public/Private Partnership. One likely effect of such additional clarity would be to reduce the scope of and uncertainty relating to issues that need

(v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;

(vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and

(vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.

(2) Totality of the circumstances. In addition to the standards set forth in section 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in section 76.65(a).

to be negotiated between the parties to the NSA. Accordingly, we seek comment on whether, if we adopt such clarifications, it would be appropriate to also reduce the length of the NSA negotiation process, and if so, what length would be reasonable. We also invite commenters to suggest other measures that we might adopt that would help to give potential bidders additional certainty regarding the outcome of the process, or otherwise reduce the risks of the process for the D Block winning bidder, or that would otherwise improve the process. In considering this issue, commenters should take into account the availability of the spectrum as of the DTV transition date, and the needs of both parties to access and utilize this spectrum in a timely manner.

3. Auction-Related Issues

a. Eligibility To Participate in the D Block Auction

155. *Background.* In the *Second Report and Order*, after considering whether open eligibility would pose a significant likelihood of substantial competitive harm in a specific market, we declined to restrict eligibility for 700 MHz Band licenses.¹⁷³ We determined that the appropriate market to assess when considering restrictions on eligibility to hold 700 MHz licenses is the broadband services market.¹⁷⁴ Recognizing the numerous actual and potential broadband service providers that exist, we concluded that the record did not demonstrate that open eligibility to hold 700 MHz band licenses was likely to result in substantial competitive harm in the provision of broadband services.¹⁷⁵ Since our prior determination, Auction 73 has only increased the number of potential providers of broadband service.

156. *Discussion.* Although there is no significant likelihood of substantial competitive harm in the broadband services market that we need to address by restricting otherwise eligible parties from holding the D Block license, the D Block is intended for uses that extend beyond commercial broadband services. Indeed, the requirements of the D Block create a unique opportunity for a new type of nationwide network. Such an opportunity is unlikely to present itself again in the foreseeable future. It therefore may serve the public interest to limit eligibility for participation in the D Block auction in order to maximize the possibility that a party

¹⁷³ *Second Report and Order*, 22 FCC Rcd at 15383–84 ¶ 256.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

otherwise without significant access to spectrum potentially suitable for the provision of mobile wireless broadband services will have an opportunity to create a nationwide 700 MHz network using the D Block.¹⁷⁶

157. The Commission has adopted auction eligibility restrictions in other circumstances, where limited opportunities in existing or emerging services presented potential competitive concerns but did not warrant restricting license ownership or spectrum access beyond the initial auction of the license.¹⁷⁷ Accordingly, we now seek comment on whether the public interest would be served by adopting an auction eligibility restriction with respect to the license(s) made available for the D Block.¹⁷⁸ More specifically, now that various parties have already obtained spectrum access as a result of Auction 73, we seek comment on whether the public interest would be served by limiting eligibility to bid on the license(s) for the D Block to parties that do not already have significant access to 700 MHz Band spectrum or other spectrum potentially suitable for the provision of mobile wireless broadband services. A restriction limited to eligibility to bid on the license(s) in a Commission auction would not restrict any parties' ability to acquire the license(s) or to access D Block spectrum in the secondary market—through leasing or wholesaling arrangements, which are otherwise permissible within our rules.¹⁷⁹ We also seek comment on

whether any restriction that limits the ability of otherwise qualified parties to bid on the license(s) for D Block spectrum should apply only to the next auction of any license(s) for D Block spectrum, or to all future auctions of such license(s). Should whether the restriction applies depend in whole or in part on whether the license(s) are subject to the 700 MHz Public/Private Partnership conditions?

158. Generally, restrictions on the ability of parties to bid for new licenses based on their existing access to spectrum may favor new entrants. Should the auction rules favor new entrants? If so, how? We seek comment on how to structure an auction eligibility restriction to assure that a party not already able to offer nationwide or near-nationwide service using 700 MHz Band spectrum or other spectrum potentially suitable for the provision of mobile wireless broadband services will have the opportunity to win a D Block license. Should we preclude from applying for D Block license(s) parties in which any party holding a present or future interest already has sufficient spectrum access, however that access is defined? Should we preclude from applying for D Block license(s) any party with an agreement to provide future access to D Block spectrum, e.g., a spectrum lease agreement, to any party that already has sufficient spectrum access, however that access is defined? Given that the restriction is intended solely to apply to auction eligibility, and not subsequent eligibility to hold the license, parties already having sufficient spectrum access might obtain an interest in winning bidders or access to their spectrum, but only after licensing.

159. With respect to the spectrum access parties already have, should the potential restriction be concerned with only particular spectrum blocks or bands, or should we consider any spectrum potentially suitable for the provision of mobile wireless broadband services? One party previously proposed a restriction that would have precluded the same party from winning in initial Commission auctions both licenses in the C Block and the D Block license.¹⁸⁰ Should we be concerned only with parties' access to the adjacent C Block or to all 700 MHz spectrum, including spectrum held in the C and D Blocks of the Lower 700 MHz Band? What extent of spectrum access should trigger any restriction? Should we restrict the auction eligibility only of those parties that have nationwide or near-nationwide 700 MHz spectrum access or

include parties that have nationwide or near-nationwide access in other bands? Should the extent of access be measured by geographic or population coverage, or some combination of the two? Should bandwidth be a factor? What is the appropriate threshold at which to apply the restriction?

160. We also seek comment on the appropriate method of measuring a party's spectrum access for this purpose. Should it be measured solely by the party's control of current 700 MHz license holders and winning bidders? Or by the party's equity interest in current 700 MHz Band license holders and winning bidders? By existing leased access to 700 MHz Band spectrum capacity, i.e., leases with respect to already granted licenses? By existing leased rights to 700 MHz Band spectrum capacity, i.e., leases with parties that are winning bidders but not yet licensees? Should we include other bands potentially suitable to the provision of mobile wireless broadband services? If so, what method should we use to measure a party's access to such bands?

161. While we seek comment on the appropriate scope of an auction eligibility restriction, at the same time, we recognize that restricting eligibility may adversely impact the ability of public safety to gain access to an advanced broadband network as quickly as possible. In this respect, it may be desirable to have the broadest pool of bidders possible in order to maximize the likelihood of a successful partnership that will benefit both public safety and consumers. We seek comment on how this consideration should impact our decision on auction eligibility rules. We also seek comment on whether the Commission should apply its spectrum aggregation screen used for wireless transactions to the D Block.

b. Reserve Price

162. *Background.* In the *Second Report and Order*, we directed WTB to adopt and publicly disclose block-specific aggregate reserve prices, pursuant to its delegated authority and its regular pre-auction process, consistent with our conclusions in the *Second Report and Order*.¹⁸¹ Those conclusions in part directed WTB to establish the particular amounts of the block-specific aggregate reserves by taking into account a conservative estimate of market value based on auction results for AWS-1 spectrum licenses.¹⁸² With respect to the specific

¹⁷⁶ As we determined in the *Second Report and Order*, we are not proposing to change our decision to prohibit geographic partitioning and spectrum disaggregation for the D Block licensee. The D Block licensee would continue to be permitted to assign or transfer its license subject to Commission review and prior approval. See *Second Report and Order*, 22 FCC Rcd at 15475 ¶ 542.

¹⁷⁷ See Service Rules for the 746–764 and 776–794 MHz Bands and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99–168, *Second Report and Order*, 15 FCC Rcd 5299, 5326 ¶ 62 (2000) (700 MHz Guard Bands *Second Report and Order*) (adopting auction eligibility restriction in new service by precluding one party from winning both licenses in a given area); Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95–168, *Report and Order*, 11 FCC Rcd 9712, 9736–37, ¶¶ 61–66 (1995) (imposing an auction eligibility restriction in Direct Broadcast Satellite ("DBS") service by prohibiting any party with an attributable interest in DBS channels at a full-CONUS orbital location from acquiring at auction an attributable interest in the full-CONUS channels offered at the 110° orbital location without divesting its prior interest in full-CONUS channels).

¹⁷⁸ As discussed elsewhere, we seek comment on whether the D Block should be comprised of regional licenses instead of one nationwide license.

¹⁷⁹ We would not, however, propose that such access would be permitted through partitioning or disaggregation of the D Block spectrum in light of the unique relationship contemplated and the D Block licensee's responsibilities under the 700 MHz Public/Private Partnership.

¹⁸⁰ See PISC Petition for Reconsideration at 3.

¹⁸¹ *Second Report and Order*, 22 FCC Rcd at 15400–01 ¶ 304.

¹⁸² *Id.*

circumstances of the D Block, we directed WTB to give substantial weight to the detailed rules regarding the D Block license, the D Block licensee's required construction of a network to be shared by public safety service users, and the resulting limitations on the flexibility of the D Block licensee, which together, we noted, might make it appropriate to expect a D Block licensee to pay only 75 to 80 percent of an amount based on AWS-1 auction results, or roughly \$1.33 billion.¹⁸³ Pursuant to our direction, WTB issued the *700 MHz Auction Comment Public Notice*, in which, among other things, WTB proposed and sought comment on reserve prices for all blocks of 700 MHz licenses offered in Auction 73, including a \$1.33 billion reserve price for the D Block.¹⁸⁴ After reviewing the record of comments submitted in response, WTB issued the *700 MHz Auction Procedures Public Notice*, which adopted and set forth procedures for Auction 73, including a \$1.33 billion D Block reserve price.¹⁸⁵ In Auction 73 bidding, applicants placed bids for licenses in the A, B, C, and E Blocks that met, and in some cases significantly exceeded, the applicable reserve price adopted pursuant to the Commission's direction.¹⁸⁶ The single bid for the D Block did not meet its reserve price.¹⁸⁷

163. *Discussion.* We now seek comment on whether we should direct WTB to adopt a different approach to establishing a reserve price in a new auction for the D Block license, pursuant to its delegated authority and its regular pre-auction process. This Second FNPRM generally considers revisions to the rules governing the D Block license in order to further the public interest by facilitating the creation of an interoperable broadband network that can meet public safety needs. In light of that public interest, as well as Auction 73's success in raising the revenue anticipated by Congress, we now seek comment on an appropriate reserve price, or whether we need a reserve price, other than a minimum opening bid, at all, for a new auction for the D Block license. We seek comment on the purpose that a reserve price should serve in the current context, and what level of reserve price would best serve that purpose. We seek comment later in this Second FNPRM regarding whether to offer regional licenses for the

D Block in place of a single nationwide license. In an auction offering multiple licenses, the Commission could set either aggregate reserve price(s), as it did for licenses in the A, B, C, and E Blocks in the 700 MHz auction, or a license-specific reserve price. Commenters should address whether aggregate or license-specific reserve prices would best serve the purpose of any proposed reserve price. In the event that there is some uncertainty regarding the relative value of multiple licenses, an aggregate reserve price applicable to a set of licenses may allow some flexibility in relative license prices. With respect to aggregate reserve prices, commenters should address whether all the licenses offered should be subject to a single aggregate reserve price or whether subsets of the licenses offered should be subject to various aggregate reserve prices. We ask that commenters provide detailed support for any suggested reserve prices provided. Furthermore, would any of the rule revisions presently contemplated be likely to increase or decrease the appropriate reserve price?

164. In addition, we seek comment on whether we should direct WTB to set minimum opening bid(s) at the amount of any separate license specific reserve price(s), whether for a single nationwide license or for regional licenses. For Auction 73, WTB established a minimum opening bid for the D Block license below the D Block license reserve price to facilitate substitution among licenses in different blocks. If we conduct an auction with multiple licenses and aggregate reserve price(s), should we set the minimum opening bids of individual licenses such that the aggregate total of the minimum opening bids is less than the aggregate reserve price, to reduce the risk that a mistaken minimum opening bid will keep bidders from bidding on a particular license? However, in the event we set license-specific reserve prices, whether for a single nationwide license or regional licenses, there would be no apparent benefit from accepting bids below the license-specific reserve.¹⁸⁸ For the next auction of license(s) for the D Block spectrum, WTB will establish the minimum opening bid and any reserve price for the D Block pursuant to its delegated authority and its regular pre-auction process. We ask commenters addressing the reserve price issues raised herein to address whether there is any reason to permit bids below any reserve price and, if so, the extent to which their comments on reserve price

issues presume a particular relationship between a minimum opening bid and any reserve price.

c. Designated Entity Eligibility for the D Block Licensee

165. *Background.* Under our designated entity eligibility rules, as modified in 2006 in the *Designated Entity Second Report and Order*, a business model that involves a designated entity licensee entering into arrangements with other entities for the lease or resale (including wholesaling arrangements) that involve more than 50 percent of the spectrum capacity of a license constitutes an impermissible material relationship and renders the licensee ineligible for otherwise available size-based bidding credits.¹⁸⁹ On November 15, 2007, however, we waived, on our own motion, the application of our impermissible material relationship rule¹⁹⁰ for purposes of determining an applicant's or licensee's designated entity eligibility solely with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the D Block license.¹⁹¹ In so doing, we determined that the unique regulations then governing the D Block license, which required the establishment of the 700 MHz Band Public/Private Partnership subject to a Commission-approved Network Sharing Agreement¹⁹²—together with the application of the Commission's other designated entity eligibility requirements¹⁹³—eliminated for the D Block license the risks that led the Commission to adopt the impermissible material relationship rule. We found that the D Block rules subjected the licensee to significant obligations and substantial Commission oversight, which when combined with the continued application of other designated entity rules led us to conclude that waiver of the

¹⁸⁹ See generally Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05–211, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) (*Designated Entity Second Report and Order recon. pending*; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05–211, *Order on Reconsideration of the Second Report and Order*, 21 FCC Rcd 6703 (2006) (*Order on Reconsideration of Designated Entity Second Report and Order*); 47 CFR 1.2110(b)(3)(iv)(A).

¹⁹⁰ 47 CFR 1.2110(b)(3)(iv)(A).

¹⁹¹ See generally *D Block Waiver Order*.

¹⁹² See *Second Report and Order*, 22 FCC Rcd at 15428–79 ¶¶ 386–553.

¹⁹³ See *Designated Entity Second Report and Order*; *Order on Reconsideration of the Designated Entity Second Report and Order*; 47 CFR 1.2110, 1.2111, 1.2112, 1.2114.

¹⁸³ *Id.* at 15401 ¶ 305.

¹⁸⁴ *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18195 ¶ 199.

¹⁸⁵ *Id.*

¹⁸⁶ See “Auction of 700 MHz Band Licenses Closes,” *Public Notice*, DA 08–595 (rel. Mar. 20, 2008) (700 MHz Auction Closing Public Notice).

¹⁸⁷ *Id.*

¹⁸⁸ *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18199–200 ¶ 212.

impermissible material relationship rule served the public interest.

166. *Discussion.* Now that we are revisiting the service and auction rules for the D Block license, we seek comment regarding whether we should adopt a service specific exception to our impermissible material relationship rule for purposes of determining designated entity eligibility solely with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the D Block license. Could revised service and auction rules that we might adopt for the D Block license continue to present unique circumstances and regulatory obligations that warrant an exception to our impermissible material relationship rule?

167. If we establish such a service specific exception to our general designated entity impermissible material relationship rule, will our other designated entity rules sufficiently ensure that only bona fide small businesses, exercising control over the D Block license in accordance with our rules, will benefit from bidding credits applicable to that license?¹⁹⁴ For instance, consistent with the scope of the *D Block Waiver Order*, will the continued application of the controlling interest rule, attributable material relationship rule, and the unjust enrichment rule, as well as all other designated entity eligibility rules together with the unique requirements that will apply to the D Block license prevent the abuses the impermissible material relationship rule was designed to address? Do the terms and conditions pertaining to the D Block license, both previously set forth and as discussed in this Second FNPRM, provide sufficient assurance that the D Block commercial licensee's provision of service for the benefit of the public will not be significantly influenced by any party leasing (or accessing through wholesale arrangements) fifty percent or more of the spectrum capacity of the D Block license? Does the unique relationship between the D Block licensee and the Public Safety Broadband Licensee, and their regulatory obligations to ensure the ongoing integrity and consistency of service to the public safety users of the network, mitigate any potential for such influence? If, however, the Commission

chooses to license the D Block without the 700 MHz Public/Private Partnership, are there any circumstances in which we should consider an exception to the impermissible material relationship rule?

d. Default Payment

168. *Background.* The Commission's competitive bidding rules provide that if a winning bidder defaults for any reason, the bidder is liable for a default payment.¹⁹⁵ In the *Second Report and Order*, the Commission provided that the D Block winning bidder would be deemed to have defaulted under Section 1.2109(c) of the Commission's rules and would be liable for the default payments set forth in Section 1.2104(g) if it failed to comply with the procedures established for negotiation or dispute resolution in the NSA, including a failure to comply with a Commission or Bureau decision in binding adjudication, as well as under other circumstances, e.g., if it failed to pay its winning bid.¹⁹⁶ Pursuant to Section 1.2104(g) of those rules, a default payment is comprised of (1) a "deficiency payment," based on the amount, if any, by which a subsequent winning bid is lower than the defaulted bid; and (2) an "additional payment," based on a percentage of the lesser of the defaulted bid or the subsequent winning bid.¹⁹⁷

169. The Commission's implementation of its competitive bidding authority enables the assignment of licenses to parties that value them more highly than others and are more likely to put the licenses to efficient and effective use. The failure to pay a winning bid undermines this entire process. At a minimum, defaults delay the assignment of licenses and the deployment of service. In addition, a default may impair the ability of the auction process to assign licenses to those parties best able to serve the public. Accordingly, the Commission requires defaulting bidders (or withdrawing bidders, in auctions in which withdrawals are permitted) to pay the deficiency portion of the default payment so that bidders are more likely to submit bids accurately reflecting their ability to pay, enhancing the efficiency of the competitive bidding process in assigning licenses.¹⁹⁸

170. The Commission further requires an additional payment when a winning bidder defaults to both discourage unsupportable bidding and provide an incentive to bidders wishing to withdraw previously placed bids to do so prior to the close of an auction (when permitted), because, among other things, a default or disqualification after an auction prevents other bidders from winning the license in the initial auction, thereby delaying the use of the spectrum to provide service to the public.¹⁹⁹ Originally, the additional default payment was set at three percent.²⁰⁰ In 2006, we concluded that having the discretion to set the additional payment percentage between three and 20 percent would help the Commission "persuade bidders to be more realistic in their advance assessment of how much they can afford to pay for licenses."²⁰¹ For Auction 73, the additional default payment percentage for any default on a bid for the D Block license was set at ten percent. In auctions where the Commission accepts single bids on combinations, or packages, of licenses, the Commission has fixed the additional default payment percentage at twenty-five percent.²⁰² The Commission adopted the higher additional default percentage in response to the greater potential significance of such a default. In auctions with combinatorial bidding, a bidder's winning bid may affect not only the licenses subject to that winning bid, but the set of bids that wins other licenses as well.

171. Over the history of the Commission's 69 auctions before Auction 73, the net winning bids placed by bidders totaled nearly \$59 billion, yet the Commission's collection of those bids has totaled far less. The shortfall in the applicants' promised payments has stemmed, in large part, from bidders' failure to bid consistently with a careful and realistic assessment of their ability to pay. This failure has been evidenced by bidders subsequently filing for bankruptcy or seeking debt compromise in lieu of fulfilling their auction obligations. Historically, the Commission has found that a bidder's inability to render full and timely payment for its winning bid impairs the Commission's assignment of licenses by competitive bidding by impeding the

¹⁹⁴ This attribution requirement based on D Block arrangements will affect the designated entity's ongoing eligibility for designated entity benefits. See, e.g., *Designated Entity Second Report and Order*, 21 FCC Rcd at 4759–60 ¶ 15, 4763–65 ¶¶ 25–30, 4765–68 ¶¶ 31–41; *Order on Reconsideration of Designated Entity Second Report and Order*, 21 FCC Rcd at 6712–13 ¶¶ 24–26; 47 CFR 1.2110(b)(3)(iv)(B), 1.2111(d). See also 47 CFR 1.2110(b)(1)(i), (m), (n).

¹⁹⁵ 47 CFR 1.2109(b), (c).

¹⁹⁶ See *Second Report and Order*, 22 FCC Rcd at 15466 ¶ 511.

¹⁹⁷ See 47 CFR 1.2104(g)(2).

¹⁹⁸ See Implementation of Section 309(j) of the Communications Act-Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2373 ¶ 147 (1994) (*Competitive Bidding Second Report and Order*).

¹⁹⁹ *Id.* at 2374 ¶ 154, 2382–83 ¶ 197.

²⁰⁰ *Id.* at 2374 ¶ 154, 2382–83 ¶ 197.

²⁰¹ Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05–211, *Report and Order*, 21 FCC Rcd 891, 903–04 ¶ 31 (2006) (*CSEA/Part 1 Report and Order*).

²⁰² 47 CFR 1.2104(g)(2)(ii).

deployment of service to the public and interfering with the efficiency of the assignment. To counter the negative effect of bidders' failure to honor their payment obligations, such as in the case of a post-auction default, we have sought to assure that the additional payment portion of the default payment calculation is sufficient to discourage defaults resulting from insincere bidding and to help ensure that licenses are assigned to financially and otherwise qualified parties that are able to use them effectively and efficiently to provide service.²⁰³

172. *Discussion.* In the present context, the need to deter default is substantially increased. The Commission seeks to license the D Block spectrum to promote the creation of a ubiquitous nationwide wireless network providing interoperable broadband service to the nation's public safety service providers. Delay in assignment of the license could result in substantial harm to the public. Much of this Second FNPRM seeks to reduce the risk of default, and consequent delay, by seeking comment on where greater specificity in the requirements of the 700 MHz Public/Private Partnership might increase the likelihood of success in creating the hoped-for public safety network. At the same time, we seek comment on whether we should modify the default payment rules with respect to a D Block winning bidder. We recognize that a D Block winning bidder faces risks of default that are different in nature, and potentially greater, than those facing the typical winning bidder in a Commission auction. We seek comment on whether a D Block winning bidder's consequent exposure to a potential default payment is excessive and, if so, on ways to reduce it to an acceptable level by modifying either the rules regarding the imposition of a default payment or the default payment amount. In particular, we seek comment regarding the obligation of a D Block winning bidder to make default payments in the event that the Bureau or the Commission adjudicate a dispute with respect to the NSA and a D Block winning bidder will not comply with the decision on the disputed issues. In this context, the default payments provide a strong inducement to a D Block winning bidder to accept the adjudicated terms. It is possible, however, that public safety representatives aware of a D Block

winning bidder's incentives may have greater incentives to make additional demands in pre-adjudication negotiations than if the D Block winning bidder were not facing the threat of default payments.

173. More specifically, we seek comment on whether we should modify the applicable default payment based on the particular circumstances that lead to the default, such as after negotiations fail to produce an NSA. Under such circumstances, should we cap the deficiency portion of the default payment, or direct WTB to apply a different percentage when calculating the additional payment portion of the default payment than it would after a winning bidder defaults on a post-auction payment, or eliminate one of these components of the default payment, while retaining the other? We note that in the event that we conduct a subsequent auction after negotiations fail to produce an NSA and offer license(s) for the D Block that are not subject to any 700 MHz Public/Private Partnership conditions, the deficiency portion of any default payment may well be zero, given that, if all other factors are equal, the winning bid(s) in such a subsequent auction should be higher. How should we take this possibility into account?

174. We seek comment on what specific amount or percentage limits, if any, would provide the best balance between maintaining the incentives for a D Block winning bidder to commit to its bid amount and the required negotiating process while limiting the risk that it may face a choice between default and accepting NSA terms that jeopardize the success of its business plan. Commenters should consider the possibility that the Commission might offer multiple regional D Block licenses subject to combinatorial bidding. Under such circumstances, should the Commission continue to retain the higher additional default payment percentage for combinatorial auctions, given the potentially greater effects of a default by one of multiple winners? We note generally with respect to the percentage for the additional payment portion of the default payment, applying the ten percent additional payment previously adopted to a bid equal to the previous \$1.33 billion reserve price would have resulted in additional payment portion of the default payment of \$133 million. The Commission has assessed a total default payment pursuant to Section 1.2109 that exceeded \$200 million on one prior occasion. The license in that case was for Basic Trading Area 347, covering Phoenix, Arizona and approximately

one-one hundredth the population covered by the D Block nationwide license. However, the largest additional payment previously assessed as part of a default payment was less than \$6 million.

175. We also seek comment on whether, in the event that the Public Safety Broadband Licensee is required to negotiate multiple times after separate auctions of the D Block license, to require a defaulting D Block winning bidder, either as a substitute for or in conjunction with any default payments, to pay the Public Safety Broadband Licensee's negotiation costs for unsuccessful negotiations. If we establish such an obligation, how should we define the covered negotiation costs? Such a payment might provide some additional incentive to reach successful negotiations, and would also ensure that, in the event the parties did not reach an agreement, the Public Safety Broadband Licensee would not be left financially unable to proceed with alternatives or to negotiate with a future licensee.

4. Narrowband Relocation

176. *Background.* Among other things, in designating the lower half of the 700 MHz Public Safety Band (763–768/793–798 MHz) for broadband communications, the *Second Report and Order* consolidated existing narrowband allocations to the upper half of the 700 MHz Public Safety block (769–775/799–805 MHz).²⁰⁴ To effectuate the consolidation of the narrowband channels, we required the D Block licensee to pay the costs of relocating narrowband radios from channels 63 and 68, and the upper one megahertz of channels 64 and 69, and capped the disbursement amount for relocation costs at \$10 million.²⁰⁵ We also cautioned that any narrowband equipment deployed in channels 63 and 68, or in the upper one megahertz of channels 64 and 69, more than 30 days following the adoption date of the *Second Report and Order* would be ineligible for relocation funding.²⁰⁶ In addition, we prohibited authorization of any new narrowband operations in that spectrum, as of 30 days following the adoption date of the *Second Report and Order*.²⁰⁷

177. We found that, in order to maximize the benefits of the 700 MHz Public/Private Partnership to deploy a

²⁰³ See BDPCS, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17598–99 ¶ 15 (2000) (citing *Second Report and Order*, 9 FCC Rcd at 2381 ¶ 190); see also *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348.

²⁰⁴ *Second Report and Order*, 22 FCC Rcd at 15406 ¶ 322.

²⁰⁵ *Id.* at 15412 ¶ 341.

²⁰⁶ *Id.* at 15412 ¶ 339.

²⁰⁷ *Id.*

nationwide, interoperable broadband communications network, the current 700 MHz narrowband public safety operations must be consolidated and cleared no later than the DTV transition date.²⁰⁸ We required every public safety licensee impacted by the consolidation to file a certification with the Commission no later than 30 days from the effective date of the *Second Report and Order*, including certain information to account for “pre-programmed narrowband radios that public safety agencies may have already taken delivery as of the adoption date of the *Second Report and Order* and intend to immediately place into operation.”²⁰⁹ We emphasized that such information was “integral to the success of the relocation process,” and cautioned public safety entities that failing to file this information in a timely manner would result in forfeiture of reimbursement.²¹⁰ As “an additional measure to define and contain the costs that would be entitled to reimbursement,” we prohibited any new authorizations outside of the consolidated narrowband segment, stating that such a prohibition would “ensure that the relocation proceeds in an orderly manner and without complications stemming from additional operations being deployed in spectrum being reallocated.”²¹¹ Moreover, as “an additional means to ensure the integrity of the relocation process,” we imposed a \$10 million cap based on the best evidence available in the record at the time of the *Second Report and Order*.²¹²

178. Two parties filed petitions seeking reconsideration of some or all of the foregoing requirements in the *Second Report and Order*.²¹³ Among other things, these parties challenged the adequacy of the \$10 million cap on relocation expenses.²¹⁴ A number of other parties also supported revising or eliminating the relocation cap.²¹⁵

179. One petitioner also asked that the Commission make clear that parties who purchased and began to deploy systems before the August 30 cut-off date can continue to deploy those systems after August 30, and allow full

reimbursement for the relocation of all such systems.²¹⁶ Another party asks the Commission to modify the *Second Report and Order* to permit continued authorization and deployment of statewide radio public safety systems in Channels 63 and 68 and the upper one megahertz of Channels 64 and 69 through January 31, 2009, allow the owner of a statewide radio public safety system to obtain reimbursement for all its costs incurred in the installation of such a system which was in the process of construction and implementation as of the date of the *Second Report and Order*, and reconsider the \$10 million cap on rebanding costs.²¹⁷

180. *Discussion.* Being mindful of the desire to provide certainty to potential bidders as to the relocation obligation that would attach to the winner of this spectrum, we seek comment on whether we should revise or eliminate the \$10 million cap on relocation expenses. In commenting, we ask parties to provide specific data and cost estimates regarding relocation expenses, particularly taking into account the certifications filed in the docket pursuant to the *Second Report and Order*.

181. Given the proposed re-auction of the D Block and associated timing, we also seek comment on the date by which such relocation must be completed. Should we continue to require relocation be completed by the DTV transition date? If not, should we set an alternative date, and if so, what would that date be? Should we allow relocation to occur on a rolling basis, such that the D Block licensee would be required to relocate narrowband operations only as the broadband network is built out in a particular market? If so, how much notice should the D Block licensee be required to give to a narrowband licensee in advance of relocation? We also seek comment on any other viable mechanism for facilitating relocation, and the appropriate timing of such an approach. Should we retain the requirement that capped costs be deposited in a trust account to be administered by the Public Safety Broadband Licensee? If we eliminate the cap, how would the trust mechanism function? Should we continue to require that the Public Safety Broadband Licensee manage the reimbursement process for these licensees? If so, should we require that public safety entities seeking reimbursement provide detailed cost

information to the Public Safety Broadband Licensee? What should such cost information entail? Should the Public Safety Broadband Licensee be afforded discretion in assessing the soundness of the cost estimates? Can the Public Safety Broadband Licensee leverage its status as the nationwide public safety broadband license holder to negotiate terms with equipment and technology vendors to relocate multiple narrowband operations, and thus achieve economies of scale? Should the Public Safety Broadband Licensee have recourse to the Commission if it determines that cost estimates provided by individual public safety entities, including those passed through by technology or equipment vendors, unreasonable?

182. With respect to the August 30, 2007, cut off date for narrowband deployments outside of the consolidated narrowband spectrum, we sought to balance the needs of individual public safety entities with the necessity of carrying out a swift and thorough narrowband relocation process in order to quickly and efficiently establish the nationwide, interoperable public safety broadband network. While we understand the concerns expressed by certain parties, we continue to believe that the cut off date was appropriate and struck the right balance. Rather, addressing each such situation on a case-by-case basis through the waiver process is a more appropriate mechanism. Accordingly, we seek comment on whether extension of the August 30, 2007, deadline established in the *Second Report and Order* would be inappropriate, and any other issue related to the reconsideration petitions filed by Virginia and Pierce Transit.

5. Size of Geographic Areas and Other Rules and Conditions

183. *Size of geographic areas.* In the *Second Report and Order*, the Commission determined that the D Block license would be auctioned as a single, nationwide license to provide for commercial service in the D Block to build and operate a joint broadband public safety and commercial network for public safety use.²¹⁸ We seek comment on the appropriate geographic service area for the D Block. Our goal has been to make a nationwide, interoperable broadband network available to state and local public safety users. We found that creating a partnership between a single, national public safety entity and a single D Block licensee with a nationwide license was

²⁰⁸ *Id.* at 15406 ¶ 322.

²⁰⁹ *Id.* at 15411 ¶ 336.

²¹⁰ *Id.* at 15411 ¶ 337.

²¹¹ *Id.* at 15412 ¶ 339.

²¹² *Id.* at 15412 ¶ 341.

²¹³ See Virginia Petition for Reconsideration; Pierce Transit Petition for Reconsideration.

²¹⁴ See Virginia Petition for Reconsideration; Pierce Transit Petition for Reconsideration.

²¹⁵ See National Association of Telecommunications Officers and Advisors (NATOA) Comments at 9–11; State of Nebraska (Nebraska) Opposition at 2; Motorola Comments at 1–7.

²¹⁶ See generally Pierce Transit Petition for Reconsideration.

²¹⁷ See generally Virginia Petition for Reconsideration.

²¹⁸ 700 MHz *Second Report and Order*, 22 FCC Rcd at 15315–16 ¶ 62.

the most practical means of speeding deployment of the shared network. We seek comments about whether there is any reason to change the approach taken in the *Second Report and Order*. Would it best serve the public interest to continue to license the D Block on a nationwide basis, or should we choose regional geographic service areas such as REAGs?

184. If the D Block were split into regional licenses, to what extent, if any, should we modify any of the policies or rules previously adopted or proposed herein with respect to a D Block 700 MHz Public/Private Partnership? How would the Commission ensure that the primary goal of a national, interoperable, communications network for public safety agencies is not jeopardized? In particular, how would we ensure interoperability of communications between public safety users of different regional networks? How would we ensure that interoperable communications capabilities are extended to first responders in every region in an equitable fashion? What obligations should we adopt to facilitate coordination between D Block licensees or to otherwise promote the ability of the regional networks to function as a seamless, nationwide network for public safety users? For example, should we mandate that each D Block licensee provide roaming to the public safety users of all other D Block regional networks? What rules should apply in the event that some regional licenses are successfully auctioned while other regional licenses are not successfully auctioned?

185. We also seek comment on whether the D Block should be split into one license (or several licenses) covering high-population density areas and a second license (or set of licenses) covering low-population density areas. Would such an arrangement allow a commercial licensee that specializes in rural coverage (or has some comparative economic advantage in covering such areas) to better serve public safety users in rural areas? Do public safety users in rural areas have different or unique technical requirements as compared to public safety users in more densely-populated areas? If so, to what extent are commercial entities that specialize in rural coverage suited to serving public safety users in such areas?²¹⁹

186. We also seek comment on whether any of our other standard rules,

such as our Part 1 competitive bidding rules, should be modified to take into account the possibility of offering multiple licenses to use D Block spectrum subject to the 700 MHz Public/Private Partnership conditions. What rules should we adopt regarding the establishment of an NSA? Are the needs of public safety served if the Public Safety Broadband Licensee must negotiate separate NSAs with several commercial entities, rather than a single, nationwide commercial partner? Under a regional approach, how would we ensure that interoperable communications capabilities are extended to first responders in every region in an equitable fashion? Should we mandate a "master" NSA that would include minimum network specifications, which could then be modified on a regional basis with more detailed schedules? If we were to adopt regional license areas for the D Block, should we also adopt corresponding regional public safety broadband licenses for the public safety broadband spectrum to facilitate the establishment of regional 700 MHz Public/Private Partnerships?

187. *Other rules and conditions.* Lastly, we seek comment on whether there are any other aspects of the rules or conditions for the 700 MHz Public/Private Partnership that we should modify. For example, should we require the D Block licensee to operate on an exclusively wholesale and/or open access basis?²²⁰ Would it serve the goals of this partnership to impose such requirements? Or, would maintaining a more flexible approach improve the viability of the 700 MHz Public/Private Partnership? How would an open access environment affect public safety? If we adopt a wholesale only approach, do we need to revise or clarify any aspect of the operational responsibilities of the D Block and the Public Safety Broadband Licensee? Should we permit the D Block licensee in certain circumstances to obtain access to public safety narrowband spectrum on a secondary, non-interference basis? If so, under what circumstances should this be permitted, and what safeguards should be adopted? Are there any other changes that the Commission should consider making to the rules or conditions for the 700 MHz Public/Private Partnership to ensure its success?

188. We seek comment on other means by which the Commission could effectively match the needs of public

safety users with the capabilities of potential service providers while still meeting our obligation under the Act to assign the D Block by competitive bidding.²²¹ In particular, we observe that Federal, State and local government agencies regularly use requests for proposals ("RFPs") to contract for services provided by private parties. Such RFPs can be weighted to reflect the priorities and needs of the contracting governments. We seek comment on the feasibility of such an approach in this instance.

189. We note that RFPs could be combined with an auction in at least two ways. Under one approach, the Commission or Public Safety Broadband Licensee could request proposals from potential providers of the broadband network for public safety, then select its preferred specification from the proposals offered, making these specifications part of the rules for the D Block license to be auctioned. Under another approach, the Commission or Public Safety Broadband Licensee could auction the D Block with a minimum set of requirements, then allow the three or four highest bidders to submit proposals that meet or exceed the minimum requirements, with the Commission ultimately selecting the winning bidder. We seek comment on these approaches. In particular, regarding the first approach, we ask commenters to address how we can incorporate the generally applicable information that RFP responses would provide while avoiding adopting entity-specific requirements that would limit the flexibility of other entities to meet our outcome objectives in a way that is best suited to their particular business plans, technologies, and resources. With respect to the second idea, we ask what specific criteria the Commission should use in selecting among proposals.

190. Similarly, we seek comment on whether the Commission could approximate the benefits of an RFP through a more expeditious process. In particular, as noted above, the Commission seeks comment in this Second FNPRM on the possibility of establishing a public/private partnership and, if such a partnership is established, what requirements should apply. As discussed in the Technical Appendix, these requirements would include specifications for the system architecture, reliability, and capacity. In requesting comment on these issues, we especially seek input from both the

²¹⁹ See Letter from Andrew D. Beard, counsel for Vanu, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 06-150; 06-169, 96-86; PS Docket No. 06-229; AU Docket No. 07-157, filed May 8, 2008.

²²⁰ In the *Second Report and Order*, the Commission declined to impose wholesale or open access obligations on the D Block licensee. *Second Report and Order*, 22 FCC Rcd at 15476-77 ¶ 545.

²²¹ See 47 U.S.C. 337(a)(2) (Commission must assign 36 megahertz of 700 MHz spectrum for commercial use "by competitive bidding pursuant to section 309(j).").

public safety users of such a network and the potential providers of such a service, including existing wireless service providers and/or potential new entrants that may be interested in participating in a public/private partnership. Following the issues raised in the Technical Appendix, what specifications are needed by public safety users? What specifications are economically feasible for potential providers, and at what cost?

C. Other Options for the D Block License and the Public Safety Broadband License

191. In this section, we consider the Commission's options in the event that we determine not to proceed with the 700 MHz Public/Private Partnership approach requiring a mandatory partnership between the D Block licensee and the Public Safety Broadband Licensee with regard to a shared network using both the D Block and public safety broadband spectrum. For example, as discussed previously, we might decide that we should not retain the 700 MHz Public/Private Partnership obligations if, in the next auction of the D Block license, we offer the D Block license with the 700 MHz Public/Private Partnership obligations and the license again fails to attract a winning bidder, or the winning bidder defaults or fails to negotiate a successful NSA with the Public Safety Broadband Licensee. Alternatively, we may decide not to retain the 700 MHz Public/Private Partnership condition, and instead immediately conduct an auction to license the D Block without a 700 MHz Public/Private Partnership obligation. There may also be other circumstances whereby the 700 MHz Public/Private Partnership obligation on the D Block would not serve its purpose and our objective to facilitate the creation of a nationwide, interoperable, broadband network for public safety users. We therefore seek comment generally on rules the Commission should adopt, both for the D Block licensee and the Public Safety Broadband Licensee, in those circumstances where the D Block license would be auctioned without a 700 MHz Public/Private Partnership condition. If the D Block was auctioned for unrestricted commercial services, how much money would the auction raise? Assuming that the auction would yield less than the cost of building a dedicated, nationwide, interoperable broadband network for public safety, how should the shortfall be addressed? If estimated network construction costs exceed the estimated receipts from the auction of license(s) for the D Block with no commercial service restrictions,

to what extent might this shortfall be addressed from the auction receipts of spectrum bands that will be, or might be, auctioned in the near future?²²² For example, what are reasonable estimates of the value of the AWS-3 spectrum with no commercial service restrictions? Similarly, what are reasonable estimates of the value of the "white spaces" spectrum (for unused portions of television channels 2–51) licensed with no commercial restrictions? In addition, if the D Block was auctioned for unrestricted commercial services, to what extent would the remaining spectrum available to public safety providers be insufficient to meet their communications needs, including the need for an interoperable broadband network?²²³

1. D Block License Service Rules Without the 700 MHz Public/Private Partnership

192. We seek comment below on the particular service rules that we should adopt for the D Block in the event that we determine that the D Block should be licensed without any 700 MHz Public/Private Partnership obligation.

a. Size of the Geographic Areas

193. *Background.* In the *First Report and Order*, the Commission determined that a balanced mix of geographic service area licenses—CMAs, EAs, and REAGs—would be appropriate for the commercial 700 MHz Band licenses.²²⁴ In the *Second Report and Order*, we reaffirmed the determination to use

²²² We note that using auction revenues for such construction would require additional Congressional action.

²²³ The Commission has allocated more than 97 MHz of spectrum for use in support of public safety services, including approximately 13.7 MHz in frequencies below 470 MHz, varying amounts in the 470–512 MHz band, 24 MHz in the 700 MHz band, an average of 4.5 MHz in the 800 MHz band, and 50 MHz in the 4.9 GHz band.

²²⁴ See Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, WT Docket No. 06–150, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94–102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01–309, Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03–264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06–169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06–229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96–86, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064, 8082–86 ¶¶ 42–45 (2007) (*First Report and Order*).

CMAs, EAs, and REAGs for all of the 700 MHz commercial spectrum blocks except for the D Block. We concluded that the D Block should be licensed on a nationwide basis for use as part of the 700 MHz Public/Private Partnership with the Public Safety Broadband Licensee.²²⁵ We adopted CMA, EA, and REAG areas for the other commercial licenses "to promote dissemination of licenses among a wide variety of applications, accommodate the competing need for both large and small licensing areas, [and] meet the needs expressed by potential entrants seeking access to spectrum and incumbents seeking additional spectrum."²²⁶

194. *Discussion.* We now seek comment on the appropriate geographic service area for the D Block in the event that the D Block license is re-auctioned without a 700 MHz Public/Private Partnership obligation. Would it best serve the public interest to continue to license the D Block on a nationwide basis, or should we choose a smaller geographic service area, such as the CMA, EA, and REAG sizes used to license the other 700 MHz blocks? We note that, in evaluating the appropriate balance of license areas, we will continue to consider the 700 MHz Band as a whole, including the commercial spectrum that has been previously auctioned. As we stated in the *Second Report and Order*, recent statutory and regulatory changes have served to harmonize this spectrum band and warrant our consideration of the 700 MHz Band spectrum as a whole.²²⁷ We request that commenters provide information that would corroborate the benefits of their proposed geographic area and the costs and benefits of adopting an alternative license area. Commenters should also discuss how a particular license area for the D Block would best serve the public interest, considering the commercial 700 MHz Band spectrum as a whole. Finally, commenters should address whether the availability of package bidding, which may mitigate the exposure risk for bidders seeking certain aggregations of licenses, should influence our choice of geographic license service area for the D Block.

b. Performance Requirements

195. *Background.* In the *Second Report and Order*, we adopted different performance requirements for the commercial 700 MHz Band licenses depending on the geographic size of

²²⁵ See *Second Report and Order*, 22 FCC Rcd at 15431 ¶ 395.

²²⁶ *Id.* at 15316 ¶ 64.

²²⁷ *Id.* at 15316 ¶ 63.

their license areas. CMA and EA licensees in the 700 MHz Band are required to provide service sufficient to cover 35 percent of the geographic area of their licenses within four years, and 70 percent of this area within ten years (the license term), and REAG licensees must provide service sufficient to cover 40 percent of the population of their license areas within four years and 75 percent of the population within ten years.²²⁸ Licensees with CMA, EA, or REAG areas that fail to meet the applicable interim benchmark, the license term is reduced by two years, and the end-of-term benchmark must be met within eight years.²²⁹ At the end of the license term, licensees with CMA, EA, or REAG areas that fail to meet the end-of-term benchmark will be subject to a “keep what you use” rule, which will make unused spectrum available to other potential users.²³⁰ We adopted these stringent performance requirements to “better promote access to spectrum and the provision of service, especially in rural areas.”²³¹

196. *Discussion.* We seek comment on the appropriate performance requirements for the D Block license or licenses if the D Block license is re-auctioned without a 700 MHz Public/Private Partnership obligation. We further seek comment on whether, if we decide to license the D Block on a CMA, EA, or REAG basis, we should impose the same performance requirements applicable to other 700 MHz commercial licenses with the same geographic service area. We seek comment on whether these performance requirements are appropriate for the D Block. In the event that we continue to license the D Block on a nationwide basis, we seek comment on whether performance benchmarks similar to those required of REAG licensees would be appropriate.²³² To the extent commenters believe the performance benchmarks should be higher or lower than the proposals above, we request that they provide information that would corroborate the benefits of their proposed benchmarks and the costs and benefits of alternative approaches. Comments should address whether these specific geographic benchmarks would promote access to spectrum and the provision of service.

c. License Block Size and Term

197. *Background.* In the *Second Report and Order*, we determined that the D Block should be auctioned as a 10-megahertz spectrum block made up of paired 5-megahertz blocks.²³³ We also determined that it be given an initial license term of 10 years, consistent with the term given to other commercial licensees.²³⁴ We found that a 10-year term would “provide regulatory parity by establishing the same license term for [] all 700 MHz licensees.”²³⁵

198. *Discussion.* We intend not to revisit these determinations if the D Block license is re-auctioned without a 700 MHz Public/Private Partnership obligation. Indeed, in the *Second Report and Order*, we determined the band plan for all commercial bands as a whole.²³⁶ Any changes to the block sizes that would affect other bands would not serve the public interest given the fact that the adjacent commercial spectrum licenses have already been auctioned. Dividing the current D Block into smaller block sizes may also not be in the public interest considering that a 10-megahertz spectrum block made up of paired 5-megahertz blocks can facilitate more innovative and efficient broadband deployment than any smaller block sizes in this band. With regard to the license term, we note that all other commercial licenses in the band have a 10-year term similar to the D Block license, and we see no reason to treat the D Block differently if it does not include the 700 MHz Public/Private Partnership. We seek comment on our intention not to revisit these determinations.

d. Power Limits and Out-of-Band Emission Limits

199. *Background.* In the *Second Report and Order*, we adopted rules to protect 700 MHz Band commercial and public safety licensees from interference from the out-of-band emissions (OOBE).²³⁷ In accordance with those rules, the D Block licensee was required to satisfy an OOBE limit of $43 + 10\log P$ dB in protecting commercial 700 MHz Band licensees²³⁸ and $76/65 + 10\log P$ dB OOBE limits in protecting the 700 MHz public safety narrowband channels.²³⁹

²³³ See *id.* at 15315–16 ¶ 62.

²³⁴ See *id.* at 15450 ¶ 457.

²³⁵ *Id.*

²³⁶ See *id.* at 15316 ¶ 63.

²³⁷ See 47 CFR 27.53(d).

²³⁸ See 47 CFR 27.53(d)(3), (5).

²³⁹ D Block base stations must meet a $76 + 10\log P$ dB limit in a 6.25 kHz band segment and D Block mobile and portable stations must meet a $65 + 10\log$

200. *Discussion.* Because of the anticipated relationship between the D Block licensee and the Public Safety Broadband Licensee, it was not necessary to impose any OOBE limits on the D Block licensee in order to protect the Public Safety Broadband Licensee. However, if that relationship is no longer in effect, we seek comment on what measures we should adopt to adequately protect public safety broadband communications from interference from D Block operations, and whether measures to protect against such interference reduce the amount of usable, broadband spectrum available to the Public Safety Broadband Licensee and the D Block licensee. We would propose to require that D Block licensees provide appropriate OOBE protection to the public safety broadband spectrum. As to the appropriate level of protection, we see no reason to protect the public safety broadband block to any lesser degree than we currently protect the public safety narrowband channels. We therefore propose that D Block licensees be required to protect the public safety broadband block by satisfying the same $76/65 + 10\log P$ dB OOBE limits currently applicable to the D Block licensee in protecting the public safety narrowband channels. We seek comment on this proposal.

201. In the *Second Report and Order*, we did not adopt any changes to the then-existing power limits for base, fixed, mobile, and portable D Block stations,²⁴⁰ nor did we modify the notification and coordination requirements we had imposed on D Block licensees choosing to operate base stations at high power levels.²⁴¹ The change in the anticipated relationship between the D Block and the public safety broadband block should not necessitate any modifications to these requirements, and we therefore seek comment on whether the power, notification, and coordination requirements currently applicable to D Block licensees should remain unchanged.²⁴²

P dB limit in a 6.25 kHz band segment. See 47 CFR 27.53(d)(1), (2), (4).

²⁴⁰ See 47 CFR 27.50(b)(2), (3), (4), (5), (9), (10).

²⁴¹ See 47 CFR 27.50(b)(7), (8), which impose coordination and notification requirements on D Block licensees operating base stations at power levels greater than 1000 watts ERP.

²⁴² We note, however, that Verizon has sought reconsideration of certain rules adopted in the *First Report and Order* regarding power limits for the 700 MHz Band commercial licensees and related notification and coordination obligations, and this petition remains pending. See Petition for Reconsideration of Verizon Wireless, WT Docket No. 06–150 (filed June 14, 2007).

²²⁸ See *id.* at 15439 ¶ 157, 15351 ¶ 162.

²²⁹ *Id.* at 15439 ¶ 157, 15351 ¶ 163.

²³⁰ *Id.* at 15439 ¶ 157, 15351 ¶ 163.

²³¹ *Id.* at 15348 ¶¶ 153, 154.

²³² We note that only the C Block, located adjacent to the D Block, is licensed on a REAG basis. *Id.* at 15293 ¶ 4.

e. License Partitioning, Disaggregation, Assignment, and Transfer

202. *Background.* In the *Second Report and Order*, the Commission prohibited geographic partitioning and spectrum disaggregation for the D Block licensee. The Commission found that adopting such a restriction would serve the public interest by assuring a reliable partnership between the D Block licensee and Public Safety Broadband Licensee.²⁴³

203. *Discussion.* If we auction the D Block without the 700 MHz Public/Private Partnership, we seek comment on whether we should allow geographic partitioning and spectrum disaggregation similar to other 700 MHz commercial bands.

f. Other Service and Auction Rules and Conditions

204. *Background.* Aside from the subjects addressed above, the *Second Report and Order* addressed a number of other service and auction related issues regarding the commercial use of the D Block and the rules regarding other 700 MHz band commercial licenses, such as open platform, wholesale, license eligibility, and small business bidding credits.²⁴⁴

205. *Discussion.* We seek comment on whether we should revisit and adopt any other rules or conditions for the D Block in the event that we auction it without a mandatory public/private partnership condition. For example, would it serve the public interest to impose any eligibility restrictions, or open platform conditions similar to those imposed on the adjacent C Block? Should the Commission consider imposing a mandatory wholesale obligation? We also seek comment on whether the Commission should apply its spectrum aggregation screen used for wireless transactions to the D Block. We also seek comment on whether any of our Part 1 competitive bidding, designated entity eligibility, and/or other auction rules or procedures would be inappropriate or should be modified for licensing the D Block without the 700 MHz Public/Private Partnership.

2. Alternate Public Safety Broadband Opportunities

206. In the event that we determine not to proceed with the 700 MHz Public/Private Partnership approach requiring a partnership between the D Block licensee and the Public Safety Broadband Licensee, we seek comment broadly on how we may still achieve the

public interest goal of ensuring a nationwide, interoperable broadband network is available for the use of public safety, and whether there are further revisions or obligations we should impose on the Public Safety Broadband Licensee to achieve these goals.

207. *Background.* In the *700 MHz Public Safety Ninth NPRM*,²⁴⁵ we previously considered one option in the absence of a public/private partnership with the D Block auction winner, that would permit the nationwide Public Safety Broadband Licensee to provide unconditionally preemptible access to the public safety broadband spectrum to commercial service providers, on a secondary basis, through spectrum leases or in the form of public/private partnerships established by contract with the Public Safety Broadband Licensee. In this respect, the Public Safety Broadband Licensee would enter into arrangements with one or more commercial service providers for accessing or sharing their communications systems infrastructure in order to create the nationwide, interoperable, broadband public safety communications network. This could be accomplished, for example, through the use of a request for proposal (RFP) process by which commercial partners would be solicited to provide access to their network infrastructure. The Public Safety Broadband Licensee would then select one or more entities to provide access to or build out all or a portion of the network, and/or provide certain services to the public safety community on the public safety broadband spectrum, in exchange for secondary, preemptible access to the Public Safety Broadband Licensee spectrum.

208. *Discussion.* We seek comment on this option as an alternative to the particular public/private partnership model that we earlier endorsed as our preferred approach in the *Second Report and Order*. This option would preserve the concepts of a unified broadband standard and nationwide level of interoperability, as managed by the Public Safety Broadband Licensee on behalf of the public safety community. We recognize, however, that such a proposal might not be ideal given that there would be no guarantee of securing a commercial partner(s) that

could provide the network infrastructure, including features beneficial to the public safety community. Further, the Public Safety Broadband Licensee may be limited in the service providers with which it could partner in order to ensure deployment of a unified broadband technology with a nationwide level of interoperability, and take advantage of economies of scale in terms of handsets and network equipment. Accordingly, we seek comment on whether we should adopt this approach should the D Block fail to attract a successful bidder. What alternatives or variations on this approach may be more appropriate? Are there other sources or mechanisms of funding that could be used to build out or support a nationwide, interoperable broadband network for public safety? Will the 10 megahertz of public safety spectrum allocated for broadband be sufficient to support a nationwide, interoperable broadband network for public safety?

209. If we do adopt an approach whereby the Public Safety Broadband Licensee could enter into multiple contracts with commercial providers, would it be necessary for the Commission to establish certain baseline performance requirements, including those for broadband system architecture, interoperability, build-out of national coverage, unconditional preemption of commercial use, and disaster restoration capability? If the Commission establishes such requirements, what should they be? Alternatively, should we require or allow any or all of these issues to be addressed by the Public Safety Broadband Licensee rather than the Commission? What limits, if any, should be placed on the Public Safety Broadband Licensee's ability to enter into leasing arrangements with commercial entities? What Commission oversight should be retained with respect to the Public Safety Broadband Licensee's activities under these circumstances? Is there additional review that the Commission should undertake with respect to approval of the leasing arrangements, or other reporting with respect to the Public Safety Broadband Licensee's activities that should be required?

210. We note that many of these considerations were initially raised in the *700 MHz Public Safety Ninth NPRM*, and we thus incorporate by reference the questions posed in that document, and seek further comment here in light of the revisions to the 700 MHz band and the possible additional changes contemplated in this *Second FNPRM*. Are there other issues raised by the 700

²⁴³ *Second Report and Order*, 22 FCC Rcd at 15475 ¶ 542.

²⁴⁴ See *id.* at 15289.

²⁴⁵ See Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, PS Docket No. 06-229, WT Docket No. 96-86, *Ninth Notice of Proposed Rulemaking*, 21 FCC Rcd 14837 (2006) (*700 MHz Public Safety Ninth NPRM*).

MHz Public Safety Ninth NPRM or associated comments that we should consider here?

211. Another alternative may be to permit build-out on a regional, state, or local basis of the broadband spectrum. This could be done either through a spectrum lease with the nationwide Public Safety Broadband Licensee, or by rescinding the nationwide license and allowing regional, state, or local licensing of this spectrum. We seek comment on both approaches. In either instance, we continue to believe parameters must still be established that would ensure that systems operating on this spectrum would be interoperable with one another on a nationwide basis. Accordingly, we seek comment on the role of the Public Safety Broadband Licensee in establishing such standards, and if we adopt a local licensing scheme, whether we should retain a national body such as the Public Safety Broadband Licensee to manage the use of this spectrum by establishing baseline performance requirements, determining a common broadband standard, and/or serving in a frequency coordinator or planning role.

212. Finally, we seek comment on whether, in the absence of a public/private partnership, we should continue to obligate the D Block auction winner to fund the relocation of those public safety narrowband systems operating in the lower portion of the public safety spectrum. As noted in the Second Report and Order, it would be to the benefit of the D Block auction winner to ensure that narrowband operations adjacent to the D Block under the former band plan be relocated to the upper portion of the public safety 700 MHz band and thus minimize interference concerns. As another option, should we grandfather existing operations until such time as relocation funding is secure, and require the Public Safety Broadband Licensee to include relocation funding in its RFP process? What alternative sources of funding may be available to facilitate this transition?

IV. Procedural Matters

A. Initial Regulatory Flexibility Analysis

213. Section 213 of the Consolidated Appropriations Act 2000 provides that the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, shall not apply to the rules and competitive bidding procedures for frequencies in the 746–806 MHz Band,²⁴⁶ which includes the frequencies

of both the D Block license and the 700 MHz public safety broadband and narrowband spectrum. Accordingly, we have not prepared an Initial Regulatory Flexibility Analysis in connection with the Second FNPRM.

B. Initial Paperwork Reduction Act Analysis of 1995 Analysis

214. This document contains proposed new or modified information collection requirements. We note, however, that Section 213 of the Consolidated Appropriations Act 2000 provides that rules governing frequencies in the 746–806 MHz Band, which encompass the spectrum associated with both the D Block license and the 700 MHz public safety broadband and narrowband spectrum, become effective immediately upon publication in the **Federal Register** without regard to certain sections of the Paperwork Reduction Act.²⁴⁷ We are therefore not inviting comment pursuant to the Paperwork Reduction Act on any information collections proposed in this document.

C. Other Procedural Matters

1. Ex Parte Presentations

215. The rulemaking shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁴⁸ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.²⁴⁹ Other requirements pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission’s rules.²⁵⁰

2. Comment Filing Procedures

216. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,²⁵¹ interested parties may file comments on or before June 20, 2008 and reply to comments July 7, 2008. All filings related to this Second FNPRM should refer to WT Docket No. 06–150, PS Docket No. 06–229, and WT Docket No. 96–86. Comments may be filed using: (1) The Commission’s Electronic Comment Filing System (ECFS), (2) the

Appropriations Act 2000, Pub. L. No. 106–113, 113 Stat. 2502, Appendix E, Sec. 213(a)(4)(A)–(B); see 145 Cong. Rec. H12493–94 (Nov. 17, 1999); 47 U.S.C.A. 337 note at Sec. 213(a)(4)(A)–(B).

²⁴⁷ *Id.*

²⁴⁸ 47 CFR 1.200 *et. seq.*

²⁴⁹ See 47 CFR 1.1206(b)(2).

²⁵⁰ 47 CFR 1.1206(b).

²⁵¹ 47 CFR 1.415, 1.419.

Federal Government’s eRulemaking Portal, or (3) by filing paper copies.²⁵²

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the Web site for submitting comments.

- **ECFS filers must transmit one electronic copy of the comments for WT Docket No. 06–150, PS Docket No. 06–229, and WT Docket No. 96–86.** In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and WT Docket No. 06–150, WT Docket No. 06–169, and WT Docket No. 96–86. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov and include the following words in the body of the message, “get form.” A sample form and directions will be sent in response.

- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

- **The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002.** The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- **Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.**

- **U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.**

217. Parties should send a copy of their filings to: Neşe Guendelsberger, Wireless Telecommunications Bureau, 445 12th Street, SW., Washington, D.C. 20554, or by e-mail to nese.guendelsberger@fcc.gov; and Jeff

²⁴⁶ In particular, this exemption extends to the requirements imposed by Chapter 6 of Title 5, United States Code, Section 3 of the Small Business Act (15 U.S.C. 632) and Sections 3507 and 3512 of Title 44, United States Code. Consolidated

²⁵² See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

Cohen, Public Safety and Homeland Security Bureau, 445 12th Street, SW., Washington, DC 20554, or by e-mail to jeff.cohen@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, Room CY-B402, 445 12th Street, SW., Washington, DC 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

218. Documents in WT Docket No. 06-150, PS Docket No. 06-229, and WT Docket No. 96-86 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, Room CY-A257, 445 12th Street, SW., Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

3. Accessible Formats

219. 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). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CARTS, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 (voice), 202-418-0432 (TTY).

V. Ordering Clauses

220. Accordingly, *it is ordered* pursuant to sections 1, 2, 4(i), 5(c), 7, 10, 201, 202, 208, 214, 301, 302, 303, 307, 308, 309, 310, 311, 314, 316, 319, 324, 332, 333, 336, 337, 614, 615, and 710 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 155(c), 157, 160, 201, 202, 208, 214, 301, 302, 303, 307, 308, 309, 310, 311, 314, 316, 319, 324, 332, 333, 336, and 337, that this *second FNPRM of proposed rulemaking* in WT Docket No. 06-150, WT Docket No. 96-86 and PS Docket No. 06-229 *is adopted*. The *second FNPRM of proposed rulemaking* shall become effective upon publication in the **Federal Register**.

221. *It is further ordered* that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415, 1.419, interested parties may file comments on the second FNPRM of proposed rulemaking on or before June

20, 2008 and reply to comments on or before July 7, 2008.

222. *It is further ordered* that the Commission *shall send* a copy of this second FNPRM of proposed rulemaking in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Appendix—Possible Technical Framework for a 700 MHz Public/Private Partnership Shared Wireless Broadband Network

I. Overview

This appendix serves as a possible framework for establishing the technical requirements for the 700 MHz public/private partnership shared wireless broadband network (SWBN). It is intended to solicit detailed comment and result in a final set of technical requirements that will provide greater certainty for bidders for the D Block license while ensuring that the network meets public safety's needs. This appendix is not intended to prejudice any of the issues identified for comment in the accompanying Second Further Notice. Further, we recognize that certain aspects of the public/private partnership, if adopted, may be impacted by determinations made through the questions posed in the Second Further Notice, and that to some extent the technical considerations here are dependent on one another.

Each of the technical requirements discussed in the Second Further Notice is covered below. In many cases we have included more specific technical specifications or obligations in order to solicit more meaningful comment. We ask commenters to recommend any specifications they believe should be modified, deleted, added or retained. The final requirements will take into account the comments filed in response to the Second Further Notice, as well as this appendix.

II. Specifications for Public/Private System Architecture

Sections 27.1305(a) and 90.1405(a) state that the network must be "[designed] for operation over a broadband technology platform that provides mobile voice, video, and data capability that is seamlessly interoperable across public safety local and state agencies, jurisdictions, and geographic areas, and which includes current and evolving state-of-the-art technologies reasonably made available in the commercial marketplace with features beneficial to the public safety community."

The architecture of the SWBN likely would consist of two general elements: (a) a Radio Access Network (RAN) and (b) a Core Broadband Network (CBN). Both the RAN

and CBN would be expected to be packet switched networks using Internet Protocol (IP).

An overall view of a generic functional architecture for the SWBN is shown in Figure 1. The SWBN depicted has the following characteristics:

1. The broadband IP network would be based on advanced next generation mobile network standards and commercial technologies, with performance characteristics supporting voice, data, and multimedia applications.²⁵³

2. The SWBN would support end to end multiple quality of service classes associated with public safety.

3. During normal operating conditions, the RAN would support assured access for public safety users over commercial users to a limit of 50% of engineered capacity.²⁵⁴

4. The RAN would support emergency priority access for public safety users over commercial users.

5. Commercial service capabilities deployed by the D Block licensee (e.g. voice calling, Internet access, etc.) would be available to public safety users at a quality of service (QoS) level as identified by the Public Safety Broadband Licensee ("PSBL") as part of its responsibilities to administer access to the SWBN and interact with individual public safety entities.

6. The CBN would support interconnection with public safety regional and local networks. This interconnection would facilitate interoperability with existing public safety networks operating in other frequency bands. It can be accomplished through a standard or proprietary interface at an appropriate point or points in an existing public safety communications system. Consideration should be given to implement this interconnection in a way that will not have a detrimental impact on the wireless broadband network. It is noted that IP broadband networks are already being used in some areas to facilitate such interoperability.

7. The D Block licensee would provide the PSBL with sufficient real-time information and network transparency to:

a. Ensure that the service obligations of the D Block licensee to the PSBL are fully met.

²⁵³ Examples of such standards and technologies are the 802.16e IEEE standard, coupled with the WiMAX Mobile profile developed by the WiMAX Forum, and the Long Term Evolution (LTE) proposal advanced by the 3GPP.

²⁵⁴ In other words, public safety would ensure to have primary access to the 10 megahertz allocated for public safety broadband operations. Further, commenters should consider the potential that advanced next generation technology may be employed to combine the public safety broadband spectrum with the D Block spectrum and then randomly allocate the spectrum to users in incremental amounts. Accordingly, with such technology this requirement could be characterized as ensuring that public safety has assured access to 50 percent of the engineered RAN capacity.

b. Provide reports on public safety network usage, user patterns, etc.
 c. Forecast future service needs.
 d. Administer access by end users.

e. Assemble data for assessing usage fees.
 f. Activate a service alert declaring an emergency condition exists for purposes of enabling priority access in excess of the 10

megahertz of public safety broadband spectrum.

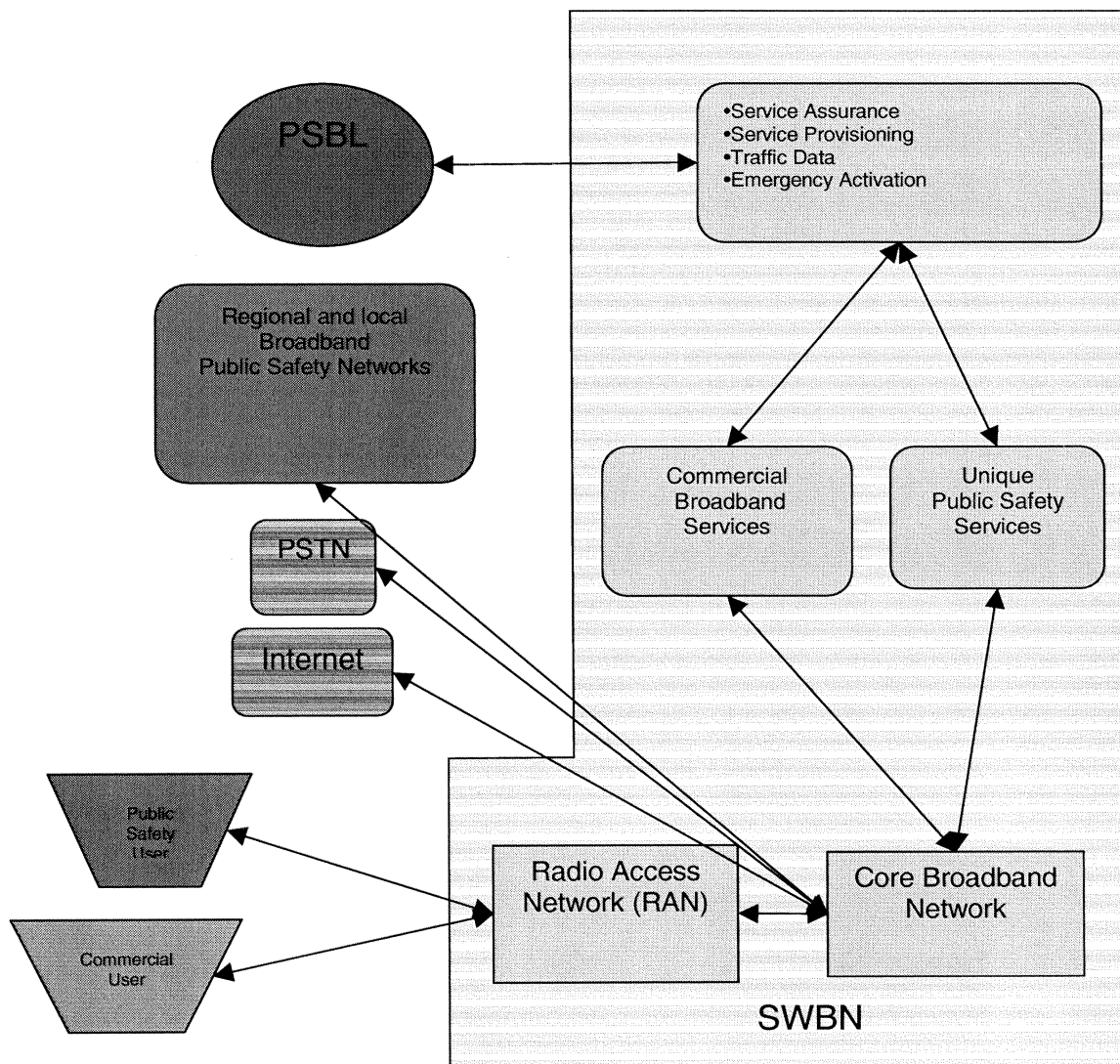


Figure 1: Generic functional architecture for the Shared Wireless Broadband Network (SWBN)

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III. Reliability, Robustness and Hardening

Sections 27.1305(c) and 90.1405(c) require that the network must incorporate "[s]ufficient robustness to meet the reliability and performance expectations of public safety."

This requirement could be met in two ways. First, the Commission could develop reasonable technical specifications based on comments received in this proceeding and incorporate these specifications into the service rules for the D Block. One advantage of this approach would be to provide certainty to public safety users as well as commercial bidders in advance of an auction. Second, the D Block licensee could prepare a draft network reliability plan and submit it

to the PSBL. The PSBL would then provide comments to the D Block licensee on the plan within 30 days of receipt. The D Block licensee would incorporate any reasonable requests or suggestions.

In developing the network reliability plan, the D Block licensee may employ a variety of techniques to ensure that service is maintained and that service is promptly restored in the event of an outage. These techniques may include the pre-deployment of backup equipment and systems, provisions for rapid deployment of systems such as cells on wheels, flexible system design that provides for rapid reallocation of resources such as boosting power at certain cell sites, etc.

Public safety users would remain responsible for the reliability of the

equipment that they purchase and use with the network, such as mobile and hand-held radios, video surveillance systems, broadband access devices, etc. Further, such equipment should meet the same standards as those specified by the D Block licensee for commercial equipment that may be connected to the broadband network.

The network reliability plan also should include the following features and capabilities:

1. The network should be designed based on industry best practices, specifically, the recommendations of the Network Reliability and Interoperability Council.²⁵⁵

²⁵⁵ See Network Reliability and Interoperability Council Wireless Network Reliability Final Report, Continued

2. Network outages must be reported to the FCC, consistent with the requirements for commercial wireless systems.²⁵⁶ Plans should be put in place and implemented to resolve any pattern of repeated outages.

3. Critical network elements,²⁵⁷ such as CBN facilities, base stations and antenna towers, should be built to withstand harsh weather and natural disasters that are reasonably foreseeable in any geographic area, such as hurricanes, floods, earthquakes, etc. Where appropriate, local building codes may be used as a guide, with an additional margin, as appropriate to ensure a reliable public safety system, taking into account cost and other factors. Switches, gateways, routers, radio and backhaul systems are typically self-redundant.²⁵⁸

4. Critical sites should have generators available with fuel supplies sufficient to operate for as many as 5 to 7 days. By "critical sites," we mean those sites that are necessary for maintaining basic system availability and access to the core network.

5. Backup power should be available at least at critical sites sufficient to last as many as 8 hours.

6. Back-haul diversity should be provided at critical sites.

7. Public safety users are encouraged to obtain any additional backup equipment they may need for their own use, such as a reserve supply of mobile units and chargers for use in emergencies.

IV. Capacity, Throughput and Quality of Service

Capacity

Sections 27.1305(d) and 90.1405(d) require that the SWBN incorporate "[s]ufficient capacity to meet the needs of public safety." One method for complying with these rules is for the D Block licensee to anticipate public safety user needs during emergency and disaster situations, so that public safety applications are not degraded (i.e., increase in blocked calls and/or transmission times or reduced data speeds) during periods of heavy usage.

The network capacity, in terms of the amount of traffic that can be carried throughout the system generally, or for each user at any given location, is determined by many variables, including the characteristics of the radio transmission technology, number of cell sites, spectrum reuse, use of efficient technologies such as smart antennas, various factors affecting propagation, core network

resources, backhaul availability, etc. Similarly, the users' traffic demand that determines the capacity requirements depends on a great many variables, such as the number of users, the applications that will run on the network and the resources they consume, peak usage times, acceptable blocking rates, etc. In the case of a SWBN, the network capacity available for public safety users will also be affected by the priority that is given to public safety communications and the ease and degree to which public safety users can access the commercial spectrum. We recognize that capacity requirements are not static and we expect them to continue to grow for both commercial and public safety applications.

This requirement could be met in two ways. First, the Commission could develop reasonable technical specifications based on comments received in this proceeding and incorporate these specifications into the service rules for the D Block. One advantage of this approach would be to provide certainty to public safety users as well as commercial bidders in advance of an auction. Second, the D Block licensee could prepare a draft plan to meet the capacity requirements of public safety users, based on consultation with the PSBL and based on their experience with commercial broadband network performance. The plan should take into account both national and local public safety requirements. The PSBL would then provide comments to the D Block licensee on the plan within 30 days of receipt. The D Block licensee would incorporate any reasonable requests or suggestions.

The D Block licensee should consult on an ongoing basis with the PSBL to address any shortcomings related to network capacity and to plan continued evolution of the network to meet growing needs. To assist with this endeavor, the PSBL should provide a rolling 12-month usage forecast on a quarterly basis. The network should incorporate a mechanism for adequate resource management so as to allow for continued improvements over time and best mitigate any detrimental impact on public safety operations.

Throughput

With regard to throughput, the SWBN should meet the following minimal specifications:

1. Data rates should be consistent with state-of-the-art commercial wireless systems, such as WiMAX Mobile, LTE, or other equivalent or advanced technologies.

2. Public safety applications should be provided sufficient resources to perform at least as well as similar applications on the commercial network (i.e., voice, video, Internet access).

3. Blocking rates should be no greater than 2% or other mutually agreeable criteria.²⁵⁹

Quality of Service

With regard to quality of service, Sections 27.1305(f) and 90.1405(f) require the SWBN to incorporate a "mechanism to

automatically prioritize public safety communications over commercial uses on a real-time basis consistent with the requirements of [Sections 27.1307 and 90.1407(c)]." There are certain priorities at the air interface that relate to the ability of a user to access and connect to the network. Such priority, "access priority," is to be distinguished from traffic priority that arises after the connection admission. The notion of QoS is applied after the connection is established.

Concerning access priority, public safety users will have priority access to the 10 megahertz of public safety broadband spectrum (or, put another way, as discussed above, half of the engineered capacity of the total spectrum (2 x 10 MHz)) at all the times, and to a portion of the engineered capacity on the D Block in the event of emergency priority access. An example of such a scheme is the current Wireless Priority Service (WPS).²⁶⁰

As it relates to traffic priority and QoS, the following can be considered as specific requirements of the SWBN:

1. The networks should provide sufficient capacity, and augment capacity as needed, in order to meet the QoS requirements for public safety applications.

2. The SWBN is anticipated to provide a number of QoS classes and performance objectives such as those defined in ITU-T Y.1541 or those defined in the advanced next generation technology standards (e.g., LTE and WiMAX Mobile). The network should support QoS classes for real time applications as well as low delay data transfer applications for public safety users, comparable to those in ITU-Y.1541.

3. Using QoS mechanisms as defined by the relevant standards (i.e. linked to the selected technology), public safety traffic should have higher priority of transmission and delivery over the commercial traffic consistent with the access priority circumstances discussed above. While the QoS classes and performance objectives are standard, the implementation of the priority schemes in achieving the QoS classes is vendor-specific. We anticipate different methods of traffic management by vendors (such as connection admission control, queuing management, congestion control, etc.) to achieve the desired QoS and priority requirements for public safety usage. It is possible that at times of network congestion, commercial traffic will be denied access to network resources, or be dropped in favor of public safety traffic, again consistent with the access priority circumstances discussed above.

4. Using QoS mechanisms as defined by standards, various public safety applications should have different levels of QoS, depending on the type of application. For instance, command-level applications may require QoS settings with relatively higher priority.

V. Security and Encryption

Sections 27.1305(e) and 90.1405(e) require the SWBN to incorporate "[s]ecurity and

September 2005 at http://www.nric.org/meetings/docs/meeting_20051019/NRICVII_FG3A_FinalReport_September_2005.pdf.

²⁵⁶ See 47 CFR 4.1-4.2, 4.3(f), 4.5, 4.7, 4.9(e), 4.11, 4.13. See also New Part 4 of the Commission's Rules Concerning Disruptions to Communications, *Report and Order and Further Notice of Proposed Rulemaking*, ET Docket No. 04-35, 19 FCC Rcd 16830, 16882-16890 ¶¶ 97-114 (2004).

²⁵⁷ By "critical network elements," we mean to refer to those network elements that would require geographic redundancy and mesh connectivity in case of catastrophic events impacting large or heavily populated areas.

²⁵⁸ Self-redundancy implies having a duplicate active element that will take over the function of the main element in case of the latter's malfunction or failure.

²⁵⁹ The term blocking is meant to include instances in which a public safety user's request for service cannot be fulfilled with the defined QoS associated with that specific service.

²⁶⁰ See <http://www.fcc.gov/pshs/emergency/wps.html>.

encryption consistent with state-of-the-art technologies.” Accordingly, the system should include the following capabilities:

1. The SWBN should implement controls to ensure that public safety priority and secure network access is limited to authorized public safety users and devices, using an open standard protocol for authentication.

2. The SWBN should allow for public safety network authentication, authorization, automatic logoff, transmission secrecy and integrity, and audit control capabilities as well as other unique attributes that may be mutually agreeable.

3. The SWBN technical and operational parameters should accommodate public safety administrative safeguards and controls for security management, oversight, incident management, and privacy that may be defined in the final negotiations.

VI. Coverage

Sections 27.1305(b) and 90.1405(b) require the SWBN to incorporate “[s]ufficient signal coverage to ensure reliable operation throughout the service area consistent with typical public safety communications systems.”

The Second Further Notice invites comment on the coverage requirements for the SWBN. Coverage may be defined in terms of the signal levels that will be available at all locations based on accepted predictive methods (i.e., 90% availability, 90% of the time) and taking into account appropriate factors to meet in-building coverage needs.

VII. Operational Capabilities—Network Services and Applications

Sections 27.1305(g) and 90.1405(g) require the SWBN to incorporate “[o]perational

capabilities consistent with features and requirements that are typical of current and evolving state-of-the-art public safety systems.” At a minimum, these capabilities should include seamless interoperability for fixed as well as mobile voice, video, and data communications on the SWBN across local, state, tribal, and Federal public safety users. To be more specific, the SWBN should support the reliable exchange of text, voice, secure voice, data, video, photographs, and detailed graphical information such as maps, drawings, engineering plans, fingerprints, graphical files, etc.

The SWBN should support and be compatible with standards used by public safety. For example, these may include the standards and practices established by the National Information Exchange Model (NIEM). NIEM is a partnership of the U.S. Department of Justice and the Department of Homeland Security (DHS). Its purpose is to develop, disseminate and support enterprise-wide information exchange standards and processes that enable jurisdictions to effectively share critical information in emergency situations, as well as support the day-to-day operations of agencies throughout the nation.²⁶¹

In addition, DHS created the National Incident Management System (NIMS) to

²⁶¹ See <http://www.niem.gov/>. “NIEM enables information sharing, focusing on information exchanged among organizations as part of their current or intended business practices. The NIEM exchange development methodology results in a common semantic understanding among participating organizations and data formatted in a semantically consistent manner. NIEM will standardize content (actual data exchange standards), provide tools, and managed processes.”

establish a framework for organizations to work together to prepare for, protect against, respond to, and recover from the entire spectrum of all-hazard events.²⁶² Other standards organizations that are important in the development of the transmission and information exchange standards that the network may employ include the Organization for the Advancement of Structured Information Standards (OASIS)²⁶³ EDXL standards, and the Global Justice XML (GJXML) data model.²⁶⁴

Users of the network should have access to the full range and suites of evolving commercial voice, data, and video services and applications as well. The Table below from the Public Safety Spectrum Trust Bidder Information Document (BID) Version 2.0 reflects example applications and services that may be supported. Actual data rates should exceed the minimum for acceptable quality of service measures and key performance indicators shown but also should be consistent with the performance indicators listed separately in this document. However, it may not be necessary to specify data rates or performance criteria for each individual application.

²⁶² See <http://www.fema.gov/emergency/nims/standards.shtml>. DHS created the National Incident Management System as required under Homeland Security Presidential Directive (HSPD)–5. NIMS is a framework that provides guidelines and principles to first responders in an effort to achieve a single nationwide system for managing incidents.

²⁶³ See <http://www.oasis-open.org/who/>.

²⁶⁴ See <http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=GJXDM>.

Table 2.9.2-A

Application/Service	Description	Data Rate
File transfer	Download of such items as high-resolution images, GIS data, etc.	Greater than 256 kb/s
Email		Less than 16 kb/s
Web browsing		Greater than 32kb/s
Cellular voice	Analogous to CMRS Voice	4-25 kb/s
Push to talk voice	Analogous to CMRS PoC	4-25 kb/s
Indoor video	Video that is transmitted from inside a building / tactical or surveillance	20-384 kb/s
Outdoor video	Video that is transmitted from the street / tactical or surveillance	32-384 kb/s
Location services	This includes location services for personnel, vehicles and other objects	Less than 16kb/s
Database transactions	This includes both remote and local jurisdictional databases	Less than 32kb/s
Messaging	Instant messaging and SMS type services, both one-way and two-way.	Less than 16kb/s
Operations data	This is a catch all for data that deals with the operations and maintenance of the network, i.e. over the air programming, remote client management, etc.	Less than 32kb/s
Dispatch data	This area primarily covers data as it relates to computer aided dispatching.	Less than 64kb/s
Generic traffic	This is a catch all for traffic that doesn't fall within any of the categories described above, and that generates less than 64kb of data per second.	Less than 64kb/s
Telemetry	Remote measurement and reporting of information for radio devices, vehicles, etc. Also includes sensors data such as passive chemical detection. Additionally, biometric sensors that require better network performance are also included in this application class.	70-120 kb/s
Virtual Private Networking		Less than 64kb/s

VIII. Operational Control and Use of the Network

Sections 27.1305(h) and 90.1405(h) require the SWBH to incorporate “[o]perational control of the network by the [PSBL] to the extent necessary to ensure that public safety requirements are met.”

The D Block licensee should provide control capabilities or a level of network transparency sufficient to permit the PSBL to exercise its role in general administration of access to the SWBN by individual public safety entities. These functions should include:

1. Real time or near real time messages detailing material violations of the technical requirements contained in the Commission's rules or the NSA, including the scale and scope of the violation. The timeframes, format and the scenarios in which this information is required should be addressed in the NSA. The PSBL should be notified immediately of any situations that impede vital public safety communications, with details to be made available as soon as practicable.

2. The ability of the PSBL to host services subject to negotiation requiring elements of IP multimedia subsystem (IMS) or Service Architecture Evolution.

3. Capabilities permitting the PSBL and/or authorized public safety entities the ability to set up and manage user/user group/application profiles, authenticate users and devices and provision services.

4. Over the air framework to allow the management of end user devices, either singly or in groups, permitting such functions as over the air programming of devices and the clearing of data and disabling of devices.

5. Notification to the PSBL of system downtime (or any work that may affect service or system performance over any given geographic area) due to planned maintenance, configuration changes, or upgrades. The PSBL should provide the D Block licensee with advance notice to address planned public safety events.

Procedural Matters

Ex Parte Rules-Permit-But-Disclose Proceeding

This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's ex parte rules. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the

presentations and not merely a listing of the subjects discussed. More than a one-or two sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules as well.

Comment Dates

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.

Filers should follow the instructions provided on the Web site for submitting comments.

- For ECFS filers, if multiple docket for rulemaking numbers appear in the caption of

this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger

delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

Comments and reply comments and any other filed documents in this matter may be obtained from Best Copy and Printing, Inc., in person at 445 12th Street, SW., Room CY-B402, Washington, DC 20554, via telephone at (202) 488-5300, via facsimile at (202) 488-5563, or via e-mail at FCC@BCPIWEB.COM. The pleadings will be also available for public inspection and copying during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, SW., Washington, DC 20554, and through the Commission's Electronic Filing System (ECFS) accessible on the Commission's Web site, <http://www.fcc.gov/cgb/ecfs>. People with Disabilities: 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).

Commenters who file information that they believe should be withheld from public inspection may request confidential treatment pursuant to § 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. See 47 CFR 0.461; 5 U.S.C. 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As such, we note that the Commission has the discretion to release information on public interest grounds that does fall within the scope of a FOIA exemption.

[FR Doc. E8-11247 Filed 5-20-08; 8:45 am]

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Federal Register

**Wednesday,
May 21, 2008**

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Part 93

**Congestion Management Rule for John F.
Kennedy International Airport and
Newark Liberty International Airport;
Proposed Rule**

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 93****[Docket No. FAA–2008–0517; Notice No. 08–05]****RIN 2120–AJ28****Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport****AGENCY:** Federal Aviation Administration (FAA).**ACTION:** Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to establish procedures to address congestion in the New York City area by assigning slots at John F. Kennedy (JFK) and Newark Liberty (Newark) International Airports in a way that allows carriers to respond to market forces to drive efficient airline behavior. This proposal is a companion to a separate rulemaking initiative addressing congestion mitigation at New York's LaGuardia airport. Today's proposal is similar to what we have proposed for LaGuardia airport, but it takes into consideration the characteristics of both JFK and Newark, including the large number of international flights at these airports and our international obligations. The FAA proposes to extend the caps on the operations at the two airports, assign to existing operators the majority of slots at the airports, and create a market by annually auctioning off a limited number of slots in each of the first five years of this rule. The FAA is proposing two alternatives.

Under the first alternative, the assignment of slots at JFK and Newark would be conducted through a uniform mechanism. The FAA would auction off a portion of the slots and would use the proceeds to mitigate congestion and delay in the New York City area. Under the second alternative, the same auction procedure would apply at Newark as under the first alternative but at JFK the auction proceeds would go to the carrier holding the slot rather than to the FAA. For both alternatives, this proposal also contains provisions for minimum usage, capping unscheduled operations, and withdrawal for operational need. The FAA proposes to sunset the rule in ten years.

DATES: Send your comments on or before July 21, 2008.**ADDRESSES:** You may send comments identified by Docket Number FAA–

2008–0517 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Bring comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the electronic form of all comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit <http://DocketsInfo.dot.gov>.

Docket: To read background documents or comments received, go to <http://www.regulations.gov> at any time and follow the online instructions for accessing the docket. Or, go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical questions regarding this rulemaking, contact: Molly W. Smith, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3275; e-mail molly.w.smith@faa.gov. For legal questions concerning this rulemaking, contact: Rebecca MacPherson, FAA Office of the Chief Counsel, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267–3073; e-mail rebecca.macpherson@faa.gov.

SUPPLEMENTARY INFORMATION: Later in this preamble, under the Additional Information section, we discuss how

you can comment on this proposal and how we will handle your comments. Included in this discussion is related information about the docket and the handling of proprietary or confidential business information. We also discuss how you can get a copy of this proposal and related rulemaking documents.

Authority for This Rulemaking

The FAA has broad authority under 49 U.S.C. 40103 to regulate the use of the navigable airspace of the United States. This section authorizes the FAA to develop plans and policy for the use of navigable airspace and to assign the use that the FAA deems necessary for its safe and efficient utilization. It further directs the FAA to prescribe air traffic rules and regulations governing the efficient utilization of the navigable airspace.

I. Background*A. History of Congestion Management Initiatives at JFK*

JFK has historically been a constrained airport. From 1969 through 2006, the FAA managed congestion there during the five hours of peak transatlantic demand—3 p.m. through 7:59 p.m., Eastern Time under the High Density Rule (HDR). 14 CFR part 93 subparts K and S.

In 1994, Congress began to relax the HDR by authorizing the Secretary of Transportation, upon making a public interest finding, to grant exemptions from the HDR to enable new entrant carriers¹ to provide air transportation at certain slot-controlled airports, including JFK. 49 U.S.C. 41714. In 1999, pursuant to this authority, the Department issued an order that authorized new flight operations at JFK by granting 75 slot exemptions to JetBlue Airways (JetBlue), a new entrant carrier, to be phased in over a five-year period.² The order stated that JetBlue would operate the majority of its flights outside the five HDR slot-controlled hours.

In 2000, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21), Public Law No. 106–181, ended the application of the HDR at JFK, effective January 1, 2007. 49 U.S.C. 41715(a)(2).³ AIR–21 also

¹ The term “new entrant carrier” was defined as “an air carrier that does not hold a slot at the airport concerned and has never sold or given up a slot at that airport after December 16, 1985, and a limited incumbent carrier.” 49 U.S.C. 41714(h)(3).

² *Application of New Air Corporation for Exemption from 14 CFR part 93, Subparts K and S of 49 U.S.C. 41714(c)*, Order 99–9–11 (September 16, 1999).

³ The phase-out also included LaGuardia, as of January 1, 2007. 49 U.S.C. 41715(a)(2). The HDR at

directed the Secretary to grant exemptions from the HDR's flight restrictions for operations by new entrant carriers or for flights serving Small-Hub and Non-Hub airports as long as the aircraft used had less than 71 seats. Additionally, it preserved the FAA's authority to impose flight restrictions by stating that "[n]othing in this section * * * shall be construed * * * as affecting the Federal Aviation Administration's authority for safety and the movement of air traffic." 49 U.S.C. 41715(b).

Until recently, most operations at JFK took place during relatively pronounced arrival and departure banks corresponding to the operating windows of transatlantic flights. Maximum efficiency at JFK has been achieved with the use of either two arrival runways and one departure runway, or two departure runways and one arrival runway. Air traffic controllers have employed that configuration to facilitate the historic transatlantic traffic flows.

Since the spring of 2006, U.S. air carriers serving JFK have significantly increased their domestic scheduled operations throughout the day. Most of the increase has come from the two largest operators at the airport, Delta Airlines (Delta) and JetBlue. The new traffic patterns affect the efficient use of JFK's four runways, impeding the use of the three-runway configurations (two arrival/one departure, or one arrival/two departure) for maximum utility of active runways.

As a result of the increase in scheduled operations at JFK, the summer 2007 demand exceeded the airport's capacity during many periods of the day. During morning hours, volume-related delays were routine from 7 a.m. through 9 a.m. The afternoon and evening demand exceeded the airport's optimal capacity until about 10 p.m. This prevented the airport from having an evening period to recover from congestion-induced delays.

During fiscal year 2007, the average daily operations at JFK increased 21 percent over fiscal year 2006. Corresponding to the increased operations, on-time performance and other delay metrics have declined year over year. The on-time performance at JFK, which is defined as the arrival at the gate within 15 minutes of the scheduled time, declined from 68.5 percent in fiscal year 2006 to 62.19 percent in fiscal year 2007. On-time arrivals during the peak travel months of June, July and August declined from

63.37 percent in 2006 to 58.89 percent in 2007, while on-time departures declined from 67.49 percent to 59.89 percent. For the entire fiscal year, the average daily arrival delays exceeding one hour increased by 87 percent over fiscal year 2006 levels. Taxi out delays, which measure the time that aircraft wait prior to departing the runway, increased by 15 percent. Taxi out delays in the evening departure periods frequently exceeded an hour in duration.

The increased congestion and associated delays at JFK impact other airports in the region and the National Airspace System (NAS). The airspace redesign for the New York/New Jersey/Philadelphia metropolitan area, approved in 2007, documents the costs and far-reaching impacts of delays that originate from this area. The delays that cascade from this area throughout the NAS are costly and far-reaching, as detailed in the recently approved airspace redesign plan for the New York/New Jersey/Philadelphia metropolitan area.⁴ The FAA has taken steps to implement airspace redesign, which will provide efficiency and congestion relief by, among other things, opening additional arrival and departure routes in the New York area. Further, the FAA, working with stakeholders, is implementing short-term initiatives to improve the efficiency of airport operations and air traffic control, particularly during severe weather. Additionally, the FAA has increased the use of a second departure runway at JFK when conditions permit. However, none of these initiatives will offer an immediate or complete solution.

On September 24, 2007, the FAA redesignated JFK as a Level 2 Schedules Facilitated Airport⁵ for the summer 2008 scheduling season in accordance with the International Air Transport Association Worldwide Scheduling Guidelines (IATA WSG). 72 FR 54317. Under the WSG, carriers must inform the coordinator of projected operations at a Level 2 airport for the next scheduling season. When submitting the required information, the airlines expressed their intent to add new flights

at JFK during peak and off-peak hours for summer 2008.

Also in September 2007, the Administrator determined that JFK was a severely congested airport and that a scheduling reduction meeting, under 49 U.S.C. 41722, was necessary to discuss flight reductions with U.S. air carriers to reduce over-scheduling and flight delays at JFK during peak operating hours. On October 12, 2007, the Secretary of Transportation determined that a scheduling reduction meeting was necessary to meet a serious transportation need or to achieve an important public benefit. On October 22, the FAA opened a docket for information on the establishment of flight reduction targets at JFK during peak hours. 72 FR 59579. In order to address increases in demand by foreign air carriers, the FAA determined that a Level 3 Coordinated Airport declaration was warranted on October 25, 2007.⁶ 72 FR 60710.

In order to address increases in demand by domestic carriers, the FAA convened the scheduling reduction meeting with U.S. carrier participants on October 23–24, 2007. Subsequent in-person and telephonic meetings took place as well. At the sessions, American Airlines, Delta and JetBlue, which together account for three-quarters of the total operations at JFK, withdrew the schedule increases each had proposed for summer 2008 during the airport's 3 p.m. to 7:59 p.m. peak hours. They also adjusted the timing of operations during those hours and others to smooth out peaks. Other airlines also agreed to retime peak operations. The FAA offered capacity during other hours to carriers who re-timed operations or added additional flights.

As a result of the agreements reached at that meeting and other discussions held with carriers regarding their projected summer 2008 schedules, the FAA issued a temporary Order limiting scheduled operations at JFK, effective 6 a.m., Eastern Time, March 30, 2008, through 11:59 p.m., Eastern Time, October 24, 2009, to U.S. and foreign air carriers serving the airport and generally capping scheduled operations at 81 per hour. 73 FR 3519 (Jan. 18, 2008), as amended 73 FR 8737 (Feb. 14, 2008). This Order temporarily responds to the carriers' desire to regularly schedule flights above the airport's capacity during peak operating hours, relieves the substantial inconvenience to the traveling public caused by excessive

⁴ See: http://www.faa.gov/airports_airtraffic/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/.

⁵ An airport, where demand is approaching capacity and a more formal level of cooperation is required to avoid the circumstances of over-capacity, is designated an IATA Level 2 Schedules Facilitated Airport. At a Level 2-designated airport, a schedules facilitator seeks the cooperation and voluntary agreement of airlines serving the airport to avoid congestion.

⁶ Where demand for an airport exceeds capacity, voluntary cooperation is unlikely to resolve the problem, and short term capacity enhancements are not available, the airport is designated an IATA Level 3 Coordinated Airport.

congestion-related flight delays at the airport (which rippled through the NAS), reduces the average length of delays, and provides for a more efficient use of airspace.

B. History of Congestion Management at Newark

Newark was once subject to the HDR although the FAA suspended the application of the rule at Newark due to sufficient airport capacity to meet demand. 35 FR 16591 (Oct. 24, 1970). Over the past several years, however, Newark has grown to be one of the most delay-prone airports in the country. Current and anticipated demand during peak hours approaches or exceeds the average runway capacity, resulting in volume-related delays. These delays are aggravated by weather or other adverse operating conditions.

Comparing FY 2007 to FY 2000, average daily operations at the airport decreased about 3 percent (from 1,253 to 1,219) but performance nevertheless suffered. The percent of on-time gate arrivals decreased from 70.66 percent to 61.71 percent; arrival delays greater than one hour increased from 54 to 93 per day on average.

In 2007, for example, Newark's on-time arrival performance was 61.8 percent, the second worst among the top 35 airports. Based on "the airport's performance metrics and imbalance between air traffic control (ATC) capacity and demand that is expected to continue in the near term," the FAA designated Newark a Level 2 IATA Schedules Facilitated Airport for the summer 2008 scheduling season.⁷ The FAA explained that "increased levels of air traffic operations, congestion and delay at [both JFK and Newark] airports and a tangible decrease in operational performance" warranted this designation.⁸ The FAA found the morning hours of 7 a.m. to 10 a.m. and the afternoon and evening hours of 2 p.m. to 10 p.m. were particularly constrained, but that capacity otherwise was available for retiming of flights or new operations.

The FAA modeled the proposed summer 2008 schedule requests against Newark's average runway capacity, and delay projections for the summer of 2008 indicated a potential increase of almost 50 percent. The FAA also discussed carriers' future schedule plans at Newark and asked carriers to consider scheduling flights at times where there was available capacity. It was clear that some carriers intended to proceed with their plans to begin

operations according to their proposed schedules during the busiest hours, regardless of the potential impact on delay. Based on the requested schedules for Newark and anticipated additional demand for Newark due to the operating limits underway at JFK, the FAA determined that the anticipated summer 2008 demand would overtax Newark's capacity, warranting a Level 3 Coordinated Airport designation. 72 FR 73418 (Dec. 27, 2007). After the designation, a series of discussions with the FAA led some carriers, including the hub carrier, Continental, to move some of their historic flights from the most oversubscribed hours. The movement of these flights tended to smooth the scheduling peaks and valleys at Newark.

The information provided by the carrier for the summer 2008 scheduling season reflected a projected increase in flight schedules during the summer of 2008, especially during the peak hours. U.S. and foreign carriers had planned about 100 new operations per day at Newark, many during the afternoon and early evening hours for the summer of 2008.⁹ That number of new flights, along with proposed retiming of historic flights into busier time periods, would have caused massive delays, because they would have exceeded the airport's optimal rate of handling flights over multiple, consecutive hours. For several consecutive hours, the number of hourly arrivals and departures would have reached the upper 80s to the mid-90s. These operations would have significantly exceeded the airport's average capacity of 83 total operations over the 12-month period ending August 2007. These additional flights would have caused a spike in congestion and delays at Newark and would also have had an adverse effect on other airports in the New York region and on the NAS.

Consequently, on March 18, 2008, the FAA proposed to place temporary caps on peak hour operations at Newark to mitigate persistent congestion and delays at the airport.¹⁰ 73 FR 14552. The cap would limit scheduled operations during constrained hours to an average of 81 per hour.¹¹ The FAA stated that it identified Newark's average capacity by considering the airport's capacity to

be "the higher value of either the aircraft throughput at the airport in a given hour or the number of arrivals and departures that ATC personnel identified as achievable in that hour." 73 FR 14552, 14554. The measurement reflected "the airport's demonstrated and potential performance over time under actual meteorological and operational conditions." *Id.* The FAA committed to closely monitoring the gains in efficiency and delay reductions from implementing the airspace redesign and other air traffic control or airport operational changes to ensure that the scheduling limits reflect the available capacity.

The FAA has adopted its March 18, 2008, proposal to impose a temporary cap on scheduled operations at Newark. The cap takes effect 30 days after publication and expires 11:59 p.m. Eastern Time, October 24, 2009. The cap limits peak hour scheduled operations to an average of 81 per hour, except as provided in the appendix to the Order, and total scheduled and unscheduled operations to an average of 83. As indicated in the proposed order, the FAA intends to use the hours with scheduled operations below the limit of 81 for delay mitigation and would lease new capacity over 81 pursuant to an auction.

C. New York Aviation Rulemaking Committee

In addition to the regulatory initiatives discussed above, on September 25, 2007, the Acting FAA Administrator established an Aviation Rulemaking Committee (ARC) to explore various options, including market-based mechanisms, for addressing airspace congestion in the New York area. The ARC was comprised of officials from the FAA and the Office of the Secretary of Transportation (OST), the Port Authority of New York and New Jersey (Port Authority), representatives of carriers and operators serving JFK, Newark, LaGuardia, and Teterboro airports, airport and aviation industry trade associations, and consumer groups.

By design, the ARC provided opportunity for extensive input by all stakeholders, having members from major air carriers in the United States and their trade organizations (the Air Transport Association, the Regional Airline Association, the Air Carrier Association of America, the National Air Carrier Association), foreign carriers and their worldwide trade organization (IATA), the Port Authority, and the Airports Council International-North America. Through the ARC process, these stakeholders played a key role in

⁹ Requests for additional flights or retiming of flights into peak periods were received after the FAA's announced schedule submission deadline of October 11, 2007. These requests were accommodated only if there was available capacity remaining after consideration of historic operations and on-time requests.

¹⁰ 73 FR 14552 (March 18, 2008).

¹¹ The appendix to the order included a few operations for summer 2008 above the 81 per hour limit.

⁷ 72 FR 54317 (Sept. 24, 2007).

⁸ *Id.*

exploring ideas to address congestion and ensuring that any actions contemplated by the Department and the FAA would be fully informed. The ARC worked throughout the fall and submitted a report to the Secretary, dated December 13, 2007, discussing its findings. A copy of the ARC Report may be found at: <http://www.dot.gov/affairs/FinalARCReport.pdf>.

II. Discussion of Proposed Rule

Today's proposal would replace the Orders imposing operating limitations at JFK and Newark and establish a rule limiting unscheduled operations at those airports. The Orders are scheduled to expire on October 24, 2009. If adopted, the proposed rule would apply to all operations at JFK and Newark

between the hours of 6 a.m. and 10:59 p.m., every day. For reasons set out in the Newark and JFK Orders, discussed above, the FAA has determined that capacity is constrained at these airports for this entire period.

The following table briefly summarizes today's proposal and identifies differences between the two options.

PROPOSED REGULATION FOR JFK AND NEWARK

Feature	Newark	JFK	
		Option 1	Option 2
Base Schedule	Seasonal schedule, as approved by the FAA, for summer 2008 and winter 2008/2009.	Seasonal schedule, as approved by the FAA, for summer 2008 and winter 2008/2009.	Same as Option 1.
Slot	Defined as right to land or depart (not both) in a 30-minute time window.	Defined as right to land or depart (not both) in a 30-minute time window.	Same as Option 1.
Number of Slots	81/hour + 1 to 2 unscheduled	81/hour + 1 to 2	Same as Option 1
Slots definition	Common Slots: The Baseline (up to 20 slots per carrier) plus 90% of slots above 20 have 10 year leases; Limited Slots: 10% would have shorter leases and be auctioned over five years (2% each) (after which they convert to Unrestricted Slots).	Common Slots: the Baseline (up to 20 slots per carrier) plus 90% of slots above 20 have 10 year leases; Limited Slots: 10% would have shorter leases and be auctioned over five years (2% each) (after which they convert to Unrestricted Slots).	Common Slots: The Baseline (up to 20 slots per carrier) plus 80% of slots above 20 would have 10 year leases; Limited Slots 20% would have shorter leases and then be reallocated via auction over five years (4%/yr).
Slot Time of Day	6:00 a.m. through 10:59 p.m., every day; no more than 81 in any one hour or 44 in any half-hour.	6:00 a.m. through 11:59 p.m., every day; no more than 81 in any one hour or 44 in any half-hour.	Same as Option 1.
Mechanics	"Fair" initial distribution with half of slots with less than 10 years life selected by carriers; the other half selected by FAA according to specified rules.	"Fair" initial distribution with half of slots with less than 10 years life selected by carriers; the other half selected by FAA according to specified rules.	Same as Option 1.
Auction	Limited Slots would be auctioned among carriers.	Limited Slots would be auctioned among carriers.	Same as Option 1.
Auction Proceeds	Auction funds to FAA to defray costs of auction, then to NY capacity/projects.	Auction funds to FAA to defray costs of auction, then to NY capacity/projects.	Auction funds (net of auction costs) to incumbent holder; incumbent cannot bid on own slots.
Use/Lose	Only on grandfathered slots as consideration for slots.	Only on grandfathered slots as consideration for slots.	As as Option 1.
Term	Program is through March 2019; slot lives are whatever proportion of 10 years remain upon reallocation.	Program is through March 2019; slot lives are whatever proportion of 10 years remain upon reallocation.	As as Option 1.
Bidders	Airlines	Airlines	As as Option 1.
Holders	Holders of record (not marketing carrier).	Holders of record (not marketing carrier).	As as Option 1.
New or returned capacity	IATA WSG	IATA WSG	As as Option 1.
Secondary market	Transparent not blind: carrier notifies FAA of intent to sublease; FAA makes slot availability known; bilateral negotiations; final terms disclosed to OST for monitoring.	Transparent not blind: carrier notifies FAA of intent to sublease; FAA makes slot availability known; bilateral negotiations; final terms disclosed to OST for monitoring.	Same.
Logistical swaps of slots	Permitted	Permitted	Same.

The rule would apply to carriers at JFK and Newark. A U.S. air carrier conducting operations solely under another carrier's market control with unified inventory control would not be considered a separate carrier, an approach that is consistent with how carriers have been treated historically

under the various slot regimes. The same would not be true for foreign air carriers. This difference in treatment reflects the commercial realities of JFK and Newark where there are foreign air carriers that share a common owner but hold out service to the public as separate commercial entities. Treating

foreign air carriers with common ownership as separate carriers for purposes of slot allocation is an accepted practice in the international arena. The recent SNPRM on LaGuardia airport, as well as the LaGuardia Order, treats carriers with common ownership as a single carrier.

As we have explained, we do not anticipate that airport and airspace system improvements scheduled to come on line during the next year and a half will be sufficient to meet the demand for flights at either JFK or Newark for the foreseeable future. Therefore, if we let the Orders expire according to their terms, we believe carriers will once again schedule flights well in excess of the respective capacities of both JFK and Newark and unscheduled operations would grow during peak hours. Historic experience strongly suggests that congestion and delays during peak operating hours would result, requiring the FAA to step in and address unacceptable operational performance yet again.

Rather than taking repeated, piecemeal approaches to limit and manage operations at JFK and Newark on a short-term basis, we believe it is prudent to adopt a longer-term rule dealing with the congestion and delays we expect to persist at those airports. The FAA's preference in addressing congestion resulting from capacity shortfalls is to expand the airport and airway system capacity and to increase the efficient use of existing resources. This is by far the most effective way to serve the traveling public and to promote a strong airport and airway system. Although both the FAA and the Port Authority are working to implement these capacity improvements, this rule would complement those efforts and mitigate projected airport congestion.

We propose to treat the three major New York City-area airports similarly by capping operations and introducing market mechanisms to allocate some slots. While we have provided two different versions of the draft regulatory text to present two alternatives for market allocation, Newark would be treated the same under both versions. Accordingly, all discussion of alternative 2 will be limited to JFK.

The FAA believes it is necessary to address congestion and delays at LaGuardia, JFK, and Newark in a coordinated manner. Congestion and delays at each of the three airports affect the other two airports as well as the NAS as a whole. The airports are all located relatively close to each other and consistently have been among the nation's most delay-prone airports.

Excluding any one of the three major New York-area airports from the imposition of caps would simply shift the problem to the non-slot controlled airport, as it would become very attractive to carriers wanting to start or add service in the New York market. The likely result would be an

overburdening of that airport and the system. We propose to award capacity at JFK and Newark through mechanisms that rely, in part, on the market. These mechanisms resemble those in the proposal for LaGuardia Airport, but are modified to reflect the respective characteristics of JFK and Newark.

Today's proposal will ensure that the scarce airspace resources are used for operations by the carriers valuing the resources most highly. Additionally, over the course of the ten-year life of the proposed rule, we will monitor the need to maintain the caps and may increase the number of scheduled operations in response to technological, operational, or capacity plans or improvements or to other factors that may warrant such action.

We note that both JFK and Newark are already capped under the respective Orders at 81 scheduled operations per hour (except as provided in the Appendices to the Orders). Today's proposal, if adopted, will replace those Orders. The FAA believes the summer of 2007 served as a stark reminder that the demand for access to New York City is exceptional and cannot be managed without these caps at an acceptable level of delay.

The NPRM proposes to apply the limits of the recent JFK and Newark Orders, except where the Administrator determines under § 93.163 of subpart N and § 93.183 of subpart O that additional slots can be accommodated. In addition, there would be no more than 44 slots in any 30-minute period at JFK and Newark, or more than 81 in a 60-minute period. We have proposed to specify the 30- and 60-minute limitations in addition to the hourly maximum to avoid excessive bunching of slots, which can cause unnecessary delays. Section 93.163(d) of subpart N and § 93.183 of subpart O sets out the authority of the Administrator to increase the number of slots as airport conditions warrant. No additional rulemaking would be required for any increase.

JFK and Newark have similar demand profiles, with an early morning peak that typically clears by mid-morning. Demand approaches capacity in the early afternoon and typically continues until about 10 p.m. Scheduled requests submitted by carriers to the FAA for summer 2008 showed marked increases throughout the day. Modeling and experience demonstrate that delays grow exponentially and have a cascading effect on airport operations and individual flights at the airport. As part of the discussions with the carriers regarding summer 2008 schedules, carriers decided to schedule flights at

off-peak hours since the FAA was unwilling to authorize new peak hour flights. Based on demand and the modeling showing the potential for increased delays, the FAA determined that the appropriate hours to limit flights would cover much of the operating day.

The FAA proposes that the final rule, if adopted, would terminate at 11 p.m. on March 30, 2019. This approach will allow for future determinations by the FAA as to whether a cap is still needed and, if so, whether changes are needed to more efficiently manage the scarce resource. At present it is impossible to determine what changes in business models may occur over the next ten years. In addition, full implementation of the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign project and NextGen technologies are expected to successfully impact delays and air traffic efficiency within the next ten years, and we should not prejudge the market response. The FAA plans to evaluate the effects of the slot program proposed today on the distribution of slots and entry into JFK and Newark. The agency intends to take this experience into account in all congestion management activities.

III. Proposal for Efficient Allocation of Capacity at JFK and Newark

A. Need for More Efficient Allocation

Congress has directed the Department to place "maximum reliance on competitive market forces and on actual and potential competition." 49 U.S.C. 40101(a)(6). The ability of carriers to initiate or expand service at the airport is hindered, in large part, by the imposition of a cap. Accordingly, the FAA believes it must strike a balance between (1) promoting competition and permitting access to new entrants and (2) recognizing historical investments in the airport by carriers and the need to provide continuity. It is not the role of the Government either to dictate particular business models or to constrain a market and provide no means for others to enter that limited market. Simply imposing a cap and then doing nothing to ensure that there are competitive market forces and actual and potential competition is unacceptable.

Not only is the FAA required to assure the efficient use of the NAS, but it must do so in a manner that does not penalize all potential operators at the airport by effectively shutting them out of the market. Accordingly, the FAA believes that it is well within the agency's authority in 49 U.S.C. 40103 to

provide some mechanism for slot reallocation. Today's proposal attempts to strike the appropriate balance by actively developing a market that values the limited asset that the FAA created.

B. Authority To Assign Slots at JFK and Newark

The FAA has statutory authority to dispose of property. Because of the congressional mandate in 49 U.S.C. 40101(a)(6) to rely to the maximum extent possible on competitive market forces, the FAA is tailoring its approach at the two airports. Today the agency is requesting comment on an approach whereby the FAA would establish a cap on operations and address, through a regulation, which slots would revert to the FAA for reallocation but would use its transaction authority to allow for reallocation of slots via a market-based mechanism.

1. Authority To Determine the Best Use of the Airspace

The United States Government holds exclusive sovereignty over United States airspace. 49 U.S.C. 40103. Citizens of the United States have a public right of transit through navigable airspace, but the FAA is authorized to assign the use of the airspace necessary to ensure the efficient use of airspace. To the extent these needs can be met without specifying which citizen may transit or reserve a particular segment of airspace at a particular time, there was no need for the FAA to place constraints such as slots on the use of the airspace—this remains the case for the vast majority of the NAS.

As described above, however, at New York-area airports, in order to ensure the efficient use of airspace, FAA has had to impose constraints by assigning to carriers operational authority to conduct a scheduled arrival or departure operation on a particular day of the week during a specified 30-minute period. These reservations of airspace were called slots under the HDR. After the FAA issued the "buy/sell rule", 14 CFR part 93, subpart S, these slots were treated not only as property of the United States Government, but also as if the carriers had a property interest, albeit an interest that was heavily encumbered by the restrictions imposed by the FAA. The nature of this property interest, however, has always been somewhat unclear. To encourage the most efficient use of constrained airspace, the FAA is clarifying the proprietary interest that the FAA is willing to transfer to airlines for a limited period of time. However, the FAA has determined that in order to assure the efficient use of airspace, it

cannot simply permit those whom it grants authority to use the airspace to treat that authority as their own; it is the United States Government that has sovereignty over, and control of, the airspace. Such an approach would not only ignore the inherently valuable nature of an airspace usage assignment, but allows a select few to profit from a governmental interest to the detriment of their competitors and the public as a whole.

2. Authority To Enter Into Leases and Cooperative Agreements

The FAA has authority to lease real and personal property, including intangible property, to others. 49 U.S.C. 106(l)(6) and 106(n). When disposing of an interest in property, however, the FAA must receive adequate compensation. 49 U.S.C. 40110(a)(2). Nevertheless, the FAA also has broad authority to enter into cooperative agreements on such terms and conditions as the FAA may consider appropriate. 49 U.S.C. 106(l)(6). Under the Federal Grants and Cooperative Agreements Act, a cooperative agreement is to be used when the principal purpose of the agreement is to transfer a thing of value to a recipient, either public or private, to carry out a public purpose of support or stimulation authorized by law, instead of acquiring (by purchase, lease or barter) property or services for the direct use or benefit of the agency, and there is substantial Federal involvement in the activity.

Because we must balance the need to promote market forces with the value of continuity and certainty of services, the FAA believes this is the appropriate vehicle to use to transfer most of the slots as described in the following options, for a ten-year period, to the carriers that currently have operating authorizations at JFK and Newark. Doing so will recognize these carriers' historical investment in JFK and Newark, and the public interest that has been served by that investment. In addition, it would prevent disruption to the national air transportation system that might otherwise occur, allowing the public to benefit from continued certainty of readily available air transportation to and from these airports. There will, however, be substantial ongoing Federal involvement with these slots, as the FAA will retain ATC responsibilities for assuring that the use of these segments of airspace for their specified times is

done safely and with maximum possible efficiency.¹²

C. Description of the Proposal

1. Categories of Slots

Today's proposal would create three categories of slots: Common Slots, Limited Slots, and Unrestricted Slots. All three categories would be held by carriers pursuant to a lease. While the overwhelming percentage of slots will be Common Slots, many carriers would hold slots in all three categories.

Common Slots would be assigned to carriers currently serving the airports, and would be leased for the duration of the rule, *i.e.*, ten years. Once the rule sunsets, all interests would revert to the FAA, assuming the rule is not replaced by a different regulatory regime. Unlike slots allocated under the HDR and Operating Authorizations allocated under the JFK and Newark Orders, carriers would be granted clear property rights to Common Slots, allowing the slots to be collateralized or subleased to another carrier for consideration. However, Common Slots would be subject to reversion to the FAA under the rule's minimum usage provision and could be withdrawn for operational reasons.

Leases for Limited Slots would also be assigned by cooperative agreements between the FAA and the carriers, but during each of the first five years of the rule, a percentage of Limited Slots would be made available by auction, at which point they would be converted to Unrestricted Slots. Limited Slots would consist only of those slots operated on a daily, year-round basis. Thus, slots used on a seasonal or on a less-than-daily basis would not be designated as Limited Slots. The FAA arrived at this tentative proposal because we seek to populate the auction pool with those slots that are most economically valuable to carriers seeking to serve New York City. Slots only available on certain days or during one scheduling season would likely have value only to small subsets of operators at any given time, thus limiting the effectiveness of the market. Although slots would be awarded to carriers through the auction for daily, year-round operation, the

¹² Under the cooperative agreements FAA will be transferring a leasehold interest in the slots, but FAA will not entirely dispose of its property. Receiving compensation from these transfers is antithetical to the definition of a cooperative agreement. Nonetheless, to the degree that adequate compensation might be considered required under 49 U.S.C. 40110(a)(2), the compensation will be the carriers' agreement to be bound by the terms in the cooperative agreement as well as FAA's recognition of the public value received by the carriers' historical investment at JFK and Newark.

acquiring carrier may sublet to other carriers any portion of that award.

Under alternative 1, as currently proposed, 10 percent of the slots above the baseline operations¹³ at both JFK and Newark would be designated as Limited Slots, and thus could become Unrestricted Slots. Under alternative 2, 20 percent of the slots at JFK above the baseline operations would be designated as Limited Slots.

The FAA recognizes that the percentage of slots that the agency proposes to reallocate represents a relatively small percentage of the total number of slots at the two airports, particularly since each carrier's first 20 slots, at each airport, will not be subject to reversion. Accordingly, we specifically invite commenters to address the desirability of assigning different percentages for both JFK and Newark under both alternatives. For example, should we increase the percentages to be auctioned under alternative 1 to 20 percent?

Additionally, the FAA seeks comment on whether the proposed percentages are sufficient to ensure the opportunity for new entry and an efficient allocation of slots among all carriers at the airports, such that each slot is allocated to the user who values it the most highly. Increasing the percentage of slots for auction would further facilitate the use of market forces to allocate capacity, which is a major goal of this rulemaking. On the other hand, lowering the number of slots withdrawn for auction would be less disruptive to the carriers currently operating at JFK and Newark, and would allow the agency to gain experience with the auction process. The agency also seeks input on the appropriate percentages of slots available for auction (both in total and annually) sufficient to assure an efficient allocation of this scarce resource. The final rule may provide for the reversion of a higher or lower percentage of slots available for auction than we have proposed under either alternative in this document.

Following a review of the comments and further consideration, we may provide in a Final Rule for an auction of a greater percentage of a carrier's Limited Slots. As with Common Slots, Limited Slots could be withdrawn under the proposed minimum usage provision, or for operational reasons.

Unrestricted Slots are slots that a carrier would lease directly from the FAA under the auction processes under both alternatives. These slots would not be withdrawn by the FAA either under

the minimum usage provisions or for operational reasons because carriers are required to purchase them due to government action. As with Common Slots, Unrestricted Slots would expire when the rule sunsets.

2. Initial Assignment of Capacity

Upon the rule's effective date, each carrier at JFK and Newark would automatically be assigned up to 20 slots. Carriers whose approved schedules under the JFK and Newark orders call for fewer than 20 operations would be assigned the same number of slots as they are approved to operate under the respective orders. These slots would constitute carrier's baseline operations. Slots above a carrier's baseline operations would be designated as Common or Limited Slots as described above. The FAA believes this is a rational approach to assuring that no carrier is affected at a level that could seriously disrupt its existing operations at the airports.

The number of slots to be designated as Limited Slots would be calculated after subtracting the slots in each carrier's baseline operations of up to 20 slots per day. In other words, if a carrier has 30 slots at JFK or Newark, 20 would be protected at that airport. Under alternative 1, 10 percent of the remainder, or one slot, would become a Limited Slot. Under alternative 2, 20 percent of the remainder, or two slots, would become Limited Slots at JFK. Of course, most carriers hold a number of slots that would not be evenly divisible by applying a 10-or 20-percent rule. In such situations, the FAA would round the number of slots to be designated as Limited Slots up or down to the nearest whole number. As a practical matter, a carrier would have to have at least 25 slots under alternative 1 or 23 slots under alternative 2, before any would be designated as Limited Slots.

Given the seasonality of operations at these airports, both in terms of differences between summer and winter operations and within-season variability (which is much greater than at LaGuardia), the determination of which carrier is entitled to which slot will be based on the seasonal schedules approved by the FAA for summer 2008 and winter 2008/2009. The FAA has tentatively decided to assign the majority of slots at the airport to existing carriers in order to minimize disruption and to recognize the carriers' historical investments in both the airport and the community.

No later than the final rule's effective date, the FAA will inform all carriers that will have Limited Slots of the number of Limited Slots they will have.

The designations as Limited Slots would be made by both carriers and the FAA. Once the total number of Limited Slots is communicated to each carrier, the carrier would designate 50 percent of the total by notifying the FAA within 10 days which of the slots in its slot pool it designates as Limited Slots. During the subsequent 10 days, the FAA would determine the remainder of slots that will be designated as Limited Slots for each carrier. In making this determination, the FAA would initially exclude from consideration slots held during all hours where carriers have collectively determined two or more slots should be Limited Slots. This approach will assure that slots will be available for auction throughout the day. The time windows for the Limited Slots would be distributed evenly over the day to the extent possible.

Limited Slots would expire on designated dates and the duration of each Limited Slot would be arranged to ensure that each affected carrier's aggregate lease duration would be approximately equal to that of the other affected carriers. The FAA would publish a list showing the expiration date for each Limited Slot. In this way, all carriers would know within 20 days of the rule's effective date what slots will become available for purchase, and when.

A technical report more fully explaining how Limited Slots could be categorized and allocated was prepared for the LaGuardia rulemaking. A copy of that report has been placed in the docket for this rulemaking. Commenters are encouraged to review and comment on that document.

3. Market-Based Award of Capacity

For the first five years of the rule, the FAA would conduct an annual auction of Limited Slots. Section 93.165(c) of subpart N and § 93.185 of subpart O provides for the conversion of Limited Slots to Unrestricted Slots. In accordance with the schedule published under § 93.164, one-fifth of the identified Limited Slots would revert to the FAA for auction each year. Both the auction and secondary market would be open to any carrier in order to avoid artificially restricting any carrier's flexibility to acquire Unrestricted Slots for its services, and to offer carriers wishing to initiate or expand operations at JFK or Newark the full range of opportunities to acquire slots.

Under alternative 1, the FAA is proposing to have 10 percent of the carriers' slots above its baseline operations revert to the FAA over the first five years of the rule. The FAA would auction the reverting Limited

¹³ "Baseline operations", as defined in § 93.162 and § 93.182, are up to 20 slots per day.

Slots, with FAA retaining proceeds of the sale. After recouping its auction costs, the FAA plans to spend the remainder of the proceeds on aviation congestion and delay management initiatives in the New York City area.

Alternative 1 would make approximately 19 slots available for auction at JFK and 18 slots available at Newark each year. Carriers typically require pairs of slots, so alternative 1 would provide the equivalent of approximately 9 round trips per day at both airports. Under alternative 1, any carrier could bid on a slot in an auction that is blind to the participants and it would be awarded in the form of an Unrestricted Slot to the highest responsive bidder. The winning carrier could commence operations using the newly acquired slot at the beginning of the next summer scheduling season.

Alternative 2 proposes a different auction procedure for JFK that would provide that the holder of a Limited Slot would retain the proceeds of its sale in the auction. The only deduction from the sale price would be for the FAA's costs associated with conducting the auction.

Under this alternative, 20 percent of the carriers' slots above the baseline operations at JFK would revert to the FAA over the first five years of the rule. Therefore, approximately 179 slots would be available at JFK, of which approximately 36 slots would be available for auction each year. Carriers typically require pairs of slots, so alternative 2 as proposed would provide the equivalent of 18 round trips per day at JFK.

Under alternative 2, Unrestricted Slots would be awarded to the highest responsive bidders in a blind auction. Only cash could be bid for a slot. Since the goal of this rulemaking is to impose marketplace discipline on the use of slots, the FAA has proposed certain restrictions in alternative 2 to reduce anticompetitive behavior. For example, carriers may not set minimum bids for the slots, so they cannot impose a price so prohibitively high as to effectively preclude any sales. For similar reasons, carriers would not be permitted to bid on their own slots; otherwise, knowing that no actual payment would be made, they could bid unrealistic amounts that no competitor could match. With unrealistic bids, the fair market value of the slot would not be identified.

Although the prohibition against a carrier bidding on its own slots would mean that the carrier would no longer have that slot, any carrier could negotiate for subleases or transfers from other carriers in the secondary market or

bid on other slots concurrently up for auction and held by other carriers.¹⁴

The FAA believes that the above procedures could not be applied at Newark, because the current market profile there would diminish the likelihood that the auction would bring the beneficial effects of market forces that this proposal seeks to stimulate. At JFK (and at LaGuardia), no one carrier provides the vast majority of slots that would be up for auction, and any carrier that values a slot at a particular time could have the opportunity to bid on an equivalent slot that is held by another carrier. At Newark, however, Continental would have approximately 174 of its slots up for auction if 20 percent of its slots reverted to the FAA, but would be unable to bid on those slots or on an equivalent number of slots because only 19 slots would be available from any other carrier. Under this circumstance, the prices paid for slots at Newark may not be reflective of their actual value, with no meaningful slot market developing.

Among the specific questions on which we request comment is whether under alternative 2, 20 percent of a carrier's slots above its baseline at Newark should revert to the FAA for auction, even though the reallocation mechanism would be the same as under the first alternative. The agency also requests comment on whether alternative 2, in its entirety, should be adopted at Newark.

The FAA considered using a transparent auction procedure for both alternatives 1 and 2. The FAA believes that such transparency with respect to identity of the bidders and their corresponding bids would encourage gaming of the auction and significantly reduce the economic value of the initial auction of slots. The FAA also believes that an auction where the identity of the bidders is not known assists new entrants seeking to enter the market. Therefore, under Alternative 1, the identity of bidders would not be known to other bidders. Since the FAA will accept the highest responsive bid, regardless of who that bidder is, there is no need to keep bidders' identities from the agency. Under Alternative 2, the identity of bidders would be known only to the auctioneer, and then only for administrative purposes.

The FAA does not propose to auction slots after the first five years because it believes that ideally slots should transfer from one carrier to another

¹⁴ The FAA will attempt to auction an even number of slots during each hour to provide an opportunity for a carrier to replace a slot that it is auctioning. This may not always be possible.

through the secondary market. Not only will the auctions help create a market for slots, but all carriers will be able to assess the true market value of a slot. Armed with information on how much a given slot is likely to be worth on the open market, carriers (and their shareholders) will be in an even better position to determine how best to use their slots based on commercial considerations.

In the unlikely event no bids were received for a slot, we propose that the FAA retire the slot until the next auction to assist in delay mitigation. We request comment on whether, in the alternative, the carrier that previously held the slot should retain the slot for use until the next season.

4. New and Returned Capacity

As mentioned above, the FAA may raise the caps at JFK or Newark based on an analysis of delay statistics, aircraft operations at the respective airports, airport and airspace improvements, and other pertinent factors. The agency believes there is unlikely to be much, if any, returned capacity because carriers can sublease slots that they do not utilize efficiently rather than surrender them to the FAA because of inadequate usage. It is impossible at this time to estimate with any certainty how much new capacity is likely to come online; but it is unlikely there will be much new capacity in the near-term. Over a longer period of time, the realization of new capacity is dependent upon NextGen technologies. The efficiencies realized from the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign project will benefit delay reduction and will not be used to add new capacity at the airports.

The auction method proposed for LaGuardia, whereby all new and returned capacity would be auctioned, maximizes the total number of slots available for auction and would, in turn, increase the efficiencies that the proposal is intended to generate. However, the FAA believes the character of operations at JFK and Newark justifies a different approach. At both airports, a substantial percentage of air traffic is international. Historically, the FAA has used the IATA Worldwide Scheduling Guidelines (WSG) to allocate slots for international operations at slot constrained airports to the extent they did not conflict with the rules imposing caps at the affected airports.

The use of the WSG to assign new slots could affect carriers' scheduling incentives and reduce the efficiency of the market for existing slots. However, given the amount of new capacity that

is likely to be available during the rule's timeframe, this effect is likely to be small. Given the significant international presence at both airports, the FAA proposes to follow procedures for assigning newly available or returned slots that are largely derived from the WSG. A new entrant would be defined as a carrier holding or operating eight slots or fewer, assigned by the FAA, during the constrained hours. The FAA understands that in order to maintain viable operations at JFK or Newark, a carrier would need four to six slots for domestic operations, and at least two slots for an international operation. The five slots contemplated under the WSG provide little opportunity for a new entrant carrier to establish its operations before losing new entrant status and thereafter being able to expand in the New York market only through the purchase of a lease. Setting a limit of eight slots administratively assigned by the FAA as the cut-off for new entrant status allows a carrier to maintain its operations and provides some ability to grow without jeopardizing the carrier's access to slots through the WSG.

The agency is proposing that carriers lose their new entrant status if, at any point during the duration of the proposed rule, the FAA assigns a total of more than eight Common or Limited Slots on a particular day. Thus, if a carrier were awarded six Common Slots on a given day of the week, it could only be eligible for assignment of two more slots for that day through the WSG before losing its new entrant status, even if it subsequently subleased some of those Common Slots to another carrier, giving it less than eight total slots. However, the same carrier could be assigned six Common Slots, acquire any number of additional slots through the secondary market, and still be eligible to receive two additional slots under the WSG as a new entrant. This provision is intended to prevent carriers from continuing to gain an advantage as a new entrant by transferring holdings for which they have provided no monetary consideration. On the other hand, since only those slots administratively assigned by the FAA, and not those awarded by auction or through a lease with another carrier, would be considered in determining new entrant status, carriers with eight or fewer of these slots will not be discouraged from entering into lease agreements with other carriers, contributing to the development of a robust secondary market. A carrier's new entrant status would not be affected by one-for-one trades, which the agency

believes are necessary for operational efficiency, which do not result in either a gain or reduction in operations, and for which no consideration may be given. The FAA seeks comment on whether carriers should be allowed to retain their new entrant status if they have subleased or otherwise transferred slots originally allocated to them by the FAA.

After allowing for retimings and accommodating requests by new entrants, the FAA would evaluate the efficiency of the requested assignment in determining which carriers should receive the slot. We would consider the effective period of operation, the extent and regularity of the proposed usage, and the carrier's schedule constraints.

Using a WSG-based approach would facilitate the continued smooth integration of JFK and Newark into the international slot allocation system. Based on discussions during the ARC, we believe that the WSG approach is well-understood and is an internationally-recognized system of allocation at airports.

We recognize that this method of allocation differs from the method proposed for new and returned capacity in the companion proposal at LaGuardia. We also recognize that several commenters to the LaGuardia NPRM argued that any administrative allocation of capacity could dilute the viability of the secondary market. Accordingly, the FAA may adopt an allocation method that allocates new and returned capacity via an auction. This was the approach favored in the LaGuardia SNPRM. Under that approach, the slots would be auctioned as Unrestricted Slots. During the first five years of the rule, this new capacity would be auctioned at the same time as the slots that revert to the FAA under today's proposal. Should insufficient capacity be available to justify the expense of conducting an auction in the last five years of the rule, the FAA would retain the slots until sufficient capacity was available for a meaningful auction. The FAA invites comment as to whether the final rule should specify that new and returned capacity at JFK and Newark be allocated by auction instead of by the WSG-method method described above.

D. Auction Procedures

The FAA is currently engaged in procuring the services of a contractor to conduct auctions of the proposed Limited Slots.¹⁵ The details regarding

the specifics of any potential auction will be disclosed after the contractor has developed and validated an auction process and the FAA is ready to proceed with an auction.¹⁶

In order to ensure that auction participants understand how the auction process works, the FAA anticipates the contractor would have to conduct a training seminar and a mock auction prior to each auction. A single training seminar and mock auction would not suffice since presumably not every carrier will participate in every auction. The auction would also have to be structured to prevent gaming. This would likely be accomplished through the use of activity rules.

Finally, the contractor would have to provide and maintain a secure communication mechanism for conducting the auction and develop a website that provides information on the availability of slots and the logistics of the auction.

At present, the FAA is contemplating requiring bidding carriers to provide upfront payments as a prerequisite to participating in the auction and requiring full payment for the slots at the time of award. The Federal Communications Commission (FCC) has experienced problems with bidders who were not financially secure or who were otherwise unwilling or unable to pay for the awards. The upfront payment could also discourage bid-sniping by preventing carriers from adding slots to their bid package beyond the amount of the upfront payment. The FAA recognizes that paying for the entire lease at one time could be expensive; however, it also believes that serious bidders should be able to obtain the requisite financing.

E. Secondary Trading

All slots will have value in the secondary market. To the extent that the secondary market is not mature and the value of slots is not well-known, the auction should inform potential buyers of the value of these slots and stimulate the secondary market. The FAA believes that ultimately the best way to maximize competition is with the

Limiting Scheduled Operations at Newark Liberty International Airport, 73 FR 14552 (3/18/08), the FAA intends to auction new or returned capacity, if any, under those orders. The contract would cover auctions at all possible airports. The FAA is not waiting until this rule is finalized to award the contract, because this proposal and the two orders contemplate potentially conducting the first auction before the end of the year.

¹⁶ Since the auction will address the lease of slots awarded by the FAA under its leasing authority rather than under any administrative allocation, notice to interested parties will be governed by applicable procurement law rather than the Administrative Procedure Act.

¹⁵ As indicated in the *Order Limiting Operations at John F. Kennedy International Airport*, 73 FR 3510 (1/18/08) and the *Notice of Proposed Order*

development of a robust secondary market. Through the years, the FAA has received complaints that carriers were unaware of possible opportunities to buy or lease slots at slot-controlled airports and that incumbent carriers were colluding to keep new entrant carriers out of the airport.

We believe some measures must be taken to assure access to the secondary market. All carriers interested in initiating operations at JFK and Newark, or increasing their operations there, should have an opportunity to participate in any transactions. Accordingly, the FAA proposes to (1) permit carriers to include Common Slots for sale in the auction, organized by the FAA, and (2) establish a "secondary-market" bulletin-board system whereby carriers seeking to sublet slots, or to acquire such subleases, would notify the FAA, which would then post the relevant information on its Web site.

If a carrier wishes to include some of its slots in the auction, these slots will be treated in the same manner as other slots being auctioned by the FAA. However, the carrier would be able to specify a minimum price for these slots so that it need not give up the slots unless they command a price that the carrier is willing to accept.

The FAA has tentatively decided that transactions via the bulletin-board-system would not have to be blind, and the transaction could include both cash and non-cash payments. While it may be argued that transparency among parties to the transaction encourages anti-competitive behavior, the FAA believes that a blind, cash-only requirement could be unduly restrictive. In particular, the FAA believes that non-cash bids promote competition by enlarging the pool of potential bidders. Thus, non-cash transactions should result in both more bidders and potentially higher bids. However, it is critical that the identities of parties be known if non-cash assets are permitted because that is the only way to value those assets. In addition, the non-cash aspect of the transaction would require direct negotiating.

The FAA believes that these concerns could be met in a blind secondary market. For example, the agency could adopt a hybrid scheme whereby the initial offer and acceptance would be blind and limited to a cash offer, but the parties could negotiate non-cash assets after the offer had been accepted. Such an approach may be workable. During the posting of the lease and subsequent bidding for the slots, the parties' identities would not be known. Once the auction closed, the FAA would

forward the highest bid to the sublessor without any bidder identification. The sublessor would have a set number of business days to accept the bid. At that point, the parties' identities would be revealed, and they would have a set period of time to negotiate the possibility of non-cash assets in lieu of money as consideration for the lease. If the parties were unable to come to an agreement, the lease would have to proceed on a cash basis. The FAA seeks comment on this and other viable alternatives.

The FAA recognizes that non-blind transactions could facilitate, and even encourage, collusion. The Department has the authority under 49 U.S.C. 41712 to investigate, prohibit, and impose penalties on an air carrier for an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. The Department has consistently held that this authority empowers it to prohibit anticompetitive conduct (1) that violates the antitrust laws, (2) that is not yet serious enough to violate the antitrust laws but may do so in the future, or (3) that, although not a violation of the letter of the antitrust laws, is close to a violation or contrary to their spirit.¹⁷

In order to assure that the Department can conduct adequate oversight, today's proposal would require carriers to file with the Department a detailed breakdown of all lease terms and asset transfers for each transaction, and the subletting carrier would have to disclose all bids submitted in response to its solicitation. The slot could not be operated by the acquiring carrier until all documentation has been received, and the FAA has approved the transfer. The FAA has considered whether to publicly disclose non-confidential business information so that all carriers have an assessment of the relative value of the slots that are being traded. We have not included language to this effect in the proposed regulatory text. However, we seek comment on whether it would be helpful for this type of information to be disclosed.

Under proposed § 93.168 and § 93.188, trades among U.S. air carriers with unified marketing control (marketing carriers) would not have to

be advertised, because they are considered a single carrier for the purpose of this rule and these trades do not have the characteristics of a normal arm's-length transaction. Since foreign air carriers are considered separate carriers, they would not be able to take advantage of this provision. As it has done historically, the FAA would approve these transactions after it has received written evidence from each carrier that it consents to the transfer. The receiving carrier could not use the slot until the FAA has provided written approval of the transfer. Same day transactions among marketing carriers that address emergency situations, such as maintenance problems, adverse weather, or other unforeseen operational issues, could take place without prior approval by the FAA, but carriers would have to notify the FAA of the trade within five business days.

One-for-one trades between any two carriers would similarly not be subject to the restrictions of the secondary market. Such trades enhance the operational efficiency of the airport. However, the proposed rule would not allow consideration other than slots to be offered. When monetary or other compensation is involved in a slot transfer, the transaction would have to be handled as a sublease under § 93.168 of subpart N and § 93.188 of subpart O. As with subleases and trades between marketing carriers, the slot could not be used by the new carrier until the FAA provides written confirmation of the transfer.

IV. Unscheduled Operations

The FAA intends to limit unscheduled operations into and out of JFK and Newark during the constrained hours. Unscheduled operations at Newark would be limited to two per hour between 6 a.m. and 11:59 a.m. and between 10 p.m. and 10:59 p.m. and one per hour between 12 noon and 9:59 p.m. At JFK, there would be two unscheduled operations permitted per hour between 6 a.m. and 1:59 p.m. and between 10 p.m. and 10:59 p.m. and one per hour between 2 p.m. and 9:59 p.m. Under today's proposal, reservations would be required to use the airport (except for emergency operations) and could be obtained up to 72 hours in advance.

To the extent ATC can handle additional requests (for example, in good weather) it will do so without regard to the reason for the request. However, there is no guarantee that the FAA would accept more than the specified number of reservations per hour, and the determination to handle more traffic would likely be made on

¹⁷ See *United Airlines, Inc. v. Civil Aeronautics Board*, 766 F. 2d 1107, 1112, 1114 (7th Cir. 1985) and cases cited therein; see also H.R. Rep. No. 98-793, 98th Cong., 2d Sess. (1984) at 4-5, Order 2002-9-2, *Complaint of the American Society of Travel Agents, Inc., and Joseph Galloway against United Air Lines, Inc., et al.* (Docket No. OST-99-6410) and *Complaint of The American Society of Travel Agents, Inc., and Hillside Travel, Inc. against Delta Air Lines, et al.* (Docket No. OST-02-12004) (September 4, 2002) at 22-23.

that day. Reservations for all non-emergency flights would still be required and would be assigned by the FAA's e-CVRS system. Additional information of procedures for obtaining reservations will be available on the Internet at <http://fly.faa.gov/ecvrs>.

The FAA proposes to allow Public Charter operators to reserve an allowable operation up to six months in advance. Since the reservation pool consists of operations planned well in advance and last-minute operations, the number of reservations made available to public charter flights up to six months in advance would be limited to no more than one in any hour and no more than 25 percent of the total reservations from 12 noon to 9:59 p.m. local time. A Public Charter operator without the advance reservation could attempt to secure a reservation within the three-day window that is available for all other unscheduled operations. A carrier could also elect to use one of its assigned slots or obtain a slot from another carrier in the secondary market.

V. Other Issues

A. 30-Minute Windows

Consistent with the existing JFK and Newark Orders, we propose to assign slots at JFK and Newark in 30-minute windows. The FAA cautions, however, that peaking within the 30-minute windows could lead to increased congestion. The FAA will continue to monitor operations and will address any significant operational issues through discussions with carriers.

B. Use-or-Lose

Consistent with the approach taken in the JFK and Newark Orders, which is based on the WSG, the FAA is proposing a use-or-lose requirement for JFK and Newark that takes into consideration the seasonal nature of international, as well as some domestic, operations at those airports. Carriers would be expected to operate their Common Slots and Limited Slots in accordance with approved schedules at least 80 percent of the time. However, proposed § 93.170 of subpart N and § 93.190 of subpart O would consider the summer and winter schedules separately. Carriers would be allocated slots on the days and for the time periods set out in their summer 2008 and winter 2008/2009 schedules approved by the FAA. The carriers will be subject to the use-or-lose requirement only for those slot times that are allocated to them. Unrestricted Slots would not be subject to usage requirements.

The proposed rule would allow for limited waivers of the minimum usage requirements in the event that the carrier experiences an unusual and unpredictable condition that prevents it from using the slot for at least five consecutive days. If weather conditions prevented operations, for example, an operator might be granted a waiver of the use-or-lose provisions.

To enable carriers to make necessary operational adjustments, the usage requirements will not apply for the first 90 days after a carrier receives a slot under a sublease. However, a transfer between carriers under § 93.168(f) of subpart N and § 93.188(f) of subpart O of this part, in which one carrier holds marketing and inventory control of the flights operated by another carrier, is not a sublease for the purpose of this section. Therefore, there would be no 90-day waiver of the minimum use requirements following a transfer between them. Likewise, there would be no waiver for slots acquired via the WSG because carriers would have ample time after the slots were allocated to take the steps necessary to initiate the new operations.

C. Usage Reporting Requirements

The minimum usage requirement for JFK and Newark would be calculated on a seasonal basis. Therefore, we are proposing to require carriers to file reports with the FAA for each scheduling season. In accordance with § 93.172 of subpart N and § 93.192 of subpart O, carriers would report the usage of Common and Limited Slots. An interim report would be due no later than September 1 for the summer scheduling season and no later than February 1 for the winter scheduling season. Carriers would also be required to file final usage reports within 30 days of the last day of the applicable scheduling season.

D. Administrative Provisions

The FAA may withdraw or suspend slots at JFK or Newark for operational reasons pursuant to § 93.167 of subpart N and § 93.187 of subpart O. The FAA would assign a withdrawal priority number to each Common and Limited Slot by a random lottery. If a reduction in operations becomes necessary, slots would be withdrawn starting with the highest number. The Common or Limited Slot with the lowest assigned numbers would be the last to be withdrawn. The FAA would provide at least 45 days' notice of its intention to withdraw or temporarily suspend a slot, unless the operational circumstances necessitate a shorter notice period. Given that a number of operators will

have only a limited number of slots at JFK and Newark, we are requesting comment on whether the FAA should establish a level of slots that would not be subject to withdrawal or temporary suspension to fulfill operational needs to avoid the possibility of marginalizing or excluding such operators from the airport.

VI. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 4 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, to be the basis of U.S. standards. Fourth, the Unfunded Mandate Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation).

In conducting these analyses, FAA has determined this final rule (1) has benefits that justify its costs, is a “significant regulatory action” as defined in § 3(f) of Executive Order 12866, which is also known as an “economically significant regulation action,” and is “significant” as defined in DOT's Regulatory Policies and Procedures; (2) would not have a significant economic impact on a substantial number of small entities; (3) would not adversely affect international trade; and (4) would not impose an unfunded mandate on State, local, or tribal governments, or on the private sector. These analyses, set forth in this document, are summarized below.

Total Costs and Benefits of This Rulemaking

Through implementation of an auction, FAA estimates that this proposed rule would result in a long-term improvement in the allocation of scarce slot resources at JFK and Newark. The estimated present value of net benefits of improved slot allocation by

auctions is between \$256 million and \$267 million at JFK and between \$207 million and 218 million at Newark from 2009 to 2019. The costs of the rule, with a present value between \$11 and \$22 million each at JFK and Newark, are due to the design, implementation and participation in an auction of slots. These costs assume that the full cost of setting up the auction mechanism and participating in the auctions are individually borne at each airport; in fact, if auctions are conducted at more than one airport in the New York area, the costs of the setting up and participating in the auctions could be shared among the users of the airports and would be lower on a per airport basis.

This regulatory impact analysis assumes as a baseline that in the absence of this rulemaking, the FAA would not otherwise impose long-term caps on aircraft operations at JFK and Newark. Therefore, the FAA estimates that, through the long-term implementation of a cap on aircraft operations, this proposed rule would result in about a 25 percent reduction in the average delay per operation at JFK relative to a situation with no cap. After allowing for the lost consumer and producer surplus due to a reduction in air service caused by the caps, the net value of the savings in average delay attributable to the cap generates a present value net benefit of about \$686 million from 2009 to 2019. At Newark, this proposed rule would result in about a 23 percent reduction in the average delay per operation at Newark relative to a situation with no cap, generating a present value net benefit (after deducting lost producer and consumer surplus from reductions in air service) of about \$705 million from 2009–2019.¹⁸ The benefits are estimated by comparing the no-rule scenario (similar to the situation at JFK and Newark in August 2007) with the proposed cap.

Who Is Potentially Affected by This Rulemaking

- Operators of scheduled and non-scheduled, domestic and international flights, and new entrants who do not yet operate at JFK and Newark.
- All communities with air service to JFK and Newark.
- Passengers of scheduled flights to JFK and Newark.

- The Port Authority of New York and New Jersey, which operates the airport.

Key Assumptions

- *Base Case:* No operating authorizations or caps.
- Cap on operations provides delay improvement.
- *Alternative 1:* 100 percent of slots held by a carrier with fewer than 21 slots at either JFK or Newark would be reassigned to the carrier with 10 years of life; for holders with 21 or more slots at either airport, 100 percent of the first 20 slots at each airport would be reassigned to the carrier with leases of 10 years and 90 percent of slots above the 20 slot base for the carrier would be reassigned to the carrier with leases of 10 years. Ten percent of slots above the 20 slot base would be designated as Limited Slots and would be auctioned: one-fifth immediately upon the implementation of the rule.¹⁹ The remaining four-fifths of the Limited Slots would be assigned to the carrier which held them previously, but with leases of 1 to 4 years of life. The FAA would auction the Limited Slots to the highest bidder in annual auctions beginning in January 2009 and ending in January 2013. FAA would use the net revenues of the annual auctions to invest in capacity in the New York area.
- *Alternative 2:* For JFK, 100 percent of slots held by carriers with fewer than 21 slots at JFK would be reassigned to the carrier with leases of 10 years; for holders with 21 or more slots, 100 percent of the first 20 slots would be reassigned to the carrier with leases of 10 years and 80 percent of slots above the 20 slot base for the carrier would be reassigned to the carrier with leases of 10 years. Twenty percent of slots above the 20 slot base would be designated as Limited Slots and would be auctioned: one-fifth immediately upon the implementation of the rule. The remaining four-fifths of the Limited Slots would be assigned to the carrier which held them previously, but with leases of 1 to 4 years of life. The FAA would auction the Limited Slots to the highest bidder in annual auctions beginning in January 2009 and ending in January 2013. Carriers at JFK could not bid on slots they formerly held but would retain the net revenues generated by the sale of the former leases. As Newark would be treated the same under either approach, the key

assumptions for Newark are the same as under Alternative 1.

- For the purposes of this evaluation, the effective date is 12/01/08.

Other Important Assumptions

- *Discount Rate*—3 and 7 percent in real (net of inflation) terms.
- *Period of Analysis:* 2009 to 2019.
- Assumes 2008 constant year (real) dollars.
- *Passenger Value of Travel Time*—\$28.60 per hour at JFK and Newark.²⁰

Alternatives We Have Considered

• *No Action:* This alternative would let the current orders restricting operations at JFK and Newark expire on October 24, 2009 without replacing the limitations. The FAA expects that, without caps, air carriers would expand flight operations at these two airports to levels equal to or exceeding those experienced in the summer of 2007, causing increasingly severe delays at these airports and throughout the National Airspace System (NAS).

• *Caps:* This alternative would permanently impose caps at 81 scheduled operations per hour each at JFK and Newark, plus up to two unscheduled operations per hour at each airport, every day from 6 a.m. to 10:59 p.m.; it would grandfather current holders of operating authorizations to operate at the airports.

• *Alternative 1:* This alternative would institute caps at both JFK and Newark as described above and reallocate 10 percent of eligible capacity via five annual auctions beginning in January 2009. The FAA would retain the net proceeds of the auctions for use on congestion and delay management initiatives in the New York City area.

• *Alternative 2:* This alternative would institute caps at JFK as above and reallocate 20 percent of eligible slots at JFK, via five annual auctions beginning in January 2009. The carrier holding a slot to be reallocated would not be able to bid on its own slots, but would retain the net auction proceeds. Under alternative 2, the regime of Newark would be the same as in alternative 1.

We are requesting comment from industry on the range of alternatives considered.

Benefits of This Rulemaking

The primary benefits of this rulemaking would be due to the delay reduction from the caps on operations

¹⁸ Estimates based on a 7 percent discount rate. All results reported in this analysis are cost-beneficial at a 7 percent discount rate; using a 3 percent rate would make them even more so, with a present value net benefit of about \$836 million from 2009–2019 for JFK and \$859 million from 2009–2019 for Newark.

¹⁹ The slots auctioned in January 2009 under both alternatives would become available beginning in the summer season of 2009. Until that time, the air carrier that formerly held the Limited Slot could continue to use it.

²⁰ GRA, Incorporated “Economic Values for FAA Investment and Regulatory Decisions, A Guide,” prepared for FAA Office of Aviation Policy and Plans, (October 3, 2007). Passenger value of time is for “all purposes,” reflecting a mix of business and leisure travel.

and an improvement in the efficiency of allocation of scarce slot resources through the use of an auction mechanism and secondary slot subleasing markets characterized by clearly defined property rights.

Costs of This Rulemaking

The major costs of this proposed rule are the costs to the public and private sectors of designing, implementing and participating in the auction. Additionally, the implementation of caps under this rulemaking will lead to a reduction in flights into JFK and Newark compared to what would occur without the caps. The FAA has estimated the value of these scheduled flight reductions and has deducted them from the delay benefits of the caps at each airport to calculate overall net benefits of the caps. FAA specifically requests comment on the impacts from the reduction in scheduled flights.

Paperwork Reduction Act

This proposal contains the following new information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted the information requirements associated with this proposal to the Office of Management and Budget for its review.

Some of the information requirements in today's notice are similar to those originally proposed in the SNPRM "Congestion Management Rule for LaGuardia Airport" (Docket No. FAA-2006-25707; Notice No. 08-04). The FAA has applied these requirements and summarized them below.

Title: Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport.

Summary: The FAA proposes to grandfather the majority of operations at JFK and Newark and develop a secondary market by annually auctioning off a limited number of slots at each airport. This proposal also contains provisions for use-or-lose and withdrawal for operational need. The FAA proposes to sunset the rule in ten years. More information on the proposed requirements is detailed elsewhere in today's notice.

Use of: The information is reported to the FAA by scheduled operators holding slots at JFK and Newark. The FAA logs, verifies, and processes the requests made by the operators.

This information is used to allocate, track usage, withdraw, and confirm transfers of slots among the operators and facilitates the transfer of slots in the secondary market. The FAA also uses this information in order to maintain an

accurate accounting of operations to ensure compliance with the operations permitted under the rule and those actually conducted at the airports.

Respondents: The respondents to the proposed information requirements in today's notice are scheduled carriers with existing service at JFK and Newark, carriers that plan to enter the JFK and Newark markets (by auction or secondary market), and carriers that enter the JFK and Newark market in the future. There are currently seventy-seven (77) carriers with existing scheduled service at JFK and thirty-nine (39) carriers with existing scheduled service at Newark. Various carriers included in these totals have service at both airports.

Frequency: The information collection requirements of the rule involve scheduled carriers notifying the FAA of their use of slots. Each carrier must notify the FAA of its: (1) Designation of 50 percent of its Limited Slots, if applicable; (2) request for confirmation to sublease slots; (3) consent to transfer slots under the transferring Carrier's marketing control; (4) requests for confirmation of one-for-one slot trades; (5) slot usage (operations); and (6) request for assignment of slots available on a temporary basis.

Annual Burden Estimate: The annual reporting burden for each subsection of the rule is presented below. Annual burden estimates presented in today's notice are based on burden estimates from the SNPRM "Congestion Management Rule for LaGuardia Airport" (Docket No. FAA-2006-25709; Notice No. 08-04).

The burden is calculated by the following formula:

$$\text{Annual Hourly Burden} = (\# \text{ of respondents}) * (\text{time involved}) * (\text{frequency of the response}).$$

Section 93.164(c)(2) Categories of Slots: A Carrier Shall Designate 50 Percent of Its Limited Slots

JFK

$$(4 \text{ carriers with Limited Slots}) * (80 \text{ hours per submittal}) = 320 \text{ hours.}$$

Based on the current allocation of Operating Authorizations and the proposed level of baseline operations each carrier would be grandfathered under today's proposal, we assumed the four carriers with the most operations at JFK would expend up to 10 days of planning time each, potentially 80 hours, to develop and submit their designations of 50 percent of their Limited Slots, for a total of 320 hours. This designation would occur once, 10 days after the final rule effective date.

Newark

$$(1 \text{ carrier}) * (240 \text{ hours per submittal}) = 240 \text{ hours.}$$

$$(5 \text{ carriers}) * (80 \text{ hours per submittal}) = 400 \text{ hours.}$$

$$\text{Total Annual Hourly Burden} = 640 \text{ hours.}$$

Based on the projected allocation of Operating Authorizations and the proposed level of baseline operations each carrier would be grandfathered under today's proposal, we assumed that one carrier, Continental Airlines, with the most operations at Newark would expend up to 30 days of planning time, potentially 240 hours, to develop and submit its designation of 50 percent of its Limited Slots. The remaining five carriers required to designate Limited Slots would each expend up to 10 days of planning time, potentially 80 hours each, to develop and submit their designation of 50 percent of their Limited Slots. These five carriers would therefore need 400 hours. In total, the six carriers at Newark required to designate Limited Slots would require 640 hours of effort to make the designation. This designation would occur once, 10 days after the final rule effective date.

Section 93.165(c) Initial Assignment of Slots

We assumed that the 77 carriers operating at JFK and 39 carriers operating at Newark would expend time submitting and collecting information to participate in the proposed auctions for slot assignments. The FAA is currently in the process of procuring auction software and services. The FAA will make available burden estimates for information requirements relating to auction participation in a separate notice.

Section 93.166(b)-(c) Assignment of New or Returned Slots

We made no assumptions about additional workload for carriers at either airport associated with the IATA-like administrative process for assigning new or returned slots. Workload would vary depending on how many (if any) new or returned slots were to develop at either airport over the 10 year period of the proposed rule. In any case, carriers are already familiar with and use IATA-like allocation methods and would handle them in the course of normal operations at JFK and Newark.

Section 93.168(b), (d), (f) Sublease and Transfer of Slots

JFK

$$(18 \text{ carriers}) * (1.5 \text{ hours per submittal}) * (4 \text{ occurrences per year}) = 108 \text{ hours.}$$

(59 carriers) * (1.5 hours per submittal)
* (2 occurrences per year) = 177
hours.

Total Annual Hourly Burden = 285
hours.

Based on burden estimates from "Congestion Management Rule for LaGuardia Airport," we assumed the 77 carriers operating at JFK would expend 1½ hours for each occurrence of a lease or transfer of a slot. For each operator with 6 or more slots (18 carriers total), we assumed that a lease or transfer of a slot would occur on average quarterly. For each operator with fewer than 6 slots (59 carriers total), we assumed that a lease or transfer of a slot would occur on average biannually. The total annual hourly burden for all carriers collectively would be 285 hours.

Newark

(1 carrier) * (1.5 hours per submittal) *
(16 occurrences per year) = 24 hours.
(12 carriers) * (1.5 hours per submittal)
* (4 occurrences per year) = 72 hours.
(26 carriers) * (1.5 hours per submittal)
* (2 occurrences per year) = 78 hours.
Total Annual Hourly Burden = 174
hours.

As with JFK, we assumed the 39 carriers operating at Newark would expend 1½ hours for each occurrence of a lease or transfer of a slot. For the largest operator, we assumed that a lease or transfer of 4 slots would occur on average quarterly. For those operators at Newark with 6 or more slots (12 carriers total, excluding Continental Airlines), we assumed that a lease or transfer of a slot would occur on average quarterly. For each operator with fewer than 6 slots (26 carriers total), we assumed that a lease or transfer of a slot would occur on average biannually. The total annual hourly burden for all carriers collectively would be 174 hours.

Section 93.169(b), (d) One-for-One Trades of Slots

JFK

(18 carriers) * (1.5 hours per submittal)
* (4 occurrences per year) = 108
hours.
(59 carriers) * (1.5 hours per submittal)
* (2 occurrences per year) = 177
hours.
Total Annual Hourly Burden = 285
hours.

Based on burden estimates from "Congestion Management Rule for LaGuardia Airport," we assumed the 77 carriers operating at JFK would expend 1½ hours for each occurrence of a one-for-one trade of a slot. For each operator with 6 or more slots (18 carriers total), we assumed that a one-for-one slot trade would occur on average quarterly. For each operator with fewer than 6 slots (59 carriers total), we assumed that a

one-for-one slot trade would occur on average biannually. The total annual hourly burden would be 285 hours.

Newark

(1 carrier) * (1.5 hours per submittal) *
(16 occurrences per year) = 24 hours.
(12 carriers) * (1.5 hours per submittal)
* (4 occurrences per year) = 72 hours.
(26 carriers) * (1.5 hours per submittal)
* (2 occurrences per year) = 78 hours.
Total Annual Hourly Burden = 174
hours.

As with JFK, we assumed the 39 carriers operating at Newark would expend 1½ hours for each occurrence of a one-for-one trade of a slot. For the largest operator, we assumed that a one-for-one trade of 4 slots would occur on average quarterly. For those operators at Newark with 6 or more slots (12 carriers total, excluding Continental Airlines), we assumed that a one-for-one slot trade would occur on average quarterly. For each operator with fewer than 6 slots (26 carriers total), we assumed that a one-for-one slot trade would occur on average biannually. The total annual hourly burden would be 174 hours.

Section 93.171 Unscheduled Operations

This section of the proposed rule requires unscheduled and public charter operations at JFK and Newark to be reserved using the Airport Reservation Office (ARO) or, for public charters seeking reservations up to six months in advance, through the Slot Administration Office. It is the FAA's intention, however, to require these reservation procedures at JFK and Newark regardless of and apart from the outcome of this rulemaking. Accordingly, the FAA will make available burden estimates relating to unscheduled and public charter operations in a separate rulemaking notice.

Section 93.172(a)-(b) Reporting Requirements

JFK

(77 carriers) * (1.5 hours per submittal)
* (4 occurrences per year) = 462
hours.

Based on burden estimates from the "Congestion Management Rule for LaGuardia Airport" (Docket No. FAA-2006-25709; Notice No. 08-04), we assumed the 77 carriers operating at JFK would expend, on average, 1½ hours two times per summer and winter season to submit the data required by § 93.172.

Newark

(39 carriers) * (1.5 hours per submittal)
* (4 occurrences per year) = 234
hours.

Based on burden estimates from the "Congestion Management Rule for

LaGuardia Airport" (Docket No. FAA-2006-25709; Notice No. 08-04), we assumed the 39 carriers operating at Newark would expend, on average, 1½ hours every two months to submit the data required by § 93.172.

Summary

JFK

Total First Year Hourly Burden—320
Hours.

Total Recurring Annual Hourly
Burden (per year for 10 years)—1,032
Hours.

Newark

Total First Year Hourly Burden—640
Hours.

Total Recurring Annual Hourly
Burden (per year for 10 years)—582
Hours.

The burden estimates for JFK and Newark do not include the time required to participate in the annual auctions. The FAA will make available burden estimates for information requirements relating to auction participation in a separate notice.

The agency is soliciting comments to—

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

(2) Evaluate the agency's estimate of the burden;

(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.

Individuals and organizations may submit comments on the information collection requirement by July 21, 2008, and should direct them to the address listed in the **ADDRESSES** section of this document. Comments also should be submitted to the Office of Information and Regulatory Affairs, OMB, via facsimile at (202) 395-6974, Attention: Desk Officer for FAA.

According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. The OMB control number for this information collection will be published in the **Federal Register**, after the Office of Management and Budget approves it.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.” To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. If the agency determines that it would, the agency must prepare a regulatory flexibility analysis as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, § 605(b) of the 1980 RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. The basis for such FAA determination follows.

The proposed rule most directly affects four scheduled operators at JFK (Delta Air Lines, JetBlue Airways, American Airlines, and United Airlines) and five scheduled operators at Newark (Continental Airlines, American Airlines, United Airlines, Delta Air Lines, and U.S. Airways). These carriers would receive one or more Limited Slots. None of these carriers are small businesses. However, the FAA considered that some small regional operators affiliated with these carriers and using slots provided by these carriers could be affected. Based on a review of the number of employees for each scheduled operator, the FAA found that only two scheduled operators (CommutAir and EOS Airlines) at JFK, and none at Newark, are considered small by Small Business Administration size standards (in this case, firms with 1,500 or fewer employees). Of the two scheduled operators at JFK, CommutAir operates under the name Continental Connection for Continental Airlines. Continental Airlines has fewer than 20 operations per day at JFK and therefore

neither it nor CommutAir is affected by this rule.

Using Enhanced Traffic Management System (ETMS) data, the FAA has determined that there are approximately 54 identifiable unscheduled operators at JFK and 61 identifiable unscheduled operators at Newark who could be affected by this rule. While some of these operators may be small businesses, the FAA does not believe they will be significantly impacted by this rulemaking. These operators typically have greater flexibility to adjust operations and carry out very few operations during peak hours compared to scheduled operators. During peak hours in the summer of 2007, there were fewer than two average unscheduled operations per hour at each airport, whereas the proposed rule would allow 1 to 2 operations per hour. Section 93.171(g) of subpart N and § 93.191(g) of subpart O enables the FAA to determine that additional reservations may be accommodated for a specific time period, and allows unused slots to be available temporarily for unscheduled operations. In summary, while the proposed rule reduces the number of unscheduled operations per hour, it does not significantly affect the overall number of current unscheduled operations that take place at each airport.

Using 2007 Census data, the FAA has also reviewed whether there would be interruptions to service to communities with a population of less than 50,000. We do not know if there will be any service interruptions as a result of the rule. We have reviewed population statistics for every city served from JFK and Newark in August 2007 (the base for initial allocation of slots under the proposal) and found none with a population of less than 50,000.

Therefore, the FAA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards or engaging in related activities is not considered as creating unnecessary obstacles to the foreign commerce of the United States, so long as the standards and activities have a legitimate domestic objective, such the protection of safety, and do not

operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA notes the proposed rule to establish slots and limited auctions of slot leases at JFK and Newark is necessary for the efficient utilization of the national airspace system, and has assessed the effects of this rulemaking to ensure that the final rule, if adopted, would not impose costs or barriers to international entities within the national airspace system.

Foreign entities at both JFK and Newark would not have any slots classified as Limited Slots under either alternative 1 or 2 under the terms of § 93.164 of subpart N and § 93.184 of subpart O of the proposed rule. Foreign carriers might benefit from the rule if they choose to participate in the proposed auction to acquire additional slots or to sublease slots in the secondary market.

Unfunded Mandate Assessment

The Unfunded Mandate Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$136.1 million in lieu of \$100 million. This final rule does not contain such a mandate. The requirements of Title II do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action 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, and, therefore, would not have federalism implications.

Environmental Analysis

FAA Order 1050.1E, “Environmental Impacts: Policies and Procedures” identifies FAA actions that are normally categorically excluded from preparation of an environmental assessment or

environmental impact statement under the National Environmental Policy Act (NEPA) in the absence of extraordinary circumstances. The FAA has determined that this rulemaking qualifies for the categorical exclusions identified in paragraph 312d "Issuance of regulatory documents (e.g., Notices of Proposed Rulemaking and issuance of Final Rules) covering administration or procedural requirements (does not include Air Traffic procedures; specific Air traffic procedures that are categorically excluded are identified under paragraph 311 of this Order)" and paragraph 312f, "Regulations, standards, and exemptions (excluding those which if implemented may cause a significant impact on the human environment.)" It has further been determined that no extraordinary circumstances exist that may cause a significant impact and therefore no further environmental review is required. The FAA has documented this categorical exclusion determination. A copy of the determination and underlying documents has been included in the Docket for this rulemaking.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this NPRM under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order because it is not a "significant regulatory action" under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Additional Information

Comments Invited: The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel

concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. You must mark the information that you consider proprietary or confidential. If you send the information on a disk or CD ROM, mark the outside of the disk or CD ROM and also identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and we place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking Portal (<http://www.regulations.gov>);
2. Visiting the FAA's Regulations and Policies Web page at http://www.faa.gov/regulations_policies/; or
3. Accessing the Government Printing Office's Web page at <http://www.gpoaccess.gov/fr/index.html>.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-9680. Make sure to identify the docket number, notice number, or amendment number of this rulemaking.

You may access all documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, from the internet through the Federal

eRulemaking Portal referenced in paragraph (1).

List of Subjects in 14 CFR Part 93

Air traffic control, Airports, Navigation (air).

Proposed Regulatory Text

In consideration of the foregoing, the Federal Aviation Administration proposes to amend Chapter I of Title 14, Code of Federal Regulations, as follows:

PART 93—SPECIAL AIR TRAFFIC RULES

1. The authority citation for part 93 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40109, 40113, 44502, 44514, 44701, 44719, 46301.

Proposed Amendment—Alternative 1

2. Subpart N is added to read as follows:

Subpart N—John F. Kennedy International Airport and Newark Liberty International Airport Traffic Rules

Sec.	
93.161	Applicability.
93.162	Definitions.
93.163	Slots for scheduled arrivals and departures.
93.164	Categories of slots.
93.165	Initial assignment of slots.
93.166	Assignment of new or returned slots.
93.167	Reversion and withdrawal of slots.
93.168	Sublease and transfer of slots.
93.169	One-for-one trade of slots.
93.170	Minimum usage requirements.
93.171	Unscheduled operations.
93.172	Reporting requirements.
93.173	Administrative provisions.

Subpart N—John F. Kennedy International Airport and Newark Liberty International Airport Traffic Rules

§ 93.161 Applicability.

(a) This subpart prescribes the air traffic rules for the arrival and departure of aircraft used for scheduled and unscheduled service, other than helicopters, at John F. Kennedy International Airport (JFK) and Newark Liberty International Airport (Newark).

(b) This subpart also prescribes procedures for the assignment, transfer, sublease and withdrawal of Slots issued by the FAA for scheduled operations at JFK and Newark.

(c) The provisions of this subpart apply to JFK and Newark during the hours of 6 a.m. through 10:59 p.m., Eastern Time. No person shall operate any scheduled arrival or departure into or out of JFK or Newark during such hours without first obtaining a Slot in

accordance with this subpart. No person shall conduct an Unrestricted Operation to or from JFK or Newark during such hours without first obtaining a Reservation.

(d) A U.S. Air Carrier conducting operations solely under another Carrier's marketing control with unified inventory control shall not be considered a separate Carrier for purposes of this subpart.

(e) The Slots assigned under this subpart terminate at 11 p.m. on March 30, 2019.

§ 93.162 Definitions.

For purposes of this subpart, the following definitions apply:

Airport Reservation Office (ARO) is an operational unit of the FAA's David J. Hurley Air Traffic Control System Command Center. It is responsible for the administration of reservations for unscheduled operations at JFK and Newark.

Baseline Operations are those common slots held by a carrier at JFK or Newark on [final rule effective date], that do not exceed 20 operations per day.

Carrier is a U.S. or foreign air carrier with authority to conduct scheduled service under parts 121, 129, or 135 of this chapter and the appropriate economic authority for scheduled service under 14 CFR chapter II and 49 U.S.C. chapter 411.

Common Slot (C-slot) is a slot that is assigned by the FAA as a lease under its cooperative agreement authority for the length of this rule.

Enhanced Computer Voice Reservation System (e-CVRS) is the system used by the FAA to make arrival and/or departure reservations for unscheduled operations at JFK, Newark, and other designated airports.

Limited Slot (L-slot) is a slot operated every day, the lease for which expires prior to the expiration of this rule for subsequent award by the FAA as an unrestricted slot.

New Entrant is any carrier that is administratively allocated a total of 8 or fewer slots at JFK or Newark, respectively, during controlled hours at any point during the duration of the rule.

Public Charter is defined in 14 CFR 380.2 as a one-way or roundtrip charter flight to be performed by one or more direct air carriers that is arranged and sponsored by a public charter operator.

Public Charter Operator is defined in 14 CFR 380.2 as a U.S. or foreign public charter operator.

Reservation is an authorization received by a carrier or other operator of an aircraft, excluding helicopters, in

accordance with procedures established by the FAA to operate an unscheduled arrival or departure on a particular day of the week during a specific 30-minute period.

Scheduled Operation is the arrival or departure segment of any operation regularly conducted by a carrier between either JFK or Newark and another point regularly served by that carrier.

Slot is the operational authority assigned by the FAA to a carrier to conduct one scheduled arrival or departure operation at JFK or Newark on a particular day of the week during a specific 30-minute period.

Summer Scheduling Season begins on the last Sunday of March.

Unrestricted Slot (U-slot) is a slot that is awarded to a carrier by the FAA via the auction of a lease.

Unscheduled Operation is an arrival or departure segment of any operation that is not regularly conducted by a carrier or other operator of an aircraft, excluding helicopters, between JFK or Newark and another service point. The following types of carrier operations shall be considered unscheduled operations for the purposes of this subpart: Public, on-demand, and other charter flights; hired aircraft service; extra sections of scheduled flights; ferry flights; and other non-passenger flights.

Winter Scheduling Season begins on the last Sunday in October.

§ 93.163 Slots for scheduled arrivals and departures.

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person shall operate any scheduled arrival or departure into or out of JFK or Newark without first obtaining a Slot in accordance with this subpart.

(b) Except as otherwise established by the FAA under paragraph (c) of this section, the number of Slots shall be limited to no more than eighty-one (81) per hour at JFK and eighty-one (81) per hour at Newark. At JFK, the number of Slots may not exceed 44 in any 30-minute period, and 81 in any 60-minute period. At Newark, the number of Slots may not exceed 44 in any 30-minute period and 81 in any 60-minute period. The number of arrival and departure Slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

(c) Notwithstanding paragraph (b) of this section, the Administrator may increase the number of Slots based on a review of the following:

(1) The number of delays;

(2) The length of delays;

(3) On-time arrivals and departures;

(4) The number of actual operations;

(5) Runway utilization and capacity plans; and

(6) Other factors relating to the efficient management of the National Airspace System.

§ 93.164 Categories of slots.

(a) *General*. Each Slot shall be designated as a Common Slot, Limited Slot or Unrestricted Slot and shall be assigned to the Carrier under a lease agreement. A lease for a Common or Limited Slot shall be awarded via a cooperative agreement. A lease for an Unrestricted Slot shall be awarded via an auction.

(b) *Common Slots*. (1) All Slots within any Carrier's Baseline Operations, as determined on [final rule effective date], shall be designated as Common Slots.

(2) Ten percent of the Slots at JFK and Newark on [final rule effective date] not otherwise designated as Common Slots under paragraph (b)(1) of this section shall be designated as Limited Slots. All other Slots shall be designated as Common Slots.

(c) *Limited Slots*. Those Slots assigned to a Carrier subject to return to the FAA under § 93.165(c) shall be designated as Limited Slots until the date of their reassignment by the FAA as Unrestricted Slots. A Carrier may continue to use a Limited Slot that has reverted to the FAA until the date of the auction.

(1) Each Carrier with a total number of daily operations at JFK or Newark in excess of its Baseline Operations will be notified by [final rule effective date] how many of its Slots will be designated as Limited Slots pursuant to paragraphs (c)(2) and (3) of this section.

(2) A Carrier shall designate 50 percent of its Limited Slots. The Carrier must notify the FAA of its determination by [date 10 days after the final rule effective date].

(3) The FAA will designate the remaining Limited Slots initially excluding those hours in which two or more Slots have been designated as Limited Slots by the Carriers.

(4) No later than [date 20 days after the final rule effective date], the FAA will publish a list of all Limited Slots and the dates upon which they will expire.

(d) *Unrestricted Slots*. Unrestricted Slots are Slots acquired by a Carrier through a lease with the FAA awarded via an auction. Unrestricted Slots are not subject to withdrawal by the FAA.

§ 93.165 Initial assignment of slots.

(a) Except as provided for under paragraphs (b) and (c) of this section,

any Carrier allocated operating rights under the Order limiting operations at JFK or the Order limiting operations at Newark as evidenced by the FAA's records, will be assigned corresponding Slots in 30-minute periods consistent with the limits under § 93.163(b) and its summer and winter season schedules as approved by the FAA. If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned Slots within the same hour to meet the 30-minute limits under § 93.163(b). The FAA Vice President, System Operations Services, is the final decisionmaker for determinations under this section.

(b) If a Carrier was allocated operating rights under the Order limiting operations at JFK or the Order limiting operations at Newark, but the operating rights were held by another Carrier, then the corresponding Slots will be assigned to the Carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) Starting [date 35 days after the effective date] and every year thereafter through 2013, one-fifth of the total number of Limited Slots shall revert to the FAA in accordance with the schedule published under § 93.164(c)(4) and be auctioned as Unrestricted Slots by the FAA. Any Slot receiving no responsive bids will be retired until the next auction. An affected Carrier will be allowed to use the Limited Slot until the effective date of an award to a Carrier as an Unrestricted Slot.

§ 93.166 Assignment of new or returned slots.

(a) This section describes the process by which the FAA assigns new Slots, as well as Slots returned to the FAA pursuant to the provisions of § 93.170. These Slots will be assigned by the FAA to requesting Carriers for the summer and winter scheduling seasons.

(b) Requests for the new Slots or returned Slots or both must be submitted to the Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591 (Facsimile: (202) 267-7277; e-mail: 7-awa-slotadmin@faa.gov), by the deadline as published by the FAA in a **Federal Register** notice for each Summer and Winter Scheduling Season. The requesting Carrier must submit its entire schedule at JFK and Newark for the particular season, noting which requests are in addition to, or changes from, the previous corresponding season at the respective airports.

(c) Before assigning new or returned Slots under this section, the FAA will first accommodate Carrier requests to

retime Slots for operational reasons or to bring the flight time closer to the time originally requested by the applicant Carrier in previous corresponding seasons, as reflected in FAA records.

(d) After accommodating Carrier requests for retiming of Slots, the FAA will assign 50% of the new Slots and returned Slots to New Entrants, unless requests by New Entrants constitute fewer than 50% of available Slots.

(e) With the remaining available Slots, if all requests for Slots under this section cannot be accommodated, the FAA will give priority to requests to introduce year-round service or to extend an existing operation to a year-round operation.

(f) Thereafter, the FAA will assign Slots considering all relevant factors including:

- (1) The effective period of operation;
- (2) The extent and regularity of intended use of a Slot;
- (3) Schedule constraints of Carriers requesting Slots.

§ 93.167 Reversion and withdrawal of slots.

(a) This section does not apply to Unrestricted Slots.

(b) A Carrier's Common Slots or Limited Slots at JFK or Newark revert back to the FAA 30 days after the Carrier has ceased all operations at the respective airport(s) for any reasons other than a strike.

(c) The FAA may retime, withdraw, or temporarily suspend Common Slots and Limited Slots at any time to fulfill operational needs.

(d) Common Slots and Limited Slots will be withdrawn in accordance with the priority list established under § 93.173 and international obligations.

(e) Except as otherwise provided in paragraph (a) of this section, the FAA will notify an affected Carrier before withdrawing or temporarily suspending a Common Slot or Limited Slot and specify the date by which operations under the Common Slot or Limited Slot must cease. The FAA will provide at least 45 days' notice unless otherwise required by operational needs.

(f) Any Common Slot or Limited Slot that is temporarily withdrawn under this paragraph will be reassigned, if at all, only to the Carrier from which it was withdrawn, provided the Carrier continues to conduct Scheduled Operations at the respective airport.

§ 93.168 Sublease and transfer of slots.

(a) A Carrier may sublease its Slots to another Carrier in accordance with this section and subject to the provisions of the Carrier's lease agreement with the FAA.

(b) A Carrier must provide notice to the FAA to sublease a Slot. Such notice must contain: the Slot number and time, effective dates and, if appropriate, the duration of the lease. The Carrier may also provide the FAA with a minimum bid price.

(c) The FAA will post a notice of the offer to sublease the Slot and relevant details on the FAA Web site at <http://www.faa.gov>. An opening date, closing date and time by which bids must be received will be provided.

(d) Upon consummation of the transaction, written evidence of each Carrier's consent to sublease must be provided to the FAA, as well as all bids received and the terms of the sublease, including but not limited to:

- (1) The names of all bidders and all parties to the transaction;
- (2) The offered and final length of the sublease;
- (3) The consideration offered by all bidders and provided by the sublessee.

(e) The Slot may not be used until the conditions of paragraph (d) of this section have been met, and the FAA provides notice of its approval of the sublease.

(f) Slots may be transferred among a U.S. Air Carrier and another Carrier that conducts operations at JFK or Newark solely under the transferring Carrier's marketing control, including the entire inventory of the flight. Each party to such transfer must provide written evidence of its consent to the transfer and the FAA must confirm and approve these transfers in writing prior to the effective date of the transaction. However, the FAA will approve transfers under this paragraph up to five business days after the actual operation to accommodate operational disruptions that occur on the same day of the scheduled operation. The FAA Vice President, System Operations Services is the final decision-maker for any determinations under this section.

(g) A Carrier wishing to sublease a Slot via an FAA auction, rather than pursuant to this section, may do so. The Carrier shall retain the proceeds and the Slot shall retain the same designation that it had prior to the Carrier placing it up for auction.

§ 93.169 One-for-one trade of slots.

(a) A Carrier may trade a Slot with another Carrier on a one-for-one basis.

(b) Written evidence of each Carrier's consent to the trade must be provided to the FAA.

(c) Each recipient of the trade may not use the acquired Slot until written confirmation has been received from the FAA.

(d) Carriers participating in a one-for-one trade must certify to the FAA that no consideration or promise of consideration was provided by either party to the trade.

§ 93.170 Minimum usage requirements.

(a) This section does not apply to Unrestricted Slots.

(b) Any Common Slot or Limited Slot included in a summer or winter season schedule approved by the FAA that is not used at least 80 percent of the time during the period for which it is assigned will be withdrawn by the FAA.

(c) Paragraph (b) of this section does not apply to the first 90-day period after assignment of a Common Slot or Limited Slot through a sublease.

(d) The FAA may waive the requirements of paragraph (b) of this section in the event of a highly unusual and unpredictable condition which is beyond the control of the Carrier and which affects Carrier operations for a period of five or more consecutive days. Examples of conditions which could justify a waiver under this paragraph are weather conditions that result in the restricted operation of the airport for an extended period of time or the grounding of an aircraft type.

(e) The FAA will treat as used any Common Slot or Limited Slot held by a Carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Sunday of January.

§ 93.171 Unscheduled operations.

(a) During the hours of 6 a.m. through 10:59 p.m. Eastern Time, no person may operate an aircraft other than a helicopter to or from JFK or Newark unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO) or in the case of Public Charters, in accordance with the procedures in paragraph (d) of this section. Requests for Reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to or departure from JFK or Newark. Additional information on procedures for obtaining a Reservation is available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Reservations, including those assigned to Public Charter operations under paragraph (d) of this section, will be available to be assigned by the ARO on a 30-minute basis as follows:

(1) At JFK, two Reservations per hour between 6 a.m. and 1:59 p.m. and between 10 p.m. and 10:59 p.m. and one Reservation per hour between 2 p.m. and 10:59 p.m.

(2) At Newark, two Reservations per hour between 6 a.m. and 11:59 a.m. and between 10 p.m. and 10:59 p.m. and one Reservation per hour between 12 noon and 9:59 p.m.

(c) The ARO will receive and process all Reservation requests for unscheduled arrivals and departures at JFK and Newark. Reservations are assigned on a "first-come, first-served" basis determined by the time the request is received at the ARO. Reservations must be cancelled if they will not be used as assigned.

(d) One Reservation per hour will be available for assignment to Public Charter operations prior to the 72-hour Reservation window in paragraph (a) of this section. No more than 25 percent of the Reservation available from 12 noon through 9:59 p.m. will be made available to Public Charter operations under this paragraph.

(1) The Public Charter operator may request a reservation up to six months in advance of the date of the flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591. Submissions may be made via facsimile to (202) 267-7277 or by e-mail to: 7-awa-slotadmin@faa.gov.

(2) The Public Charter operator must certify that its prospectus has been accepted by the Department of Transportation in accordance with 14 CFR part 380.

(3) The Public Charter operator must identify the call sign/flight number or aircraft registration number of the direct Air Carrier, the date and time of the proposed operation(s), the airport served immediately prior to or after JFK or Newark, aircraft type, and the nature of the operation (e.g., ferry or passenger). Any changes to an approved Reservation must be approved in advance by the Slot Administration Office.

(4) If Reservations under paragraph (d)(1) of this section have already been assigned, the Public Charter Operator may request a Reservation under paragraph (a) of this section.

(e) The filing of a request for a Reservation does not constitute the filing of an IFR flight plan as required by regulation. The IFR flight plan may be filed only after the Reservation is obtained, must include the Reservation number in the "Remarks" section, and must be filed in accordance with FAA regulations and procedures.

(f) Air Traffic Control will accommodate declared emergencies without regard to Reservations. Non-emergency flights in direct support of

national security, law enforcement, military aircraft operations, or public-use aircraft operations may be accommodated above the Reservation limits with the prior approval of the Vice President, System Operations Services, Air Traffic Organization. Procedures for obtaining the appropriate waiver will be available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(g) Notwithstanding the limits in paragraph (b) of this section, if the Air Traffic Organization determines that air traffic control, weather and capacity conditions are favorable and significant delay is unlikely, the FAA may determine that additional Reservations may be accommodated for a specific time period. Unused Slots may also be made available temporarily for unscheduled operations. Reservations for additional operations must be obtained through the ARO.

(h) Reservations may not be bought, sold or leased.

§ 93.172 Reporting requirements.

(a) No later than September 1 for the summer scheduling season and February 1 for the winter scheduling season, each Carrier holding a Common Slot or Limited Slot must submit an interim report of Slot usage for each day of the applicable scheduling season. No later than 30 days after the last day of the applicable scheduling season, each Carrier holding a Common Slot or Limited Slot must submit a final report of the completed operations for each day of the entire scheduling season.

(b) Such reports, in a format acceptable to the FAA, must contain the following information for each Common Slot or Limited Slot:

(1) The Slot number, time, and arrival or departure designation;

(2) The operating Carrier;

(3) The date and time of each of the operations conducted pursuant to the Slot, including the flight number and origin/destination; and

(4) The aircraft type identifier.

(c) The FAA may withdraw the Slot of any Carrier that does not meet the reporting requirements of paragraph (a) of this section.

§ 93.173 Administrative provisions.

(a) Each Slot shall be assigned a number for administrative convenience.

(b) The FAA will assign priority numbers by random lottery for Common Slots and Limited Slots at JFK and Newark. Each Common Slot and Limited Slot will be assigned a withdrawal priority number, and the 30-minute time period for the Common Slot or Limited Slot, frequency, and the arrival or departure designation.

(c) If the FAA determines that operations need to be reduced for operational reasons, the lowest assigned priority number Common Slot or Limited Slot will be the last withdrawn.

(d) Any Slot available on a temporary basis may be assigned by the FAA to a Carrier on a non-permanent, first-come, first-served basis subject to permanent assignment under this subpart. Any remaining Slots may be made available for unscheduled operations on a non-permanent basis and will be assigned under the same procedures applicable to other operating Reservations.

(e) All transactions under this subpart must be in a written or electronic format approved by the FAA.

Proposed Amendment—Alternative 2

3. Subparts N and O are added to read as follows:

Subpart N—John F. Kennedy International Airport Traffic Rules

Sec.

- 93.161 Applicability.
- 93.162 Definitions.
- 93.163 Slots for scheduled arrivals and departures.
- 93.164 Categories of slots.
- 93.165 Initial assignment of slots.
- 93.166 Assignment of new or returned slots.
- 93.167 Reversion and Withdrawal of Slots.
- 93.168 Sublease and transfer of slots.
- 93.169 One-for-one trade of slots.
- 93.170 Minimum usage requirements.
- 93.171 Unscheduled operations.
- 93.172 Reporting requirements.
- 93.173 Administrative provisions.

Subpart O—Newark Liberty International Airport Traffic Rules

- 93.181 Applicability.
- 93.182 Definitions.
- 93.183 Slots for scheduled arrivals and departures.
- 93.184 Categories of slots.
- 93.185 Initial assignment of slots.
- 93.186 Assignment of new or returned slots.
- 93.187 Reversion and withdrawal of slots.
- 93.188 Sublease and transfer of slots.
- 93.189 One-for-one trade of slots.
- 93.190 Minimum usage requirements.
- 93.191 Unscheduled operations.
- 93.192 Reporting requirements.
- 93.193 Administrative provisions.

§ 93.161 Applicability.

(a) This subpart prescribes the air traffic rules for the arrival and departure of aircraft used for scheduled and unscheduled service, other than helicopters, at John F. Kennedy International Airport (JFK).

(b) This subpart also prescribes procedures for the assignment, transfer, sublease and withdrawal of Slots issued by the FAA for scheduled operations at JFK.

(c) The provisions of this subpart apply to JFK during the hours of 6 a.m. through 10:59 p.m., Eastern Time. No

person shall operate any scheduled arrival or departure into or out of JFK during such hours without first obtaining a Slot in accordance with this subpart. No person shall conduct an Unscheduled Operation to or from JFK during such hours without first obtaining a Reservation.

(d) A U.S. Air Carrier conducting operations solely under another Carrier's marketing control with unified inventory control shall not be considered a separate Carrier for purposes of this subpart.

(e) The Slots assigned under this subpart terminate at 11 p.m. on March 30, 2019.

§ 93.162 Definitions.

For purposes of this subpart, the following definitions apply:

Airport Reservation Office (ARO) is an operational unit of the FAA's David J. Hurley Air Traffic Control System Command Center. It is responsible for the administration of reservations for unscheduled operations at JFK.

Baseline Operations are those common slots held by a carrier on [final rule effective date], that do not exceed 20 operations per day.

Carrier is a U.S. or foreign air carrier with authority to conduct scheduled service under Parts 121, 129, or 135 of this Chapter and the appropriate economic authority for scheduled service under 14 CFR chapter II and 49 U.S.C. chapter 411.

Common Slot (C-slot) is a slot that is assigned by the FAA as a lease under its cooperative agreement authority for the length of this rule.

Enhanced Computer Voice Reservation System (e-CVRS) is the system used by the FAA to make arrival and/or departure reservations for unscheduled operations at JFK and other designated airports.

Limited Slot (L-slot) is a slot operated every day, the lease for which must be transferred to another carrier by the holder of the limited slot as an unrestricted slot.

New Entrant is any carrier that is administratively allocated a total of 8 or fewer slots at JFK during controlled hours at any point during the duration of the rule.

Public Charter is defined in 14 CFR 380.2 as a one-way or roundtrip charter flight to be performed by one or more direct air carriers that is arranged and sponsored by a public charter operator.

Public Charter Operator is defined in 14 CFR 380.2 as a U.S. or foreign public charter operator.

Reservation is an authorization received by a carrier or other operator of an aircraft, excluding helicopters, in

accordance with procedures established by the FAA to operate an unscheduled arrival or departure on a particular day of the week during a specific 30-minute period.

Scheduled Operation is the arrival or departure segment of any operation regularly conducted by a carrier between JFK and another point regularly served by that carrier.

Slot is the operational authority assigned by the FAA to a carrier to conduct one scheduled arrival or departure operation at JFK on a particular day of the week during a specific 30-minute period.

Summer Scheduling Season begins on the last Sunday of March.

Unrestricted Slot (U-slot) is a slot that is awarded to another carrier by the holder of a limited slot pursuant to the mandatory lease transfer provisions of this subpart.

Unscheduled Operation is an arrival or departure segment of any operation that is not regularly conducted by a carrier or other operator of an aircraft, excluding helicopters, between JFK and another service point. The following types of carrier operations shall be considered unscheduled operations for the purposes of this subpart: public, on-demand, and other charter flights; hired aircraft service; extra sections of scheduled flights; ferry flights; and other non-passenger flights.

Winter Scheduling Season begins on the last Sunday in October.

§ 93.163 Slots for scheduled arrivals and departures.

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person shall operate any scheduled arrival or departure into or out of JFK during such hours without first obtaining a Slot in accordance with this subpart.

(b) Except as otherwise established by the FAA under paragraph (c) of this section, the number of Slots shall be limited to no more than eighty-one (81) per hour at JFK. The number of Slots may not exceed 44 in any 30-minute period, and 81 in any 60-minute period. The number of arrival and departure Slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

(c) Notwithstanding paragraph (b) of this section, the Administrator may increase the number of Slots based on a review of the following:

- (1) The number of delays;
- (2) The length of delays;
- (3) On-time arrivals and departures;
- (4) The number of actual operations;

(5) Runway utilization and capacity plans; and

(6) Other factors relating to the efficient management of the National Airspace System.

§ 93.164 Categories of slots.

(a) *General.* Each Slot shall be designated as a Common Slot, Limited Slot or Unrestricted Slot and shall be assigned to the Carrier under a lease agreement. A lease for a Common or Limited Slot shall be awarded via a cooperative agreement. A lease for an Unrestricted Slot shall be awarded via an auction.

(b) Common Slots.

(1) All Slots within any Carrier's Baseline Operations, as determined on [final rule effective date], shall be designated as Common Slots.

(2) Twenty percent of the Slots at JFK on [final rule effective date] not otherwise designated as Common Slots under paragraph (b) (1) of this section shall be designated as Limited Slots. All other Slots shall be designated as Common Slots.

(c) *Limited Slots.* Those Slots assigned to a Carrier subject to return to the FAA under § 93.165(c) shall be designated as Limited Slots until they are transferred to another Carrier under those provisions. A Carrier may continue to use a Limited Slot that has reverted to the FAA until reassigned to another Carrier as an Unrestricted Slot.

(1) Each Carrier with a total number of daily operations at JFK in excess of its Baseline Operations will be notified by [final rule effective date] how many of its remaining Slots will be classified as Limited Slots pursuant to paragraphs (c)(2) and (3) of this section.

(2) A Carrier shall designate 50 percent of its Limited Slots. The Carrier must notify the FAA of its determination by [date 10 days after the final rule effective date].

(3) The FAA will designate the remaining Limited Slots, initially excluding those hours in which two or more Slots have been designated as Limited Slots by the Carriers.

(4) No later than [date 20 days after the final rule effective date], the FAA will publish a list of all Limited Slots and the dates upon which they will expire.

(d) *Unrestricted Slots.* Unrestricted Slots are Slots acquired by a Carrier through a lease with the FAA awarded via an auction. Unrestricted Slots are not subject to withdrawal by the FAA.

§ 93.165 Initial assignment of slots.

(a) Except as provided for under paragraphs (b) and (c) of this section, any Carrier allocated operating rights

under the Order limiting operations at JFK, as evidenced by the FAA's records, will be assigned corresponding Slots in 30-minute periods consistent with the limits under § 93.163(b), and its summer and winter season schedules as approved by the FAA. If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned Slots within the same hour to meet the 30-minute limits under § 93.163(b). The FAA Vice President, System Operations Services, is the final decisionmaker for determinations under this section.

(b) If a Carrier was allocated operating rights under the Order limiting operations at JFK but the operating rights were held by another Carrier, then the corresponding Slots will be assigned to the Carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) Starting [date 35 days after the effective date] and every year thereafter through 2013, one-fifth of the total number of Limited Slots identified on [date 20 days after the effective date] shall revert to the FAA in accordance with the schedule published under § 93.164(c)(4) and be auctioned as Unrestricted Slots by the FAA and subsequently transferred to another Carrier, effective no later than the next Summer Scheduling Season.

(1) The auction shall be blind, and only cash may be bid.

(2) The holder of a Limited Slot may not bid on its own Slots.

(3) The FAA shall pay to the holder of the Limited Slot all proceeds from the transaction following deduction of the FAA's expenses for conducting the auction.

(4) The auction shall be conducted by the FAA, which will dictate all procedures related to the auction, including but not limited to the requirement that the Carrier may not specify a minimum bid price.

(5) In the event no Carrier bids on the Slot, the FAA will retire it until the next auction.

(6) The Carrier holding a Limited Slot will be allowed to use the Slot until the first day of the next Summer Scheduling Season.

§ 93.166 Assignment of new or returned slots.

(a) This section describes the process by which the FAA assigns new Slots, as well as Slots returned to the FAA pursuant to the provisions of § 93.170. These Slots will be assigned by the FAA to requesting Carriers for the Summer and Winter Scheduling Seasons.

(b) Requests for the new Slots or returned Slots or both must be

submitted to the Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591 (Facsimile: (202) 267-7277; e-mail: 7-awa-slotadmin@faa.gov), by the deadline as published by the FAA in a **Federal Register** notice for each Summer and Winter Scheduling Season. The requesting Carrier must submit its entire schedule at JFK for the particular season, noting which requests are in addition to, or changes from, the previous corresponding season at the respective airports.

(c) Before assigning new or returned Slots under this section, the FAA will first accommodate Carrier requests to re-time Slots for operational reasons or to bring the flight time closer to the time originally requested by the applicant Carrier in previous corresponding seasons, as reflected in FAA records.

(d) After accommodating Carrier requests for re-timing of Slots, the FAA will assign 50% of the new Slots and returned Slots to New Entrants, unless requests by New Entrants constitute fewer than 50% of available Slots.

(e) With the remaining available Slots, if all requests for Slots under this section cannot be accommodated, the FAA will give priority to requests to introduce year-round service or to extend an existing operation to a year-round operation.

(f) Thereafter, the FAA will assign Slots considering all relevant factors including:

(1) The effective period of operation;

(2) The extent and regularity of intended use of a Slot;

(3) Schedule constraints of Carriers requesting Slots.

§ 93.167 Reversion and withdrawal of slots.

(a) This section does not apply to Unrestricted Slots.

(b) A Carrier's Common Slots or Limited Slots revert back to the FAA 30 days after the Carrier has ceased all operations at JFK for any reasons other than a strike.

(c) The FAA may re-time, withdraw, or temporarily suspend Common Slots and Limited Slots at any time to fulfill operational needs.

(d) Common Slots and Limited Slots will be withdrawn in accordance with the priority list established under § 93.173 and international obligations.

(e) Except as otherwise provided in paragraph (a) of this section, the FAA will notify an affected Carrier before withdrawing or temporarily suspending a Common Slot or Limited Slot and specify the date by which operations under the Common Slot or Limited Slot

must cease. The FAA will provide at least 45 days' notice unless otherwise required by operational needs.

(f) Any Common Slot or Limited Slot that is temporarily withdrawn under this paragraph will be reassigned, if at all, only to the Carrier from which it was withdrawn, provided the Carrier continues to conduct Scheduled Operations at JFK.

§ 93.168 Sublease and transfer of slots.

(a) A Carrier may sublease its Slots to another Carrier in accordance with this section and subject to the provisions of the Carrier's lease agreement with the FAA.

(b) A Carrier must provide notice to the FAA to sublease a Slot. Such notice must contain: the Slot number and time, effective dates and, if appropriate, the duration of the lease. The Carrier may also provide the FAA with a minimum bid price.

(c) The FAA will post a notice of the offer to sublease the Slot and relevant details on the FAA Web site at <http://www.faa.gov>. An opening date, closing date and time by which bids must be received will be provided.

(d) Upon consummation of the transaction, written evidence of each Carrier's consent to sublease must be provided to the FAA, as well as all bids received and the terms of the sublease, including but not limited to:

(1) The names of all bidders and all parties to the transaction;

(2) The offered and final length of the sublease;

(3) The consideration offered by all bidders and provided by the sublessee.

(e) The Slot may not be used until the conditions of paragraph (d) of this section have been met, and the FAA provides notice of its approval of the sublease.

(f) Slots may be transferred among a U.S. Air Carrier and another Carrier that conducts operations at JFK solely under the transferring Carrier's marketing control, including the entire inventory of the flight. Each party to such transfer must provide written evidence of its consent to the transfer and the FAA must confirm and approve these transfers in writing prior to the effective date of the transaction. However, the FAA will approve transfers under this paragraph up to five business days after the actual operation to accommodate operational disruptions that occur on the same day of the scheduled operation. The FAA Vice President, System Operations Services, is the final decision-maker for any determinations under this section.

(g) A Carrier wishing to sublease a Slot via an FAA auction, rather than

pursuant to this section, may do so. The Carrier shall retain the proceeds and the Slot shall retain the same designation that it had prior to the Carrier placing it up for auction.

§ 93.169 One-for-one trade of slots.

(a) A Carrier may trade a Slot with another Carrier on a one-for-one basis.

(b) Written evidence of each Carrier's consent to the trade must be provided to the FAA.

(c) Each recipient of the trade may not use the acquired Slot until written confirmation has been received from the FAA.

(d) Carriers participating in a one-for-one trade must certify to the FAA that no consideration or promise of consideration was provided by either party to the trade.

§ 93.170 Minimum usage requirements.

(a) This section does not apply to Unrestricted Slots.

(b) Any Common Slot or Limited Slot included in a summer or winter season schedule approved by the FAA that is not used at least 80 percent of the time during the period for which it is assigned will be withdrawn by the FAA.

(c) Paragraph (b) of this section does not apply to the first 90-day period after assignment of a Common Slot or Limited Slot through a sublease.

(d) The FAA may waive the requirements of paragraph (b) of this section in the event of a highly unusual and unpredictable condition which is beyond the control of the Carrier and which affects Carrier operations for a period of five or more consecutive days. Examples of conditions which could justify a waiver under this paragraph are weather conditions that result in the restricted operation of the airport for an extended period of time or the grounding of an aircraft type.

(e) The FAA will treat as used any Common Slot or Limited Slot held by a Carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Sunday of January.

§ 93.171 Unscheduled operations.

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person may operate an aircraft other than a helicopter to or from JFK unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO) or in the case of public charters, in accordance with the procedures in paragraph (d) of this section. Requests for Reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to

or departure from JFK. Additional information on procedures for obtaining a Reservation is available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Reservations, including those assigned to Public Charter operations under paragraph (d) of this section, will be available to be assigned by the ARO on a 30-minute basis at JFK as follows:

(1) Two Reservations per hour

between 6 a.m. and 1:59 p.m. and

between 10 p.m. and 10:59 p.m.

(2) One Reservation per hour between 2 p.m. and 10:59 p.m.

(c) The ARO will receive and process all Reservation requests for unscheduled arrivals and departures at JFK.

Reservations are assigned on a "first-come, first-served" basis determined by the time the request is received at the ARO. Reservations must be cancelled if they will not be used as assigned.

(d) One Reservation per hour will be available for assignment to Public Charter operations prior to the 72-hour Reservation window in paragraph (a) of this section. No more than 25 percent of the reservations from 12 noon through 9:59 p.m. will be made available for Public Charter operations under this paragraph.

(1) The Public Charter Operator may request a reservation up to six months in advance of date of the flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591. Submissions may be made via facsimile to (202) 267-7277 or by e-mail to: 7-awa-slotadmin@faa.gov.

(2) The Public Charter operator must certify that its prospectus has been accepted by the Department of Transportation in accordance with 14 CFR part 380.

(3) The Public Charter operator must identify the call sign/flight number or aircraft registration number of the direct Air Carrier, the date and time of the proposed operations(s), the airport served immediately prior to or after JFK, aircraft type, and the nature of the operations (e.g., ferry, passenger). Any changes to an approved Reservation must be approved in advance by the Slot Administration Office.

(4) If Reservations under paragraph (d)(1) of this section have already been assigned, the Public Charter Operator may request a Reservation under paragraph (a) of this section.

(e) The filing of a request for a Reservation does not constitute the filing of an IFR flight plan as required by regulation. The IFR flight plan may be filed only after the Reservation is obtained, must include the Reservation

number in the "Remarks" section, and must be filed in accordance with FAA regulations and procedures.

(f) Air Traffic Control will accommodate declared emergencies without regard to Reservations. Non-emergency flights in direct support of national security, law enforcement, military aircraft operations, or public-use aircraft operations may be accommodated above the Reservation limits with the prior approval of the Vice President, System Operations Services, Air Traffic Organization. Procedures for obtaining the appropriate waiver will be available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(g) Notwithstanding the limits in paragraph (b) of this section, if the Air Traffic Organization determines that air traffic control, weather and capacity conditions are favorable and significant delay is unlikely, the FAA may determine that additional Reservations may be accommodated for a specific time period. Unused Slots may also be made available temporarily for unscheduled operations. Reservations for additional operations must be obtained through the ARO.

(h) Reservations may not be bought, sold or leased.

§ 93.172 Reporting requirements.

(a) No later than September 1 for the Summer Scheduling season and February 1 for the Winter Scheduling Season, each Carrier holding a Common Slot or Limited Slot must submit an interim report of Slot usage for each day of the applicable scheduling season. No later than 30 days after the last day of the applicable scheduling season, each Carrier holding a Common Slot or Limited Slot must submit a final report of the completed operations for each day of the entire scheduling season.

(b) Such reports, in a format acceptable to the FAA, must contain the following information for each Common Slot or Limited Slot:

- (1) The Slot number, time, and arrival or departure designation;
- (2) The operating Carrier;
- (3) The date and time of each of the operations conducted pursuant to the Slot, including the flight number and origin/destination; and
- (4) The aircraft type identifier.

(c) The FAA may withdraw the Slot of any Carrier that does not meet the reporting requirements of paragraph (a) of this section.

§ 93.173 Administrative provisions.

- (a) Each Slot shall be assigned a number for administrative convenience.
- (b) The FAA will assign priority numbers by random lottery for Common

Slots and Limited Slots at JFK. Each Common Slot and Limited Slot will be assigned a withdrawal priority number, and the 30-minute time period for the Common Slot or Limited Slot, frequency, and the arrival or departure designation.

(c) If the FAA determines that operations need to be reduced for operational reasons, the lowest assigned priority number Common Slot or Limited Slot will be the last withdrawn.

(d) Any Slot available on a temporary basis may be assigned by the FAA to a Carrier on a non-permanent, first-come, first-served basis subject to permanent assignment under this subpart. Any remaining Slots may be made available for unscheduled operations on a non-permanent basis and will be assigned under the same procedures applicable to other operating Reservations.

(e) All transactions under this subpart must be in a written or electronic format approved by the FAA.

Subpart O—Newark Liberty International Airport Traffic Rules

§ 93.181 Applicability.

(a) This subpart prescribes the air traffic rules for the arrival and departure of aircraft used for scheduled and unscheduled service, other than helicopters, at Newark Liberty International Airport (Newark).

(b) This subpart also prescribes procedures for the assignment, transfer, sublease and withdrawal of Slots issued by the FAA for scheduled operations at Newark.

(c) The provisions of this subpart apply to Newark during the hours of 6 a.m. through 10:59 p.m., Eastern Time. No person shall operate any scheduled arrival or departure into or out of Newark during such hours without first obtaining a Slot in accordance with this subpart. No person shall conduct an Unscheduled Operation to or from Newark during such hours without first obtaining a Reservation.

(d) A U.S. Air Carrier conducting operations solely under another Carrier's marketing control with unified inventory control shall not be considered as a separate Carrier for purposes of this rule.

(e) The Slots assigned under this subpart terminate at 11 p.m. on March 30, 2019.

§ 93.182 Definitions.

For purposes of this subpart, the following definitions apply:

Airport Reservation Office (ARO) is an operational unit of the FAA's David J. Hurley Air Traffic Control System Command Center. It is responsible for

the administration of reservations for unscheduled operations at Newark.

Baseline Operations are those Common Slots held by a carrier on [final rule effective date], that do not exceed 20 operations per day.

Carrier is a U.S. or foreign air carrier with authority to conduct scheduled service under Parts 121, 129, or 135 of this Chapter and the appropriate economic authority for scheduled service under 14 CFR chapter II and 49 U.S.C. chapter 411.

Common Slot (C-slot) is a slot that is assigned by the FAA as a lease under its cooperative agreement authority for the length of this rule.

Enhanced Computer Voice Reservation System (e-CVRS) is the system used by the FAA to make arrival and/or departure reservations for unscheduled operations at Newark and other designated airports.

Limited Slot (L-slot) is a slot operated every day, the lease for which expires prior to the expiration of this rule for subsequent award by the FAA as an unrestricted slot.

New Entrant is any carrier that is administratively allocated a total of 8 or fewer slots at either JFK or Newark during controlled hours at any point during the duration of the rule.

Public Charter is defined in 14 CFR 380.2 as a one-way or roundtrip charter flight to be performed by one or more direct air carriers that is arranged and sponsored by a public charter operator.

Public Charter Operator is defined in 14 CFR 380.2 as a U.S. or foreign public charter operator.

Reservation is an authorization received by a carrier or other operator of an aircraft, excluding helicopters, in accordance with procedures established by the FAA to operate an unscheduled arrival or departure on a particular day of the week during a specific 30-minute period.

Scheduled Operation is the arrival or departure segment of any operation regularly conducted by a carrier between Newark and another point regularly served by that carrier.

Slot is the operational authority assigned by the FAA to a carrier to conduct one scheduled arrival or departure operation at Newark on a particular day of the week during a specific 30-minute period.

Summer Scheduling Season begins on the last Sunday of March.

Unrestricted Slot (U-slot) is a slot that is awarded to a carrier by the FAA via the auction of a lease.

Unscheduled Operation is an arrival or departure segment of any operation that is not regularly conducted by a carrier or other operator of an aircraft,

excluding helicopters, between Newark and another service point. The following types of carrier operations shall be considered unscheduled operations for the purposes of this rule: public, on-demand, and other charter flights; hired aircraft service; extra sections of scheduled flights; ferry flights; and other non-passenger flights.

Winter Scheduling Season begins on the last Sunday in October.

§ 93.183 Slots for scheduled arrivals and departures.

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person shall operate any scheduled arrival or departure into or out of Newark without first obtaining a Slot in accordance with this subpart.

(b) Except as otherwise established by the FAA under paragraph (c) of this section, the number of Slots shall be limited to no more than eighty-one (81) period at Newark. The number of Slots may not exceed 44 in any 30-minute period and 81 in any 60-minute period. The number of arrival and departure Slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

(c) Notwithstanding paragraph (b) of this section, the Administrator may increase the number of Slots based on a review of the following:

- (1) The number of delays;
- (2) The length of delays;
- (3) On-time arrivals and departures;
- (4) The number of actual operations;
- (5) Runway utilization and capacity plans; and
- (6) Other factors relating to the efficient management of the National Airspace System.

§ 93.184 Categories of slots.

(a) *General.* Each Slot shall be designated as a Common Slot, Limited Slot or Unrestricted Slot and shall be assigned to the Carrier under a lease agreement. A lease for a Common or Limited Slot shall be awarded via a cooperative agreement. A lease for an Unrestricted Slot shall be awarded via an auction.

(b) *Common Slots.*

(1) All Slots within any Carrier's Baseline Operations, as determined on [final rule effective date], shall be designated as Common Slots.

(2) Ten percent of the Slots at Newark on [final rule effective date] not otherwise designated as Common Slots under paragraph (b) (1) of this section shall be designated as Limited Slots. All other Slots shall be designated as Common Slots.

(c) *Limited Slots.* Those Slots assigned to a Carrier subject to return to the FAA under § 93.185(c) shall be designated as Limited Slots until the date of their reassignment by the FAA as Unrestricted Slots. A Carrier may continue to use a Limited Slot that has reverted to the FAA until reassigned to another Carrier as an Unrestricted Slot.

(1) Each Carrier with a total number of daily operations at Newark in excess of its Baseline Operations will be notified by [final rule effective date] how many of its remaining Slots will be designated as Limited Slots pursuant to paragraphs (c)(2) and (3) of this section.

(2) A Carrier shall designate 50 percent of its Limited Slots. The Carrier must notify the FAA of its determination by [date 10 days after the final rule effective date].

(3) The FAA will designate the remaining Limited Slots, initially excluding those hours in which two or more Slots have been classified as Limited Slots by the Carriers.

(4) No later than [date 20 days after the final rule effective date], the FAA will publish a list of all Limited Slots and the dates upon which they will expire.

(d) *Unrestricted Slots.* Unrestricted Slots are Slots acquired by a Carrier through a lease with the FAA awarded via an auction. Unrestricted Slots are not subject to withdrawal by the FAA.

§ 93.185 Initial assignment of slots.

(a) Except as provided for under paragraphs (b) and (c) of this section, any Carrier allocated operating rights under the Order limiting operations at Newark as evidenced by the FAA's records, will be assigned corresponding Slots in 30-minute periods consistent with the limits under § 93.183(b) and its summer and winter season schedules as approved by the FAA. If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned Slots within the same hour to meet the 30-minute limits under § 93.183(b). The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this section.

(b) If a Carrier was allocated operating rights under the Order limiting operations at Newark, but the operating rights were held by another Carrier, then the corresponding Slots will be assigned to the Carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) Starting [date 35 days after the effective date] and every year thereafter through 2013, one-fifth of the total number of Limited Slots shall revert to the FAA in accordance with the

schedule published under § 93.164(c)(4) and be auctioned as Unrestricted Slots by the FAA. Any Slot receiving no responsive bids will be retired until the next auction. An affected Carrier will be allowed to use the Limited Slot until the effective date of an award to a Carrier as an Unrestricted Slot.

§ 93.186 Assignment of new or returned slots.

(a) This section describes the process by which the FAA assigns new Slots, as well as Slots returned to the FAA pursuant to the provisions of § 93.190. These Slots will be assigned by the FAA to requesting Carriers for the Summer and Winter Scheduling Seasons.

(b) Requests for the new Slots or returned Slots or both must be submitted to the Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591 (Facsimile: (202) 267-7277; e-mail: 7-awa-slotadmin@faa.gov), by the deadline as published by the FAA in a **Federal Register** notice for each Summer and Winter Scheduling Season. The requesting Carrier must submit its entire schedule at Newark for the particular season, noting which requests are in addition to, or changes from, the previous corresponding season at the respective airports.

(c) Before assigning new or returned Slots under this section, the FAA will first accommodate Carrier requests to retime Slots for operational reasons or to bring the flight time closer to the time originally requested by the applicant Carrier in previous corresponding seasons, as reflected in FAA records.

(d) After accommodating Carrier requests for retiming of Slots, the FAA will assign 50% of the new Slots and returned Slots to New Entrants, unless requests by New Entrants constitute fewer than 50% of available Slots.

(e) With the remaining available Slots, if all requests for Slots under this section cannot be accommodated, the FAA will give priority to requests to introduce year-round service or to extend an existing operation to a year-round operation.

(f) Thereafter, the FAA will assign Slots considering all relevant factors including:

- (1) The effective period of operation;
- (2) The extent and regularity of intended use of a Slot;
- (3) Schedule constraints of Carriers requesting Slots.

§ 93.187 Reversion and withdrawal of slots.

(a) This section does not apply to Unrestricted Slots.

(b) A Carrier's Common Slots or Limited Slots revert back to the FAA 30 days after the Carrier has ceased all operations at Newark for any reasons other than a strike.

(c) The FAA may retime, withdraw, or temporarily suspend Common Slots and Limited Slots at any time to fulfill operational needs.

(d) Common Slots and Limited Slots will be withdrawn in accordance with the priority list established under § 93.193 and international obligations.

(e) Except as otherwise provided in paragraph (a) of this section, the FAA will notify an affected Carrier before withdrawing or temporarily suspending a Common Slot or Limited Slot and specify the date by which operations under the Common Slot or Limited Slot must cease. The FAA will provide at least 45 days' notice unless otherwise required by operational needs.

(f) Any Common Slot or Limited Slot that is temporarily withdrawn under this paragraph will be reassigned, if at all, only to the Carrier from which it was withdrawn, provided the Carrier continues to conduct Scheduled Operations at the airport.

§ 93.188 Sublease and transfer of slots.

(a) A Carrier may sublease its Slots to another Carrier in accordance with this section and subject to the provisions of the Carrier's lease agreement with the FAA.

(b) A Carrier must provide notice to the FAA to sublease a Slot. Such notice must contain: the Slot number and time, effective dates and, if appropriate, the duration of the lease. The Carrier may also provide the FAA with a minimum bid price.

(c) The FAA will post a notice of the offer to sublease the Slot and relevant details on the FAA Web site at <http://www.faa.gov>. An opening date, closing date and time by which bids must be received will be provided.

(d) Upon consummation of the transaction, written evidence of each Carrier's consent to sublease must be provided to the FAA, as well as all bids received and the terms of the sublease, including but not limited to:

(1) The names of all bidders and all parties to the transaction;

(2) The offered and final lengths of the sublease;

(3) The consideration offered by all bidders and provided by the sublessee.

(e) The Slot may not be used until the conditions of paragraph (d) of this section have been met, and the FAA provides notice of its approval of the sublease.

(f) Slots may be transferred among a U.S. Air Carrier and another Carrier that

conducts operations at Newark solely under the transferring Carrier's marketing control, including the entire inventory of the flight. Each party to such transfer must provide written evidence of its consent to the transfer and the FAA must confirm and approve these transfers in writing prior to the effective date of the transaction.

However, the FAA will approve transfers under this paragraph up to five business days after the actual operation to accommodate operational disruptions that occur on the same day of the scheduled operation. The FAA Vice President, System Operations Services is the final decision-maker for any determinations under this section.

(g) A Carrier wishing to sublease a Slot via an FAA auction, rather than pursuant to this section, may do so. The Carrier shall retain the proceeds and the Slot shall retain the same designation that it had prior to the Carrier placing it up for auction.

§ 93.189 One-for-one trade of slots.

(a) A Carrier may trade a Slot with another Carrier on a one-for-one basis.

(b) Written evidence of each Carrier's consent to the trade must be provided to the FAA.

(c) Each recipient of the trade may not use the acquired Slot until written confirmation has been received from the FAA.

(d) Carriers participating in a one-for-one trade must certify to the FAA that no consideration or promise of consideration was provided by either party to the trade.

§ 93.190 Minimum usage requirements.

(a) This section does not apply to Unrestricted Slots.

(b) Any Common Slot or Limited Slot included in a summer or winter season schedule approved by the FAA that is not used at least 80 percent of the time during the period for which it is assigned will be withdrawn by the FAA.

(c) Paragraph (b) of this section does not apply to the first 90-day period after assignment of a Common Slot or Limited Slot through a sublease.

(d) The FAA may waive the requirements of paragraph (b) of this section in the event of a highly unusual and unpredictable condition which is beyond the control of the Carrier and which affects Carrier operations for a period of five or more consecutive days. Examples of conditions which could justify a waiver under this paragraph are weather conditions that result in the restricted operation of the airport for an extended period of time or the grounding of an aircraft type.

(e) The FAA will treat as used any Common Slot or Limited Slot held by a Carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Sunday of January.

§ 93.191 Unscheduled operations.

(a) During the hours of 6 a.m. through 10:59 p.m. Eastern Time, no person may operate an aircraft other than a helicopter to or from Newark unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO) or in the case of Public Charters, in accordance with the procedures in paragraph (d) of this section. Requests for Reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to or departure from Newark. Additional information on procedures for obtaining a Reservation is available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Reservations, including those assigned to Public Charter operations under paragraph (d) of this section, will be available to be assigned by the ARO on a 30-minute basis at Newark as follows:

(1) Two Reservations per hour between 6 a.m. and 11:59 a.m. and between 10 p.m. and 10:59 p.m.

(2) One Reservation per hour between 12 noon and 9:59 p.m.

(c) The ARO will receive and process all Reservation requests for unscheduled arrivals and departures at Newark. Reservations are assigned on a "first-come, first-served" basis determined by the time the request is received at the ARO. Reservations must be cancelled if they will not be used as assigned.

(d) One Reservation per hour will be available for assignment to Public Charter operations prior to the 72-hour Reservation window in paragraph (a) of this section. No more than 25 percent of the reservations available from 12 noon through 9:59 p.m. will be made available for Public Charter operations under this paragraph.

(1) The Public Charter Operator may request a reservation up to six months in advance of the date of the flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591. Submissions may be made via facsimile to (202) 267-7277 or by e-mail to: 7-awa-slotadmin@faa.gov.

(2) The Public Charter operator must certify that its prospectus has been accepted by the Department of

Transportation in accordance with 14 CFR part 380.

(3) The Public Charter operator must identify the call sign/flight number or aircraft registration number of the direct Air Carrier, the date and time of the proposed operation(s), the airport served immediately prior to or after Newark, aircraft type, and the nature of the operation (e.g., ferry, passenger). Any changes to an approved Reservation must be approved in advance by the Slot Administration Office.

(4) If Reservations under paragraph (d)(1) of this section have already been assigned, the Public Charter operator may request a Reservation under paragraph (a) of this section.

(e) The filing of a request for a Reservation does not constitute the filing of an IFR flight plan as required by regulation. The IFR flight plan may be filed only after the Reservation is obtained, must include the Reservation number in the "Remarks" section, and must be filed in accordance with FAA regulations and procedures.

(f) Air Traffic Control will accommodate declared emergencies without regard to Reservations. Non-emergency flights in direct support of national security, law enforcement, military aircraft operations, or public-use aircraft operations may be accommodated above the Reservation limits with the prior approval of the Vice President, System Operations Services, Air Traffic Organization. Procedures for obtaining the appropriate waiver will be available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(g) Notwithstanding the limits in paragraph (b) of this section, if the Air Traffic Organization determines that air traffic control, weather and capacity conditions are favorable and significant delay is unlikely, the FAA may determine that additional Reservations may be accommodated for a specific time period. Unused Slots may also be made available temporarily for unscheduled operations. Reservations for additional operations must be obtained through the ARO.

(h) Reservations may not be bought, sold or leased.

§ 93.192 Reporting requirements.

(a) No later than September 1 for the Summer Scheduling Season and February 1 for the Winter Scheduling Season, each Carrier holding a Common Slot or Limited Slot must submit an interim report of Slot usage for each day of the applicable scheduling season. No later than 30 days after the last day of the applicable scheduling season, each Carrier holding a Common Slot or Limited Slot must submit a final report of the completed operations for each day of the entire scheduling season.

(b) Such reports, in a format acceptable to the FAA, must contain the following information for each Common Slot or Limited Slot:

(1) The Slot number, time, and arrival or departure designation;

(2) The operating Carrier;

(3) The date and time of each of the operations conducted pursuant to the Slot, including the flight number and origin/destination; and

(4) The aircraft type identifier.

(c) The FAA may withdraw the Slot of any Carrier that does not meet the reporting requirements of paragraph (a) of this section.

§ 93.193 Administrative provisions.

(a) Each Slot shall be assigned a number for administrative convenience.

(b) The FAA will assign priority numbers by random lottery for Common Slots and Limited Slots at Newark. Each Common Slot and Limited Slot will be assigned a withdrawal priority number, and the 30-minute time period for the Common Slot or Limited Slot, frequency, and the arrival or departure designation.

(c) If the FAA determines that operations need to be reduced for operational reasons, the lowest assigned priority number Common Slot or Limited Slot will be the last withdrawn.

(d) Any Slot available on a temporary basis may be assigned by the FAA to a Carrier on a non-permanent, first-come, first-served basis subject to permanent assignment under this subpart. Any remaining Slots may be made available for unscheduled operations on a non-permanent basis and will be assigned under the same procedures applicable to other operating Reservations.

(e) All transactions under this subpart must be in a written or electronic format approved by the FAA.

Issued in Washington, DC, on May 15, 2008.

Nan Shellabarger,

Director of Aviation Policy and Plans.

[FR Doc. 08-1271 Filed 5-16-08; 12:00 pm]

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Part IV

Federal Trade Commission

16 CFR Part 316

**Definitions and Implementation Under
the CAN-SPAM Act; Final Rule**

FEDERAL TRADE COMMISSION**16 CFR Part 316**

[Project No. R411008]
RIN 3084-AA96

Definitions and Implementation Under the CAN-SPAM Act

AGENCY: Federal Trade Commission.

ACTION: Final Rule.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") issues its Statement of Basis and Purpose and final Discretionary Rule ("final Rule") pursuant to section 7711(a) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM" or "the Act"), which gives the FTC discretionary authority to "issue regulations to implement the provisions of [the] Act."

EFFECTIVE DATE: The provisions of the final Rule will become effective on July 7, 2008.

ADDRESSES: Requests for copies of the provisions of the Statement of Basis and Purpose and final Rule should be sent to: Public Records Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. Copies of these documents are also available at the Commission's Website: <http://www.ftc.gov>.

FOR FURTHER INFORMATION CONTACT: Janis Claire Kestenbaum, (202) 326-2798, and Sana Coleman Chriss, (202) 326-2249, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The final Rule: (1) Adds a definition of the term "person"; (2) modifies the term "sender" in those instances where a single email message contains advertisements for the products, services, or websites of multiple entities; (3) clarifies that a sender may comply with section 7704(a)(5)(A)(iii) of the Act by including in a commercial email message a post office box or private mailbox established pursuant to United States Postal Service regulations; and (4) clarifies that to submit a valid opt-out request, a recipient cannot be required to pay a fee, provide information other than his or her email address and opt-out preferences, or take any steps other than sending a reply email message or visiting a single page on an Internet website. This Statement of Basis and Purpose also explains the Commission's rationale for not adopting

other proposals contained in the Commission's May 12, 2005 Notice of Proposed Rulemaking ("NPRM"),¹ and addresses the application of CAN-SPAM to forward-to-a-"friend" emails and certain other categories of email messages identified in the NPRM.

STATEMENT OF BASIS AND PURPOSE**I. BACKGROUND***A. CAN-SPAM Act of 2003*

On December 16, 2003, the President signed into law the CAN-SPAM Act.² The Act, which took effect on January 1, 2004, imposes a series of new requirements on the use of commercial electronic mail ("email") messages. In addition, the Act gives federal civil and criminal enforcement authorities new tools to combat commercial email that is unwanted by the recipient and/or deceptive. The Act also allows state attorneys general to enforce its civil provisions, and creates a private right of action for providers of Internet access service.

In enacting the CAN-SPAM Act, Congress made the following determinations of public policy, set forth in section 7701(b) of the Act: (1) there is a substantial government interest in regulation of commercial email on a nationwide basis; (2) senders of commercial email should not mislead recipients as to the source or content of such mail; and (3) recipients of commercial email have a right to decline to receive additional commercial electronic mail from the same source.

Based on these policy determinations, Congress, in sections 7704(a) and (b) of the CAN-SPAM Act, outlawed certain commercial email acts and practices. Section 7704(a)(1) of the Act prohibits transmission of any email that contains false or misleading header or "from" line information. Section 7704(a)(2) prohibits the transmission of commercial email messages with false or misleading subject headings. Section 7704(a)(3) requires that a commercial email message contain a functioning return email address or similar Internet-based mechanism for recipients to use to "opt out" of receiving future commercial email messages. Section 7704(a)(4) prohibits the sender, or others acting on the sender's behalf, from initiating a commercial email to a recipient more than ten business days after the recipient has opted out. Section 7704(a)(5) prohibits the initiation of a

commercial email message unless it contains three disclosures: (1) clear and conspicuous identification that the message is an advertisement or solicitation; (2) clear and conspicuous notice of the opportunity to decline to receive further commercial email messages from the sender; and (3) a valid physical postal address of the sender. And section 7704(b) specifies four "aggravated violations" — practices that compound the available statutory damages when alleged and proven in combination with certain other CAN-SPAM violations.³

The Act authorizes the Commission to enforce violations of the Act in the same manner as an FTC trade regulation rule.⁴ Section 7706(f) authorizes the attorneys general of the states to enforce compliance with certain provisions of section 7704(a) of the Act by initiating enforcement actions in federal court, after serving prior written notice upon the Commission when feasible.⁵ CAN-SPAM also authorizes providers of Internet access service to bring a federal court action for violations of certain provisions of sections 7704(a), (b), and (d).⁶

B. Notice of Proposed Rulemaking

In its May 12, 2005 NPRM, the Commission proposed rule provisions on five topics: (1) defining the term "person," a term used throughout the Act, but not defined; (2) modifying the definition of "sender" to make it easier to determine which of multiple parties

³ 15 U.S.C. 7704(b). The four such practices set forth in the statute are: address harvesting; dictionary attacks; automated creation of multiple email accounts; and relaying or retransmitting through unauthorized access to a protected computer or network. The Act's provisions relating to enforcement by state attorneys general and providers of Internet access service create the possibility of increased statutory damages if a court finds a defendant has engaged in one of the practices specified in section 7704(b) while also violating section 7704(a). Specifically, sections 7706(f)(3)(C) and (g)(3)(C) permit a court to increase a statutory damages award up to three times the amount that would have been granted without the commission of an aggravated violation. Sections 7706(f)(3)(C) and (g)(3)(C) also provide for this heightened statutory damages calculation when a court finds that the defendant's violations of section 7704(a) were committed "willfully and knowingly."

⁴ Sections 7706(a) and (c) of the CAN-SPAM Act provide that a violation of the Act shall be treated as a violation of a rule issued under section 18(a)(1)(B) of the FTC Act, 15 U.S.C. 57a(a)(1)(B).

⁵ 15 U.S.C. 7706(f). Specifically, the state attorneys general may bring enforcement actions for violations of section 7704(a)(1), 7704(a)(2), or 7704(d). The states may also bring an action against any person who engages in a pattern or practice that violates section 7704(a)(3), (4), or (5).

⁶ 15 U.S.C. 7706(g). Section 7704(d) of the Act requires warning labels on commercial email messages containing sexually oriented material. 15 U.S.C. 7704(d). In April, 2004, the Commission promulgated its final rule regarding such labels. See 69 FR 21024 (Apr. 19, 2004); 16 CFR 316.4.

¹ 70 FR 25426.

² 15 U.S.C. 7701-7713.

advertising in a single email message must have its valid physical postal address included in the message and is responsible for honoring “opt-out” requests; (3) clarifying that Post Office boxes and private mailboxes established pursuant to United States Postal Service regulations constitute “valid physical postal addresses” within the meaning of the Act; (4) shortening from ten days to three days the time a sender may take before honoring a recipient’s opt-out request; and (5) clarifying that to submit a valid opt-out request, a recipient cannot be required to pay a fee, provide information other than his or her email address and opt-out preferences, or take any steps other than sending a reply email message or visiting a single page on an Internet website.⁷

In response to this NPRM, the Commission received 152 comments from email marketers and their associations, email recipients, and other interested parties.⁸ Based upon the entire record in this proceeding and the Commission’s law enforcement experience, the Commission hereby adopts final Rule provisions that are very similar, but not identical, to the proposed Rule provisions. As discussed in detail below, the adopted provisions are based upon the recommendations of commenters to make certain modifications in the proposed provisions, as well as the Commission’s anti-spam law enforcement experience. Commenters’ recommendations that the Commission has declined to adopt in its

final Rule are also identified, along with the Commission’s reasons for rejecting them.

II. DISCUSSION OF THE FINAL RULE

A. Section 316.2 — Definitions

Section 316.12,⁹ one of the Rule provisions previously adopted under CAN-SPAM, defines thirteen terms by reference to the corresponding sections of the Act that define those terms.¹⁰ The NPRM proposed modification of the previously-adopted definition of “sender” by adding a proviso to cover multiple sender scenarios. The NPRM also proposed adding definitions of “person” and “valid physical postal address.” All other definitions were to remain as adopted. While the NPRM did not propose any changes to the Act’s definition of “transactional or relationship message,” it posed a series of questions about the interpretation and potential expansion of this definition, and similarly requested comment on the application of the Act’s definitions of “sender” and “initiate” to forward-to-a-“friend” email campaigns.

1. Section 316.2(h) — Definition of “Person”

In the NPRM,¹¹ the Commission proposed adding a definition of “person,” a term used throughout the Act,¹² pursuant to its authority to “issue regulations to implement the provisions of this Act.”¹³ Under the definition proposed in the NPRM, which is identical to the definition contained in the Telemarketing Sales Rule, 16 CFR 310.2, the term “person” would mean “an individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.”

Seven of the eight commenters that addressed this issue supported the addition of the Commission’s proposed definition of “person,” opining that it would clarify the types of entities to which the Act applies.¹⁴ The sole

objection came from the Society for Human Resources Management (“SHRM”), which argued that unincorporated nonprofit associations should be excluded from the definition of “person” and, therefore, wholly exempt from CAN-SPAM.¹⁵ SHRM argued that, without such an exemption, the risk of liability under the Act could discourage the organization’s members from volunteering to serve in a leadership capacity.

Having considered the comments, the Commission adopts without modification the definition of “person” in the proposed Rule. The Commission believes that the addition of this definition will advance the implementation of the Act by clarifying that the term “person” is broadly construed and is not limited to a natural person. The Commission rejects the argument that there should be a blanket exemption for all messages sent by unincorporated nonprofit entities. As we have previously observed, CAN-SPAM does not set up a dichotomy between “commercial” and “nonprofit” messages.¹⁶ Accordingly, when nonprofit organizations send emails the primary purpose of which is the advertisement or promotion of a commercial product or service, recipients are entitled to the Act’s protections. In any event, as discussed below, *see infra* Part II.A.3.j., messages from an association to its members will often be “transactional or relationship messages” under section 7702(17) of the Act and thus not required to include a functioning Internet-based mechanism for consumers to use to opt out of receiving future commercial messages.¹⁷

2. Section 316.2(m) — Definition of “Sender”

Section 7702(16)(A) of CAN-SPAM defines “sender” as “a person who initiates [a commercial electronic mail]

modifying the definition of “person,” but, at bottom, its argument appears to relate to liability in the context of a multi-marketer email. The Commission thus has considered Adknowledge’s comment in connection with the definition of “sender,” below. *See infra* Part II.A.2.

¹⁵ See also ABA (noting that its comments on the ANPR asked the Commission to clarify that the term “person” should exclude associations and other tax-exempt nonprofit organizations with respect to their email sent in pursuit of their tax-exempt nonprofit purposes).

¹⁶ 69 FR 50091, 50100 (Aug. 13, 2004).

¹⁷ Section 7706(d) makes clear that the Commission has only the same jurisdiction and power under the Act as it has under the FTC Act, 15 U.S.C. 41, *et seq.* Consequently, the FTC lacks jurisdiction to enforce CAN-SPAM against any entity that is not “organized to carry on business for its own profit or that of its members.” 15 U.S.C. 44. States and providers of Internet access service can bring CAN-SPAM actions against nonprofits, however.

⁷ Prior to the NPRM, the Commission issued an Advance Notice of Proposed Rulemaking (“ANPR”), 69 FR 11776 (Mar. 11, 2004), soliciting comments on a number of issues raised by CAN-SPAM, including the interpretation of the term “primary purpose,” which the Commission addressed in a final Rule issued on January 19, 2005, codified at 16 CFR 316.3. In addition, the ANPR requested comment on the definitions of “transactional or relationship message” and “valid physical postal address,” the application of the Act to both multiple-marketer and forward-to-a-“friend” emails, the sufficiency of the ten-business-day opt-out period that had been set by the Act, the potential addition of new aggravated violations, and implementation of the Act’s provisions generally. (Two issues addressed in the NPRM and in this Statement of Basis and Purpose — the definition of “person” and the prohibition on charging a fee or imposing other requirements on recipients who wish to opt-out — were not addressed in the ANPR.) The ANPR also solicited comment on questions related to four Commission reports required to be submitted to Congress. The Commission received over 13,500 comments in response to the ANPR.

⁸ Approximately 93 of these comments were submitted by industry representatives, 56 were submitted by consumers, and 3 were submitted by privacy groups. Appendix A is a list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the NPRM. These comments are available on the Commission’s website at the following address: <http://www.ftc.gov/os/comments/canspam3/index.shtml>.

⁹ Because the final Rule contains several new provisions, the numbering of the Rule’s subsections has changed. All cites to the Rule in this Statement of Basis and Purpose are to the new, renumbered Rule provisions, unless otherwise stated.

¹⁰ The Commission adopted these definitions in the Adult Labeling Rulemaking proceeding under section 7704(d) of CAN-SPAM, which required the Commission to prescribe a mark to be included in commercial email containing sexually oriented material. 69 FR 21024 (Apr. 19, 2004). A fourteenth term, “character,” not defined in CAN-SPAM, was also defined in the Adult Labeling Rule. 16 CFR 316.2(b).

¹¹ NPRM, 70 FR at 25428.

¹² See, e.g., 15 U.S.C. 7702(8), (9), (12), (15) & (16); 7704(a)(1), (2) & (3).

¹³ 15 U.S.C. 7711(a).

¹⁴ See Discover; Empire; ESPC; FNB; KeySpan; NAR; Metz. Adknowledge also advocated

message and whose product, service, or Internet web site is advertised or promoted by the message.”¹⁸ In the NPRM, the Commission proposed amending the definition of “sender” to address concerns identified in the ANPR comments about the application of CAN-SPAM’s definition of “sender” to scenarios where multiple marketers use a single email message — for example, where a commercial email from an airline also contains advertisements or promotions for a hotel chain and a car rental company. The Commission received almost 60 comments in response to this proposal, many of which suggested modifications to the proposed Rule provision. After consideration of these comments, the Commission has modified the definition of “sender” as proposed in the NPRM. The final Rule provides that multiple “senders” of a commercial email, under certain conditions, may identify one among them as the “sender” who will be deemed the sole “sender” of the message (the “designated sender”). Thus, under the final Rule, the designated sender, but not the other marketers using the same email message, must honor opt-out requests made by recipients of the message.¹⁹ Moreover, under the final Rule, the physical address of the designated sender, but not the addresses of the other marketers using the same email message, must appear in the message.

a. Background

As discussed in the ANPR, the Act itself does not specifically address multiple-marketer emails. Rather, under the Act, if multiple senders using a single email message meet the definition of “sender,” each would need to provide an opt-out mechanism, a valid physical postal address for each sender would have to appear in the message, and each would be responsible for honoring an opt-out request by a recipient.²⁰ The ANPR sought comment on “whether it would further the

purposes of CAN—SPAM or assist the efforts of companies and individuals seeking to comply with the Act if the Commission were to adopt rule provisions clarifying the obligations of multiple senders under the Act.”²¹

Commenters responding to the ANPR claimed that implementation of the Act may be impeded in multiple marketer scenarios because marketers and consumers will encounter certain difficulties under a regime that holds more than one party responsible as the sender of a single email. First, commenters claimed that consumer confusion would result from multiple opt-out mechanisms and valid physical postal addresses in a single email message.²² Second, some ANPR commenters predicted that rigid application of CAN-SPAM’s sender definition would likely chill electronic commerce and destroy the type of joint marketing arrangements that are common in industry.²³ According to these commenters, marketers would have to develop mechanisms for receiving suppression lists (lists of email addresses of consumers who previously had opted-out of receiving messages from a sender) from every marketer or co-marketer with which they deal, and for comparing their own mailing lists against multiple suppression lists.²⁴ In addition, a marketer would have to develop processes for managing multiple opt-outs, *i.e.*, ensuring that the consumer can opt out from each marketer and that all opt-outs sent to the marketer are forwarded to the marketers from whom the consumer no longer wishes to receive commercial email. These commenters argued that existing CAN-SPAM treatment of multiple senders in a single email is needlessly complex and results in unnecessary administrative costs and delays for legitimate email marketers because of the need to maintain and effectuate multiple suppression lists.²⁵ Third, commenters stated that a requirement to check names against multiple lists would necessitate passing lists back and forth among several parties, increasing the risk that consumers’ private information may be shared with inappropriate entities or exposed to hackers. Moreover, these commenters

opined that multiple suppression lists could force a business to divulge customer names to list owners and other marketers, even when the business has promised to protect that information under its privacy policy.²⁶

For these reasons, many commenters responding to the ANPR urged that the Act’s “sender” definition be modified to provide that when more than one company’s products or services are advertised or promoted in a single email message, only one among them be responsible as the sender of a message for purposes of the Act.

Based upon these comments, in the NPRM, the Commission proposed adding a proviso to the definition of “sender” to allow multiple sellers advertising in a single email message to designate one among them as the single “sender” of the message for purposes of the Act. Under the NPRM’s proposed proviso, only one of multiple persons whose products or services are advertised or promoted in an email message would have been the “sender” if that person: (A) initiated the message and otherwise met the Act’s definition of “sender,” and (B) was the *only* person who: (1) “controls the content of such message,” (2) “determines the electronic mail addresses to which such message is sent,” or (3) “is identified in the ‘from’ line as the sender of the message.” Under the proposed Rule, if more than one person meeting the Act’s definition of “sender” were to satisfy one of these three criteria, then each such person who satisfied the definition would have been considered a sender for purposes of CAN-SPAM compliance obligations.²⁷

²⁶ *Id.* (citing comments by American Bankers Association; ASTA; ACB; DMA; IAC; MPA; Microsoft; Time Warner). ANPR commenters identified a fourth problem in some situations, such as newsletters. Commenters stated that a requirement that each separate marketer in a single email message be treated as a separate sender would run counter to consumer expectations — consumers would expect to opt out of the email list of the person with whom the consumer had a relationship, not from a marketer in the newsletter. *Id.* (citing comments by ABM; DMA; Microsoft; Midway; Time Warner).

²⁷ A hypothetical example illustrated the NPRM “sender” definition proposal. If X, Y, and Z are sellers who satisfy the Act’s “sender” definition, and they designate X to be the single “sender” under the Commission’s proposal, *among the three sellers*, only X may control the message’s content, control its recipient list, or appear in its “from” line. X need *not* satisfy *all three* of these criteria, but *no other seller* may satisfy *any* of them. The sellers may use third parties to be responsible for any criteria not satisfied by X. For example, if X appears in the “from” line, the sellers may use third parties — but *not* Y or Z — to control the message’s content and recipient list. 70 FR at 25428.

¹⁸ 15 U.S.C. 7702(16)(A). The Commission incorporated by reference into the CAN-SPAM rules this definition of “sender” in its primary purpose rulemaking. 16 CFR 316.2(l); 70 FR at 3127.

¹⁹ Under the final Rule, where a commercial email is sent by multiple “senders” who designate one “sender” to be responsible for honoring opt-out requests, the other marketers using the single email message still will be “initiators” of the email message and therefore responsible for complying with CAN-SPAM’s requirements concerning “initiators”: 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C. 7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4.

²⁰ The “sender” is required by the Act to honor opt-out requests. 15 U.S.C. 7704(a)(4)(A)(i). Additionally, the “sender’s” physical postal address must be included in the message. 15 U.S.C. 7704(a)(5)(A)(iii).

²¹ 69 FR at 11778.

²² 70 FR at 25429 (citing comments by American Bankers Association; DMA; ERA; IAC; MPAA; Microsoft; PMA; Time Warner).

²³ *Id.* (citing comments by NAA; Time Warner).

²⁴ *Id.* (citing comments by American Bankers Association; DMA; ERA; IAC; MPAA; Microsoft; PMA; Time Warner).

²⁵ *Id.* (citing comments by American Bankers Association; DMA; ERA; MPAA; Microsoft).

b. The Final Rule

Based upon the comments responding to the NPRM proposal, the Commission believes that modification of the proposed Rule's definition of "sender" as it relates to multi-marketer emails is necessary. The final Rule drops the proposed "controls the content" and "determines the electronic mail addresses to which such message is sent" elements, adds compliance with the core provisions of CAN-SPAM as an element, makes the elements conjunctive rather than disjunctive, and makes the element requiring identification of the person in the "from" line mandatory. The Commission believes that these modifications will meet the concerns of marketers while still preserving CAN-SPAM opt-out protections.

Thus, under the final Rule, multiple marketers can designate as a single "sender," for purposes of compliance with the Act, a person who: (A) meets the Act's definition of "sender," *i.e.*, such person initiates a commercial electronic mail message in which it advertises or promotes its own goods, services, or Internet website; (B) is identified uniquely in the "from" line of the message; and (C) is in compliance with 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C. 7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4.²⁸ In 16 CFR 316.2(m), the final Rule thus states:

The definition of the term "sender" is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), *provided that*, when more than one person's products, services, or Internet website are advertised or promoted in a single electronic mail message, each such person who is within the Act's definition will be deemed to be a "sender," *except that*, only one person will be deemed to be the "sender" of that message if such person: (A) is within the Act's definition of "sender"; (B) is identified in the "from" line as the sole sender of the message; and (C) is in compliance with 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C. 7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4.

The Commission makes this clarification pursuant to its discretionary rulemaking authority to

"issue regulations to implement the provisions of this Act."²⁹

The definition of "sender" in the final Rule provides marketers flexibility to structure their messages in a way that alleviates redundant obligations for the various marketers in a single email while ensuring that recipients of such messages receive the benefit of CAN-SPAM's core opt-out protections. Specifically, the final Rule makes it more practicable than the proposed Rule for multiple marketers promoting their products in a single email to designate a single entity as the "sender" under the Act because the marketers' decision as to which of them will appear in the "from" line resolves the question of which will be considered a "sender" under the Act and will be charged with the resulting responsibilities. The final Rule eliminates the complex fact determination of who "controls" the content and the element of who "determines the electronic mail addresses to which such message is sent." By placing the focus on the "from" line, the best point of reference for consumers, the modification in the final Rule more directly conforms to consumers' expectations as to the identity of the entity responsible for sending them a multi-marketer email.

An example illustrates how the final Rule's "sender" definition applies in the multi-marketer email context. Suppose A, B, and C have goods advertised or promoted in a single email message and that each is an initiator under the Act. If A's name appears in the "from" line of the message, A is considered the "sender" under the final Rule. While B and C promote their goods, services, or Internet website in the message, may control portions or all of the content of the message, and may supply email addresses for A to use to address the message, neither B nor C would be considered "senders," unless A did not comply with the listed requirements that apply to "initiators," namely 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C. 7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4. It would be clear to a consumer that an opt-out request would be sent to A, the one person identified in the "from" line.

The comments and the FTC's law enforcement experience suggest that a

provision, such as the final Rule's sender definition, that allows multiple senders flexibility in determining who will be the sole "sender" raises the possibility of abuse by illegitimate marketers. As discussed below, this concern is addressed in part by the addition of certain initiator provisions to the proviso: 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C. 7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4. If the designated sender is not in compliance with the initiator provisions, then all marketers in the message will be liable as senders.

c. Comments on the NPRM's Definition of "Sender"

Commenters who addressed the proposed definition of sender were nearly unanimous in supporting a "sender" definition that would enable marketers to designate a single "sender" when multiple marketers use a commercial email message. Reiterating ANPR comments, several commenters noted that such a rule provision would avoid "daunting compliance challenges" for email marketers, such as the heavy burden of cross-checking the opt-out lists of all the individual marketers with the designated sender's opt-out list.³⁰ Likewise, commenters supported the NPRM's proposed Rule because it would enable recipients to determine the party responsible for honoring opt-out requests.³¹ Others noted with approval that designating a single sender would eliminate confusion for consumers who otherwise would face multiple opt-out links and postal addresses.³² Finally, other commenters opined that the proposed Rule would promote protection of consumer privacy.³³

In contrast to the almost unanimous support for a multi-marketer proviso, however, few commenters supported the definition of "sender" as proposed in the NPRM without change.³⁴ Many commenters raised concerns about the workability and clarity of the proposal,

³⁰ See, e.g., ATAA; Charter; DoubleClick; ERA; ESPC; FNB; IAC; ICC; IPPC; Mattel; Microsoft; NAR; NEPA; NetCoalition; NNA. As the ERA summarized it, "[D]esignating a single sender will enhance accuracy and compliance efforts, streamline the opt-out process for consumers and sellers/marketers, and avoid confusion by, among other things, avoiding cluttered or repetitious information in messages or multiple suppression lists. It also helps address privacy concerns that may attend to sharing consumer suppression data."

³¹ See, e.g., Mattel; NAFCU.

³² See ATAA (it would be "difficult to format messages in a way that makes them compelling and understandable to recipients" because of the welter of opt-out links and postal addresses); ERA; ESPC.

³³ See ERA; NetCoalition.

³⁴ See, e.g., ARDA; Empire; Mattel; NAFCU; NAR; NNA; SHRM; Wahmpreneur.

²⁸ These provisions, as explained below, apply to initiators of commercial emails and require that the email message may not contain false or misleading transmission information or a deceptive subject heading; but must contain a valid postal address, a working opt-out link, and proper identification of the message's commercial or sexually explicit nature.

²⁹ 15 U.S.C. 7711(a). Like the proposed Rule, this final Rule does not eliminate the possibility that a message may have more than one "sender."

However, marketers can use the criteria set forth in the proviso to establish a single sender and reduce CAN-SPAM's compliance burdens. If marketers fail to structure the message to avoid multiple senders under the sender definition, then each sender is obligated to comply with CAN-SPAM requirements for senders, notably, to provide its physical postal address and to honor any opt-out requests.

as well as its consistency with consumer expectations. Most commenters urged the Commission to modify or clarify the criteria articulated in the proposed Rule. Such comments concerned four issues. The first three issues relate to the three listed criteria in the NPRM's proposed proviso: (1) the significance of the person identified in the "from" line; (2) the meaning of "controls the content of the message" and the structure of the proviso; and (3) the meaning of "determines the electronic mail addresses" to which a message is sent. A fourth category of comments addressed what it means to "advertise" or "promote" a product, service, or website under the Act, which is related to the question posed in the NPRM about whether "list owners" can be "senders" under the Rule and thus be required (or allowed) to process opt-out requests in lieu of other marketers who promote a product, service, or website in the email.³⁵

(i) *"From" Line*

Many commenters favored looking to the "from" line of the message in order to determine who, under the Act, is the "sender" of a multi-marketer message. Commenters urged that this element is most critical for recipient expectations³⁶ and would be easy to use as a way to designate a single sender.³⁷ Some commenters argued that the other two proposed elements should be deleted.³⁸ A few commenters also requested that the Commission provide additional guidance on which non-deceptive names can be used in the "from" line, including a company's brands and service names.³⁹

(ii) *"Controls the Content"*

Most commenters voiced concerns about the "controls the content" element of the proposed proviso and its likely effect. Many of these commenters found this criterion vague and urged the

Commission to provide additional guidance concerning what it means to "control" the content of commercial email.⁴⁰ Many advocated eliminating this factor altogether,⁴¹ and others urged various ways to modify it.⁴² Two primary themes emerged from the comments: (1) several parties may exercise some degree of "control" over content, and (2) "control" in this context is a vague and ill-defined concept. Commenters explained that in joint marketing arrangements, it is standard industry practice for each marketer to exercise control over the use of its own trademarks, branding, legal disclosures, and advertising copy.⁴³ Commenters further explained that in highly regulated industries, such as life insurance, securities, pharmaceuticals, and alcoholic beverages, marketers may be required to include certain text and legal disclosures.⁴⁴ Some commenters also stated that, in addition to controlling their own trademarks and disclosures, marketers sometimes influence the content of other parts of a message without "controlling" it, or may suggest advertising text without making the final decision about the advertising content.⁴⁵ To protect their brand reputations, commenters explained that they need to be able to review and approve the advertising content of other marketers.⁴⁶

A number of commenters opined that, without clarification, under a literal application of the proposed Rule, essentially *all* marketers would be deemed to "control" the content of a multi-marketer email, thereby preventing the designation of a single sender and defeating the purpose of the proposed Rule.⁴⁷ Conversely, according to commenters, a standard that forced marketers to cede all control of the content of messages to one marketer among several using a single email

message would greatly disrupt standard industry practices.⁴⁸

To alleviate these perceived problems, a number of commenters suggested that the Commission eliminate the "controls the content" element, because they believed that the proposed Rule could operate effectively in its absence.⁴⁹ Others suggested that the Commission clarify that "control" means control of the "primary" or "overall" content of the message, but does not mean either control by a company over its own advertisement⁵⁰ or the practice of reviewing and approving the advertising content of other marketers.⁵¹ These commenters asked the Commission to clarify that "control" should refer to control over what content will be distributed in the email message as a whole and not control over the design, content, or placement of a particular advertisement in a multi-marketer message.⁵² Other commenters advocated that "control" of the content of the message should mean the ultimate ability to determine whether and when the message is transmitted.⁵³

In a similar vein, some commenters felt that the structure of the proviso as proposed in the NPRM would have limited the ability of legitimate marketers to co-promote their products without any corresponding benefit to consumers.⁵⁴ Commenters pointed out that there are circumstances when one entity provides the email addresses to which a message is to be sent and one or more other entities control the content of the message. Under the proposal in the NPRM, all entities would be considered senders because the proposed Rule's definitional requirements allowing one sender to be designated could not be met.⁵⁵ These commenters asked that the final Rule be made more flexible to accommodate the variety of marketing agreements commonly used in the industry.⁵⁶

³⁵ At least one commenter suggested, without further detail, that the sender in a multi-marketer email should be the "entity that controls the sampling, distribution, and opt-out registry." CMOR. Another commenter suggested determination of a sender in a multi-marketer email with a "single, dominant marketer" test. Bigfoot.

The Direct Marketing Association ("DMA") advocated formal adoption by the Commission of the Staff Letter of March 8, 2005, which opined on a specific fact pattern involving, among other things, multiple marketers who send commercial email messages to persons who had provided affirmative consent to receive multi-marketer commercial email messages. The Commission declines to adopt the Staff Letter. The final Rule will govern multi-marketer message sender liability.

³⁶ See, e.g., Bigfoot; Charter; DoubleClick; KeySpan; MBNA; Nextel; OPA; SHRM.

³⁷ See Charter; DoubleClick; Nextel; Reed.

³⁸ See DoubleClick; KeySpan.

³⁹ See, e.g., MBNA; SIIA.

⁴⁰ See, e.g., ACB; ACLI; Associations; BOA; CBA; Charter; DLA; DMA; Discover; ERA; ESPC; FNBO; HSBC; IAC; Mastercard; Microsoft; MPA; MPAA; NAA; NAIFA; NBCEP; NEPA; NetCoalition; PMA; SIIA; Time Warner.

⁴¹ See Associations; ATAA; Charter; DoubleClick; Keyspan; MasterCard; NAIFA; SIIA; Wells Fargo. Similarly, other commenters suggested that the proposed Rule be modified to allow more than one marketer to control the content of the message, while still allowing one of the marketers to be designated as the sender. See CBA; DMA; MPA; NBCEP; NetCoalition; NRF.

⁴² See e.g., Adknowledge; ICC; MPA.

⁴³ See Reed; DoubleClick; Time Warner; MasterCard; Microsoft; Bigfoot; HSBC; MPAA; OPA.

⁴⁴ See, e.g., ACLI; BF; HSBC; IPPC; MPAA; OPA; SIA.

⁴⁵ See, e.g., BF; Visa.

⁴⁶ See, e.g., Associations; ERA; HSBC; MasterCard; MPA; NetCoalition; Nextel; NRF; OPA; PMA.

⁴⁷ See ATA; DoubleClick; HSBC; IAC; IPPC; Mastercard; Time Warner.

⁴⁸ See e.g., NAA; Time Warner.

⁴⁹ See NAIFA; SIIA.

⁵⁰ See, e.g., ACB; Adknowledge; Associations; ATAA; CBA; Charter; Discover; DMA; Experian; FNB; IAC; ICC; KeySpan; Microsoft; MPAA; NAIFA; NBCEP; NEPA; NetCoalition; NRF; OPA; Reed; SIIA; Time Warner; Wells Fargo.

⁵¹ See, e.g., ERA; HSBC; MasterCard; MPA; Nextel; PMA.

⁵² See ACB; BoA; Discover; ERA; ESPC; Experian; HSBC; IAC; ICC; Mastercard; Microsoft; MPA; MPAA; NAA; PMA; Visa.

⁵³ See, e.g., BigFoot; SIIA.

⁵⁴ See Bigfoot; CBA; DMA; DoubleClick; ESPC; MPAA; NBCEP; NetCoalition; NRF; SIIA; Wells Fargo.

⁵⁵ See DMA; SIIA.

⁵⁶ See, e.g., MPAA.

(iii) “Determines the Electronic Mail Addresses to Which Such Message is Sent”

Few commenters discussed the third element of the proposed proviso for the definition of “sender”: that the sender be the party that determines the email addresses to which such message is sent. Some commenters objected to this element of the definition because, they contend, entities in joint marketing campaigns may want to contribute or recommend some email addresses without being considered the primary “sender.”⁵⁷

(iv) “Promote”

Finally, a few commenters suggested that the Commission define broadly the term “promote” in the Act’s definition of sender. They argued that a person “advertises” or “promotes” the person’s “product, service, or Internet website” by appearing in the “from” line of the message or simply by having the person’s name referenced in the email.⁵⁸ Under this interpretation, they argued, more persons could qualify as designated “senders” under the proviso.

d. Response to Comments on the Definition of “Sender” and Explanation of the Final Rule’s Definition of “Sender”

Having considered the comments on the proposed definition of “sender,” the Commission adopts a modified version as its final Rule. These modifications mitigate the concerns of marketers raised in the comments, recognize the benefits afforded by advertising by multiple entities in a single email, conform more closely to the expectations of email recipients, and continue to provide the CAN-SPAM protections contemplated by Congress. In summary, as discussed below, the Commission retains the “from” line element in the proviso as a mandatory element, drops the “controls the content” and “determines the electronic mail addresses to which the message is sent” elements, and adds a requirement that the designated sender be in compliance with certain provisions of the Act and Rules that apply to initiators.

In response to comments regarding the “from” line, the Commission found

persuasive the suggestions that the “sender” of a multi-marketer email should be the person identified in the “from” line of the message. The Commission agrees that a rule that uses the “from” line as the sole determinant of the sender in a multi-marketer email would be straightforward for marketers to follow and is the single most helpful element of an email to enable recipients to identify the sender of the email.⁵⁹ A designated “sender” for purposes of a multi-marketer email must, in addition to meeting the other requirements listed below, include its non-deceptive name, trade name, product, or service in the “from” line of the email.⁶⁰

And, under the final Rule, the designated sender must be “identified in the ‘from’ line as the sole sender of the message” — if two or more senders appear in the “from” line, the multi-marketer proviso would not be met.

On the second issue identified by commenters, the Commission has deleted the “controls the content of such message” element from the proviso. Comments urging its removal were persuasive, and comments that advocated clarification rather than removal revealed that retaining this element would not serve to assist recipients in identifying or confirming the sender of a multi-marketer message. By its nature, a multi-marketer message promotes more than one company’s content, and thus more than one company controls its content in at least some way.⁶¹ Modifying the criterion to require “overall” control of the content would simply add further nuance and complication and make enforcement difficult. Deleting this criterion will make the proviso more practicable for legitimate marketers to designate a single “sender” while preserving for email recipients the protections of CAN-

SPAM.⁶² Under the final Rule, therefore, a non-designated sender under the multi-marketer proviso will not have “sender” liability just because it controls its own advertising copy, including its trademarks and legal disclosures, or reviews other marketers’ content to ensure the absence of objectionable material in proximity to its own brand.

The Commission has deleted the third element discussed by commenters that required that the designated “sender” of a multi-marketer email determine the email address to which such message will be sent. The NPRM rationale for this element was to ensure that the designated sender had the ability to process opt-out requests. The Commission is now convinced that requiring the designated sender to determine recipient email addresses would serve little, if any, purpose. Under the Act, as a sender, the designated sender already must check to make sure that none of the email recipients appears on its opt-out list. In a multi-marketer email, if the designated sender receives a list of proposed email addresses from a non-designated sender, the designated sender must scrub that list against its own opt-out list before sending the message to the addresses on that list.

On the fourth and final issue raised by commenters, the Commission declines to make any additional changes to the definition of “sender” proposed by the NPRM. Some commenters suggested that the FTC define broadly the phrase “advertised or promoted” in the Act’s definition of “sender,” so that more entities could qualify as “senders” under the multi-marketer proviso. The Commission believes that the definition of a “sender” should be based on consumer expectations. If a reasonable consumer would not believe that a person’s product, service, or website were “advertised or promoted” in the message, then that person does not qualify as a “sender.” The Commission believes that the meaning of “advertised or promoted” is clear and broadly understood.⁶³

⁶² See, e.g., Charter (“the Commission’s proposed definition is inadequate and unworkable”); DoubleClick; Keyspan; MasterCard; NAIFA; SIIA.

⁶³ By analogy, another definition in the Act, that of a “commercial electronic mail message,” states that

[t]he inclusion of a reference to a commercial entity or a link to the web site of a commercial entity in an electronic mail message does not, by itself, cause such message to be treated as a commercial electronic mail message for purposes of this chapter if the contents or circumstances of the message indicate a primary purpose other than commercial advertisement or promotion of a commercial product or service.

⁵⁷ See, e.g., KeySpan; Reed; SIA. Several commenters also requested clarification of what constitutes “determines” and suggested that merely providing criteria for targeting recipients (such as demographic characteristics) should not qualify as “determining” the email addresses. See DoubleClick; KeySpan; MasterCard; Unsub. As discussed below, this element has been removed, and thus these requests for clarification need not be addressed.

⁵⁸ See, e.g., Adknowledge; ESPC; Unsub.

⁵⁹ See Charter (stating that the “from” line criterion “specifically accords with consumer expectations.”).

⁶⁰ In response to commenters seeking further guidance about whether a company’s non-deceptive product or service names can be used in the “from” line, the Commission responds as follows. CAN-SPAM provides that “a ‘from’ line . . . that accurately identifies any person who initiated the message shall not be considered materially false or misleading.” 15 U.S.C. 7704(a)(1)(B). The Commission believes that this does not mean that the “from” line necessarily must contain the initiator’s formal or full legal name, but it does mean that it must give the recipient enough information to know who is sending the message. Email senders should consider their messages from their recipients’ perspective. If a reasonable recipient would be confused by the “from” line identifier, the sender is not providing sufficient information. See NPRM, 70 FR at 25431 (further discussing this issue).

⁶¹ See IAC.

Lastly, based on its law enforcement experience, the Commission recognizes that illegitimate marketers may attempt to use the proviso to escape liability under CAN-SPAM. Both CAN-SPAM's definition of "initiator" and the final Rule's revised definition of "sender" substantially reduce the likelihood of such abuse.⁶⁴ First, marketers in a single email message who are not designated senders are still "initiators" under CAN-SPAM and liable under any of the provisions that apply to initiators, such as the prohibition against use of deceptive headers and subject lines and the requirement to include an opt-out link.⁶⁵ Second, the final Rule's definition of "sender" requires that the designated "sender" be in compliance with certain initiator provisions of the Act: 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C. 7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4.⁶⁶ The proviso states that if the designated sender does not comply with these five "initiator" responsibilities, all the marketers will be liable as *senders* (and not just initiators) under the Act because the proviso will not apply. By requiring the designated sender to comply with these provisions of law, the other marketers using a single email

15 U.S.C. 7702(2)(D).

⁶⁴ At least one commenter suggested that the proviso could be subject to abuse. See Adknowledge (suggesting that to avoid abusive practices, the proposed regulation explicitly should state that a "person" must be a "*bona fide* business entity" because "spammers continually change the name of the originating entity along with header or other information, or consider a mere email address list as a 'business entity.'").

⁶⁵ See, e.g., *FTC v. Phoenix Avatar*, 2004-2 Trade Cas. (CCH) ¶ 74,507 (N.D. Ill. Jul. 30, 2004) (order granting preliminary injunction); *FTC v. Opt-in Global*, No. 05-cv-1502 (N.D. Cal. filed Apr. 12, 2005) (final order entered Apr. 6, 2006); *FTC v. Dugger*, No. CV-06-0078 (D. Ariz. filed Jan. 9, 2006) (final order entered Jul. 31, 2006).

⁶⁶ Section 7704(a)(1) of the Act prohibits initiation of an email that contains false or misleading transmission information, and section 7704(a)(2) prohibits initiation of an email with a deceptive subject heading. Section 7704(a)(3)(A)(i) requires an initiator to include a "functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient may use to submit . . . a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from [the] sender [responsible for the initial commercial message]." Section 7704(a)(5)(A) of the Act requires that an initiator "provide clear and conspicuous identification that the message is an advertisement or solicitation, clear and conspicuous notice of the opportunity . . . to decline to receive further commercial electronic mail messages from the sender, and a valid physical postal address of the sender." Finally, 16 CFR 316.4, the Sexually Explicit Labeling Rule, imposes certain requirements on a message that includes sexually oriented material, including the 19 characters "SEXUALLY EXPLICIT:" at the beginning of the subject header of the message.

message must ensure that the entity that is the designated "sender" complies with the Act and the Commission's rules. Otherwise, the other marketers using the email risk losing the protections provided by the proviso and each will be a "sender" of the message. The final Rule, therefore, provides senders of multi-marketer emails a method of reducing the burdens associated with multiple opt-out links and postal addresses while guarding against possible abuse. Nonetheless, if the Commission finds such abuse through the operation of the proviso, it will reconsider whether the final Rule is justified under the Act.⁶⁷

e. List Owners

In the NPRM, the Commission asked whether under CAN-SPAM, third-party list providers who do nothing more than provide a list of names to whom others send commercial emails could be required to honor opt-out requests.⁶⁸ Specifically, the NPRM asked whether such list providers could satisfy the statutory definition of sender, *i.e.*, a person that both initiates a message and advertises its product, service, or website in the message.

Some commenters opposed extending opt-out responsibilities to third-party list providers because it would be contrary to congressional intent, difficult to implement and monitor, and would impose administrative costs and complexity for legitimate list providers and email marketers.⁶⁹ Although the NPRM asked about list owners who have no other involvement in the message besides providing a list of names to others, commenters discussed other list rental arrangements in which both the marketer and the list owner have some degree of control over the content of the message.⁷⁰ In those cases, list owners typically do not have control over the specific creative content within an advertisement, but they can approve or disapprove an advertisement for delivery to email addresses on their lists.

On the other hand, two commenters argued in favor of extending opt-out obligations to third-party list

providers.⁷¹ Some of these commenters thought the Commission should clarify that in such situations the list owner exercises fundamental "control" of the content of the message for purposes of the then-proposed regulatory definition of "sender."⁷² Other commenters urged the Commission to adopt the position that a list owner would be considered a sender if the list owner "advertises or promotes" its services merely by being referenced in the "from" line or in the message itself, thereby making it responsible for the opt-out function and other CAN-SPAM compliance.⁷³

Because of the variety of situations in which a list owner might be involved in a commercial email, and because none of the commenters provided a workable mechanism for all of these situations, the Commission is persuaded that amending the rules under CAN-SPAM to create a specific provision for list owners is not feasible.

The Commission finds that a list owner must honor opt-out requests only if it qualifies as the "sender" of a commercial email (*i.e.*, it is an initiator and its "product, service, or Internet web site" are "advertised or promoted" in the email). And, if it does qualify as a "sender," it may avail itself of the multi-marketer proviso added to the definition of sender in the final Rule.

f. Safe Harbor for Email Messages Sent By Affiliates

In the NPRM, the Commission asked whether it should adopt a "safe harbor" with respect to opt-out and other obligations for a sender whose product, service, or website is advertised by affiliates or other third parties. Moreover, the Commission sought guidance on the criteria for a safe harbor.⁷⁴

Although the Act does not provide a definition of "affiliate," the Commission noted in the NPRM that "affiliates" are induced to send commercial email messages by sellers seeking to drive traffic to their websites, and that sellers generally pay affiliates based on the number of individuals who, directed by the affiliates, ultimately visit the seller's

⁷¹ See Adknowledge; EPIC.

⁷² See, e.g., ESPC.

⁷³ See, e.g., Adknowledge; Baker; ESPC; cf. Microsoft (arguing that it should constitute a deceptive trade practice for a list owner to fail to identify itself and the role that it plays in sending the message, that its identification would be considered advertising or promoting its services, and thus that the list owner would meet the definition of "sender" and have CAN-SPAM liability); Adknowledge (proposing that the Commission make it "mandatory for list owners to advertise or promote themselves in each email message they transmit").

⁷⁴ 70 FR at 25450.

⁶⁷ Of course, it should be noted that the proviso in no way relieves non-designated senders of liability for ensuring that their own advertising complies with the FTC Act.

⁶⁸ 70 FR at 25450.

⁶⁹ See FNB; Jumpstart; Lashback; Schnell; SIA (list providers play a role "similar to that of a telephone directory service," are neither "advertising or promoting their products and services," nor "initiating the email," and accordingly "do not come within the definition of 'sender' under the CAN-SPAM Act.").

⁷⁰ See, e.g., Unsub.

website and/or purchase the seller's product or service.⁷⁵

Before turning to the issue of whether a safe harbor is appropriate to shield marketers from liability for CAN-SPAM violations of affiliates, two preliminary questions must be considered. First, is the marketer who uses an affiliate an "initiator" under the final Rule? Second, in scenarios where a marketer uses an affiliate, what is the impact of the final Rule on the status of both the marketer and the affiliate as "senders"?

With regard to whether a marketer that uses affiliates is an "initiator," under the Act, a person is an "initiator" if the person originates, transmits, or "procure[s] the origination or transmission of" a message.⁷⁶ In the typical affiliate marketing scenario, the affiliate originates and transmits the message, and is therefore an initiator. The marketer, however, does not originate or transmit the message, but does "procure" the origination of the message. The Act defines "procure" as "intentionally to pay or provide other consideration to, or induce, another person to initiate[] a message on one's behalf."⁷⁷ A few commenters argued that a marketer does not actually "initiate" an email message if it does not provide consideration to an affiliate for each message, because it provides consideration to the affiliate for visits to its website or completed sales made as a result of the affiliate's email messages.⁷⁸ According to this argument, in these circumstances, the marketer

pays consideration for the referral, but not for the message itself.

The Commission believes that this interpretation is too narrow. By agreeing in advance to pay an affiliate for sales to persons who come to a marketer's website as a result of an affiliate's referral, a seller or marketer creates an inducement for the affiliate to originate or transmit commercial email messages to the public. In the language of the Act, the seller induces another person — the affiliate — to initiate messages on the seller's behalf.

With regard to the second question, in the typical affiliate program, the marketer is a "sender" because its product, service, or website is promoted in the email message, and the affiliate is only an "initiator." It is only when the affiliate promotes its own product, service, or website along with that of the marketer that the affiliate is also a "sender" under the Act. In such a case, under the final Rule, the affiliate may serve as the designated sender, provided that it is listed in the "from" line of the message and is in compliance with 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C. 7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4. If, however, the affiliate promotes its own product, service, or website in addition to that of the marketer, but does not comply with the designated sender requirements in the final Rule, then both the affiliate and the marketer are liable as "senders" under the final Rule.⁷⁹

A "safe harbor" would absolve a marketer of initiator liability (or of sender liability if the affiliate is not the designated sender under the final Rule) if the marketer takes prescribed steps to ensure that the affiliate complies with CAN-SPAM. Those who commented on this issue were split on whether the Commission should adopt a safe harbor for CAN-SPAM liability for marketers whose products are promoted by affiliates or other third parties. Those opposed to a safe harbor stated that it would allow marketers to circumvent CAN-SPAM requirements.⁸⁰ Those in favor of a safe harbor stated that it would: (1) provide clarity to marketers that practice due diligence when selecting third-party email marketers; (2) encourage marketers to maintain reasonable practices and procedures to prevent violations of CAN-SPAM; and (3) effectuate congressional intent.⁸¹

⁷⁹ In either case, both the affiliate and the marketer are "initiators" under the Act.

⁸⁰ See, e.g., Amin; Jumpstart; LashBack; Schaefer; Unsub; VFCU.

⁸¹ See e.g., AeA; ARDA; ERA LashBack; MPAA; NADA.

Many online businesses advocated the adoption of a safe harbor in principle,⁸² but only a fraction of those commenters suggested specific components to the safe harbor. Those suggestions included the following requirements: (1) that the contract between the marketer and the affiliate specifically require the affiliate to comply with CAN-SPAM;⁸³ (2) that the affiliate periodically certify that it complies with CAN-SPAM;⁸⁴ (3) that the marketer provide the affiliate with written guidelines on how to comply with CAN-SPAM;⁸⁵ (4) that the marketer maintain additional reasonable procedures to determine whether the affiliates are complying with CAN-SPAM;⁸⁶ (5) that a marketer comply with its privacy policy relating to the conduct of third parties sending email messages on its behalf;⁸⁷ and (6) that a marketer have "flexibility to determine what procedures are reasonable."⁸⁸

After considering all the comments submitted and in the light of the changes to the Rule's definition of "sender" for multi-marketer messages as well as its law enforcement experience, the Commission has decided against creation at this time of a "safe harbor" for companies whose products, services, or website are advertised by affiliates or other third parties. First, the requisite criteria for a safe harbor have not been articulated clearly. Second, email marketing models continue to evolve, and there may not be enough transparency in email marketing to support a safe harbor.

The Commission believes that the final Rule's definition of "sender" gives marketers the necessary flexibility to market their products using email on their own or in conjunction with other parties while at the same time preserving the protections afforded to consumers by CAN-SPAM. If, after marketers have had the opportunity to conduct business under the "sender" definition in the final Rule, concerns about the necessity of a safe harbor persist, the Commission can reconsider this issue.

⁸² See ESPC (noting that it is "generally supportive of safe harbor programs" and "would be very interested in further discussion of such programs"); SIIA (making a "preliminary proposal"); Visa ("such a safe harbor could be based on examples demonstrating relationships that do not result in control of content or email addresses."); Wahmpreneur (suggesting a safe harbor that would apply to permission-based marketing).

⁸³ See IAC.

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See SIIA; ACLI.

⁸⁸ See IAC.

⁷⁵ 70 FR at 25428 n.23. According to IAC, in a typical affiliate program, a marketer enters an arrangement with an affiliate to pay the affiliate for referrals to its website. The affiliate can employ a variety of methods to direct consumers to the marketer's website, including email messages. The affiliate sends email messages containing an advertisement promoting the marketer's goods or services and a hypertext link to visit the marketer's website directly from the email message (either as a direct link or through the affiliate's link, which redirects the recipient to the marketer's website). If a recipient of the email uses this link to visit the marketer's website, the marketer logs the visit as attributable to the affiliate's email. Depending on the arrangement between the marketer and the affiliate, the marketer will pay the affiliate a prescribed amount either for the visit (also known as a "click through") or for a completed sale, or both. IAC states in its comments that it has thousands of affiliates. For Expedia, one of IAC's websites, however, the majority of the sales from the affiliate program are generated by a relatively small number of productive affiliates.

⁷⁶ 15 U.S.C. 7702(9).

⁷⁷ 15 U.S.C. 7702(12) (emphasis added).

⁷⁸ See IAC (arguing that affiliates are not "hired" to do anything, but are "simply paid a small fee for referrals," and that the affiliate emails are "created and transmitted entirely at the discretion of the affiliate."); Unsub (arguing that the payment structure does not differ from a company renting a mailing list from a third party).

g. Messages Sent to Members of Online Groups

The NPRM asked whether CAN-SPAM should apply to email messages sent to members of online groups. According to ESPC, online groups are also known as discussion lists, list servs, mailing lists, and chat groups. They often constitute communities engaging in both commercial and non-commercial speech via email. Many such lists are volunteer efforts, but their messages sometimes include commercial content. Lists can be fee-based or free.⁸⁹

Generally discussion groups are permission-based, that is, “opt-in.” Those lists that are free to join often include advertising in messages sent to subscribers, either with or without content relating to the purpose of the group. Depending on the type of discussion group, different individuals may be able to send messages to the entire group. In some groups, any member may send a message; in other groups, only the moderator or list owner may send messages; in still other groups, anyone may send a message, but the message must be approved by a moderator. It is rare for mailing list software to allow subscribers to choose the senders from whom they want to receive messages. In other words, they opt to receive all messages in the discussion group or none at all.⁹⁰

Four commenters stated that they believe online groups should not be subject to CAN-SPAM.⁹¹ They felt that compliance with CAN-SPAM would be too burdensome for unpaid list moderators and might cause them to cease operations, potentially chilling free speech. ESPC argued that email service providers that host mailing list services generally are considered to be engaged in routine conveyance under the Act, taking them outside the definition of initiator under the Act. ESPC also argued that most moderators also would be engaging in routine conveyance when sending messages to the group on behalf of group members.⁹²

One commenter urged the Commission not to distinguish between email messages sent to members of groups and email messages sent to

recipients who are not members of groups. That commenter stated that an exception from CAN-SPAM would give an unfair advantage to the operators of online groups without compelling justification, and would create an incentive for “group” status that would likely be exploited by aggressive marketers.⁹³

The Commission believes that CAN-SPAM compliance is not unduly burdensome for online groups. Of course, in some cases, the primary purpose of emails sent by and to online groups will not be commercial, and thus the Act will not apply.⁹⁴ However, for those messages with a primary purpose that is commercial, group members should be entitled to the benefits of CAN-SPAM’s opt-out provisions. Indeed, best practices in the industry already require group members to opt into listservs and provide straightforward mechanisms for opting out.⁹⁵ The Commission, therefore, has determined not to exempt online groups from CAN-SPAM at this time, but may reconsider the issue in the future should circumstances warrant.

3. Section 316.2(o)—Definition of “Transactional or Relationship Message”

CAN-SPAM designates five broad categories of emails as “transactional or relationship messages.”⁹⁶ The Act

⁸⁹ See Jumpstart.

⁹⁴ Most of the Act’s requirements apply to an email only if it is a “commercial electronic mail message,” which is defined as an email “the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet web site operated for a commercial purpose).” 15 U.S.C. 7702(2)(A). See also 16 CFR 316.3 (primary purpose rule).

⁹⁵ See ESPC.

⁹⁶ Section 7702(17)(A) of the Act defines a “transactional or relationship message” as “an electronic mail message the primary purpose of which is —

(i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(iii) to provide —

(I) notification concerning a change in the terms and features of;

(II) notification of a change in the recipient’s standing or status with respect to; or

(III) at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

excludes these messages from its definition of “commercial electronic mail message,”⁹⁷ and thus relieves them from most of the Act’s requirements and prohibitions.⁹⁸ In the NPRM, the Commission proposed no modification to Rule 316.2(n), which incorporates the Act’s definition of “transactional or relationship message” by reference. Under the Act, the Commission can expand or contract the definition of “transactional or relationship message” only if two conditions are met: (1) such modification is necessary to accommodate changes in email technology or practices; and (2) such modification is necessary to “accomplish the purposes of [the Act].”⁹⁹ None of the 50 comments submitted on this issue demonstrated that an expansion or contraction of the “transactional or relationship message” categories were necessary to accommodate changes in email technology of practices. Accordingly, the final Rule leaves the statutory definition unaltered.¹⁰⁰ The NPRM also invited comment on a series of questions concerning the application of the existing categories of “transactional or relationship messages” to certain types of messages. The Commission has carefully reviewed these comments and discusses its views on these issues below.

a. Legally Mandated Notices

In the NPRM, the Commission asked whether an email message that contains only a “legally mandated notice” — *i.e.*, communications mandated by state or federal law — should be considered a “transactional or relationship message.”¹⁰¹ Commenters identified messages mandated by the Truth in Lending Act, the Gramm-Leach-Bliley

(v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.”

⁹⁷ See *supra* n.94.

⁹⁸ Section 7704(a)(1)’s prohibition on false or misleading transmission information applies equally to “commercial electronic mail messages” and “transactional or relationship messages.” Otherwise, CAN-SPAM’s prohibitions and requirements cover only “commercial electronic mail messages.”

⁹⁹ 15 U.S.C. 7702(17)(B).

¹⁰⁰ The NPRM asked whether there are any types of messages that erroneously fall outside of the reach of the proposed Rule, and, if so, how such a shortcoming should be remedied. 70 FR at 25450. No commenters identified any such categories of messages. See, *e.g.*, Discover (stating that it was aware of no messages that fall outside the Rule that should be covered by it). Accordingly, the Commission adopts no modification of the definition of “transactional or relationship message” to accommodate any such categories of messages.

¹⁰¹ 70 FR at 25450.

⁸⁹ See ESPC.

⁹⁰ See ESPC.

⁹¹ See ESPC; NAEDA; PCIAA; Schnell.

⁹² The Commission notes, however, that CAN-SPAM defines “routine conveyance” as requiring an “automatic technical process.” 15 U.S.C. 7702(15). Thus, if a list moderator is manually forwarding messages to the group on behalf of group members, the moderator would not be engaged in “routine conveyance.” See also *infra* Part II.A.5 (discussing “routine conveyance” in connection with forward-to-a-“friend” emails).

Act, and the USA PATRIOT Act as well as messages concerning billing errors and changes in terms or account features as examples of legally mandated notices.¹⁰²

All 13 commenters that addressed this issue opposed classifying messages that solely contained legally mandated notices as “commercial electronic mail messages.”¹⁰³ Commenters were divided on whether such messages should be exempt from the Act,¹⁰⁴ categorized under a new definition of “transactional or relationship message,”¹⁰⁵ or classified under one of the existing, statutory categories of transactional or relationship emails, such as messages to facilitate a commercial transaction that the parties have entered into (section 7702(17)(A)(i))¹⁰⁶ or messages to provide notification regarding a change in the terms and features of an account (section 7702(17)(A)(iii)).¹⁰⁷

The Commission declines either to expand the definition of “transactional or relationship message” to include legally mandated notices or to make a blanket determination that such messages fall under one of the existing categories of transactional or relationship emails. Despite the unanimity of opinion expressed in the comments that such notices should not be treated as commercial in nature, none of the commenters demonstrated that expansion of the definition of “transactional or relationship message” to include legally mandated notices was necessary to accommodate changes in email technology or practices and to accomplish the purposes of the Act.¹⁰⁸

That said, the Commission believes that, in most cases, the types of legally mandated notices described by the commenters likely would be categorized as transactional or relationship messages. Such determinations, however, must be made on a case-by-case basis depending on the specific content and context of such messages. Moreover, if a message providing a non-commercial legally mandated notice also includes commercial content, it should be evaluated under the Commission’s primary purpose criteria as a dual purpose message.¹⁰⁹

b. Debt Collection Emails

In the NPRM, the Commission invited comment on the Act’s application to debt collection email messages, including messages sent by a third party on behalf of the seller from whom the recipient purchased goods or services rather than by the seller itself.¹¹⁰ Nearly all of the 15 commenters that addressed this issue urged that debt collection emails by a seller from whom the consumer made a purchase should be considered transactional or relationship in nature.¹¹¹ Most of these commenters also stated that the same conclusion should apply to emails sent by third-party debt collectors.¹¹²

The Commission declines to modify the definition of “transactional or relationship messages” to include an express provision addressing debt collection emails because there is no evidence in the record that such a modification is necessary to accommodate new email technology or practices. Such a modification is also unwarranted because debt collection messages will usually qualify as “transactional or relationship messages” under the existing definition of the term. The primary purpose of debt collection emails is not the “advertisement or promotion of a commercial product or service,” and,

therefore, they generally would not be “commercial electronic mail messages” under section 7702(2)(A) of CAN-SPAM.¹¹³ Rather, debt collection emails from a seller from whom the consumers made a purchase are best understood as “complet[ing] . . . a commercial transaction that the email recipient has previously agreed to enter into with the sender,” and thus are “transactional or relationship messages” under section 7702(17)(A)(i). Moreover, the Commission agrees with the overwhelming majority of commenters that the “sender” with whom the “recipient has previously agreed to enter into” a commercial transaction can be interpreted to encompass a third party acting on behalf of a seller from whom the consumer made a purchase.¹¹⁴ Thus, an email from a third party collecting on behalf of a seller likely is a “transactional or relationship message.”

c. Copyright Infringement Notices and Market Research

Two business organizations urged the Commission to clarify that messages containing copyright infringement notices or marketing and opinion research surveys are neither commercial nor transactional or relationship in nature and thus are exempt from the Act.¹¹⁵ One of these commenters further asserted that an email containing a copyright infringement notice that also provided information on how to obtain a legitimate, licensed version of the copyrighted material in question would not fall within the scope of the Act.¹¹⁶ In the NPRM, the Commission acknowledged that there may be messages that are neither “commercial electronic mail messages” nor “transactional or relationship messages” as defined by the Act, and thus are not

¹⁰² See, e.g., ACA; CBA; FNB; NRF.

¹⁰³ See FNB; KeySpan; Schnell; Wells Fargo; ESPC; BOA; ACA; DoubleClick; NRF; HSBC; CBA; Discover; PCIAA.

¹⁰⁴ See Discover; ESPC (arguing that legally mandated notices are either exempt from the Act or transactional or relationship in nature, depending on the content and context of the message in question); FNB; KeySpan (arguing that legally mandated notices should either be exempt from the Act or that the Commission should create a new transactional or relationship category for legally required notes); PCIAA (same); MPAA (arguing that messages containing legally mandated notices are not “commercial electronic mail messages” provided that their commercial content does not exceed the amount reasonably believed by the sender to be required to meet the legal requirement prompting the message); Schnell (“[A]n e-mail message containing only a legally mandated notice should have no standing in CAN-SPAM at all, other than perhaps a routine conveyance. It is not a commercial e-mail message, and is not a transactional or relationship message.”).

¹⁰⁵ See DoubleClick; KeySpan; NRF.

¹⁰⁶ See HSBC (arguing that such an email facilitates the commercial transaction into which the parties have entered).

¹⁰⁷ See ACA; CBA; Wells Fargo; BOA.

¹⁰⁸ KeySpan addressed the statutory standard by arguing that “[i]t has become common practice for

senders to email legally required notices to individuals who purchased the sender’s products or services online.” The Commission, however, is not persuaded that this is a “change” in email practices that has evolved since the passage of the Act.

¹⁰⁹ 16 CFR 316.3; see also NPRM, 70 FR at 25438.

¹¹⁰ NPRM, 70 FR at 25450.

¹¹¹ See NADA; Schnell; FNB; ESPC; DMA; NCTA; NNA; Charter; HSBC; CUNA; KeySpan; PCIAA; VFCU. But see Discover (arguing that all debt collection emails should be exempt from regulation under CAN-SPAM); ACA (arguing that “at most” debt collection emails should be regulated as “transactional or relationship messages”).

¹¹² See, e.g., DMA; ESPC; FNB; NCTA. But see Schnell (arguing that debt collection emails from a third party should be considered commercial); Charter (arguing that debt collection messages sent by third-party debt collectors would be neither “commercial” nor “transactional or relationship” messages and thus would fall outside the scope of CAN-SPAM).

¹¹³ Cf. Telemarketing Sales Rule, 68 FR 4580, 4664 n.1020 (Jan. 29, 2003) (“[D]ebt collection . . . activities are not covered by the [Telemarketing Sales Rule, 16 CFR 310] because they are not ‘telemarketing’ — i.e., they are not calls made ‘to induce the purchase of goods or services.’”). If a debt collection email also contains material advertising or promoting a commercial product, service, or website, then it must be analyzed as a dual purpose message under Rule 316.3.

¹¹⁴ Debt collection emails also must comply with other applicable federal and state laws. Significantly, the Fair Debt Collection Practices Act, 15 U.S.C. 1601, *et seq.* (“FDCPA”), imposes limitations on debt collectors’ communications with consumers and third parties. Compliance with CAN-SPAM in no way excuses a debt collector from complying with the FDCPA and other statutes and regulations affecting communications regarding debt collection.

¹¹⁵ See BSA (copyright infringement notices); SIA (research and opinion surveys).

¹¹⁶ See BSA.

addressed in CAN-SPAM.¹¹⁷ As a general matter, the Commission agrees that if a sender has had no previous dealings with the recipient — thus lacking the predicate for a message to be deemed “transactional” — and that sender’s messages contain *only* a copyright infringement notice, the messages also are not primarily commercial in purpose and thus are not subject to the requirements and prohibitions of CAN-SPAM. Nevertheless, where a copyright infringement notice also contains information on how to obtain licensed versions of copyrighted materials, evaluation under the Primary Purpose Rule provisions governing dual purpose messages may lead to the conclusion that such messages are covered by CAN-SPAM.¹¹⁸ Likewise, emails containing true opinion and research surveys may fall outside the scope of the Act, but to the extent that any such message seeks to advertise or promote a brand, a company, or a product or service to the recipient, it also may be primarily commercial in purpose, and therefore subject to the Act’s requirements and prohibitions.

d. Transactions that Do Not Involve an Exchange of Consideration

The NPRM invited comment on the Act’s application to messages sent pursuant to a relationship in which no consideration passes, such as messages from a “free” Internet service (such as Evite or Shutterfly). No commenters provided any evidence of changes in email practices or technology that would warrant modifying the definition of “transactional or relationship message” specifically to address such messages. Indeed, as explained in the NPRM, even without a Rule change, the existing definition of “transactional or relationship message” includes two categories that could include messages sent pursuant to a relationship in which there has been no exchange of consideration: section 7702(17)(A)(i), under which an electronic mail message the primary purpose of which is to “facilitate, complete, or confirm a *commercial transaction* [emphasis added] that the recipient has previously agreed to enter into with the sender” is deemed transactional or relationship in nature; and section 7702(17)(A)(v), which provides that an email the primary purpose of which is “to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a *transaction* [emphasis added] that the

recipient has previously agreed to enter into with the sender” also qualifies as transactional or relationship in nature. In the NPRM, the Commission explained that it believed an email from a free Internet service to someone who has registered with the service would be considered a message “to deliver goods or services * * * that the recipient is entitled to receive under the terms of a transaction” under section 7702(17)(A)(v) rather than a “*commercial transaction*” under section 7702(17)(A)(i) (emphasis added), but sought comment on this question.¹¹⁹

Ten of the 13 commenters that addressed this issue took the position that an email message that is primarily for the purpose of facilitating, completing, or confirming a commercial transaction with the sender previously agreed to by the recipient is “transactional” under section 7702(17)(A)(i), even when the transaction at issue involves no exchange of consideration.¹²⁰ A few of these commenters argued further that, in any event, many “free” Internet services *do* involve an exchange of consideration; these commenters contended that agreeing to receive commercial email or to view advertising, for example, constitutes consideration.¹²¹ Three commenters argued that a “commercial transaction” under section 7702(17)(A)(i) must involve an exchange of consideration.¹²²

The Commission continues to believe that in many cases it is unnecessary to reach the question of whether registration with a “free” Internet service constitutes a “*commercial transaction*” under section 7702(17)(A)(i) (emphasis added), because it is likely a “transaction” under section 7702(17)(A)(v). That said, having reviewed the comments, the Commission has been persuaded that the term “commercial transaction” in section 7702(17)(A)(i) can encompass situations in which there has been no exchange of consideration between the sender and the recipient.¹²³ This is

consistent with the Commission’s interpretation of the term “commercial electronic mail message,” which, as defined in section 7707(2), includes an email the primary purpose of which is the advertisement or promotion of a commercial product or service that is free and does not involve the exchange of consideration so long as it is a “commercial product or service (including content on an Internet website operated for a commercial purpose).” Many free Internet services are undoubtedly engaged in “commerce” and offer consumers goods or services that are “commercial” in nature whether or not they involve an exchange of consideration.¹²⁴

e. Affiliated Third Parties Acting on Behalf of a Person With Whom the Recipient Has Previously Entered Into a Commercial Transaction

The NPRM invited comment concerning the application of the Act to messages sent by affiliated third parties that are acting on behalf of an entity with whom a consumer has transacted business. All but one of the dozen commenters addressing this issue argued that messages “to facilitate, complete, or confirm a commercial transaction to which the recipient has previously agreed” are generally “transactional or relationship messages” under section 7702(17)(A)(i) regardless of whether the messages were transmitted by the entity with whom the consumer transacted business or an affiliated third party acting on the business’s behalf.¹²⁵

its members — *e.g.*, the transaction that occurs when a consumer registers at the website — can reasonably constitute a “commercial transaction.”

¹²⁴ As the Commission noted in the Primary Purpose Rulemaking, 70 FR at 3113, the Random House College Dictionary defines “commercial” as “of, pertaining to, or characteristic of commerce; engaged in commerce.” It defines “commerce” as “an interchange of goods or commodities, especially on a large scale; trade; business.” **RANDOM HOUSE COLLEGE DICTIONARY 270** (Rev. ed. unabridged 1980). Likewise, the term “commerce” as defined in section 4 of the FTC Act, 15 U.S.C. § 44, is broadly construed to include services that are provided without charge where they include commercial advertising. *See, e.g., Ford Motor Co. v. FTC*, 120 F.2d 175, 183 (6th Cir. 1971) (“Interstate commerce includes intercourse for the purpose of trade which results in the passage of property, persons or messages from within one state to within another state. All of those things which stimulate or decrease the flow of commerce, although not directly in its stream, are essential adjuncts thereto The use of advertising as an aid to the production and distribution of goods has been recognized so long as to require only passing notice.”).

¹²⁵ *See* NAEDA; Wahmprenner; FNB; Wells Fargo; ESPC; NAFCU; NAIFA; CBA; Discover; PCIAA; SIA. *But see* Schnell (arguing against application of section 7702(17)(A)(i) to affiliated third parties).

¹¹⁷ NPRM, 70 FR at 25433 n.85.

¹¹⁸ 16 CFR 316.3.

¹¹⁹ NPRM, 70 FR at 25434.

¹²⁰ *See* Discover; Jumpstart; Mattel; NFCU; NAR; NetCoalition; SIA; Schnell; United; VFCU.

¹²¹ *See* Jumpstart; United. One commenter also suggested that to protect consumers, trial memberships and other situations where consideration is not paid until a later time should be considered commercial. *See* Schnell.

¹²² *See* ABM; NADA; PCIAA.

¹²³ The NPRM stated that the Commission “believe[d] that the modifier ‘commercial’ has been deliberately omitted from [section 7702(17)(A)(v)] of CAN-SPAM to accommodate just the sort of scenario that IAC and Microsoft raise,” *i.e.*, emails from free Internet services, like Evite, to their members. 70 FR at 25434. Upon further reflection, the Commission has concluded that a transaction between a free Internet website, such as Evite, and

Because there is no evidence of changes in email technology or practices that would warrant amending the Rule expressly to address messages sent by affiliated third parties that are acting on behalf of an entity with whom the recipient has done business, the Commission does not make any modifications to the Rule concerning such messages. In addition, the Commission notes that the examples provided by commenters (e.g., travel agents, insurance agents) are fairly straightforward examples of types of messages that would likely qualify as a “transactional or relationship message” under section 7702(17)(A)(i).¹²⁶ The Commission, however, does not interpret this provision as necessarily covering every email message sent by an affiliated third party. For example, if an affiliated third party were to market its own product, service, or Internet website in an email message in which the affiliated third party is also facilitating or completing a transaction on behalf of another vendor, then that message would contain both commercial and transactional content, thus triggering analysis of the primary purpose of the dual purpose message.

f. Messages Sent to Effectuate or Complete a Negotiation

In the NPRM, the Commission asked under what circumstances an email sent to effectuate or complete a negotiation should be considered a “transactional or relationship message” under section 7702(17)(A)(i).¹²⁷ Twelve of the 13 commenters addressing this issue agreed that such messages should be deemed transactional or relationship messages or should fall outside the scope of the Act.¹²⁸

The Commission declines to alter the definition of “transactional or relationship message” to address communications for the purpose of effectuating or completing a negotiation because of the lack of any evidence in

the record that such a modification would be necessary to accommodate changes in email technology or practices and to further the purposes of the Act. However, even without such a modification, the Commission continues to believe that, as it stated in the NPRM, to the extent that negotiation may be considered a “commercial transaction” that a recipient has previously agreed to enter into, such messages likely would be considered transactional or relationship under section 7702(17)(A)(i) if they were sent to facilitate or complete the negotiation.¹²⁹ The Commission, however, does not interpret the term “transactional or relationship message” to include an initial unsolicited message that proposes a transaction and attempts to launch a negotiation by offering goods or services. Likewise, after a party has terminated a negotiation, an email from the other party seeking to restart the negotiations would not be a “transactional or relationship message.”

g. Messages in the Employment Context

In the NPRM, the Commission sought comment on the Act’s application to several types of emails that arise in the employment context. Due to the lack of evidence in the record that would satisfy the statutory standard for modifying the definition of “transactional or relationship message,” the Commission does not adopt any provision in the final Rule concerning such messages.

(i) Messages Concerning Employee Discounts or Similar Messages

The NPRM asked whether it is appropriate to classify emails from employers offering employee discounts or similar messages as communications that “provide information directly related to an employment relationship” under section 7702(17)(A)(iv).¹³⁰ In addition, the Commission asked whether it was relevant whether the employee’s email address to which the message was sent had been assigned to the employee by the employer.¹³¹ All 20 commenters that addressed this issue argued either that such messages should be considered “transactional or relationship messages” under section 7702(17)(A)(iv)¹³² or that they are neither “commercial” nor “transactional or relationship” messages and thus fall outside the scope of the Act.¹³³ A

consistent theme in the comments was that an employer should be free to send whatever information it wants to an email address that the employer owns and assigns to an employee.¹³⁴ In such circumstances, these commenters argued, the employer is both the “sender” and the “recipient” under the Act.

The comments persuade the Commission that section 7702(17)(A)(iv) should be interpreted to encompass messages that offer employee discounts from employers to email accounts they have provided to their employees. Moreover, there is nothing in the legislative history suggesting that such emails were of concern to Congress in enacting CAN-SPAM. Further, it seems unlikely that employers would inundate their employees’ workplace email accounts with offers of employee discounts and the like and thereby divert their employees’ attention from their job responsibilities.¹³⁵ Thus, because the definition of “transactional or relationship message” is broad enough to encompass emails from employers to their employees offering discounts, it is unnecessary to modify the definition to address such messages.

(ii) Messages From a Third Party on Behalf of the Recipient’s Employer

In the NPRM, the Commission asked whether an email that “provide[s] information directly related to an employment relationship or related benefit plan in which the recipient is currently involved” and that would be a “transactional or relationship message” under section 7702(17)(A)(iv) if it were sent by the recipient’s employer would retain its transactional or relationship character if sent by a third party acting on the employer’s behalf. Most of the handful of commenters that addressed this

¹²⁶ See NAIFA; NAIDA; FNB; IAC (comments submitted in response to ANPR); Wahmpreneur. For example, if a consumer purchases an airline ticket on a travel website like Orbitz, a subsequent message from Orbitz or the airline (or both) “to facilitate, complete, or confirm” the message will be a “transactional or relationship message” (or a dual purpose message if there is additional content in the email). Likewise, an email from an insurance agent to a customer can qualify as transactional or relationship in nature notwithstanding the fact the customer paid the premium to the insurer, not its agent.

¹²⁷ NPRM, 70 FR at 25434, 25450.

¹²⁸ See NADA; ARDA; FNB; Wells Fargo; BOA; Cendant; SIA; SIIA; CBA; MPAA; KeySpan; Discover. See also Schnell (emails to effectuate or complete a negotiation should be deemed transactional or relationship only if the recipient has a reasonable expectation that such a negotiation will occur via email).

¹²⁹ NPRM, 70 FR at 25434.

¹³⁰ *Id.* at 25436, 25450.

¹³¹ *Id.* at 25450.

¹³² See Associations; NNA; CBA; NRF; NADA; FNB; MPA; SIIA; Coalition; MPAA; KeySpan; Wells Fargo; BOA; ASTA; DoubleClick; Nextel.

¹³³ See AeA; Discover; PCIAA; Schnell.

¹³⁴ See, e.g., CBA (“The conclusion must be that an employer can send whatever message it desires to an e-mail account that the employer owns and assigns the employee.”); NRF (“[I]f the company provides the e-mail account to the employee primarily for the employer’s benefit, [then] the employer should be free to utilize its own proprietary network to send information to its employees.”).

¹³⁵ The Commission, however, rejects the argument of some commenters that employees should not be deemed “recipients” under the Act of such messages sent by their employers to their employer-provided email addresses. See, e.g., BOA; CBA; Coalition; DoubleClick; DMA; MPA; Wells Fargo. The Act broadly defines the “recipient” as an “authorized user of the electronic mail address to which the message was sent or delivered” and does not require ownership of the email address. 15 U.S.C. 7702(14) (emphasis added). Consequently, employees are “recipients” of messages delivered to their workplace email accounts, whether such emails were sent by their employers or another person.

question agreed with the Commission's view that messages sent by a third party on behalf of an employer should be considered transactional or relationship in nature.¹³⁶ The Commission reiterates its interpretation of section 7702(17)(A)(iv) as being sufficiently broad to allow an employer to retain a third party as its agent to send a message to its employees that would otherwise fit within the confines of a "transactional or relationship message."¹³⁷ Thus, because the definition of "transactional or relationship message" is broad enough to include a message sent by the third-party agent of an employer to its employees, provided the message would be considered transactional or relationship in nature if sent by the employer itself, there is no need to modify the definition of "transactional or relationship message" to address such messages.

(iii) Messages Sent After an Offer of Employment is Tendered

In the NPRM, the Commission asked whether, for purposes of section 7702(17)(A)(iv) of the Act, providing information directly related to an employment relationship should include providing information related to such a relationship after an offer of employment is tendered, but prior to the recipient's acceptance of the job offer.¹³⁸ The several commenters that addressed the issue believed that such messages provide "information directly related to an employment relationship" and thus are transactional and relationship in nature.¹³⁹ None of the commenters argued that prospective employees would be subject to unwanted commercial email messages from their prospective employers between the time an offer of employment is made and the time it is either accepted or rejected.

As an initial matter, the Commission notes that, where the primary purpose of an email from an employer to a prospective employee is something other than the promotion or advertisement of a commercial product or service, the message would not be

subject to CAN-SPAM's requirements for commercial email messages.¹⁴⁰ Where, for example, a message provides only information about a prospective employee's salary and job responsibilities and does not advertise or promote a commercial product or service, it is not a "commercial electronic mail message" under the Act. Rather, an email sent to a prospective employee who has received a *bona fide* offer of employment after actively seeking such employment would be considered information "directly related to an employment relationship or related benefit plan" under section 7702(17)(A)(iv), provided the email concerned only the prospective employment relationship.¹⁴¹ To the extent, however, that such messages included both information about the job offer and an advertisement or promotion of a commercial product or service, e.g., an effort to induce the job applicant to purchase the employer's goods or services, then the message would be analyzed as a dual purpose message under the Primary Purpose provisions of the Commission's CAN-SPAM Rules.¹⁴²

h. Electronic Newsletter Subscriptions and Other Content that a Recipient is Entitled to Receive as a Result of a Prior Transaction with the Sender

The NPRM asked "where a recipient has entered into a transaction with the sender that entitles the recipient to receive future newsletters or other electronically delivered content, should email messages the primary purpose of which is to deliver such products or services be deemed transactional or relationship messages?"¹⁴³ The commenters that addressed this issue generally believed such emails were "transactional or relationship messages" under section 7702(17)(A)(v).¹⁴⁴ Several

commenters thought the Commission's "primary purpose" rule already addressed the issue and supported the position that transmission of a periodical delivered via email "falls within one of the 'transactional or relationship message' categories."¹⁴⁵ In addition, three commenters stressed that it is irrelevant whether electronic newsletters or other content provided via subscription are entirely commercial in nature (e.g., a catalog), so long as the content conforms to the consumer's reasonable expectations about the material he or she has requested.¹⁴⁶

The comments do not establish the statutory prerequisite to modifying the definition of "transactional or relationship message" expressly to address electronic newsletters and other content sent pursuant to a subscription. Specifically, there is no showing that such a modification is necessary to accommodate changes in email technology or practices and to accomplish the goals of the Act. Moreover, the Commission believes that the existing definition of "transactional or relationship message" already adequately addresses such emails. In view of the comments received on this issue, the Commission continues to believe, as it stated in the Primary Purpose Rulemaking, that when a recipient subscribes to a periodical delivered via email, transmission of that periodical to that recipient falls within section 7702(17)(A)(v), which includes "goods or services . . . that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender," provided the periodical consists exclusively of informational content or combines informational and commercial content.¹⁴⁷ On the other hand, when a sender delivers an *unsolicited* newsletter or other periodical via email, and there is no subscription, the situation is materially

under CAN-SPAM; Sonnenschein (advocating a distinction between the "bona fide transaction [in which a consumer] sign[s] up for a service or subscrib[es] to receive emails, coupons, or electronic newsletters and the mere provision of affirmative consent to receive commercial emails").

¹⁴⁵ See DoubleClick; MPAA; FNB.

¹⁴⁶ See NEPA; ICC; Sonnenschein.

¹⁴⁷ See NPRM, 70 FR at 3118. Likewise, the Commission continues to believe that, as it explained in the Primary Purpose Rulemaking, "if an email consists exclusively of commercial content (such as a catalog or other content that is purely an advertisement or promotion), then the email would be a single-purpose commercial message. This is because delivery of such advertising or promotional content would not constitute the 'delivery of goods or services * * * that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender,' under section 7702(17)(A)(v)." *Id.* at 3118 n.91.

¹⁴⁰ 15 U.S.C. 7702(2).

¹⁴¹ One commenter argued that section 7702(17)(A)(iv)'s exemption for employment-related emails "does not go far enough" and that the final Rule should exempt "e-mails regarding current or prospective job openings that are sent to individuals who are not currently employed by the sender, and who are not charged any fees or other consideration in connection with any current or prospective job." ASA. As noted above, if such emails do not advertise or promote a product or service, they are not commercial email messages and thus they fall outside the Act.

¹⁴² 16 CFR 316.3.

¹⁴³ NPRM, 70 FR at 25450.

¹⁴⁴ See NADA; NAEDA; Wahmpreneur; ICC; MPAA; KeySpan; PCIAA; United; IPPC; Jumpstart; NEPA; TimeWarner; DoubleClick; Mattel. See also NFCU (electronic newsletters sent to a sender's members should be entirely exempt from CAN-SPAM); Discover (arguing that primary purpose of a newsletter delivered by email should be determined on a case-by-case basis); Schnell (opining that consumer request for electronic newsletter or other content is not determinative

¹³⁶ See KeySpan; FNB; MPAA; PCIAA. But see Schnell ("commercial messages to employees of a given employer that come from third parties should not be considered transactional or relationship messages, and should be considered commercial under CAN-SPAM").

¹³⁷ Nevertheless, the Commission's interpretation does have its limits. For example, if a third party were to market to a client company's employees the third party's own goods and services on its own behalf, rather than on behalf of the client, those messages would not be deemed "transactional or relationship messages" under section 7702(17)(A)(iv).

¹³⁸ NPRM, 70 FR at 25436, 25450.

¹³⁹ See FNB; KeySpan; Discover; MPAA.

different for purposes of CAN-SPAM than when such content is delivered with the consent of the recipient. In such a scenario, the emails likely would not be “transactional or relationship messages” within the meaning of the Act.

i. “Business Relationship” Messages

The NPRM asked whether the Commission should expand the Act’s definition of “transactional or relationship message” to include what some commenters call “business relationship messages,” which are individualized messages sent from one employee of a company to an individual recipient (or a small number of recipients) at another business.¹⁴⁸ Or, as one commenter described this type of message “one-to-one e-mail that is sent by employees in the business-to-business context.”¹⁴⁹ The nine commenters who addressed the issue of “business relationship” messages all supported expanding the definition of “transactional or relationship message” to include this type of email. Commenters did not claim that business relationship messages are “commercial electronic mail messages” under the Act, but, rather, opined that *if* such messages were deemed “commercial electronic messages,” they would face significant administrative and technological burdens, because business email systems are not designed to scrub each email sent by each employee against the business’s CAN-SPAM opt-out list.¹⁵⁰ In addition, commenters argued that such a requirement would interfere with legitimate practices that are critical to business relationships and operations.¹⁵¹ To avoid any such potential problems, the commenters urged the Commission to add a new category of “transactional or

relationship message” to cover business relationship messages.

None of the commenters, however, demonstrated changes in email technology or practices that would warrant an express carve-out for business relationship messages. For example, there is no evidence that the technological burdens that the commenters cite as a basis for creating the exemption did not exist when the Act was passed in 2003. There is, therefore, an insufficient evidentiary basis to modify the definition of “transactional or relationship message” under the statutory standard. Thus, the Commission declines to add a “business relationship message” category to the definition of “transactional or relationship.”

In any event, the commenters’ concerns about the impact of the Act on the ability of one of their employees to send emails to a small number of employees at another company with which they have a preexisting relationship may be overblown. For example, to the extent an employee at one company provides affirmative consent to receive emails from an employee of another company, or from that company in general, such consent overrides any prior opt-out request.¹⁵² Consequently, when affirmative consent has been given, there is no need to “scrub” the email against the business’s CAN-SPAM opt-out list. Nevertheless, the recipient can always opt out of receiving *future* emails from the sender, notwithstanding his or her prior affirmative consent. As the Commission has previously observed, affirmative consent to receive commercial emails from a sender does not eliminate the sender’s obligation to provide a functioning Internet-based mechanism to opt out of receiving future emails or any of the sender’s other obligations under CAN-SPAM.

j. Messages from an Association to its Membership

In the NPRM, the Commission stated that it believes that email messages from an association or membership entity to its members are likely “transactional or relationship messages” under section 7702(17)(A)(v).¹⁵³ The Commission inquired whether messages from such senders to *lapsed* members should also be considered transactional or relationship under section 7702(17)(A)(v), and whether messages to lapsed members should be considered commercial electronic messages when they advertise or promote the

membership entity.¹⁵⁴ The seven commenters that addressed this question argued that email messages to lapsed members should be considered “transactional or relationship messages,”¹⁵⁵ but most recommended limiting the amount of time that such email messages may be sent to former members.¹⁵⁶

Under the existing definition of “transactional or relationship message” the Commission believes that where a recipient is no longer a member of an organization, it is unlikely that messages from the organization fall within any of the categories of “transactional or relationship messages.”¹⁵⁷ For example, a message that advertises or promotes the sale of a new or renewed membership would be a “commercial electronic mail message” (or a dual purpose message to the extent it also includes non-commercial content). However, the Commission declines to modify the definition of “transactional or relationship message” to include such emails. None of the commenters offered any evidence that either such modification is necessary to accommodate changes in email

¹⁵⁴ *Id.*

¹⁵⁵ See NAEDA; Independent; NAFCU; CUNA; Cendant; PCIAA; SIA. In addition, some commenters, while not responding to the NPRM’s inquiry about lapsed members, addressed the question of the Act’s regulation of communications from an association to its current members. See, e.g., Metz; SHRM; ABM; ARTBA; NAR; ACA; ASAE. As the Commission explained in the NPRM, 70 FR at 25438, and reiterates here, messages from an association to its membership are likely transactional or relationship in nature. The Commission continues to believe, however, that there is no basis to expand the existing definition of “transactional or relationship” to create an express exemption for such communications.

¹⁵⁶ See NAEDA (arguing that messages to former members should be allowed and considered transactional or relationship messages for a specific amount of time e.g., 180 days); Independent (arguing that messages to former members are still “transactional or relationship messages” rather than “commercial” messages for 12 months after membership lapses); Cendant (membership entity should be able to contact members for 18 months after last transaction); CUNA (arguing that contact may be made for a reasonable amount of time); PCIAA (stating that, consistent with the Do-Not-Call Rules, an email message to a lapsed member should be considered a “transactional or relationship message” for 90 days after the membership has lapsed); VFCU (arguing that email messages to lapsed members should still be considered transactional or relationship in nature if the purpose is related to administrative matters). See also SIA (arguing against a “*per se* approach” concerning an association’s communications with lapsed members).

¹⁵⁷ There are, of course, exceptions; for example, an email from a membership organization to a lapsed member to obtain payment of a debt would be a “transactional or relationship” message under section 7702(17)(A)(i), just as a debt collection email from non-membership entity would be transactional and relationship in nature, as discussed above. See *supra* Part II.A.3.b.

¹⁴⁸ *Id.* at 25438 n.137, 25450. For the most part, commenters described “business relationship messages” as arising in the context of business-to-business communications, rather than communications with individual consumers. See, e.g., BOA (“For example, in the first mortgage business, e-mails are sent to brokers to inform them up-to-the minute information about current mortgage rates.”); CBA (“in the context of the equipment leasing industry, it is typical for lenders to e-mail equipment vendors a rate sheet that describes the amount of interest a lender would charge on a given piece of equipment”); Reed (“For example, our ad sales personnel routinely contact current advertisers about upcoming issues of publications.”). But see Cendant (interpreting “business relationship messages” to encompass messages from a business to individual consumers with whom the sender has an existing business relationship).

¹⁴⁹ See CBA.

¹⁵⁰ See, e.g., BOA; CBA; Wells Fargo; MPAA.

¹⁵¹ See BOA; CBA; Cendant; ESPC; ICC; KeySpan; MPAA; Reed; Wells Fargo.

¹⁵² 15 U.S.C. 7704(a)(4)(B).

¹⁵³ NPRM, 70 FR at 25450.

practices or technology or to accomplish the purposes of the Act, and thus the statutory standard for amending the definition of “transactional or relationship message” is not satisfied.

4. Section 316.2(p) — Definition of “Valid Physical Postal Address”

Proposed Rule 316.2(p) clarified that a sender may comply with section 7704(a)(5)(A)(iii) of the Act — which requires inclusion in any commercial email message of the sender’s “valid physical postal address” — by including in any commercial email message any of the following: (1) the sender’s current street address; (2) a Post Office box the sender has registered with the United States Postal Service; or (3) a private mailbox the sender has registered with a commercial mail receiving agency (“CMRA”) that is established pursuant to United States Postal Service regulations. A substantial majority of commenters supported the proposed definition. In consideration of these comments, the Commission adopts as a final Rule a modified version of the definition proposed in the NPRM. This modified definition allows for the use of Post Office or private mailboxes, but clarifies that a sender must “accurately” register such mailboxes pursuant to postal regulations to be considered a “valid physical postal address” under the Act. Comments addressing the proposed definition are discussed in detail below.

In response to the NPRM, the Commission received 25 comments addressing the definition of “valid physical postal address.” Of these, 18 commenters supported the definition as proposed. Specifically, supporters noted that the proposed definition appropriately recognized that many legitimate businesses, large and small alike, use Post Office boxes or private mailboxes, and that allowing commercial email messages to disclose such a P.O. box or private mailbox would provide flexibility and security to email marketers without compromising law enforcement efforts.¹⁵⁸ Other commenters, including small businesses and independent contractors, supported the proposed definition because it recognizes the privacy and security concerns of individuals who work from home or are fearful of publishing their street address for other reasons.¹⁵⁹

Two additional commenters supported the Commission’s proposal that P.O. boxes and private mailboxes be included under the definition of “valid

physical postal address,” but objected to the additional requirement that the sender be registered with the United States Postal Service (“USPS”). Specifically, HSBC Bank Nevada (“HSBC”) and MasterCard suggested that the definition be modified to allow for any address to which mail is delivered for a particular sender, whether or not that sender is registered with the USPS.¹⁶⁰ HSBC noted that several affiliated companies often will receive mail at the same P.O. box, yet not all such companies may be registered to use that box with the USPS, as the proposed definition would require.¹⁶¹ HSBC and MasterCard argued that their proposed modifications would achieve the purposes of the Act by providing consumers with a mechanism to contact senders other than by email.¹⁶² The approach suggested by MasterCard and HSBC, however, does not take into account the other important purpose of the valid physical postal address provision — that law enforcement authorities be able to identify a sender using a given address, which would be difficult if not impossible without registration of all mailbox users with the USPS.¹⁶³

Furthermore, USPS regulations require that anyone registering an individual P.O. box identify the names of all persons authorized to receive mail at such address, and to provide two forms of identification for each listed person.¹⁶⁴ Similarly, with respect to “organization” P.O. boxes or private mailboxes where the applicant is a “firm,” USPS regulations require any of the organization’s members or employees who receive mail at such mailbox to be listed on the requisite postal form.¹⁶⁵ Thus, USPS regulations specifically require that anyone

receiving mail at a given address be registered with the USPS.

Only five commenters opposed the Commission’s proposed definition of “valid physical postal address.” Three of these commenters felt that P.O. boxes and private mailboxes should not be included in the proposed definition because they are often used in fraud schemes as a way to shield their owners from identification.¹⁶⁶ The Commission previously addressed this argument in the NPRM, noting that “[a]n individual or entity seeking to evade identification can just as easily use inaccurate street addresses’ as hide behind a Post Office box or private mailbox.”¹⁶⁷ No commenters provided any information to refute this statement.

One consumer commenter opposing the proposed definition suggested that P.O. boxes have proven insufficient as a means of contacting senders that fail to honor opt-out requests.¹⁶⁸ The Commission, however, has no evidence to suggest that certain senders are difficult to contact *because of the fact* that those senders have provided P.O. boxes or private mailboxes as their contact addresses. It is more likely the case that such senders are unscrupulous and have either provided a false or nonexistent address as a means of evading identification, or simply do not respond to consumer inquiries. In such instances, the Commission sees no added benefit to requiring that senders provide a street address, which could just as easily be falsified or simply disregarded.

Finally, ACUTA suggested that the Commission assess and evaluate the relevant postal regulations to ensure that they adequately protect the interests of consumers and law enforcement.¹⁶⁹ Such evaluation, however, goes beyond the scope of this rulemaking proceeding — especially when the Commission has no basis upon which to question the effectiveness of the USPS regulations.

In consideration of all of these comments, the Commission adopts a modified definition of “valid physical postal address.” In the final Rule, the Commission has modified slightly the definition of “valid physical postal address” to clarify that a sender must “accurately” register a P.O. box or private mailbox in compliance with these regulations. For example, if a sender provides a P.O. box or private mailbox address in its commercial email message and is not accurately identified

¹⁶⁰ See HSBC; MasterCard.

¹⁶¹ See HSBC.

¹⁶² See HSBC; MasterCard.

¹⁶³ Under USPS regulations, federal, state, or local government agencies may obtain postal and private mailbox registrant information from the USPS upon written certification that such information is required to perform the agency’s duties. 39 CFR 265.6(d)(4) & (d)(9). This is one avenue that law enforcement can pursue in order to identify a sender that fails to comply with CAN-SPAM.

¹⁶⁴ See Domestic Mail Manual (“DMM”) 508.4.3.1(b) (other adult persons who receive mail in the post office box of an individual box customer must be listed on Form 1093 and must present two items of valid identification to the post office).

¹⁶⁵ See DMM 508.4.3.1(c) (requiring an organization’s employees or members who receive mail at the organization’s postal box to be listed on Form 1093; each person must have verifiable identification and present this identification to the Postal Service upon request) and PS Form 1583 (if applicant is a firm, applicant must provide the name of each person whose mail is to be delivered).

¹⁵⁸ See, e.g., ACLI; ACB; DMA; DoubleClick; NNA; SIA.

¹⁵⁹ See Discover; Independent; NAR.

¹⁶⁶ See CUNA; NFCU; Sowell.

¹⁶⁷ NPRM, 70 FR at 25439 (quoting SIA).

¹⁶⁸ See Kapecki.

¹⁶⁹ See ACUTA.

on the applicable postal form, fails to provide two forms of valid identification if required,¹⁷⁰ or otherwise fails to comply with applicable USPS regulations, such address would not be considered a “valid physical postal address” for purposes of the Act. Accordingly, the Commission adopts final Rule 316.2(p), which provides that a “‘valid physical postal address’ means the sender’s current street address, a Post Office box the sender has *accurately* registered with the United States Postal Service, or a private mailbox the sender has *accurately* registered with a commercial mail receiving agency that is established pursuant to United States Postal Service regulations.” (Emphasis added.)

5. *Applicability of the Act to Forward-to-a-“Friend” Email Marketing Campaigns*

In the NPRM, the Commission sought comment on CAN-SPAM’s impact on forward-to-a-“friend” email — a type of commercial email that can take a variety of forms. In its most basic form, a person (the “forwarder”) receives a commercial email message from a seller and forwards the email message to another person (the “recipient”). Other scenarios include those in which a seller’s web page enables visitors to the seller’s website to provide the email address of a person to whom the seller should send a commercial email.

Due to the myriad forms of forward-to-a-“friend” email, CAN-SPAM’s applicability to such messages is a highly fact specific inquiry. As explained below, the central question in this analysis often will be whether the seller has “procured” the origination or transmission of the forwarded message.

a. *Background*

In the NPRM, the Commission discussed the interplay of multiple definitions in CAN-SPAM and their relevance in analyzing the Act’s applicability to forward-to-a-“friend” emails. The Commission began its analysis by examining CAN-SPAM’s definition of “sender” which the Act defines to mean “a person who initiates [a commercial electronic mail] message and whose product, service, or Internet web site is advertised or promoted by the message.”¹⁷¹ Thus, to be a “sender,” a seller must be both an “initiator” of the message and have its product, service, or Internet website advertised or promoted by the message.

¹⁷⁰ See, e.g., DMM 508.1.9.2(a) (requiring applicants of private mailboxes to furnish two forms of valid identification).

¹⁷¹ 15 U.S.C. 7702(16)(A).

A forward-to-a-“friend” email will ordinarily advertise a seller’s product, service, or website. Thus, the NPRM focused on whether a seller would meet CAN-SPAM’s definition of “initiate.” The Act defines “initiate” to mean “to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message.”¹⁷²

In the NPRM, the Commission then examined the meaning of the term “procure” and concluded that a seller “procures” an email by either: (1) providing a forwarder with consideration (such as money, coupons, discounts, awards, additional entries in sweepstakes, or the like) in exchange for forwarding the message, or (2) intentionally inducing the initiation of a commercial email through an affirmative act or an explicit statement that is “designed to urge another to forward the message.”¹⁷³ Thus, the Commission opined that CAN-SPAM’s inclusion of the word “induce” in the definition of “procure,” meant that a seller could “procure” the initiation of a message without offering to provide a forwarder with any consideration if it exhorted visitors to its website to forward a message.¹⁷⁴

Finally, the Commission concluded by stating that a seller who offered a web-based “click-here-to-forward” mechanism, but did not exhort visitors to forward a message or offer to pay or provide other consideration in exchange for forwarding the message, would be engaged in the “routine conveyance” of the message and therefore not be an “initiator” of the message.¹⁷⁵

b. *Comments Received in Response to the NPRM*

The Commission received more than forty comments concerning forward-to-a-“friend” emails. Some of these comments asserted that: (1) forward-to-a-“friend” messages are not “commercial electronic mail messages”; (2) most marketers whose products, services, or website are promoted by a

¹⁷² 15 U.S.C. 7702(9).

¹⁷³ The NPRM indicated that to “intentionally induce” the initiation of a commercial email a “seller must make an explicit statement that is designed to urge another to forward the message.” 70 FR 25441.

¹⁷⁴ For instance, the Commission posited that a seller would induce a message (and therefore “procure” the initiation of a message) if, without offering to provide a forwarder with any consideration, its web-based forwarding mechanism urged visitors to “Tell-A-Friend—Help spread the word by forwarding this message to friends! To share this message with a friend or colleague, click to the ‘Forward E-mail button.’” NPRM, 70 FR at 25441 n.178.

¹⁷⁵ *Id.* at 25441-42.

forward-to-a-“friend” message are engaged in “routine conveyance”; (3) the Commission’s view of “routine conveyance” was unduly narrow; (4) forward-to-a-“friend” emails sent through a seller’s web-based mechanism should be treated the same as emails that the seller sends to a forwarder who then forwards the messages to a recipient; (5) making CAN-SPAM’s applicability hinge on whether a seller offered to pay a forwarder consideration was contrary to the language and purpose of the Act; (6) sweeping forward-to-a-“friend” messages into CAN-SPAM would impose high compliance burdens for sellers. Each cluster of comments is elaborated upon below.

First, some commenters opined that the most relevant inquiry in a forward-to-a-“friend” scenario is whether the primary purpose of the forwarded message is “commercial.” If the message’s primary purpose is not “commercial” (and it is not a “transactional or relationship message”), CAN-SPAM does not apply.¹⁷⁶

Second, a handful of commenters asserted that the key factor in determining whether a forward-to-a-“friend” message is covered by the Act should be whether the seller is engaged in “routine conveyance.”¹⁷⁷ These commenters argued that under section 7702(9) of the Act, any person engaged in “routine conveyance” is necessarily not an “initiator,” and thus it is unnecessary to inquire whether it “procured” the message in question.

Third, a number of commenters posited that the Commission’s understanding of what constitutes “routine conveyance” was unduly narrow.¹⁷⁸ Many commenters opined that all, or almost all, forward-to-a-“friend” mechanisms constitute “routine conveyance.”¹⁷⁹ Some commenters argued that under the Act’s definition of “initiate,” whether a company pays consideration or otherwise induces a person to forward an email is irrelevant to whether the company is engaged in “routine

¹⁷⁶ See CBA; DMA; HSBC; Wells Fargo. Section 316.3 of the Rule defines the “primary purpose” test for commercial email. 16 CFR 316.3.

¹⁷⁷ See, e.g., Microsoft.

¹⁷⁸ See, e.g., AeA; Charter; ePrize; ERA; Independent; MPA; Masterfoods; Mattel; Microsoft; OPA; PMA.

¹⁷⁹ See AeA; ePrize; ERA; MPAA; MPA; Masterfoods; Mattel; Microsoft; NCTA; NetCoalition; OPA; PMA; SIIA; Wells Fargo. *But see* Metz (“A company that sends a commercial e-mail and provides a website for forwarding that e-mail is not simply engaging in ‘routine conveyance’; the message that it is conveying is its own.”).

conveyance.”¹⁸⁰ The majority of commenters, however, expressed the view that a company that offers consideration to a person to send or forward an email to another person is not engaged in “routine conveyance” under the Act.¹⁸¹ Within this group, commenters were divided as to whether the offer of *de minimis* consideration, such as coupons, sweepstakes entries, or points towards the purchase of a good or service, was sufficient to render a company ineligible for the “routine conveyance” exception.¹⁸²

Fourth, many commenters also stated that web-based mechanisms for forwarding emails should be treated no differently than the “forward” button on a typical email program.¹⁸³ In these email programs, the “sender” of the email, according to the commenters, is the person forwarding the email.

Fifth, many of the commenters noted that making the offer of consideration the standard for determining whether a forwarder “procured” the origination or transmission of a message or engaged in “routine conveyance” would both be contrary to Congress’s intent in passing the CAN-SPAM Act,¹⁸⁴ and unnecessary because there is no evidence to suggest that Congress or consumers viewed forward-to-a-“friend” messages as spam.¹⁸⁵

Finally, some commenters noted the compliance burdens that would result from the inclusion of forward-to-a-“friend” emails in CAN-SPAM’s regulatory regime. According to these commenters, once a person forwards an email using his or her own email

program, the original “sender” loses the ability to control the email message’s content and whether the message retains its compliance with CAN-SPAM.¹⁸⁶ Commenters also stated that it was very difficult to check the names of recipients of forwarded messages against company opt-out lists.¹⁸⁷ Moreover, some commenters who operate websites directed to children opined that if they were considered the “sender” of certain forwarded emails, they would have to honor opt-out requests and maintain opt-out lists, which might cause conflicts with the Children’s Online Privacy Protection Rule.¹⁸⁸

c. Commission Statement on Forward-to-a-“Friend” Emails

Whether a seller or forwarder is a “sender” or “initiator” is a highly fact specific inquiry. Nonetheless, the application of the Act to a forward-to-a-“friend” message likely often will turn on whether the seller has offered to pay or provide other consideration to the forwarder. Below, the Commission expands upon its discussion contained in the NPRM by discussing the liability of sellers in two common forms of forward-to-a-“friend” emails: (1) those sent using a web-based forwarding mechanism and (2) those forwarded using the forwarder’s own email program. The Commission then discusses the potential liability CAN-

SPAM imposes on consumers who send forward-to-a-“friend” emails.

(i) Seller’s Liability in the Context of a Forwarding Mechanism on a Seller’s Website

With a web-based mechanism, a seller’s website includes a button that enables a visitor to the website to send an email advertising the seller’s product, service, or website. When the visitor clicks on the button, the seller requests the recipient’s email address and often additional information such as the visitor’s name and email address. The seller may also enable the visitor to add text that will be included in the message sent to the recipient. Upon entering the information, the visitor must press a “send” button for the message to be sent. The message will be sent to the recipient via the seller’s or seller’s agent’s email server.

The starting point in analyzing CAN-SPAM’s applicability to forward-to-a-“friend” messages is the language of the Act. A seller is a “sender” if it “initiates” the message and its product, service, or Internet website is advertised or promoted in the message.¹⁸⁹ Because the message sent using the seller’s web-based mechanism will ordinarily advertise the seller’s product, service, or website, the seller will be a “sender” if it “initiates” the message sent to the recipient.

CAN-SPAM defines “initiate” to mean “to originate or transmit [a commercial email] or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message.”¹⁹⁰ Thus, where a seller is involved solely in “routine conveyance,” the seller will be exempt from the responsibilities of an “initiator” or a “sender” under the Act. The Act defines “routine conveyance” to mean the “transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses.”¹⁹¹ The Act’s legislative history explains that a company engages in “routine conveyance” when it “simply plays a technical role in transmitting or routing a message and is not involved in coordinating the recipient addresses for the marketing appeal.”¹⁹² Thus, under the web-based

¹⁸⁰ See, e.g., ERA; ePrize; MPA; Microsoft (“a message may be induced or procured but still fall within the routine conveyance exception to the Act’s definition of ‘initiate’”); NAIFA; PMA; SIA.

¹⁸¹ See ACLI; BOA; Charter; CBA; Discover; MasterCard; MPAA; NRF; NetCoalition; OPA; Time Warner.

¹⁸² For comments arguing that a company could be engaged in routine conveyance notwithstanding its offer of sweepstakes entries, coupons, discounts, “points” and the like to persons for forwarding an email, see, e.g., AeA; ERA; FNB; Mattel; Coalition; PMA; RIAA (“[The] legislative history also casts doubt on whether Congress intended that the furnishing of merely nominal consideration - for instance, ‘points’ to be accumulated toward the award of a free CD or music download - would be enough to qualify as ‘procuring’ the forwarding of a commercial e-mail. Surely when one company ‘hires’ another to carry out a commercial e-mail campaign, much more than nominal consideration would be involved.”). For comments expressing the view that an offer of sweepstakes entries, points, coupons, discounts and the like in exchange for forwarding a message would render a company ineligible for the routine conveyance exception, see, e.g., Charter; MPAA; NAA; NRF; OPA; Time Warner.

¹⁸³ See, e.g., Charter; DMA.

¹⁸⁴ See AeA; Associations; Charter; CBA; DoubleClick; MasterCard; Microsoft; NAIFA; NCTA; NetCoalition; PMA; RIAA; SIA; Wells Fargo.

¹⁸⁵ See Masterfoods; Mattel; Visa.

¹⁸⁶ See Associations; BOA; Charter; CMOR; DMA; ERA; FNB; Jumpstart; MPAA; MPA; Coalition; NRF; NetCoalition; RIAA; Wahmpreneur.

¹⁸⁷ See AeA; Candant; ePrize (there are substantial costs in building a software platform that would allow scrubbing of names before using forwarding mechanism); MPAA (“It is virtually impossible to meet the CAN-SPAM requirement that a company not send e-mail to someone who has already opted out from its lists for Forward to a Friend, because the company will never know the e-mail address of the recipient The company would need to put all such e-mail in a queue and then compare the recipient’s e-mail address with its opt-out list, a complicated and laborious process.”); Masterfoods; Mattel; NRF; NetCoalition; Wahmpreneur.

¹⁸⁸ The Children’s Online Privacy Protection Rule (“COPPA”), 16 CFR Part 312, establishes rules and guidelines to provide a more secure Internet experience for children and to protect them from unwanted invasions of privacy. As a result, operators of websites directed to children have to follow specific rules on what personal information may or may not be gathered from children. Section 312.5 of COPPA states: “An operator [of a website] is required to obtain verifiable parental consent before any collection, use, and/or disclosure of personal information from children” Two commenters, Masterfoods and Mattel, argued that the Commission’s proposed application of “induce” would likely result in their being considered the “sender” of emails “initiated” through their websites. They therefore argued that, under the Commission’s analysis in the NPRM, they would be required to maintain an opt-out list, which would undoubtedly contain personal information of children, and could thereby conflict with COPPA.

¹⁸⁹ 15 U.S.C. 7702(16).

¹⁹⁰ 15 U.S.C. 7702(9).

¹⁹¹ 15 U.S.C. 7702(15).

¹⁹² S. Rep. 108-102 at 15. The legislative history therefore makes clear that, if a seller retains the email address of the person to whom the message is being forwarded for a reason other than relaying

scenario described above, a seller that transmits a message through an automatic technical process to an email address provided by a forwarder, absent more, is engaged in "routine conveyance" and is exempt from liability under the Act.

However, under the Act, "routine conveyance" is narrowly circumscribed. Where the seller goes beyond serving as a technical intermediary that transmits, routes, relays, handles, or stores the email, the seller will be liable as the "initiator" and "sender" of the message forwarded from its website. A seller who "procures" the origination or transmission of an email goes well beyond the technical role of transmitting or routing the message.

CAN-SPAM defines "procure" to mean "intentionally to pay or provide other consideration to, or induce another person to initiate [a commercial email] on one's behalf."¹⁹³ As explained in the NPRM, if a seller offers to "pay or provide other consideration" to a visitor to its website in exchange for forwarding a commercial message, the seller will have "procured" any such messages forwarded by the visitor.¹⁹⁴ As noted in the NPRM, the term "consideration" is not defined in the Act, but is generally understood to mean "something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee."¹⁹⁵ This includes things of minimal value. Accordingly, a message has been "procured" if the seller offers money, coupons, discounts, awards, additional entries in a sweepstakes, or the like in exchange for forwarding a message.¹⁹⁶ Even the offer to provide *de minimis* consideration takes the seller beyond the mere "routine conveyance" of the forwarded message and into the "procurement" of the forwarded message.

The definition of "procure," however, does not merely cover those scenarios in which a seller offers to pay or provide other consideration to a forwarder. A seller who "induces" another person to initiate a commercial email will also fall within the definition of "procure." The NPRM explained that "to induce" is much broader than "to pay consideration." While CAN-SPAM does not define the term "induce," in the NPRM, the Commission applied the word's common definition: "to lead on to; to influence; to prevail on; to move

by persuasion or influence."¹⁹⁷ The Commission then opined that "to induce" did not require the transfer of something of value.¹⁹⁸ Rather, the Commission explained, "one must do something that is designed to encourage or prompt the initiation of a commercial e-mail."¹⁹⁹ Thus, the Commission stated that, "in order to 'intentionally induce' the initiation of a commercial email, the sender must affirmatively act or make an explicit statement that is designed to urge another to forward the message."²⁰⁰ In addition, the Commission stated that whether a seller "induced" a person to forward a message could hinge on the forcefulness of the language used by the seller.²⁰¹

The Commission believes that this description of "induce" in the NPRM is unduly narrow and inconsistent with the statute's text and purpose. First, "inducement" need not take the form of an "explicit statement" or "affirmative act" specifically urging someone to send an email. The word "induce" in the definition of "procure" simply makes clear that a seller may "procure" the origination or transmission of a message even where it does not specifically pay or provide other consideration to someone for sending an email. For instance, where a seller offers to pay or provide consideration to someone in exchange for generating traffic to a website or for any form of referrals, and such offer results in the forwarding of the seller's email message, the seller will have "induced," and therefore "procured," the forwarding of the seller's email. Likewise, in an affiliate program where the seller does not directly offer to pay a sub-affiliate in exchange for generating web traffic or other referrals, the seller's offer to pay the affiliate for generating web traffic or other referrals will constitute "inducement" of emails sent by the sub-affiliate that advertise the seller's product, service, or website. Under each of these scenarios, the seller will have "induced" the forwarding of an email and will have gone well beyond routine conveyance.

However, CAN-SPAM's applicability should not rest on the specificity or forcefulness of the language used by the seller, notwithstanding the suggestion to the contrary in the NPRM.²⁰² Accordingly, a seller's use of language exhorting consumers to forward a message does not, absent more, subject

the seller to "sender" liability under the Act.

A seller, of course, is not prohibited from offering consideration to a visitor to its website in exchange for forwarding a commercial message, or otherwise inducing the visitor to do so. If it does, however, it will not be engaged in mere "routine conveyance" and must therefore comply with CAN-SPAM's requirements for a "sender." For instance, the seller will need to ensure that it does not forward a message to a recipient who has previously made an opt-out request and will need to include in the message an opt-out mechanism.

(ii) Seller's Liability for Email Forwarded Using a Consumer's Email Program

In the most basic forward-to-a-"friend" scenario, a seller sends a commercial email to a consumer who then, using his or her own email program, forwards the message to a recipient.²⁰³ Typically, the seller will have no liability under CAN-SPAM for the original recipient's forwarding of an email. It is only where the seller "initiates" the forwarding of the message that it will be deemed the "sender" of the forwarded message under the Act.²⁰⁴ Again, the starting point is the language of the Act, which defines "initiate" as "to originate or transmit [a commercial email] or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message."²⁰⁵ In contrast to the web-based scenario discussed above, the "routine conveyance" exemption has no applicability when a consumer forwards a message using his or her own email program, because the seller would not be involved in the transmission, routing, relaying, or storage of the forwarded message. Nor is the seller "originating" or "transmitting" the message in this scenario. The inquiry thus turns on whether the seller has "procured" the forwarded message. The principles guiding the determination of whether the seller has "procured" the forwarded message are the same here as when the forwarding occurs through the seller's website. Accordingly, if the seller "pays or provides other consideration" to someone in exchange for forwarding the commercial message, the seller will have "procured" the forwarding of the

the forwarded message (such as for use in future marketing efforts), the seller would not fall within the routine conveyance exemption.

¹⁹³ 15 U.S.C. 7702(12).

¹⁹⁴ 70 FR at 25441.

¹⁹⁵ Black's Law Dictionary 300 (7th ed. 1999).

¹⁹⁶ NPRM, 70 FR at 25441.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ 70 FR at 25441 n.178.

²⁰² *Id.*

²⁰³ We assume for purposes of this analysis that the email promotes or advertises the seller's product, service, or website.

²⁰⁴ 15 U.S.C. 7702(9).

²⁰⁵ *Id.*

email.²⁰⁶ For the reasons explained above, this is true regardless of the amount of the consideration offered; offering *de minimis* consideration in the form of coupons, discounts, sweepstakes entries and the like in exchange for forwarding a commercial email constitutes “procurement” of the forwarded message. Likewise, if the seller “induces” the forwarding of the message — such as by offering payment in exchange for generating traffic to a website — it will be an “initiator,” and thus also the “sender,” of the forwarded message. In such a circumstance, the seller will be obligated to comply with CAN-SPAM’s requirements for a “sender,” such as ensuring that the forwarded message contains a functioning opt-out mechanism and ensuring that email is not forwarded to someone who has already opted out of receiving commercial emails from the seller.²⁰⁷

(iii) *Liability of a Consumer-Forwarder*

The NPRM did not discuss the potential liability of a consumer who forwards a commercial message via a seller’s web-based mechanism or using his or her own email program. Such a consumer-forwarder would be an “initiator” under CAN-SPAM regardless of whether the seller “procured” the message because, as explained above, the definition of “initiate” includes the “origination” of a message and the consumer-forwarder would be the “originator” of the message. Thus, while a seller who provided a web-based forwarding mechanism (and did not “procure” the message) would be exempt from “initiator” or “seller” liability where it was engaged in “routine conveyance,” the consumer-forwarder still would be an “initiator.” Likewise, a consumer who forwarded a message using his or her own email program (and the message was not “procured” by the seller) would be an “initiator” of the message, while the seller would not be.

Thus, the Act’s terms result in an anomaly: a seller in such situations would be exempt from liability under CAN-SPAM, but the consumer-

forwarder would be required to comply with CAN-SPAM’s “initiator” obligations. In other words, as “initiators,” ordinary consumers who, without being offered any consideration or inducement, forward a commercial message using either a seller’s web-based forwarding mechanism or their own email program, would be required to provide recipients with a mechanism for opting out of receiving future commercial emails from the “sender,” a clear and conspicuous disclosure that the message is an advertisement or solicitation, a clear and conspicuous notice of the right to opt out of receiving commercial emails from the “sender,” and a clear and conspicuous disclosure of the “sender’s physical address.” Yet, because the seller is not an “initiator,” there would be no “sender” of the message under the Act.

The Commission believes that Congress did not intend to sweep into CAN-SPAM’s regulatory scheme consumers who, without being offered any consideration or inducement for doing so, use a seller’s web-based forwarding mechanism or their own email programs to send isolated commercial email messages to recipients. Indeed, as the Commission recognized in promulgating the Primary Purpose Rule, “the repeated inclusion of the modifying word ‘commercial’ in section 7702(2)(A) is not merely tautological, but evidences an intention to ensure that the CAN-SPAM regulatory scheme would not reach isolated email messages sent by individuals who are not engaged in commerce, but nevertheless seek to sell something to a friend, acquaintance, or other personal contact.”²⁰⁸ Hence, the Commission believes that under these facts, such a consumer-forwarder would not be swept into CAN-SPAM’s regulatory scheme.²⁰⁹

B. Section 316.4 — Prohibition Against Failure to Effectuate An Opt-Out Request Within Ten Business Days of Receipt

Section 7704(a)(4) of the Act prohibits senders from initiating the transmission of a commercial email message to a recipient more than ten business days after the senders have received the recipient’s opt-out request. Section

7704(c)(1) gives the Commission authority to issue regulations modifying the ten-business-day period — what is, in effect, a “grace period” — for processing recipients’ opt-out requests if the Commission determines that a different time frame would be more reasonable after taking into account “(A) the purposes of [subsection 7704(a)]; (B) the interests of recipients of commercial electronic mail; and (C) the burdens imposed on senders of lawful commercial electronic mail.”²¹⁰ Accordingly, in the ANPR, the Commission sought comment on the reasonableness of the ten-business-day grace period for processing opt-out requests and whether a shorter grace period would be more reasonable, in view of the three considerations enumerated in the statute and the relative costs and benefits.

In consideration of the comments received in response to the ANPR, the NPRM proposed to shorten the time period for honoring an opt-out request from ten to three business days. The Commission also posed a number of questions in Part VII of the NPRM about the appropriate time to allow for processing an opt-out request, including questions about: technical procedures and cost implications associated with opt-out processing; the level of risk associated with “mail bombing” — the bombardment of an email address with commercial email in the nine business days following an opt-out request, aggressive email targeting tactics; and the effect of third-party arrangements on the timing of opt-out processing. In response to the NPRM, the Commission received numerous comments opposing the proposed rule.

Based on the Commission’s analysis of the comments received in response to the NPRM, the Commission is persuaded that: (1) reducing the opt-out grace period from ten to three business days would not necessarily advance the privacy interests of consumers; (2) the time period for processing opt-out requests required by legitimate commercial emailers varies, and often exceeds three business days depending upon a number of factors, including the size of the business, the existence of third-party marketing agreements, and the maintenance of multiple email databases; and (3) neither the current record nor the Commission’s experience reflects that email bombing of commercial email recipients is a wide-scale tactic deployed by lawful commercial emailers. Furthermore, the record does not reflect that shortening the opt-out grace period would

²⁰⁶ 15 U.S.C. 7702(12).

²⁰⁷ As noted above, a number of commenters argued that complying with the Act’s requirements when a consumer uses his or her own email program to forward the seller’s email is impracticable for the seller. See Associations; BOA; Charter; CMOR; DMA; ERA; FNB; Jumpstart; MPAA; MPA; Coalition; NRF; NetCoalition; RIAA; Wahmpreneur. However, it is our understanding that marketing campaigns in which consideration is offered to consumers in exchange for forwarding an email typically rely on the seller’s web-based forwarding mechanism. In such circumstances, there is no reason the seller cannot fully comply with CAN-SPAM.

²⁰⁸ 70 FR at 3113.

²⁰⁹ For the same reason, even where consideration or inducement such as coupons, discounts, awards, additional entries in sweepstakes is provided to the consumer-forwarder, the consumer-forwarder is unlikely to be a target of enforcement (though the seller offering the consideration or other inducement might be), absent indicia that the consumer-forwarder is, in fact, acting akin to an affiliate marketer, for example.

²¹⁰ 15 U.S.C. 7704(c)(1).

necessarily reduce any potential threat of email bombing. Accordingly, the Commission declines to adopt a final Rule that would reduce the statutory grace period from ten business days to three business days, but will continue to monitor whether commercial emailers are using abusive targeting tactics and/or failing to honor opt-out requests in a timely manner to determine whether regulatory or other action is required in the future. Likewise, as explained below, the Commission reaffirms its refusal to impose a limit on the duration of opt-out requests at this time.

1. The Appropriate Deadline for Effectuating an Opt-Out Request

Approximately 100 commenters addressed the issue of whether the period for opt-out compliance should be reduced. The vast majority — over 85 percent — opposed reducing the time frame to less than ten business days.²¹¹ Many of these commenters argued that the need for coordination and synchronization of opt-out mechanisms requires a minimum of ten days.²¹² Some of these commenters also suggested that senders of email messages who are not now complying with the Act would not comply with the proposed change, but those who are attempting to comply would be burdened, with no gain in protection of consumers's privacy interests.²¹³

A number of commenters provided substantive descriptions of the time frames that are involved with processing opt-out requests and coordinating such efforts with third-party vendors. Commenters explained that the time necessary to process opt-out requests varies based on a number of factors, such as whether the sender itself collects opt-out requests and removes email addresses from its own marketing list or uses a third-party vendor for the entire process or for certain portions of the process.²¹⁴

According to another commenter, some cable companies rely on third-

party vendors to handle all email marketing, process opt-out requests, and manage suppression lists. "The cable operator may be able to input a customer's opt-out request in one to two business days in its own internal database, but the third party vendor that provides a variety of targeted marketing and advertising services may take up to 8-10 business days to complete the processing."²¹⁵

A few commenters argued that delays also can result from concerns about privacy with respect to negotiating non-disclosure agreements and using hard copy media, such as CDs, to transmit their suppression files. As one commenter explained:

We often see other situations that make the three-day period difficult at best, including large corporations with legacy databases that must plan for their marketing campaigns and use of suppression lists a week in advance, use of hard-copy media — such as CDs — to transmit the files via the postal service, and then the use by small businesses which only have access to low bandwidth connections. A three-day deadline could cause many advertisers, especially small or traditionally offline businesses, to abandon their e-mail acquisition efforts altogether in order to comply.²¹⁶

Finally, a few commenters pointed out that they offer not only Internet-based opt-out mechanisms but also opportunities to unsubscribe by telephone or other means, which can be very time-consuming.²¹⁷

In terms of potential benefits to consumers from reducing the grace period to three business days, nearly all of the commenters argued that bombarding a recipient with email following an opt-out request is not a valid concern and that the potential risk of mail bombing would not, in any event, be mitigated by shortening the opt-out period to three days.²¹⁸

A few commenters argued either in favor of the proposed three-day time period,²¹⁹ or recommended time periods of less than three days.²²⁰ These commenters, several of whom are individual consumers, generally believe that there are no technical obstacles to automatic or near-automatic opt-out processing. Other commenters suggested that five to seven days could represent a reasonable period of time to process an opt-out request.²²¹

Many small businesses, however, opined that compliance with a shorter time frame would pose a significant burden due to the technical support needed.²²² For example, some small entities process opt-out requests manually or have only part-time staff. Given holidays and vacations, those entities do not believe they could process requests within three days.²²³ Small membership-based associations such as the American Road and Transportation Builders Association and SHRM also expressed concern about staffing issues. SHRM argued that it would be unreasonable to expect volunteers or even a single paid staff director to check for, and handle, opt-out requests several times per week to satisfy the proposed three-day rule.

Finally, a few commenters argued that ten business days is not sufficient time for processing opt-out requests and a longer time frame would be better.²²⁴ Some of these commenters pointed out that telemarketers have 31 days to process new listings on the National Do

ExactTarget; Sprint. *But see* iPost ("[I]t has been demonstrated by the use of 'honeypot' or 'spamtrap' emailboxes that submitting opt-out requests does lead to targeting for receipt of additional commercial email The length of time that elapses following submission of the opt-out request has little bearing on this practice, which no responsible marketer would employ in any case.").

²¹⁹ See Unsub; Rushing; Nelson; NAFCU.

²²⁰ See Aurelius; Edge; Schaefer; Roberts; Pernetian; Amin.

²²¹ See, e.g., May ("Extending the time period to 5 days, but shortening from 7 [sic] days, would encompass 90% of the online population and is a reasonable time period to comply with opt-in requests."); Clear (supporting a compromise of five or six days).

²²² See, e.g., NADA; BrightWave; Ezines; ARDA; ABM; ASAE; NAMB ("NAMB believes that the proposed 3-business day time period has a disproportionate economic impact on all small business entities, which includes many mortgage brokers."); MPA; NAR; NAA (indicating that a three-business-day period would be challenging for small newspapers); ASTA ("Nearly instantaneous processing" may be possible for some, but there is no record support for the proposition that it is possible for all, or even most, businesses, particularly small businesses.").

²²³ See, e.g., Sheu; Wiederhoeft; Intermark; ECFCU; SHRM; IS; ASAE; Comerica; IPPC; BD; ARTBA.

²²⁴ See, e.g., NNA; ACLI; NRF; ICC.

²¹¹ See, e.g., CMOR; BrightWave; Swent; Footlocker; Intermark; Empire; SHRM; FNB; Wells Fargo; VCU; MPAA; ACB; Bigfoot; PMA; BOA; NetCoalition; Reed; DoubleClick; DMA; CBA; Time Warner; Coalition; NEPA; IAC; Charter; Jumpstart; HSBC; ASAE; Comerica; Cendant; CUNA; KeySpan; MasterCard; Discover; Microsoft; PCIAA; Vertical; BD; Exact; ARTBA; ACUTA; Sprint (stating that it would have to devote at least 30,000 man hours, or in excess of \$2 million, in order to modify its systems to accelerate the process of implementing opt-out requests); ABM ("Diversified Business Communications has concluded that imposition of a three-day opt-out requirement would reduce the effectiveness of its marketing and increase its cost by a minimum of \$20,000 per year.").

²¹² See, e.g., ACUTA; BD; Experian.

²¹³ See, e.g., ERA; OPA; ATAA; ARDA; Charter; MPA; PMA.

²¹⁴ See, e.g., DMA.

²¹⁵ See NCTA.

²¹⁶ See Experian.

²¹⁷ See, e.g., Masterfoods; Mattel; Jumpstart. With respect to these comments, the Commission notes that section 7704(a)(3)(A)(i) of the Act requires that a commercial email message contain a functioning return email address or other Internet-based mechanism that the recipient may use to submit an opt-out request, but does not require requests submitted in other ways to be honored within the given time period. See also NPRM, 70 FR at 25443.

²¹⁸ See, e.g., CMOR; Verizon; LashBack; ACLI; ABM; FNB; ERA; ESPC; ARTBA; MPA (arguing that, if a marketer were involved in mail bombing, it could still do so under a three-business-day time frame); PMA; BOA; SLA; NRF; NetCoalition; Reed; DoubleClick; Associations; Time Warner; IAC; ICC; Nextel (asserting that no rational marketer would undertake mail bombing); Charter; HSBC; MasterCard; Discover; Microsoft; Nissan; Vertical;

Not Call Registry²²⁵ and that commercial email messages directed to certain mobile devices are prohibited if the wireless domain name referenced in the address has been posted on the Federal Communications Commission's ("FCC") wireless domain list for at least 30 days.²²⁶ These commenters argued that, for consistency, 31 or 30 days should be allowed for processing opt-out requests.²²⁷

Having carefully considered the comments concerning the amount of time required to process and coordinate opt-out requests, along with the Commission's law enforcement experience, the Commission is persuaded that it should retain the ten-business-day grace period for honoring opt-out requests. The Commission is persuaded that its proposal in the NPRM to shorten the period to three business days could impose a substantial burden on legitimate commercial email marketers. In particular, the Commission is concerned that reducing the opt-out period could pose a significant challenge for small entities. In addition, the Commission believes that reducing the opt-out period would not necessarily advance the privacy interests of consumers. Neither the current record nor the Commission's law enforcement experience indicates that email bombing of commercial email recipients is a wide-scale tactic deployed by lawful commercial emailers, or that reducing the opt-out grace period would necessarily reduce any potential threat of email bombing.

At the same time, the Commission rejects the argument that email marketers should have more than ten business days to process opt-out requests. The Commission finds that, based on the record, senders of commercial email are not unduly burdened by the ten-business-day grace period for honoring opt-out requests established by Congress.²²⁸ Indeed, in

2005, a Commission study revealed that nearly 90% of the top 100 emailers honored the ten-business-day opt-out time period,²²⁹ which suggests that, on balance, compliance is feasible for most senders of commercial email. Further, the Commission is not persuaded that the fact that telemarketers have 31 days to process new listings on the National Do Not Call Registry justifies extending the period for honoring CAN-SPAM opt-out requests to 31 days, in view of the difference in the structure and operation of email suppression lists as compared to the National Do Not Call Registry.

For all these reasons, the Commission declines to adopt proposed Rule 316.4, which would have reduced the statutory ten-business-day grace period for honoring opt-out requests.²³⁰ The grace period therefore remains ten business days.

2. Expiration of Opt-out Requests

In the NPRM, the Commission declined to propose a time limit for how long an opt-out request will remain in effect, but indicated that it would consider submissions of information or data that would show whether such a time limit would be useful in implementing the provisions of the Act. The Commission noted that, in the somewhat similar context of the Do Not Call Registry, the Registry administrator is able routinely to purge defunct or changed telephone numbers from the Registry database, whereas email marketers do not appear to have similar capabilities for such purging.²³¹ The Commission also stated that an email

the ten-business-day time period and would strongly oppose lengthening it.").

²²⁹ See "Top Emailers' Compliance with CAN-SPAM's Opt-Out Provisions," Staff Report (July 2005), available at <http://www.ftc.gov/reports/optout05/050801optoutemailersrpt.pdf>. This report explained that 89% of the top 100 emailers that sent commercial email during the study honored all three of the opt-out requests made by FTC staff.

²³⁰ Proposed Rule 316.4(b) would have clarified that law enforcement officials are not required to allege or prove a defendant's state of mind to obtain a cease and desist order or an injunction to enforce compliance with proposed Rule 316.4(a), which pertains to the time period for honoring opt-out requests. Because the Commission declines to adopt Rule 316.4(a), proposed Rule 316.4(b) is no longer necessary. Moreover, the language of the Act itself is clear on this issue — whenever a provision of the Act or the Commission's Rule contains a state-of-mind component, that requirement does not apply when a law enforcement official seeks a cease and desist order or an injunction. 15 U.S.C. 7706(e) & (f)(2).

²³¹ 70 FR at 2544. The NPRM also stated that the duration of a person's registration on the Do Not Call Registry is five years or until the registrant changes his or her telephone number or takes the number off the Registry. *Id.* Congress has since enacted legislation which eliminates the expiration of listings on the Registry. See Do-Not-Call Improvement Act of 2007, Pub. L. No. 110-188 (2008).

marketer's suppression list is likely to have far fewer entries than the then 91 million numbers²³² on the Do Not Call Registry, making the prospect of "scrubbing" far less daunting, and potentially vitiating the argument that setting an expiration period for opt-out requests is required.²³³

Several commenters argued that the Commission should limit the length of time that requests should remain in effect. These commenters, however, were divided on what would be an appropriate time limit.²³⁴ Other commenters argued that the Commission should not impose a time limit on a consumer's opt-out request.²³⁵

Various commenters submitted data to the Commission about the size of their suppression lists. That data showed that suppression list size varies, and it is not clear whether or in what instances suppression lists may exceed the Do Not Call Registry. While many suppression lists contain less than 100,000 addresses,²³⁶ ESPC states that the suppression lists of some companies exceed the Do Not Call Registry by over 10 million entries. One commenter noted that "[f]rom a logistical perspective, many companies have large suppression lists that can exceed a million names."²³⁷ Another commenter reported that its suppression list will likely have fewer than the number of entries that the National Do Not Call Registry contains.²³⁸

In analyzing the data submitted by these commenters, the Commission finds that, at this time, there is insufficient evidence to show that email suppression list scrubbing is impeded by the lack of a time limit on opt-out requests, or that imposing a limit will be

²³² As of June 2007, the Do Not Call Registry contained more than 145 million telephone numbers.

²³³ 70 FR at 2544.

²³⁴ See, e.g., ARDA; Wells Fargo; BOA; NRF (all arguing for a two- to three-year time limit); CMOR; ABM; FNB; ERA; ESPC; ACB; Bigfoot; Visa (all arguing for a five-year or longer time limit).

²³⁵ For example, DoubleClick argued that it did "not believe that a consumer's choice should have an expiration date. If a consumer asks to be removed from a commercial email list and subsequently changes her/his mind, s/he can re-subscribe to that mailing list." Similarly, the Virginia Credit Union argued that it also believes that "the opt-out request should be honored indefinitely until such time the consumer contacts the sender and requests otherwise."

²³⁶ See ESPC ("The time and cost varies linearly based on the size of the lists involved. Both the size of the suppression list and the size of the active list affect the processing time and cost. Many senders' suppression lists contain less than 100,000 addresses, in which case the time and cost are fairly negligible.").

²³⁷ See DoubleClick.

²³⁸ See FNB.

²²⁵ 69 FR 16368 (Mar. 29, 2004).

²²⁶ The FCC has issued a list of wireless domains to which commercial email messages cannot be directed without the addressee's express prior authorization or if other conditions are met. 47 CFR 64.3100(a) & (e). The thirty-day safe harbor does not apply if the person or entity initiating the message did so knowing the address was to a protected mobile service. 47 CFR 64.3100(a)(4); *Rules and Regulations Implementing the Controlling the Assault Of Non-Solicited Pornography and Marketing Act of 2003*, CG Docket No. 04-53, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 19 FCC Rcd. 15927, 15969 (2004).

²²⁷ See, e.g., Verizon; Intermark; NAR; SIIA; MCI; IAC.

²²⁸ See, e.g., DoubleClick; ACB; Cendant; iPost; Empire. See also NCL's comments in the ANPR (stating that "We are unaware of any problems with

useful in implementing the provisions of the Act under section 7711(a). Notably, Congress chose neither to impose such a time limit nor to specifically authorize the Commission to do so at this time. Consequently, the Commission declines to impose a time limit on the duration of an opt-out request.

C. Proposed Rule 316.5 — Prohibition on Charging a Fee or Imposing Other Requirements on Recipients Who Wish To Opt Out

In the NPRM, the Commission proposed to prohibit the imposition, as a condition for accepting or honoring a recipient's opt-out request, of any fee, obligation to provide personally identifying information (beyond one's email address), or any other requirement.²³⁹ Several commenters agreed with the Commission's proposal to prohibit senders from charging a fee to opt out,²⁴⁰ but challenged the portion of the rule that would prevent the collection of additional personal information or require email recipients to interface with more than one Internet Web page to opt out from receiving future commercial email messages from the sender. These commenters cumulatively identified a host of factors — the risk of typographical errors, computer security issues, online identity theft, and sabotage by competitors — arguing for the necessity of collecting personal information or requiring multiple opt-out steps to verify the identity of the recipient.²⁴¹ While the Commission recognizes that computer security and identity theft are serious problems facing online consumers, the Commission is not persuaded that imposing additional requirements on consumers who are attempting to opt out would do anything to minimize the risk of these problems. To the contrary, the Commission believes that requiring consumers to transmit additional personally identifying information would increase the risk of that information being

intercepted by a hacker or rogue third party.

Other commenters explained that verifying the identity of a recipient would be important because their suppression lists are connected to consumer account information rather than consumer email addresses. For example, DMA argued that “tracking by account information also makes it easier to honor opt-out requests for customers regardless of what they change their email address to.”²⁴² The Commission does not find this argument persuasive, because, as the Commission stated in the NPRM, “according to CAN-SPAM, opt-out requests are specific to a recipient's email address, not his or her name,” and, in this case, certainly not to his or her account information.²⁴³

At least one commenter argued in favor of allowing marketers an opportunity to “display an advertisement or other incentive in order to remind the recipient of the value of the list subscription prior to their unsubscription.”²⁴⁴ The Commission reiterates its position stated in the NPRM that subjecting a recipient who wishes to opt out to sales pitches before the opt-out request is completed is an unacceptable encumbrance on a consumer's ability to opt out of receiving unwanted commercial email messages.

Accordingly, the Commission adopts final Rule 316.5, which prohibits the imposition of any fee, any requirement to provide personally identifying information (beyond one's email address), or any other obligation as a condition for accepting or honoring a recipient's opt-out request.

D. Section 7704(c)(2) — Aggravated Violations Related to Commercial Email

The final Rule does not provide for any additional aggravated violations beyond those already specified in the Act. Committing an aggravated violation along with a violation of section 7704(a) could subject a defendant to triple damages in a CAN-SPAM enforcement action by a state attorney general or an ISP.²⁴⁵ Section 7704(b) of the Act lists

four practices which are to be considered “aggravated violations.”²⁴⁶ According to a Senate Committee Report on an earlier version of the Act, designating specific practices as “aggravated” violations is intended to “apply to those who violate the provisions of the bill while employing certain problematic techniques used to either generate recipient email addresses, or remove or mask the true identity of the sender.”²⁴⁷

Section 7704(c)(2) of the Act authorizes the Commission to specify activities or practices — in addition to the four already enumerated in the statute — as aggravated violations if the Commission determines that “those activities or practices are *contributing substantially to the proliferation of commercial electronic mail messages* that are unlawful under [section 7704(a) of the Act].” (Emphasis added.)

In response to the Commission's request in the NPRM for comment on whether any specific practices were contributing substantially to the proliferation of email, the Commission received only five comments. Three of the commenters complained about various practices that either are already illegal under the Act or that the commenters believed should be made illegal, but did not provide any evidence that the practices were contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under section 7704(a) of the Act, and, thus, should be deemed aggravated violations.²⁴⁸

The other two commenters expressed concern that lists of email addresses of consumers who have opted out from receiving email (known as “suppression lists”) can be, and in some instances have been, misused by third parties to send unwanted email.²⁴⁹ Specifically, these commenters indicated that, in some cases, third parties have obtained unauthorized access to another company's suppression list, which the third parties have then used to send emails of their own. The record,

²³⁹ As proposed and adopted here, Rule 316.5 provides: “Neither a sender nor any person acting on behalf of a sender may require that any recipient pay any fee, provide any information other than the recipient's electronic mail address and opt-out preferences, or take any other steps except sending a reply electronic message or visiting a single Internet web page, in order to: (a) use a return electronic mail address or other Internet-based mechanism, required by 15 U.S.C. 7704(a)(3), to submit a request not to receive future commercial electronic mail messages from a sender; or (b) have such a request honored as required by 15 U.S.C. 7704(a)(3)(B) and (a)(4).”

²⁴⁰ See, e.g., KeySpan; MasterCard; Metz; Empire; Wells Fargo; Coalition; BOA.

²⁴¹ See, e.g., Wells Fargo; Coalition; Experian; MPAA; AeA; Microsoft; Verizon; MasterCard.

²⁴² See also MPAA; Microsoft (both requesting the Commission to clarify that the use of passwords or other authentication information is permitted under the rule); ABA (stating that it would be beneficial to have “member-recipients log on the entity's Website, edit the member's profile, and thereby directly express the member's complete opt-out preferences.”).

²⁴³ NPRM, 70 FR at 25445. Similarly, for this reason, the Commission is not persuaded by those commenters arguing that senders should be able to require their member-recipients to update their member profiles in order to opt out from receiving commercial email messages. See, e.g., ABA; ATAA.

²⁴⁴ See Experian.

²⁴⁵ 15 U.S.C. 7706(f)(3)(C) & (g)(3)(C).

²⁴⁶ The four practices are: (1) automated email address harvesting; (2) dictionary attacks; (3) automated creation of multiple email accounts; and (4) relay or retransmission of a commercial email message through unauthorized access.

²⁴⁷ S. Rep. No. 108-102, at 8 (2003).

²⁴⁸ See Nelson (email spoofing); Rubin (selling email addresses after opt-out; single seller using multiple domain names); Sowell (commercial email messages should have only one sender; email should indicate how the sender obtained the recipient's name or email address).

²⁴⁹ See LashBack (some companies allow third parties to access their suppression lists); Unsub (“many sellers . . . post a text version of their opt-out suppression lists on Blind Affiliate Networks, allowing easy access for any list owner who is a member” of that network).

however, lacks evidence that this practice is widespread and is “contributing substantially to the proliferation of commercial electronic mail messages that are unlawful under [section 7704(a) of the Act].”²⁵⁰ Thus, there is an insufficient evidentiary basis for the Commission to designate this practice as an aggravated violation. In any event, depending on the facts, some of these practices may violate section 7704(a)(4)(A)(iv) of the Act. Under this provision, “the sender or any other person that knows that the recipient has made [an opt-out request to the sender]” may not “sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic address of the recipient) for any purpose other than compliance with this chapter or other provision of law.”

III. PAPERWORK REDUCTION ACT

In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520 (“PRA”), the Commission reviewed the proposed and final Rule. The final Rule does not impose any recordkeeping, reporting, or disclosure requirements and, thus, does not constitute a “collection of information” as defined in the regulations implementing the PRA.²⁵¹

IV. REGULATORY FLEXIBILITY ACT

The NPRM included an initial regulatory flexibility analysis (“IRFA”) under the Regulatory Flexibility Act (“RFA”),²⁵² even though the Commission did not expect that the proposed Rule would have a significant economic impact on a substantial number of small entities. In addition, the Commission invited public comment on the proposed Rule’s effect on small entities to ensure that no significant impact would be overlooked.²⁵³

This Final Regulatory Flexibility Analysis (“FRFA”) incorporates: the Commission’s initial findings, as set forth in the May 12, 2005 NPRM; addresses the comments submitted in response to the IRFA notice; and describes the steps the Commission has taken in the final Rule to minimize its impact on small entities consistent with the objectives of the CAN-SPAM Act.

A. Succinct Statement of the Need for, and Objectives of, the Final Rule

The final Rule was created pursuant to the Commission’s mandate under the CAN-SPAM Act. The Act authorizes the Commission, at its discretion and subject to certain conditions, to: promulgate regulations expanding or contracting the categories of “transactional or relationship messages”;²⁵⁴ modify the ten-business-day period proscribed in the Act for effectuating a recipient’s opt-out request;²⁵⁵ and specify additional activities or practices as “aggravated violations.”²⁵⁶ The Act also authorizes the Commission to “issue regulations to implement the provisions of [the] Act.”²⁵⁷ The final Rule modifies certain definitions of the Act, such as what constitutes a “sender” and a “valid physical postal address”; adds a definition of “person”; and clarifies other relevant provisions of the Act.

B. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

In the IRFA, the Commission sought comment regarding the impact of the proposed Rule and any alternatives the Commission should consider, with a specific focus on the effect of the proposed Rule on small entities. The public comments on the proposed Rule are discussed above throughout the Statement of Basis and Purpose, as are any changes that have been made in the final Rule. After reviewing the comments, including those that specifically addressed the impact of the Rule on small entities, the Commission does not believe that the final Rule will unduly burden entities that send commercial electronic mail messages or transactional or relationship mail messages. The majority of comments concerning the impact of the proposed Rule on small entities addressed the Commission’s proposal to shorten the opt-out period from ten business days to three. As noted in Part II.B above, these commenters argued that a shortened time frame would impose undue administrative costs and burdens on small businesses.²⁵⁸ The Commission agrees that the final Rule must not be unduly burdensome to small businesses, and, while the record still lacks specific data describing the time and cost involved with processing opt-out requests for small businesses, the

Commission finds that three business days would pose a challenge for some of these entities. In light of the concerns raised by the commenters, including small entities, the final Rule retains the opt-out period at ten business days.

C. Explanation as to Why No Estimate is Available as to the Number of Small Entities to Which the Final Rule Will Apply

Determining a precise estimate of the number of small entities subject to the final Rule, or describing those entities, is not readily feasible for two reasons. First, there is insufficient publicly available data to determine the number and type of small entities currently using email in any commercial setting. As noted in the IRFA, the final Rule will apply to “‘senders’ of ‘commercial electronic mail messages,’ and, to a lesser extent, to ‘senders’ of ‘transactional or relationship messages.’”²⁵⁹ Thus, any company, regardless of industry or size, that sends commercial email messages or transactional or relationship messages would be subject to the final Rule.

In the IRFA, the Commission set forth the few sources of publicly available data to approximate the number of entities that send commercial email messages or transactional or relationship messages, noting that “[g]iven the paucity of data concerning the number of small businesses that send commercial e-mail messages or transactional or relationship messages, it is not possible to determine precisely how many small businesses would be subject to the proposed Rule.”²⁶⁰ None of the comments provided information regarding the number of entities of any size that will be subject to the final Rule.

The second reason that determining a precise estimate of the number of small entities subject to the final Rule is not readily feasible is that the assessment of whether the primary purpose of an email message is “commercial,” “transactional or relationship,” or “other” turns on a number of factors that require factual analysis on a case-by-case basis. Thus, even if the number of entities that use email in commercial dealings were known, the extent to which the messages they send will be regulated by the final Rule depends upon the primary purpose of such messages, a determination which cannot be made absent factual analysis.

²⁵⁰ 15 U.S.C. 7704(c)(2).

²⁵¹ See 5 CFR 1320.3(c).

²⁵² 5 U.S.C. 601-612.

²⁵³ NPRM, 70 FR at 25447-49.

²⁵⁴ 15 U.S.C. 7702(17)(B).

²⁵⁵ 15 U.S.C. 7704(c)(1)(A)-(C).

²⁵⁶ 15 U.S.C. 7704(c)(2).

²⁵⁷ 15 U.S.C. 7711(a).

²⁵⁸ See, e.g., ABM; ARDA; BrightWave; Ezines; MPA; NAA; NADA; NAMB; NAR.

²⁵⁹ NPRM, 70 FR at 25448.

²⁶⁰ *Id.*

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities that Will Be Subject to the Requirements of the Final Rule and the Type of Professional Skills that Will Be Necessary to Implement the Final Rule

The final Rule does not itself impose any reporting, recordkeeping, or other disclosure requirements within the meaning of the Paperwork Reduction Act. The final Rule primarily: clarifies the scope of certain definitions within the CAN-SPAM Act, such as “sender” and “valid physical postal address”; defines one new term, “person”; and clarifies that a recipient may not be required to pay a fee, provide information other than his or her email address and opt-out preferences, or take any other steps other than sending a reply email message or visiting a single Internet Web page to submit an opt-out request. Any costs attributable to CAN-SPAM are the result of the substantive requirements of the Act itself — such as the requirement that commercial email messages include an opt-out mechanism and certain disclosures — not the Commission’s interpretive final Rule.

E. Discussion of Significant Alternatives the Commission Considered That Would Accomplish the Stated Objectives of the CAN-SPAM Act and That Would Minimize Any Significant Economic Impact of the Final Rule on Small Entities

Through both the ANPR and the May 12, 2005 NPRM, the Commission sought to gather information regarding the economic impact of CAN-SPAM’s requirements on all businesses, including small entities. The Commission requested public comment on whether the proposed Rule would unduly burden such entities that use email to send messages defined as “commercial” or “transactional or relationship” messages under the Act and the FTC’s CAN-SPAM Rule; whether this burden is justified by offsetting benefits to consumers; what effect the proposed Rule would have on small entities that initiate messages the primary purpose of which are commercial or transactional or relationship; what costs would be incurred by small entities to “implement and comply” with the proposed Rule; and whether there were ways the proposed Rule could be modified to reduce the costs or burdens for small entities while still being consistent with the requirements of the Act. The Commission requested this

information in an attempt to minimize the final Rule’s burden on all businesses, including small entities.

In drafting the final Rule, the Commission carefully considered and sought to mitigate the burdens placed on email marketers, both large and small alike. For example, because a shortened time frame for processing opt-out requests might place a significant burden on senders, including small businesses, the final Rule retains the original ten-business-day period set forth in the Act. Moreover, the final Rule’s definition of “valid physical postal address” provides for the use of commercial and postal mailboxes in light of the concerns many small entities expressed with respect to disclosing their physical addresses in email messages. Finally, to the extent that small entities participate in sending multiple marketer messages, the final Rule’s definition of “sender” minimizes the burden placed on such entities by permitting the designation of a single “sender” to comply with CAN-SPAM’s disclosure and opt-out requirements.

As explained earlier in this Statement of Basis and Purpose, the Commission has considered the comments and alternatives proposed by such commenters, and continues to believe that the final Rule will not create a significant economic impact on small entities or others who send or initiate commercial email messages or transactional or relationship messages.

List of Subjects in 16 CFR Part 316

Advertising, Business and industry, Computer technology, Consumer protection, Labeling.

■ Accordingly, for the reasons set forth in the preamble above, the Commission amends title 16, CFR Chapter I by revising Part 316 to read as follows:

PART 316—CAN-SPAM RULE

Sec.

- 316.1 Scope.
- 316.2 Definitions.
- 316.3 Primary purpose.
- 316.4 Requirement to place warning labels on commercial electronic mail that contains sexually oriented material.
- 316.5 Prohibition on charging a fee or imposing other requirements on recipients who wish to opt out.
- 316.6 Severability.

Authority: 15 U.S.C. 7701-7713.

§ 316.1 Scope.

This part implements the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. 7701-7713.

§ 316.2 Definitions.

(a) The definition of the term “affirmative consent” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(1).

(b) “Character” means an element of the American Standard Code for Information Interchange (“ASCII”) character set.

(c) The definition of the term “commercial electronic mail message” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(2).

(d) The definition of the term “electronic mail address” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(5).

(e) The definition of the term “electronic mail message” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(6).

(f) The definition of the term “initiate” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(9).

(g) The definition of the term “Internet” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(10).

(h) “Person” means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(i) The definition of the term “procure” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(12).

(j) The definition of the term “protected computer” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(13).

(k) The definition of the term “recipient” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(14).

(l) The definition of the term “routine conveyance” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(15).

(m) The definition of the term “sender” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), *provided that*, when more than one person’s products, services, or Internet website are advertised or promoted in a single electronic mail message, each such person who is within the Act’s definition will be deemed to be a “sender,” except that, only one person will be deemed to be the “sender” of that message if such person: (A) is within the Act’s definition of “sender”; (B) is identified in the “from” line as the sole sender of the message; and (C) is in compliance with 15 U.S.C. 7704(a)(1), 15 U.S.C. 7704(a)(2), 15 U.S.C.

7704(a)(3)(A)(i), 15 U.S.C. 7704(a)(5)(A), and 16 CFR 316.4.

(n) The definition of the term “sexually oriented material” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7704(d)(4).

(o) The definition of the term “transactional or relationship messages” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(17).

(p) “Valid physical postal address” means the sender’s current street address, a Post Office box the sender has accurately registered with the United States Postal Service, or a private mailbox the sender has accurately registered with a commercial mail receiving agency that is established pursuant to United States Postal Service regulations.

§ 316.3 Primary purpose.

(a) In applying the term “commercial electronic mail message” defined in the CAN-SPAM Act, 15 U.S.C. 7702(2), the “primary purpose” of an electronic mail message shall be deemed to be commercial based on the criteria in paragraphs (a)(1) through (3) and (b) of this section:¹

(1) If an electronic mail message consists exclusively of the commercial advertisement or promotion of a commercial product or service, then the “primary purpose” of the message shall be deemed to be commercial.

(2) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as transactional or relationship content as set forth in paragraph (c) of this section, then the “primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or

(ii) The electronic mail message’s transactional or relationship content as set forth in paragraph (c) of this section does *not* appear, in whole or in substantial part, at the beginning of the body of the message.

(3) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as other content that is not transactional or relationship content as set forth in paragraph (c) of this section, then the

“primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or

(ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors illustrative of those relevant to this interpretation include the placement of content that is the commercial advertisement or promotion of a commercial product or service, in whole or in substantial part, at the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.

(b) In applying the term “transactional or relationship message” defined in the CAN-SPAM Act, 15 U.S.C. § 7702(17), the “primary purpose” of an electronic mail message shall be deemed to be transactional or relationship if the electronic mail message consists exclusively of transactional or relationship content as set forth in paragraph (c) of this section.

(c) Transactional or relationship content of email messages under the CAN-SPAM Act is content:

(1) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(2) To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(3) With respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender, to provide —

(i) Notification concerning a change in the terms or features;

(ii) Notification of a change in the recipient’s standing or status; or

(iii) At regular periodic intervals, account balance information or other type of account statement;

(4) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(5) To deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive

under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

§ 316.4 Requirement to place warning labels on commercial electronic mail that contains sexually oriented material.

(a) Any person who initiates, to a protected computer, the transmission of a commercial electronic mail message that includes sexually oriented material must:

(1) Exclude sexually oriented materials from the subject heading for the electronic mail message and include in the subject heading the phrase “SEXUALLY-EXPLICIT:” in capital letters as the first nineteen (19) characters at the beginning of the subject line;²

(2) Provide that the content of the message that is initially viewable by the recipient, when the message is opened by any recipient and absent any further actions by the recipient, include only the following information:

(i) The phrase “SEXUALLY-EXPLICIT:” in a clear and conspicuous manner;³

(ii) Clear and conspicuous identification that the message is an advertisement or solicitation;

(iii) Clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial electronic mail messages from the sender;

(iv) A functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that

(A) A recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and

(B) Remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message;

(v) Clear and conspicuous display of a valid physical postal address of the sender; and

(vi) Any needed instructions on how to access, or activate a mechanism to access, the sexually oriented material, preceded by a clear and conspicuous statement that to avoid viewing the sexually oriented material, a recipient

² The phrase “SEXUALLY-EXPLICIT” comprises 17 characters, including the dash between the two words. The colon (:) and the space following the phrase are the 18th and 19th characters.

³ This phrase consists of nineteen (19) characters and is identical to the phrase required in 316.5(a)(1) of this Rule.

¹ The Commission does not intend for these criteria to treat as a “commercial electronic mail message” anything that is not commercial speech.

should delete the email message without following such instructions.

(b) *Prior affirmative consent.*

Paragraph (a) does not apply to the transmission of an electronic mail message if the recipient has given prior affirmative consent to receipt of the message.

§ 316.5 Prohibition on charging a fee or imposing other requirements on recipients who wish to opt out.

Neither a sender nor any person acting on behalf of a sender may require that any recipient pay any fee, provide any information other than the recipient's electronic mail address and opt-out preferences, or take any other steps except sending a reply electronic mail message or visiting a single Internet Web page, in order to:

(a) Use a return electronic mail address or other Internet-based mechanism, required by 15 U.S.C. 7704(a)(3), to submit a request not to receive future commercial electronic mail messages from a sender; or

(b) Have such a request honored as required by 15 U.S.C. 7704(a)(3)(B) and (a)(4).

§ 316.6 Severability.

The provisions of this Part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark

Secretary

Note: The following Appendix will not appear in the Code of Federal Regulations

**LIST OF COMMENTERS AND ACRONYMS
CAN-SPAM DISCRETIONARY RULEMAKING
COMMENTS**

Acronym	Commenter
ABA	American Bar Association
ABM	American Business Media
ACA	ACA International
ACB	America's Community Bankers
ACLI	American Council of Life Insurers
ACUTA	ACUTA, Inc.
Adknowledge	Adknowledge, Inc.
AeA	American Electronics Association
Allen	Bobby Allen
Amin	J. Amin
aQuantive	aQuantive, Inc.
ARDA	American Resort Development Association
ARTBA	American Road and Transportation Builders Association

**LIST OF COMMENTERS AND
ACRONYMS—Continued
CAN-SPAM DISCRETIONARY RULEMAKING
COMMENTS**

Acronym	Commenter
ASA	American Staffing Association
ASAE	American Society of Association Executives
Associations	Direct Marketing Association et al. on behalf of American Advertising Federation, American Association of Advertising Agencies, American Bankers Association, American Council of Life Insurers, American Society of Association Executives, American Society of Travel Agents, Inc. — Cruise Lines International Association, Association of National Advertisers, Consumer Bankers Association, Direct Marketing Association, Inc., Electronic Retailing Association, Email Service Provider Coalition, The Financial Services Roundtable, Information Technology Association of America, Interactive Travel Services Association, Internet Alliance, Internet Commerce Coalition, Magazine Publishers of America, National Business Coalition on E-Commerce and Privacy, National Retail Federation, NetCoalition, Network Advertising Initiative, Promotion Marketing Association, U.S. Chamber of Commerce American Society of Travel Agents, Inc.
ASTA	Air Transport Association of America
ATAA	Russell Ault
Ault	Aurelius
Aurelius	Baker & Hostetler, LLP
Baker	BD, Inc.
BD	Bigfoot Interactive
Bigfoot	Bank of America Corporation
BOA	BrightWave Marketing, Inc.
BrightWave	Brown-Foreman Corporation
Brown	Business Software Alliance
Brown	Arthur Buschner
BSA	Cambridge Electronics Laboratory
Buschner	Elaine Cantor
Cambridge	Consumer Bankers Association
Cantor	
CBA	

**LIST OF COMMENTERS AND
ACRONYMS—Continued
CAN-SPAM DISCRETIONARY RULEMAKING
COMMENTS**

Acronym	Commenter
Cendant	Cendant Cooperation
Cha	Brian Cha
Charter	Charter Communications, Inc.
Christensen	Keith Christensen
Clark	Patrick Clark
Clear	Luanne Clear
Click	Click Tactics, Inc.
CMOR	The Council for Marketing and Opinion Research
Coalition	National Business Coalition on E-Commerce and Privacy
Comerica	Comerica Incorporated
CUNA	Credit Union National Association
Darling	RWR Darling
Dennis	David Dennis
Discover	Discover Financial Services
DMA	Direct Marketing Association, Inc.
DoubleClick	DoubleClick, Inc.
Edge	Ronald D. Edge
Edwards	Edwards
Ellenburg	George M. Ellenburg
Empire	Empire Corporate FCU
EPIC	Electronic Privacy Information Center
ePrize	ePrize, LLC
ERA	Electronic Retailing Association
ESPC	Email Service Provider Coalition
Exact	ExactTarget, Inc.
Experian	Experian Marketing Solutions
Ezines	The Circle of Ezines
FNB	First National Bank of Omaha
Footlocker	Footlocker.com/Eastbay
Goldbar	Goldbar Enterprises, LLC
Gorman	Richard Gorman
Gray	Woodrow Gray
HSBC	HSBC Bank of Nevada
IAC	IAC/InterActiveCorp
ICC	Internet Commerce Coalition
ICOP	International Council of Online Professionals
IMN	iMake News, Inc.
Independent	Independent Sector
Intermark	Intermark Media
iPost	Bart Schaefer on behalf of iPost
IPPC	International Pharmaceutical Privacy Consortium
Jarrell	Lon Jarrell, Jr.
Jumpstart	Jumpstart Technologies, LLC
Kapecki	Jon Kapecki
KeySpan	KeySpan Energy
Landesmann	Mark Landesmann
Lantow	Lantow
LashBack	LashBack, LLC
MasterCard	MasterCard International
Masterfoods	Masterfoods USA
Mattel	Mattel, Inc.
May	William May
MBNA	MBNA America Bank, N.A.
MCI	MCI, Inc.
Metz	Seymour Metz
Microsoft	Microsoft Cooperation

LIST OF COMMENTERS AND ACRONYMS—Continued		LIST OF COMMENTERS AND ACRONYMS—Continued		LIST OF COMMENTERS AND ACRONYMS—Continued	
CAN-SPAM DISCRETIONARY RULEMAKING COMMENTS		CAN-SPAM DISCRETIONARY RULEMAKING COMMENTS		CAN-SPAM DISCRETIONARY RULEMAKING COMMENTS	
Acronym	Commenter	Acronym	Commenter	Acronym	Commenter
Morris	Ireeta Morris	NNA	National Newspaper Associa- tion	SIIA	Software Information Industry Association
MPA	Magazine Publishers of America	NRF	National Retail Federation	Sing	Ah Sing-Bombard
MPAA	Motion Picture Association of America	OPA	Online Publishers Associa- tion	Slachetka	Mike Slachetka
NAA	Newspaper Association of America	Oriez	Charles Oriez	Sonnenschein	Sonnenschein Nath & Rosenthal, LLP
NADA	National Automobile Dealers Association	PCIAA	Property Casualty Insurers Association of America	Sowell	Sean Sowell
NAEDA	North American Equipment Dealers Association	Pernetian	Pernetian	Sprint	Sprint Corporation
NAFCU	National Association of Fed- eral Credit Unions	PMA	Promotion Marketing Asso- ciation, Inc.	Subscriber	SubscriberMail, LLC
NAIFA	National Association of Insur- ance and Financial Advi- sors	Reed	Reed Elsevier, Inc.	Swent	Norm Swent
NAMB	National Association of Mort- gage Brokers	Return	Return Path, Inc.	Tietjens	Richard Tietjens
NAR	National Association of Real- tors	RIAA	Recording Industry Associa- tion of America	Time Warner	Time Warner, Inc.
NCTA	National Cable and Tele- communications Associa- tion	Roberts	Bart Roberts	Topica	Topica
Nelson	Nelson	Rubin	Kim Rubin	Travaglini	Anne Travaglini
NEPA	Newsletter and Electronic Publishers Association	Rushing	Rushing	Unsub	UnsubCentral
NetCoalition	NetCoalition	Rushizky	Paul Rushizky	UOL	United Online
Nextel	Nextel Communications, Inc.	SAG	Strategic Advisory Group	VCU	Virginia Credit Union
NFCU	Navy Federal Credit Union	Satchell	Stephen Satchell	VFCU	Visions Federal Credit Union
Nissan	Nissan North America, Inc.	Schaefer	Mark Schaefer	Verizon	Verizon, Inc.
		Schnell	Ron Schnell	Vertical	Vertical Response, Inc.
		Sheu	Caroline Sheu	Visa	Visa U.S.A., Inc.
		Shires	William Shires	Wahmpreneur	Wahmpreneur Publishing, Inc.
		SHRM	Society for Human Resource Management	Wells Fargo	Wells Fargo & Company
		SIA	Securities Industry Associa- tion	West	Hal West
				Wiederhoeft	Phyllis Wiederhoeft
				Wyle	Ed Wyle

[FR Doc. E8-11394 Filed 5-20-08; 8:45 am]

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Federal Register

**Wednesday,
May 21, 2008**

Part V

The President

**Notice of May 20, 2008—Continuation of
the National Emergency With Respect to
the Stabilization of Iraq**

Presidential Documents

Title 3—

Notice of May 20, 2008

The President

Continuation of the National Emergency With Respect to the Stabilization of Iraq

On May 22, 2003, by Executive Order 13303, I declared a national emergency protecting the Development Fund for Iraq and certain other property in which Iraq has an interest, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (IEEPA). I took this action to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq.

In Executive Order 13315 of August 28, 2003, Executive Order 13350 of July 29, 2004, Executive Order 13364 of November 29, 2004, and Executive Order 13438 of July 17, 2007, I modified the scope of the national emergency declared in Executive Order 13303 and amended the steps taken pursuant to it.

Because the obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, the national emergency declared on May 22, 2003, and the measures adopted on that date, August 28, 2003, July 29, 2004, November 29, 2004, and July 17, 2007, to deal with that emergency must continue in effect beyond May 22, 2008. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to the stabilization of Iraq.

This notice shall be published in the **Federal Register** and transmitted to the Congress.

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

THE WHITE HOUSE,
May 20, 2008.

[FR Doc. 08-1288

Filed 5-20-08; 11:06 am]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which

have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-741-6043. This list is also available online at <http://www.archives.gov/federal-register/laws.html>.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the

Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-1808). The text will also be made available on the Internet from GPO Access at <http://www.gpoaccess.gov/plaws/index.html>. Some laws may not yet be available.

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