5–28–08 Wednesday
Vol. 73 No. 103 May 28, 2008

Pages 30455–30726

Federal Register

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

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

WHEN: Tuesday, June 10, 2008
9:00 a.m.–Noon

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

RESERVATIONS: (202) 741–6008

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Rules and Regulations

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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

RIN 3206–AL52

Compensatory Time Off for Travel; Prevailing Rate (Wage) Employees

AGENCY: U.S. Office of Personnel Management.

ACTION: Final Rule.

SUMMARY: The U.S. Office of Personnel Management is issuing final regulations to implement a provision of the National Defense Authorization Act for Fiscal Year 2008 permitting prevailing rate (wage) employees to earn compensatory time off for time spent in a travel status away from the official duty station when such time is not otherwise compensable.

DATES: The regulations are effective May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Gene Holson by telephone at (202) 606–2858; by fax at (202) 606–0824; or by email at *pay-performance-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing final regulations to implement section 1111 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181, January 28, 2008), hereafter referred to as ''the Act.'' Section 1111 of the Act amends subchapter V of chapter 55 of title 5, United States Code, to cover prevailing rate (wage) employees under the compensatory time off for travel provision in 5 U.S.C. 5550b. Subject to the conditions specified in 5 U.S.C. 5550b and 5 CFR part 550, subpart N, a covered employee is entitled to earn, on an hour-for-hour basis, compensatory time off for time spent in a travel status away from the employee's official duty station when the travel time is not otherwise compensable.

Because the section of law authorizing compensatory time off for travel is in 5 U.S.C. chapter 55, subchapter V, the provision applies to an ''employee'' as defined in 5 U.S.C. 5541(2), who is employed in an ''Executive agency,'' as defined in 5 U.S.C. 105. Prevailing rate (wage) employees previously were excluded from the compensatory time off for travel provision by 5 U.S.C. 5541(2)(xi). However, the Act amends 5 U.S.C. 5541(2) and 5 U.S.C. 5550b to permit prevailing rate (wage) employees to earn compensatory time off for travel under 5 U.S.C. 5550b and 5 CFR part 550, subpart N.

Effective Date

Section 1111(c) of the Act provides that the amendment takes effect on the earlier of (1) the effective date of implementing regulations or (2) the 90th day after the date of the law's enactment, which is April 27, 2008. These regulations are effective on April 27, 2008 and apply prospectively from that date. Accordingly, we have revised § 550.1402 to provide that prevailing rate (wage) employees are covered by 5 CFR part 550, subpart N, effective April 27, 2008. Agencies must credit prevailing rate (wage) employees who perform officially authorized travel on or after the effective date with any compensatory time off for travel to which they are entitled under the law and regulations. If an employee is on an extended period of officially authorized travel on the effective date, only the qualifying travel hours occurring on or after the effective date are creditable for the purpose of earning compensatory time off for travel.

Authority Citation

Subpart N of part 550 of title 5, Code of Federal Regulations, previously did not include an authority citation. Therefore, we have added 5 U.S.C. 5548(a) as the authority citation for 5 CFR part 550, subpart N.

Waiver of Notice of Proposed Rulemaking

Pursuant to section 553(b)(B) of title 5 of the United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective in less than 30 days. These regulations implement a provision of Public Law 110–181 that takes effect on the earlier of (1) the effective date of implementing regulations or (2) the 90th day after the date of the law's enactment. The statutory change is unambiguous and does not require interpretation, since it simply extends coverage under a particular provision of law to an additional category of employees. These regulations merely incorporate the statutory change. Thus, a notice of proposed rulemaking and a delayed effective date is unnecessary. This waiver will facilitate timely implementation of the law as intended by Congress.

E.O. 12866, Regulatory Review

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

U.S. Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, OPM is amending 5 CFR part 550 as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart N—Compensatory Time Off for Travel

■ 1. An authority citation for subpart N of part 550 is added to read as follows:

Authority: 5 U.S.C. 5548(a).

■ 2. Section 550.1402 is revised to read as follows:

§ 550.1402 Coverage.

This subpart applies to an employee as defined in 5 U.S.C. 5541(2) who is employed by an agency. In accordance with section 1111 of Public Law 110–181, an employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under subchapter IV of chapter 53 of title 5,

United States Code, or by a wage board or similar administrative authority serving the same purpose, is covered by this subpart effective April 27, 2008.

[FR Doc. E8–11839 Filed 5–27–08; 8:45 am]

BILLING CODE 6325–39–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 1, 19, 20, 30, 40, 50, 52, 55, 60, 61, 63, 70, 71, 72, 73 and 76

[NRC–2008–0270]

RIN 3150-AI39

Administrative Changes: NRC Region IV Address Change and Phone Number and E-mail Address Changes

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to update the street address for its Region IV office, and to update a telephone number and e-mail address for the Office of Information Services (OIS). This document is necessary to inform the public of these changes to the NRC's regulations.

DATES: *Effective date:* This rule is effective May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Angella Love Blair, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–5661, e-mail *angella.love-blair@nrc.gov*.

SUPPLEMENTARY INFORMATION:

Background

The NRC is amending its regulations at 10 CFR parts 1, 19, 20, 30, 40, 50, 52, 55, 60, 61, 63, 70, 71, 72, 73 and 76 to update the street address for the NRC Region IV office, and to update a telephone number and e-mail address for OIS. The physical location for the NRC Region IV office has not changed; the street address change is necessary because of local road construction. This rule also updates the internal addressee for the NRC Region IV office due to reorganization.

Because these amendments constitute minor administrative corrections to the regulations, the notice and comment provisions of the Administrative Procedure Act do not apply pursuant to 5 U.S.C. 553(b)(B). The amendments are effective upon publication in the **Federal Register**. Good cause exists under 5 U.S.C. 553(d) to dispense with the usual 30-day delay in the effective date of the final rule, because the amendments are of a minor and administrative nature dealing with corrections to certain CFR sections. These amendments do not require action by any person or entity regulated by the NRC, and the final rule does not change the substantive responsibilities of any person or entity regulated by the NRC.

Summary of Changes

Change in Street Address for Region IV, USNRC

The street address of the NRC Region IV office has been changed. The new address is incorporated into the following sections of the NRC's regulations: § 1.5(b)(4), Appendix D to 10 CFR part 20, § 30.6(b)(2)(iv), § 40.5(b)(2)(iv), § 55.5(b)(2)(iv), § 70.5(b)(2)(iv), and Appendix A to 10 CFR part 73.

Change in Internal Addressee for Region IV, USNRC

Due to reorganization in the NRC Region IV, the appropriate internal addressee is the Division of Nuclear Materials Safety. The new name is incorporated into the following sections of the NRC's regulations: § 30.6(b)(2)(iv), § 40.5(b)(2)(iv), and § 70.5(b)(2)(iv).

Change in OIS Telephone Number

The OIS telephone number for requesting NRC forms has been changed. The new telephone number is incorporated into the following sections of the NRC's regulations: Appendix G to 10 CFR part 20, § 30.7(e)(3), § 40.7(e)(3), § 50.7(e)(2), § 55.23, § 55.31(a)(1), § 60.9(e)(2), § 61.9(e)(2), § 63.9(e)(2), § 70.7(e)(3), § 71.9(e)(2), § 72.10(e)(2), § 73.57(d)(1), and § 76.7(e)(3).

Change in OIS E-mail Address

The OIS e-mail address for requesting NRC forms has been changed. The new e-mail address is incorporated into the following sections of the NRC's regulations: § 19.11(e)(2), § 30.7(e)(3), § 40.7(e)(3), § 50.7(e)(2), § 52.5(e)(2), § 60.9(e)(2), § 61.9(e)(2), § 63.9(e)(2), § 70.7(e)(3), § 71.9(e)(2), § 72.10(e)(2), § 73.57(d)(1), and § 76.7(e)(3).

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rule.

Paperwork Reduction Act Statement

This final rule does not contain information collection requirements and, therefore, is not subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

Backfit Analysis

The NRC has determined that the backfit rule does not apply to this final rule; therefore, a backfit analysis is not required for this final rule because these amendments are administrative in nature and do not involve any provisions that would impose backfits as defined in 10 CFR Chapter I.

Congressional Review Act (CRA)

In accordance with the CRA of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

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10 CFR Part 20

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10 CFR Part 30

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Criminal penalties, High-level waste, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 61

Criminal penalties, Low-level waste, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 63

Criminal penalties, High-level waste, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 71

Criminal penalties, Hazardous materials transportation, Nuclear materials, Packaging and containers, Reporting and recordkeeping requirements.

10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

10 CFR Part 73

Criminal penalties, Export, Hazardous materials transportation, Import, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 76

Certification, Criminal penalties, Radiation protection, Reporting and record keeping requirements, Security measures, Special nuclear material, Uranium enrichment by gaseous diffusion.

■ For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 1, 19, 20, 30, 40, 50, 52, 55, 60, 61, 63, 70, 71, 72, 73 and 76.

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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

Authority: Sec. 23, 16181, 68 Stat. 925, 948, as amended (42 U.S.C. 2033, 2201); sec. 29, Pub. L. 85–256, 71 Stat. 759, Pub. L. 95–209, 91 Stat. 1483 (42 U.S.C. 2039); sec. 191 Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); secs. 201, 203, 204, 205, 209, 88 Stat.1242, 1244, 1245, 1246, 1248, as amended (42 U.S.C. 5841, 5843, 5844, 5845, 5849); 5 U.S.C. 552, 553; Reorganization Plan No. 1 of 1980, 45 FR 40561, June 16, 1980.

■ 2. In § 1.5, revise paragraph (b)(4) to read as follows:

§ 1.5 Location of principal offices and Regional Offices.

* * * * *

(b) * * *

(4) Region IV, USNRC, 612 E. Lamar Blvd., Suite 400, Arlington, TX 76011–4125.

PART 19—NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

■ 3. The authority citation for part 19 continues to read as follows:

Authority: 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955, as amended, sec. 234, 83 Stat. 444, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282 2297f); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 19.32 is also issued under sec. 401, 88 Stat.1254 (42 U.S.C. 5891).

§ 19.11 [Amended]

■ 4. In § 19.11, paragraph (e)(2), remove the e-mail address ''*forms@nrc.gov*'' and add in its place the e-mail address ''*FORMS.Resource@nrc.gov*''.

PART 20—STANDARDS FOR PROTECTION AGAINST RADIATION

■ 5. The authority citation for part 20 continues to read as follows:

Authority: Secs. 53, 63, 65, 81, 103, 104, 161, 182, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 953, 955, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2073, 2093, 2095, 2111, 2133, 2134, 2201, 2232, 2236, 2297f), secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

■ 6. In Appendix D to part 20, second column, revise the address for Region IV to read as follows:

Appendix D to Part 20—United States Nuclear Regulatory Commission Regional Offices

* * * * *

USNRC, Region IV, 612 E. Lamar Blvd., Suite 400, Arlington, TX 76011–4125.

* * * * *

Appendix G to Part 20—[Amended]

■ 7. In Appendix G to part 20, paragraph I.(c), third paragraph, remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232''.

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

■ 8. The authority citation for part 30 continues to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 30.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42

U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 9. In § 30.6, revise the second sentence of paragraph (b)(2)(iv) to read as follows:

§ 30.6 Communications.

* * * * *

(b) * * *

(2) * * *

(iv) * * * All mailed or hand-delivered inquiries, communications, and applications for a new license or an amendment, renewal, or termination request of an existing license specified in paragraph (b)(1) of this section must use the following address: U.S. Nuclear Regulatory Commission, Region IV, Division of Nuclear Materials Safety, 612 E. Lamar Blvd., Suite 400, Arlington, Texas 76011–4125; where e-mail is appropriate, it should be addressed to *RidsRgn4MailCenter@nrc.gov.*

§ 30.7 [Amended]

■ 10. In § 30.7, paragraph (e)(3), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

■ 11. The authority citation for part 40 continues to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95 604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86 373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97 415, 96 Stat. 2067 (42 U.S.C. 2022); sec. 193, 104 Stat. 2835, as amended by Pub. L. 104 134, 110 Stat. 1321, 1321 349 (42 U.S.C. 2243); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 40.7 also issued under Pub. L. 95 601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 12. In § 40.5, revise the second sentence of paragraph (b)(2)(iv) to read as follows:

§ 40.5 Communications.

* * * * *

(b) * * *

(2) * * *

(iv) * * * All mailed or hand-delivered inquiries, communications, and applications for a new license or an amendment or renewal of an existing license specified in paragraph (b)(1) of this section must use the following address: U.S. Nuclear Regulatory Commission, Region IV, Division of Nuclear Materials Safety, 612 E. Lamar Blvd., Suite 400, Arlington, Texas 76011–4125; where e-mail is appropriate, it should be addressed to *RidsRgn4MailCenter@nrc.gov.*

§ 40.7 [Amended]

■ 13. In § 40.7, paragraph (e)(3), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 14. The authority citation for part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5841). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80—50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

§ 50.7 [Amended]

■ 15. In § 50.7, paragraph (e)(2), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 52—EARLY SITE PERMITS; STANDARD DESIGN CERTIFICATIONS; AND COMBINED LICENSES FOR NUCLEAR POWER PLANTS

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

Authority: Secs. 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2133, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

§ 52.5 [Amended]

■ 17. In § 52.5, paragraph (e)(2), remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 55—OPERATORS' LICENSES

■ 18. The authority citation for part 55 continues to read as follows:

Authority: Secs. 107, 161, 182, 68 Stat. 939, 948, 953 , as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2137, 2201, 2232, 2282); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).Sections 55.41, 55.43, 55.45, and 55.59 also issued under sec. 306, Pub. L. 97–425, 96 Stat. 2262 (42 U.S.C. 10226).

Section 55.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237).

■ 19. In § 55.5, revise the second sentence of paragraph (b)(2)(iv) to read as follows:

§ 55.5 Communications.

* * * * *

(b) * * *

(2) * * *

(iv) * * * Submission by mail or hand delivery must be addressed to the Administrator at U.S. Nuclear Regulatory Commission, 612 E. Lamar Blvd., Suite 400, Arlington, Texas 76011–4125; where e-mail is appropriate, it should be addressed to *RidsRgn4MailCenter@nrc.gov.*

§ 55.23 [Amended]

■ 20. In the introductory text of § 55.23, remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232''.

§ 55.31 [Amended]

■ 21. In § 55.31, paragraph (a)(1), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232''.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

■ 22. The authority citation for part 60 continues to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97–425, 96 Stat. 2213g, 2228, as amended (42 U.S.C. 10134, 10141), and Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 60.9 is also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851).

§ 60.9 [Amended]

■ 23. In § 60.9, paragraph (e)(2), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

■ 24. The authority citation for part 61 continues to read as follows:

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851) and Pub. L. 102–486, sec 2902, 106 Stat. 3123, (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 61.9 is also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851).

§ 61.9 [Amended]

■ 25. In § 61.9, paragraph (e)(2), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 63—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN A GEOLOGIC REPOSITORY AT YUCCA MOUNTAIN, NEVADA

■ 26. The authority citation for part 63 continues to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97–425, 96 Stat. 2213g, 2238, as amended (42 U.S.C. 10134, 10141), and Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

§ 63.9 [Amended]

■ 27. In § 63.9, paragraph (e)(2), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

■ 28. The authority citation for part 70 continues to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended, (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282, 2297f); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846). Sec. 193, 104 Stat. 2835 as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.81 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.82 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

■ 29. In § 70.5, revise the second sentence of paragraph (b)(2)(iv) to read as follows:

§ 70.5 Communications.

* * * * *

(b) * * *

(2) * * *

(iv) * * * All mailed or hand-delivered inquiries, communications, and applications for a new license or an amendment or renewal of an existing license specified in paragraph (b)(1) of this section must use the following address: U.S. Nuclear Regulatory Commission, Region IV, Division of Nuclear Materials Safety, 612 E. Lamar Blvd., Suite 400, Arlington, Texas 76011–4125; where e-mail is appropriate, it should be addressed to *RidsRgn4MailCenter@nrc.gov.*

§ 70.7 [Amended]

■ 30. In § 70.7, paragraph (e)(3), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 71—PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

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

Authority: Secs. 53, 57, 62, 63, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2201,2232, 2233, 2297f); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 71.9 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851).

Section 71.97 also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789–790.

■ 32. In § 71.9, revise paragraph (e)(2) to read as follows:

§ 71.9 Employee protection.

* * * * *

(e) * * *

(2) Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in Appendix D to Part 20 of this chapter, by calling (301) 415–7232, via e-mail to *FORMS.Resource@nrc.gov,* or by visiting the NRC's Web site at *http://www.nrc.gov* and selecting forms from the index found on the home page.

* * * * *

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 33. The authority citation for part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092,

2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

§ 72.10 [Amended]

■ 34. In § 72.10, paragraph (e)(2), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

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

Authority: Secs. 53, 161, 149, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2169, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 5841, 5844, 2297f); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109–58, 119 Stat. 594 (2005).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C, 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99–399, 100 Stat. 876 (42 U.S.C. 2169).

§ 73.57 [Amended]

■ 36. In § 73.57, paragraph (d)(1), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

■ 37. In Appendix A to Part 73, first table, second column, and second table, second column, revise the address for Region IV to read as follows:

Appendix A to Part 73—U.S. Nuclear Regulatory Commission Offices and Classified Mailing Addresses

* * * * *

USNRC, Region IV, 612 E. Lamar Blvd., Suite 400, Arlington, TX 76011–4125.

* * * * *

USNRC, Region IV, 612 E. Lamar Blvd., Suite 400, Arlington, TX 76011–4125.

* * * * *

PART 76—CERTIFICATION OF GASEOUS DIFFUSION PLANTS

■ 38. The authority citation for part 76 continues to read as follows:

Authority: Secs. 161, 68 Stat. 948, as amended, secs. 1312, 1701, as amended, 106 Stat. 2932, 2951, 2952, 2953, 110 Stat. 1321–349 (42 U.S.C. 2201, 2297b–11, 2297f); secs. 201, as amended, 204, 206, 88 Stat. 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846). Sec 234(a), 83 Stat. 444, as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243(a)); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Sec. 76.7 also issued under Pub. L. 95–601. Sec. 10, 92 Stat 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Sec. 76.22 is also issued under sec. 193(f), as amended, 104 Stat. 2835, as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243(f)). Sec. 76.35(j) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152).

§ 76.7 [Amended]

■ 39. In § 76.7, paragraph (e)(3), remove the telephone number ''(301) 415–5877'' and add in its place the telephone number ''(301) 415–7232'', and remove the e-mail address *''forms@nrc.gov''* and add in its place the e-mail address *''FORMS.Resource@nrc.gov''.*

Dated at Rockville, Maryland, this 20th day of May, 2008.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration.

[FR Doc. E8–11751 Filed 5–27–08; 8:45 am]

BILLING CODE 7590–01–P

FARM CREDIT ADMINISTRATION

12 CFR Part 613

RIN 3052–AC33

Eligibility and Scope of Financing; Processing and Marketing

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA or Agency) issues this final rule to amend its regulation governing financing of processing and marketing operations by Farm Credit System (Farm Credit, FCS, or System) institutions under titles I and II of the Farm Credit Act of 1971, as amended (Act). The final rule revises the criteria used to determine the eligibility of legal entities for financing as processing and marketing operations. This revision will enable FCS institutions to better meet the changing needs of their eligible borrowers. The rule further requires System institutions to develop policies and procedures for ensuring that the revised eligibility criteria are met and to include information on all processing and marketing loans in their Reports of Condition and Performance filed with the FCA. The final rule also makes a non-substantive technical correction to the regulation defining the term ''person''.

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

FOR FURTHER INFORMATION CONTACT: Barry Mardock, Associate Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, (703) 883–4456, TTY (703) 883–4434; or Michael J. Duffy, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, (952) 854–7151, TTY (952) 854–2239; or Howard I. Rubin, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4029, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 1.11(a)(1) and 2.4(a)(1) of the Act authorize Farm Credit banks and associations to finance the processing and marketing operations of bona fide farmers, ranchers, and aquatic producers or harvesters that are ''directly related'' to the operations of the borrower, provided that the operations of the borrower supply some portion of the raw materials used in the processing or marketing operation (throughput).[1] Current § 613.3010(a)(1)

[1] 12 U.S.C. 2019(a)(1), 2075(a)(1). Each Farm Credit bank has transferred its title I authority to

provides that a borrower is eligible for financing for a processing or marketing operation only if the borrower is eligible to borrow from the System or is a legal entity in which eligible borrowers own more than 50 percent of the voting stock or equity.

We believe that the existing rule, focusing solely on the percentage of eligible borrower ownership in a legal entity, is unnecessarily narrow. Therefore, FCA adds additional specific criteria for determining what legal entities are eligible for financing for processing and marketing operations in accordance with the provisions in sections 1.11(a) and 2.4(a) of the Act. While potentially expanding the pool of eligible legal entities, we believe that the additional criteria properly ensure that there is a sufficiently strong economic link—or identity of interests—between eligible borrowers and the processing or marketing entity so that the financing can be considered made to eligible borrowers and ''directly related'' to their operations.

On October 16, 2006, we published a proposed rule (71 FR 60678) to amend the regulation governing financing of processing and marketing operations by FCS institutions with the comment period closing on December 15, 2006. On January 11, 2007, we reopened the comment period for the proposed rule (72 FR 1300) after receiving requests from several commercial bank trade organizations. The comment period was reopened for 45 days and ended on February 26, 2007.

II. Purpose of the Rule

FCA believes its amendment to § 613.3010 will permit System associations to more effectively meet the credit needs of eligible borrowers in the face of changing agricultural and economic conditions while remaining consistent with the Act. We recognize the increasing importance of value-added agriculture and aquaculture and the changing ownership structures in processing and marketing operations. As part of these changing agricultural and economic conditions, FCA seeks to ensure that affordable and dependable credit for businesses that add value to farm and aquatic products and commodities remains available for the benefit of agricultural and aquacultural producers (and the rural communities in which they operate).

As farmers, ranchers, and producers or harvesters of aquatic products look for opportunities to increase their income and diversify income sources, the importance of value-added agriculture and aquaculture has emerged. Producers are pursuing value-added activities to gain more direct access to markets and a greater share of the consumers' food dollar. As such, farmers are increasingly reliant upon vertical integration and coordination of production, processing, and marketing to deliver products that meet consumer needs. These opportunities have stemmed from increased consumer demands regarding health, nutrition, and convenience; efforts by food processors to improve their productivity; and technological advances that enable producers to provide what consumers and processors desire. With continued movement to a global economy, the international market for value-added products is also growing.

Ownership structures within processing and marketing operations are changing as substantial capital investments cannot be fully raised through traditional methods. The farmer-owned sole proprietorships or closely held entities prevalent in the past are often no longer economically viable. Therefore, new forms of cooperatives, limited liability companies, limited liability partnerships, and other ownership structures—requiring outside investment—are being used to address capital needs. For example, many new ethanol plants are only partially owned by farmers; however, these plants are usually directly related to the farmer-owners' operations and provide significant benefits to both producers and the rural communities in which they are located.

Moreover, even where sole proprietorships or closely held entities are economically viable, they are often not advisable from a legal liability, tax, or estate planning perspective. Structuring a processing or marketing operation with prudent legal liability considerations protects borrowers' financial interests and is an appropriate safety and soundness practice. We do not believe that our rules should create a circumstance that forces eligible borrowers to reject prudent legal, business and tax advice if they wish to continue borrowing from their FCS lender.

Processing and marketing agricultural businesses are projected to continue to evolve and grow within rural America. The entrepreneurial spirit of farmers, ranchers, and producers of aquatic products will require a reliable and flexible source of credit and financial services. As value-added agriculture continues to grow, agricultural producers are challenged by the need to attract substantial capital in order to provide products to an increasing number of consumers and improve the output and efficiency of their operations. The success of value-added agriculture not only directly benefits rural America, but American and international consumers as well.[2]

FCA recognizes the importance of these value-added enterprises to producers, rural areas and American agriculture and consumers. We believe this regulation will help ensure dependable credit for businesses that add value to farm, ranch and aquatic products and commodities, as well as the communities in which they operate. We also believe that the regulation will provide the FCS with the additional flexibility to meet the existing and future credit needs of processing and marketing entities upon which farmers, ranchers, and producers or harvesters of aquatic products are increasingly dependent for economic survival.

III. Structure of Final Rule

The two criteria contained in existing § 613.3010(a)(1) and (a)(2) for determining the eligibility of processing or marketing operations are retained in paragraphs (a)(1) and (a)(2) of revised § 613.3010. In addition, paragraph (a)(2) clarifies that it only applies to a legal entity that does not qualify for financing under paragraph (a)(1) as a bona fide farmer, rancher, or producer or harvester of aquatic products. However, as discussed above, we believe that a limitation based solely on the percentage of voting stock held by eligible borrowers—representing pure numerical voting ''control'' of the entity—is an unnecessarily narrow way

make long-term real estate mortgage loans to Federal land bank associations pursuant to section 7.6 of the Act (12 U.S.C. 2279b).

[2] For background on the issues discussed in this section, *see*, e.g., Klinefelter, D. A., and Penson, J. B., ''Growing Complexity of Agricultural Lending Decisions.'' *Choices,* 20(1) (1st Quarter 2005); Bowers, D. and Gale, F., ''Value-Added Manufacturing—An Important Link to the Larger U.S. Economy,'' *Rural Conditions and Trends,* Vol. 8, No. 3 (March 1998); Govindasamy, R., and Thornsbury, S., ''Theme Overview: Fresh Produce Marketing: Critical Trends and Issues,'' *Choices,* 21(4) (4th Quarter 2006); Gehlhar, M. and Coyle, W., ''Global Food Consumption and Impacts on Trade Patterns,'' *Agriculture and Trade Report,* Market and Trade Economics Division, Economic Research Service, U.S. Department of Agriculture, WRS–01–1 (May 2001); Holz-Clause, M., ''Using Value-added Agriculture to Create a New Rural America,'' Economic Development Administration, U.S. Department of Commerce (Summer 2004); Kohl, D. M., and Morris, A. M., ''Agri-lending Vision 2020: When Vision and Reality Meet.'' *Choices,* (20)1 (1st Quarter 2005); and Innovation & Information Consultants, Inc., ''Empirical Approach to Characterize Rural Small Business Growth and Profitability,'' Office of Advocacy, Small Business Administration, *Small Business Research Summary* (February 2006).

of looking through a legal entity to determine whether a loan can be viewed as made to an eligible borrower or ''directly related to'' an eligible borrower's operation.

The final rule adds new paragraph § 613.3010(a)(3) to provide alternative methods for determining actual eligible borrower ''control'' over a legal entity where the eligible borrower owns 50 percent or less of the voting stock or equity. New § 613.3010(a)(4) provides eligibility criteria for legal entities where eligible borrowers have a significant equity stake and provide a substantial amount of the throughput for the processing and marketing operation. New § 613.3010(a)(5) provides criteria for financing legal entities that are a direct extension or outgrowth of an eligible borrower's production operation, regardless of the amount of eligible borrower ownership of the legal entity. A legal entity must meet one of the criteria under § 613.3010 to borrow from an FCS association for its processing and marketing activities.

The final rule also adds new paragraph (c), adding new reporting requirements for each System institution making processing or marketing loans and new paragraph (d), requiring the board of directors of each System institution making processing or marketing loans to adopt a policy that, at a minimum, directs institution management to establish procedures for ensuring compliance with the eligibility provisions of § 613.3010.

IV. Comments Received

We received a total of 5,016 comment letters on our proposed rule. We received letters from commenters residing in Puerto Rico, the District of Columbia, and from 48 states. Of the comment letters received, 1,976 letters expressed support for the proposed amendments. The majority of these letters were submitted by System institutions and their member/borrowers, officers, and employees, as well as four comment letters from the Farm Credit Council (FCC) on the behalf of all System institutions and two letters from the 10th District of the FCC. We also received a letter of support from the Empire State Council of Agricultural Organizations, an umbrella organization comprised of 25 farm, commodity and agribusiness organizations in New York.

We received 3,040 comment letters expressing opposition to the proposed rule. Of the opposition comment letters received, 2,945 were submitted by commercial banks, 67 by trade organizations representing commercial banks, and 28 by individuals. The national trade associations that provided opposition comments included the American Bankers Association of America (ABA), the Independent Bankers Association of America (ICBA), the Financial Services Roundtable, the Conference of State Bank Supervisors, the American Bankers Insurance Association, and America's Community Bankers. The states from which banking chapters and affiliates of their national associations submitted comments included Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

Although we received opposition letters from commenters throughout the country, almost 75 percent of all opposition comment letters came from the following states located in the central portion of the country: Kansas (429 letters), Oklahoma (325 letters), Minnesota (288 letters), Nebraska (180 letters), Missouri (157 letters), South Dakota (146 letters), Michigan (128 letters), Iowa (125 letters), North Dakota (108 letters), Wisconsin (89 letters), Illinois (80 letters), Colorado (57 letters), Arkansas (55 letters), Wyoming (54 letters), and Tennessee (46 letters). Moreover, commenters in Kansas and Oklahoma submitted approximately 25 percent of all the opposition letters we received.

We received a significant number of letters criticizing the proposal from the three noncontiguous states of Oregon (129 letters), Pennsylvania (109 letters), and Virginia (98 letters). By adding the opposition letters from these three states to those from the 15 states identified above, we note that almost 86 percent of all opposition letters we received in response to the proposed rule came from 18 states.

We also received support letters from commenters located throughout the country. The largest geographic concentration (approximately 27 percent) of letters supporting the proposal came from commenters residing in states located in the South Atlantic section of the country. For example, we received numerous support letters from South Carolina (215 letters), North Carolina (147 letters), Georgia (96 letters), and Virginia (81 letters). In contrast to the opposition letters we received, which were primarily from commenters residing in the middle of the country, we received letters supporting the proposed rule from commenters throughout the United States. Approximately 40 percent of the letters supporting the proposed rule were submitted by the member/borrowers, officers, and employees of the System from Colorado (120 letters), Minnesota (89 letters), California (88 letters), Pennsylvania (87 letters), Kansas (70 letters), Washington (64 letters), North Dakota (61 letters), Texas (60 letters), Ohio (58 letters), Illinois (49 letters), and Wisconsin (49 letters). Consequently, approximately 67 percent of all supporting comments came from the 15 noncontiguous states identified above.

The vast majority of the 5,016 letters we received in response to our proposed rule—4,683 letters or 93.4 percent of all letters received—were form letters or letters with the same language as numerous other letters with only the names and addresses changed. For example, of the 3,040 responses we received opposing the proposed rule, 3,007 were form letters. Consequently, 98.9 percent of all opposition comments were submitted through form letters by the officers and employees of commercial banks and their trade associations (Bankers). In addition, of the 1,976 responses we received in support of the proposed rule, 1,676 were form letters. Therefore, 84.8 percent of the supporting comments were submitted through form letters by the member/borrowers, officers, and employees of the System. The form letters submitted by System and non-System commenters expressed strong opinions—albeit from very different positions—on the rule.

V. Summary of Supporting Comments

We received 1,976 comments in favor of the proposed rule. Most letters highlighted the changes occurring in the industry and the importance of value-added agriculture, stating:

- The existing regulations no longer fully meet the needs of today's producers and the proposed revisions are necessary to address the changing agricultural conditions farmers currently face;
- Congress recognized the importance of economic diversity for farmers and rural communities and established the FCS to improve the income and well being of agricultural producers who often have limited options for marketing their products;
- The proposed regulatory changes will allow producers to coordinate the production, processing and marketing of their commodities through a financial structure that is conducive to a natural business model;
- Processing and marketing operations are becoming increasingly

important to the success and viability of farmers and rural areas as traditional operations diversify into facilities that support producers with value-added activities;

• FCA should develop a rule that allows System institutions to finance the complex business entities that agricultural producers employ to efficiently and effectively manage their operations; and

• The proposed rule will help rural areas by increasing the level of outside investment in processing and marketing businesses.

The commenters also suggested a number of additional changes to provide further flexibility for financing processing and marketing entities, including:

• Revising proposed § 613.3010(a)(2) to require ''at least 50-percent ownership'' rather than ''more than 50-percent ownership'' to allow the financing of hybrid operations that include half eligible producers and half investor owners; and

• Emphasizing ''throughput'' rather than ''ownership'' for determining eligibility to better accommodate future changes in the operating structures of agricultural entities.

VI. Summary of Opposing Comments

We received a total of 3,040 comment letters opposing the proposed changes to the rule. The vast majority of the opposition letters—received from commercial bankers and commercial bank lobbyists—requested that the FCA withdraw the proposed rule. We refer to these throughout this preamble as ''Bankers' comments.'' Bankers' comments included:

• FCA lacks the authority to establish new or revised criteria for processing and marketing borrowers;

• The proposal is an attempt to change the mission of the FCS so it can expand into ''every sphere of commercial lending'';

• The proposed rule will allow the System to move away from financing farmer-owned businesses and will lead to the direct financing of commercial businesses that may have only marginal farmer involvement, in conflict with Congress' original intent for the System;

• The proposed expansion of authority could be harmful to rural America due to the unregulated growth of the System and lead to another Federal bailout;

• There is no need for the proposed regulatory changes because there is abundant capital in the marketplace and numerous banks and other lending institutions seeking to make processing and marketing loans;

• FCA should retain its existing rule because it is quantifiable and easy to use when determining eligibility;

• Revisions to the eligibility requirements are not necessary because System institutions can make processing and marketing loans under their similar entity authorities;

• The proposed criteria for determining eligibility is ''very subjective and arbitrary'';

• FCA does not provide a transparent process or criteria for determining a borrower's eligibility;

• The proposed rule will expand the lending authority of the System and is part of the System's ''Horizons'' project;

• The proposed rule does not include an explanation of how the FCA would monitor compliance with the new criteria;

• The proposal does not allow for public input, oversight or the ability to challenge a System funding decision; and

• The proposed rule will negatively impact several thousand small banks that compete with the FCS.

VII. Consideration of Comments and Summary of Changes

In response to the concerns raised by the commenters, we made several changes to the proposed rule to: (1) Ensure the language of the regulation conforms to our stated purposes and objectives, (2) increase the objectivity of the eligibility criteria, (3) ensure adequate controls over System processing and marketing lending activities, and (4) add new reporting requirements for processing and marketing loans. We believe the final rule is consistent with the intent of the proposed rule while minimizing or eliminating the potential for unintended consequences or overly broad interpretation of the eligibility criteria. Changes from the proposed to final rule include:

• Revising proposed § 613.3010 (eligibility based on actual management control) by eliminating (a)(3)(iii) and requiring eligible borrowers to constitute a majority of the directors of a corporation, general partners of a limited partnership, or managing members of a limited liability company and exercise actual control;

• Revising proposed § 613.3010(a)(5) (eligibility based on a direct extension or outgrowth of a borrower's operation) to—

○ Require that the processing or marketing entity was created for the primary purpose of processing or marketing the eligible borrower's throughput and would not exist but for the eligible borrower's involvement, and

○ Add specific throughput requirements;

• Adding new § 613.3010(c) (reporting requirements) to require periodic reporting on processing and marketing loans as part of the quarterly Reports of Condition and Performance required under § 621.12 of this chapter; and

• Adding new § 613.3010(d) (institution policies) to require the board of directors of each System institution making processing or marketing loans to legal entities under authority of this section to adopt a policy, that, at a minimum, directs institution management to establish procedures for ensuring that the eligibility provisions of § 613.3010 are properly adhered to.

VIII. Response to General Comments

A. Legal Authority for Rule

Many Bankers commented that FCA's proposal violates sections 1.11(a)(1) and 2.4(a)(1) of the Act (authorizing System banks and associations to finance the processing and marketing credit needs of bona fide farmers, ranchers, and aquatic producers and harvesters that are ''directly related'' to the operations of the borrower) because it allows financing for entities not majority owned by farmers. We disagree.

While the Bankers' comment letters supported FCA's existing rule (requiring eligible borrowers to own more than 50 percent of a processing or marketing entity) as a necessary and objective bright line test under the Act, in 1997 the ICBA and ABA filed suit against FCA seeking to invalidate that rule (and other regulatory changes adopted at the same time). The ICBA and ABA argued to the court that the plain language of the statute requires that the applicant be an agricultural producer and therefore only 100-percent farmer-owned operations should be eligible for financing. At the time, FCA argued that the new 50-percent rule was valid because it ensured that the processing or marketing operation was ''directly related'' to the eligible borrower's production operation by requiring farmers to ''control'' the processing or marketing entity.

Even under FCA's pre-1997 rule, System lenders could make processing or marketing loans to ''persons'' other than eligible farmers or ranchers. At that time, FCA rules required that eligible borrowers own 100 percent of the processing or marketing entity. Whether a corporation (or most other ''legal entities'') is owned 1 percent or 100 percent by farmers, it is considered to be a separate ''person'' under the law, able

to sue and be sued in its own name. It is a hallmark of the corporate form that shareholders are not liable for the debts of their corporation, and the corporation is not liable for the debts of the shareholders. A loan to a corporation is not the same thing as a loan to its shareholders.

In January 1999, the United States Court of Appeals for the District of Columbia rejected the Bankers' challenge (affirming the district court's decision), holding that under either the old (100-percent ownership) or new (more than 50-percent ownership) rule:

> legal entities could obtain financing for their processing and marketing operations, provided they were controlled by actual farmers. Appellants' [ICBA and ABA] objection is thus one of degree: how much ownership of the legal entity is enough before the business is no longer farmer-controlled. The statute does not directly address this issue, and appellants fail to demonstrate that the agency's requirement that farmers have a majority ownership of the operation is not a reasonable interpretation.[3]

Notably, the Court did not say that the 50-percent rule was the only reasonable interpretation or formulation allowed under the Act.

Today, the Banker commenters are making conceptually the same legal argument—and in some cases almost word-for-word the same legal argument—that the Court of Appeals rejected in 1999. There is nothing in the Act that requires 50-percent ownership or any other numerical threshold for farmer ownership for an entity to be eligible for processing or marketing credit. The 50-percent rule is simply a test FCA devised for determining whether a processing or marketing entity has a sufficient identity of interests with an eligible borrower so that it is considered ''directly related'' to the eligible borrower's operations and therefore eligible for financing under the Act. There are, however, other meaningful ways to make that determination.

While the 50-percent rule does provide a ''bright line'' test, it excludes many borrowers we believe should be eligible under the Act and is therefore an imperfect test. An example: a processing facility is operated on a day-to-day basis by an eligible farmer and his son, who works full-time in the processing facility. The farmer's equipment and employees are used to operate the facility and the farmer supplies 100 percent of the throughput. However, the processing operation is not eligible for System financing because the farmer only owns 49.9 percent of the stock in the corporation that owns the facility, with the other 50.1 percent owned by the farmer's son, who is not an eligible farmer because he does not own agricultural land or produce agricultural products.[4]

The Bankers argue that the 50-percent rule is necessary to ensure that legal entities financed by the System are ''controlled'' by eligible borrowers. Many Banker commenters noted that the proposed rule is ''arbitrary'' and would ''eliminate the quantifiable, easily determined requirement that eligible processing and marketing operations have at least 50-percent farmer or rancher ownership and would replace it with a graduated series of mostly subjective determinations regarding the control, authority, and dependent financial condition of the producers and borrowers.''

However, there are many ways to measure ''control'' over a legal entity. For example, statutes and regulations applicable to a wide spectrum of activities define ''control'' several different ways, including use of various numerical thresholds. In some contexts, as little as 5-percent ownership of an entity can be deemed a ''controlling'' interest.[5] We believe that each of the new § 613.3010 provisions require substantial control over an entity by an eligible borrower. More importantly, since the concept of ''control'' is not contained in the Act, control through majority stock ownership is clearly not the only way to determine whether financing a processing or marketing entity is necessary to meet the credit needs of an eligible borrower or whether the operation is ''directly related'' to the farmer's production operation.

The 50-percent rule was adopted by FCA more than 10 years ago even though nothing in the Act required a 50-percent test for eligibility. As we noted in the preamble to the proposed rule, we believe that our current rule is unnecessarily narrow in focusing solely on percentage of ownership to determine eligibility. However, the Financial Services Roundtable commented that ''[h]owever arbitrary these percentage minimums and maximums [in the current rule] may seem, these percentages of eligible borrower ownership permit an objective application of FCA regulations.'' We disagree that a Federal agency should settle for a potentially arbitrary rule just because it permits an ''objective'' application. Ease of application is not the only criterion to consider when promulgating a rule. There may not be a perfect method available to determine which processing or marketing entities should be eligible and which should not; however, we do believe our current rules are deficient because they exclude entities we believe Congress intended to be eligible under the Act.

As discussed herein, we have made changes to address commenters' concerns over ''subjectivity'' and the potential for overly broad lending under the rule. Far from being ''arbitrary'' or unduly ''subjective,'' we have attempted to carefully target the new provisions of § 613.3010 to ensure that farmers, ranchers, and aquatic producers and harvesters are able to obtain System credit for their value-added activities as they vertically integrate their operations.

B. Prior FCA Interpretations

The Bankers further assert that the new rule contradicts FCA's previous interpretation of legislative history, contradicts the System's mission to serve farmers and ranchers, and contains proposals FCA rejected in prior rulemakings. As discussed below, these assertions are based, in large part, on a misunderstanding of the intended scope of the rule. As Banker commenters noted, ''FCA has long held the position that the Act only authorizes titles I and II lenders to lend to processing and marketing operations that are directly related to the borrowers' agricultural or aquatic activities.'' We continue to believe this; we also believe that, in today's agricultural economy, processing and marketing operations not 50 percent owned by farmers may also be ''directly related'' to an eligible borrower's production activities. While the Bankers criticize FCA for ''expanding the class'' of eligible borrowers under the rule, the new rule, like the prior rule, is intended to ensure that farmers and ranchers can get System financing for their processing and marketing needs, even when legal structures are arranged so that they do not own more than 50 percent of the entity. In adopting the processing and marketing provisions of the Act, we believe Congress intended System lenders to continue to finance their borrowers as they grow their agricultural businesses into value-added activities; our intent with the new rule is to remove artificial constraints

[3] *Independent Bankers Ass'n* v. *Farm Credit Admin.,* 164 F.3d 661, 670 (DC Cir. 1999).

[4] *See* 12 CFR 613.3000(a)(1).

[5] *See,* e.g., 12 CFR 612.2130(c) (definition of ''controlled entity'' under FCA Standards of Conduct rule); 12 U.S.C. 1841(a) (statutory presumptions related to determining bank holding company ''control''); 7 CFR 59.200 (definition of an affiliate of a packer under United States Department of Agriculture rule); 5 CFR 890.1003 (definition of ''control interest'' by a health care provider under Office of Personnel Management rule).

impeding System lenders' efforts to fully serve the credit needs of their customers.

With regard to our interpretation of legislative history, FCA is required to implement the Act as adopted by Congress. Legislative history is a tool of statutory interpretation that can help provide insight into Congress's intent. However, it is not the law, and it cannot override the plain words of a statute enacted by Congress. Moreover, as the Court of Appeals stated in the 1999 *Independent Bankers* v. *FCA* case, ''the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.'' [6] The ICBA's comment includes lengthy quotes from 1980 Committee Reports that accompanied the legislation establishing a 20-percent minimum throughput requirement. However, Congress changed the law in 1990 to allow financing where there was only ''some'' farmer-owner throughput, clearly evidencing a Congressional intent to broaden eligibility requirements and clearly limiting the usefulness of the 1980 quotes in determining Congressional intent.

More fundamentally, as the Court of Appeals said in its 1999 decision, an ''initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.'' [7] The Supreme Court has stated that agencies ''must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.' '' [8] As discussed above, we believe our new rule is necessary to ensure that the regulatory authorities of System lenders keep up with the evolving nature of their customers' businesses.

C. Unmet Credit Needs

Virtually all of the Banker commenters assert that our rule is not necessary because there is not an ''unmet need'' for processing and marketing credit. The Bankers assert that commercial banks are filling this credit need and therefore this type of financing is generally available in the relevant marketplace. The Bankers support this argument by pointing to the large number of commercial banks operating in rural communities. The Bankers assert that the System would provide unfair competition for these loans, ultimately driving commercial banks out of the market to the detriment of rural communities.[9] The Bankers further assert that FCA must be able to demonstrate an unmet credit need for processing and marketing businesses prior to adopting a final rule.

We believe that the Bankers' comments misconstrue both the System's statutory mission and authorities and FCA's role as a Federal regulatory agency. Moreover, many of the Bankers' comments appear to be based on factual misconceptions as well.

Congress established the System to be a nationwide lender to make loans to all creditworthy agricultural borrowers covered by the Act. The preamble to the Act states that the System is intended, among other things, to ''provide for an adequate and flexible flow of money into rural areas.'' Congress further provided in section 1.1(a) of the Act (12 U.S.C. 2001) that:

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

Congress did not intend for the System to only serve those agricultural producers ''who could not otherwise obtain credit.'' Congress could have, but did not, limit the System to only those areas and to only those times when credit was otherwise ''unavailable.'' Congress also did not authorize FCA to limit the System's lending authority to only those times and places where there was a lack of available credit. Congress specifically rejected this approach, providing in section 1.1(c) of the Act that the System offer ''competitive'' credit to borrowers. Further, in response to banker opposition to new System rural housing authority in the 1971 Act, the House Agriculture Committee stated that:

> The committee does not agree that those lenders have a vested right to be free from competition and free to make the choice of the areas in which adequate credit is actually available for fully repayable housing loans. There will be no 'credit elsewhere' requirement.[10]

The Act requires the System to provide financing for the processing and marketing credit needs of farmers, ranchers and aquatic producers and harvesters and directs FCA to implement the Act through regulations. Therefore, Congress has already addressed the question of System competition and FCA has an obligation to ensure that its rules enable System lenders to fully meet their statutory obligations. The Bankers generally assert that FCA has exceeded its statutory authority in proposing this rule; however, in the same comment letters they are asking FCA to regulate the System in a manner that would essentially suppress competition for agricultural credit, a result inconsistent with clear statutory intent. Such action by FCA would exceed its Constitutional and statutory authority as an administrative agency.

D. Adequacy of Processing and Marketing Credit

The Act specifically authorizes System lenders to serve the processing and marketing credit needs of farmers, ranchers and aquatic producers and harvesters. Therefore Congress, as expressed through the Act, has decided the 'unmet credit need' policy question for FCA. While we carefully considered and evaluated the Bankers' assertions, we remain convinced that the rule is appropriate to ensure a continuing and ''adequate and flexible flow of money into rural areas.''

The ICBA supports its contentions, in part, with the results of a poll of its own commercial bank members, in which the poll respondents nearly universally concluded that they are meeting the credit needs of processing and marketing borrowers. We are unaware of any national poll of processing and marketing borrowers gauging their satisfaction with credit providers. However, we note that of the 3,040 people who signed comments in opposition to the rule, only one identified him or herself as a farmer, rancher, or agricultural credit customer. In contrast, we received hundreds of letters from persons who identified themselves as farmers, ranchers and/or

[6] *Id.* at 668.

[7] *Id.* (quoting *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–64 (1984)).

[8] *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

[9] We note that many of the Banker commenters appear to contradict this assertion by stating that it is ''comical'' or ''nonsense'' to believe that the 100 or so direct lenders of the System can have any significant impact on competition in credit markets.

[10] H. Rep. No. 92–593, 92nd Cong., 1st Sess., (Oct. 27, 1971) at 12. See also *Independent Bankers Ass'n* v. *National Credit Union Admin.*, 936 F. Supp. 605, 612 (W.D. Wis. 1996) (stating ''Congress enacted the Farm Credit Act solely for the benefit of farmers and other agricultural entities, not for the benefit of the banks. In fact, Congress seems to have intended that the Act would promote competition for banks by providing farmers with an alternative access to credit'').

System borrowers offering strong support regarding the need for the rule. Moreover, we received a number of letters (19) from farmers in the Northeastern United States stating that commercial banks are not interested in lending to agricultural borrowers in their area. This regional variation in agricultural credit availability also seems to be borne out by the geographic distribution of opposition letters; as discussed above, a large percentage of the opposition letters came from a small number of states. In contrast, we received relatively very few opposition letters from major agricultural states such as California, Texas and Florida (in addition to the Northeast).

Various independent studies on the availability of credit in rural areas have indicated there is the need for additional competition. For example, a recent article in *Choices* magazine, a publication of the American Agricultural Economics Association, explored the need for additional competition in rural credit markets. The authors focused their attention on the competitive forces in rural credit markets in 12 Midwestern states. The authors found that price discrimination and barriers to entry may result in the extension of less credit in rural areas than is optimal. They also concluded that when barriers to entering a market exist, banks that provide agricultural credit engage in credit rationing towards farmers and away from nonfarm borrowers.[11] Similarly, an article entitled ''Financing the New Rural Economy,'' presented at a conference on rural policy issues sponsored by the Federal Reserve Bank of Kansas City, noted that borrowers with large debt capital needs, borrowers needing debt capital for start-up businesses, and borrowers needing debt capital for businesses unfamiliar to their lenders can expect difficulties obtaining credit.[12]

A study recently commissioned by the ABA and the Pennsylvania Bankers Association on rural credit markets in Pennsylvania confirmed that the capital needs of rural America require many participants to be involved.[13] The study's authors (professors at Pennsylvania State University) stated that ''multiple sources of credit will be required'' to meet rural Pennsylvania's future needs in order to avoid the possibility of ''credit rationing.'' Most importantly, the professors surveyed farm-related businesses and found those businesses want to work with a lender that has expertise in agriculture, but commercial banks are not replacing their agricultural loan officers who move or retire and some banks are exiting the agricultural market entirely. The study also concluded that the System is ''clearly involved in agricultural lending to an extremely high degree while the average commercial bank does comparatively little agricultural lending in Pennsylvania.'' We also note that we received comments from System customers stating their preference for working with System lenders because of their specialized knowledge and expertise in agricultural lending.

Other independent academic and government sources also indicate that while there may be access to some credit at some price in all parts of rural America today, there is a lack of adequate competition for credit throughout the rural areas of the United States. For example, the 1997 Conference on Rural Development sponsored by the Kansas City Federal Reserve Bank documented shortfalls in financing for rural and agricultural businesses.[14] More recently, a 2005 study of farm level data from the United States Department of Agriculture's (USDA) Agricultural Resource Management Survey (ARMS) looked at competition in farm credit markets and studied farm loans made during the periods of 1991–93 and 2001–02. The study noted the number of counties called ''highly competitive'' (three or more banks with at least one branch in the county and at least 10-percent agricultural loans or $50 million of agricultural loans) declined between the two periods and the number that were ''uncompetitive'' (with no banks meeting the conditions outlined above) increased. The study found FCS lenders were more likely to serve full-time commercial farmers and farmers located in regions with less competitive credit markets.[15] Factors such as distance from metropolitan areas, economies of scale, and the small number of potential customers in remote areas are market-entry barriers that limit competition. Thus, banks in these markets are in a position to charge higher interest rates, pay lower rates on deposits, offer a narrower range of products, and take on fewer risks than they otherwise would in a more competitive situation. Clearly, the presence of a System institution in these rural credit markets has a moderating influence on what commercial banks offer, and rural customers benefit from the additional competition provided by the System's presence.[16] This benefit may become more significant as commercial banks continue to consolidate, particularly if the acquiring bank chooses to focus more heavily on nonagricultural pursuits. Notably the number of commercial banks classified as agricultural banks by the Federal Deposit Insurance Corporation (*i.e.*, at least 25 percent of a bank's loan portfolio consists of agricultural loans) has declined by about a third (34 percent) over the last 10 years to 1,634 banks at year-end 2006.[17]

Additionally, there is significant anecdotal evidence that commercial banks are not interested in providing financing for start-up and other small or potentially risky processing and marketing ventures, which are the primary intended beneficiaries of our rule. Some of the Banker commenters tacitly acknowledge this, asserting that System institutions employ ''relaxed underwriting standards that do not meet our safety and soundness requirements.'' This means that the System is making processing and marketing loans that commercial banks typically do not make. System institutions have a public mission to serve agriculture in good times and bad and therefore we expect them to accept a reasonable degree of risk that commercial banks may not be willing to accept; because System institutions are dedicated agricultural lenders, their expertise and experience in lending to agricultural ventures should enable

[11] Kilkenny, M., & Jolly, R., ''Are Rural Credit Markets Competitive? Is There Room for Competition in Rural Credit Markets?'' *Choices*, 20(1) (1st Quarter 2005).

[12] Markley, D. M., ''Financing the New Rural Economy.'' Federal Reserve Bank of Kansas City Rural Conference: *Exploring Policy Options for a New Rural America*, 69–80 (2001).

[13] Stokes, J. R. and Moore, H. L., *Rural Credit Conditions in Pennsylvania.* American Bankers Association and Pennsylvania Bankers Association (April 2007). Available on the World Wide Web at: *http://www.aba.com/Press+Room/041007Farm Disputes.htm.*

[14] Federal Reserve Bank of Kansas City, *Financing Rural America* (1997). Available on the World Wide Web: *http://www.kansascityfed.org/publicat/fra/framain.htm.*

[15] Dodson, C. B. and Koenig, S. R., ''Competition in Farm Credit Markets: Identifying Market Segments Served by the Farm Credit System and Commercial Banks,'' *Agricultural Finance Review*, 64, no. 2, 167–186 (2004).

[16] Markley, D. M., ''Financing the New Rural Economy.'' *Exploring Policy Options for a New Rural America.* Federal Reserve Bank of Kansas City (April 30—May 1, 2001). Available on the World Wide Web at: *http://www.kansascityfed.org/PUBLICAT/Exploring/RC01Mark.pdf.*

[17] Economic Research Service, *Ag Income and Finance Outlook* (AIS 80). U.S. Department of Agriculture (March 11, 2003). Available on the World Wide Web at: *http://usda.mannlib.cornell.edu/usda/ers/AIS//2000s/2003/AIS–03–11–2003.pdf*; and Federal Deposit Insurance Corporation (FDIC), Bank Data & Statistics. Available on the World Wide Web at: *http://www.fdic.gov/bank/statistical/index.html.*

them to more accurately measure, understand, and adequately address the risks involved.

A good example of this is the ethanol industry. The System appears to have provided financing for the majority of independently owned ethanol plants (excluding ethanol plants owned by large corporate entities) in the start-up phase of the industry. Contrary to Banker assertions about System loan pricing, interest spreads on System ethanol loans would ordinarily be very attractive and, in other industries, draw a great deal of competition for the loans.

E. ''Unfair'' System Competition

Many bankers commented that the System—because of its Government-sponsored enterprise (GSE) status—provides ''unfair'' competition for commercial banks, asserting that it is unfair for ''private sector'' banks to compete against ''government,'' ''Federal instrumentality,'' ''taxpayer subsidized'' System institutions. This comparison needs careful consideration.

First, each System association—the entity that makes direct loans to farmers, ranchers, and aquatic producers and harvesters—is a cooperative owned and controlled by its member borrowers. The Farm Credit banks—which provide funding to the associations—are in turn owned by their affiliated associations. CoBank, ACB has the authorities of both a Farm Credit bank and a bank for cooperatives and is therefore jointly owned by its affiliated associations and by its cooperative borrowers. FCS institutions are privately owned and in 1985 legislation, Congress expressly referred to ''commercial bankers and Farm Credit System'' as ''private lenders'' in contrast to ''public lenders.'' [18] Therefore, similar to their commercial bank competitors, no government capital is invested in System institutions.

Second, Congress established the System to fulfill a public purpose and specifically designated System institutions to be ''Federal instrumentalities.'' Congress also created the national banks to fulfill a public purpose and courts have long recognized that national banks are also ''Federal instrumentalities.'' [19] Congress continues to expect the System and banks to meet public needs; for example, Congress made banks (and not the System) subject to the Community Reinvestment Act, while obligating the System (and not banks) to focus on lending to ''young, beginning, and small farmers and ranchers.''

Third, System institutions do not receive any government ''subsidy,'' which directs payments by the government to a private party, such as in various USDA programs providing payments to farmers. Instead, Congress provided that Farm Credit banks and Federal land bank associations, and their long-term mortgage lending business are exempt from Federal and state income taxation. The production credit activities of System associations are taxable. Congress provided similar tax exemptions for a wide variety of privately owned entities that also fulfill public purposes; 26 U.S.C. 501 alone lists some 31 categories of tax-exempt organizations. Moreover, Congress has provided a variety of ways for privately owned businesses to minimize their Federal income taxes. For example, System institutions are organized as cooperatives; to the extent that they return profits to their members in the form of patronage, they are able to minimize their taxes under Subchapter T of the Internal Revenue Code. Similarly, as of December 31, 2006, some 2,356 commercial banks have organized as Subchapter S corporations and are therefore also able to pass their Federal tax burden on to shareholders.[20] This number has risen steadily since 1997 when financial institutions were first allowed to elect Subchapter S status.[21] This trend is particularly pronounced for commercial banks that are classified as agricultural banks by the Federal Deposit Insurance Corporation, with 49 percent electing to be organized as Subchapter S corporations at December 31, 2006, compared to 11 percent in 1997.[22]

Fourth, commercial banks also receive government benefits not available to System institutions and are free from statutory restrictions that System lenders must live by. For example, unlike System lenders, commercial banks may accept Federally insured (government-guaranteed) deposits (and earn service fees associated with those deposits). By statute, commercial banks also may lend to a much broader range of customers and provide a much broader range of services to those customers than can System institutions. Moreover, unlike commercial banks, System lenders must comply with rigid statutory borrower rights provisions, offering their borrowers extensive disclosures and distressed loan restructuring. Additionally, each System borrower must purchase stock in the lending association (with a statutory minimum of the lesser of 2 percent of the loan or $1,000) before obtaining a loan.

Fifth, Banker commenters assert that ''unlike FCS lenders,'' commercial banks are subject to many safety and soundness regulatory limitations. We invite commenters to review our rules at 12 CFR part 600 *et seq.*, in particular parts 613 (eligibility and scope of financing), 614 (loan policies and operations), 615 (funding and fiscal affairs), 616 (leasing), 618, subpart A (related services), and 621 (accounting and reporting requirements) which demonstrate that FCA's safety and soundness rules are comparable to those of other financial institution regulators.

Lastly, the Bankers assert the System has an ''unfair funding advantage'' because the financial markets treat the System as having an implicit government guarantee, thereby allowing the System to obtain funds at favorable ''agency'' interest rates (and thereby allowing System lenders to undercut them on interest rate pricing). However, commercial banks also have access to ''agency'' or GSE funding through the Federal Home Loan Bank System and have increased those borrowings significantly in recent years.[23] Additionally, we have found that arguments about an unfair funding advantage are not clear cut and are extremely difficult to evaluate and ensure meaningful comparison given the multiple variables impacting various lenders' cost structures and funding strategies. We note that none of the comment letters the Agency received presented any empirical data on this issue.

F. Similar Entity Authorities

Many Bankers suggested that the financing proposed under the revised rule could be accomplished using existing similar entity authorities and that FCA should be encouraging the System to work with commercial banks through the Act's similar entity authority rather than discouraging that cooperation by expanding eligibility for processing and marketing operations. Under section 4.18A of the Act (12 U.S.C. 2206a), System title I and II

[18] 12 U.S.C. 2001 *note*.

[19] *See Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896).

[20] *See* U.S. Government Accountability Office letter to Senator Bernard Sanders, April 30, 2007 (GAO–07–593R).

[21] *Id.*

[22] Federal Deposit Insurance Corporation (FDIC), Required Financial Reports, Call and Thrift Financial Reports (December 2006). Available on the World Wide Web at: *http://www.fdic.gov/regulations/required/index.html.*

[23] Federal Deposit Insurance Corporation (FDIC), ''FLHB Borrowings Rose Sharply,'' *Quarterly Banking Profile,* (November 27, 2007). Available on the World Wide Web at: *http://www2.fdic.gov/gbp/2007sep/chart8.html.*

lenders may participate with non-System lenders in loans made to entities that are not otherwise eligible to receive a loan from a System bank or association, provided the entities are ''functionally similar'' to System-eligible borrowers. Among other statutory restrictions, System lenders must hold less than 50 percent of any similar entity loan. System institutions may also participate with non-System lenders in loans to eligible borrowers.

Similar entity authorities are designed to meet the credit needs of (functionally similar) ineligible borrowers while the processing and marketing statutory and regulatory provisions are intended to meet the needs of eligible borrowers. As Congress directed the System in the Act to serve eligible borrower needs directly, a reliance on the more limited similar entity authorities would not be appropriate.

Moreover, the System has been very active in working with commercial banks through participation and similar entity authorities. According to Call Report data (available at *http://www.FCA.gov*), System institutions held $10 billion (net, *i.e.*, purchases less sales) in participations obtained from non-System lenders, including nearly $5.8 billion (net of similar entity loans) at December 31, 2006. FCA continues to encourage System lenders to work with their commercial bank counterparts in providing credit to borrowers. However, the Act caps similar entity volume (lending capacity) at 15 percent of total loan volume. Because the capital intensive nature of processing and marketing facilities often results in large loans, some associations that serve these operations are already approaching this cap. Using this capacity for loans to borrowers that should be eligible unnecessarily restricts the System's ability to work with commercial bankers in the similar entity marketplace for functionally similar ineligible borrowers.

More fundamentally, we believe that this rule will not have a significant effect on similar entity or eligible borrower participations by System lenders with commercial banks. This is because multi-lender transactions are driven by economic considerations, not regulatory fiat. Most System-commercial bank participations involve large credits. Multiple lenders make sense for those transactions because: (1) The lead lender may not have the capacity to make the entire loan, (2) the risk exposure can be spread among multiple lenders, and (3) the costs associated with using multiple lenders makes sense in the context of the loan size. These types of large loans will continue to be made with multiple lenders. However, this means that the needs of young, beginning and small farmers for start-up processing and marketing credit—intended beneficiaries of this rule—may not be met through participations and are unlikely to be met in the future because of the economics and risks inherent in such loans. Moreover, where commercial banks have made a business decision to avoid lending (or participating in loans) in a particular industry or to a particular class of borrowers, similar entity authority does not provide any means for the System to provide financing.

G. Scope of Rule—Processing or Marketing Operations

Many of the opposition commenters, without specific reference to any proposed rule language, asserted that the rule will allow System institutions ''unlimited opportunities'' to finance ''investor-owned'' businesses that have little or no connection to farmers. Several commenters also expressed concern that the revised regulation would allow System lenders to finance large, publicly traded firms and investor-owned firms. Numerous commenters used Wal-Mart as an example of a large, publicly traded entity that would qualify for System financing as a result of its relationship with farmer-owned suppliers.

It was not an objective of the regulation to expand the System's authority so that it could lend to businesses that only have a tangential relationship to agricultural or producers' operations. As we stated in the **Federal Register** notice reopening the comment period, ''[s]uch a wide scale expansion of lending authority is not the intent of the proposed rule.'' [24] As discussed in detail below, we have made significant changes to § 613.3010(a)(5) to allay these concerns and avoid unintended consequences. However, many of the comments appear to be based on a misunderstanding of the scope of the System's processing and marketing lending authority under the Act and FCA's prior rule. This is evidenced by this passage appearing in many of the letters:

> Another example possible under the proposed rule: A rural town has two farm supply stores. One of the stores is a farmer-owned store (greater than 50 percent of the enterprise is owned by eligible borrowers), and the second one is owned by some investors that do not live in the community. Under the existing regulations, only the farmer-owned supply store would be eligible for total FCS financing because it is majority owned by eligible farmers. Under the proposed rule the FCS lender would be able to finance both enterprises or either enterprise. If the FCS lender determines that the investor-owned business was a better business deal for them, they could finance it, and deny credit to the farmer-owned store, thus providing taxpayer subsidized credit to an enterprise that was in competition with a farmer owned business.

The problem with this example is that ordinarily neither of these businesses would be eligible for financing under either the old or new version of § 613.3010 because neither of them appears to be a ''processing or marketing'' operation.[25] Sections 1.11(a)(1) and 2.4(a)(1) (12 U.S.C. 2019(a)(1) and 2075(a)(1)) of the Act authorize System institutions to make loans to meet the ''processing and marketing'' credit needs of eligible borrowers. The Act does not define ''processing'' or ''marketing.'' FCA has also not adopted a definition of those terms, primarily because we have not seen significant confusion in the System as to what is a ''processing'' or ''marketing'' operation.

Processing and marketing operations are often called ''value-added'' operations. USDA regulations at 7 CFR 4284.3 define ''value-added'' this way:

> *Value-Added.* The incremental value that is realized by the producer from an agricultural commodity or product as the result of a change in its physical state, differentiated production or marketing, as demonstrated in a business plan, or product segregation. Also, the economic benefit realized from the production of farm or ranch-based renewable energy. Incremental value may be realized by the producer as a result of either an increase in value to buyers or the expansion of the overall market for the product. Examples include milling wheat into flour, slaughtering livestock or poultry, making strawberries into jam, the marketing of organic products, an identity-preserved marketing system, wind or hydro power produced on land that is farmed and collecting and converting methane from animal waste to generate energy. Identity-preserved marketing systems include labeling that identifies how the product was produced and by whom.

While we are not adopting this as our definition of ''processing or marketing,'' it provides commenters with a good overview of what kinds of businesses are—and are not—covered. For example, it is unlikely that general retail and other ''main street'' businesses could qualify for System financing as an agricultural ''processing or marketing''

[24] *See* 72 FR 1300 (Jan. 5, 2007).

[25] Additionally, this and similar examples used by the Bankers set up a false choice. Absent safety and soundness or other regulatory limitations, we would expect a System lender to finance all creditworthy eligible borrowers, not pick and choose among them.

operation. Contrary to commenters'' suggestions otherwise, a farmer selling produce to a grocery store does not turn the grocery store into a ''processing or marketing'' entity.

The Act and our existing rules do not allow ''unlimited'' lending in this area. Sections 1.11 and 2.4 of the Act (12 U.S.C. 2019 and 2075) and § 613.3010(b) of our rules—which we did not propose to change—provide specific limits on processing and marketing lending. Under § 613.3010(b), processing or marketing loans to eligible borrowers who regularly supply less than 20 percent of the throughput are subject to the following restrictions:

• *Bank limitation.* The aggregate of such processing and marketing loans made by a Farm Credit bank shall not exceed 15 percent of all its outstanding retail loans at the end of the preceding fiscal year.

• *Association limitation.* The aggregate of such processing and marketing loans made by all direct lender associations affiliated with the same Farm Credit bank shall not exceed 15 percent of the aggregate of their outstanding retail loans at the end of the preceding fiscal year. Each Farm Credit bank, in conjunction with all its affiliated direct lender associations, shall ensure that such processing or marketing loans are equitably allocated among its affiliated direct lender associations.

Our analysis indicates that System institutions appear to have low market penetrations in the agricultural processing and food manufacturing industries. In addition, total FCS association and Farm Credit bank lending to agricultural processing and marketing entities is well below the regulatory limitations previously noted.

Although the proposed regulation does not specifically exclude large, publicly traded entities, the ownership, throughput, control, and functional integration requirements serve to ensure that the System only funds operations that are ''directly related'' to eligible borrowers and their operations, effectively excluding large publicly traded entities from becoming borrowers. If Wal-Mart could be considered a ''processing'' or ''marketing'' operation it would still not meet any of the criteria for eligibility provided for in § 613.3010 and it therefore would not qualify for System processing and marketing funding. We note that numerous commenters provided examples involving large, publicly traded entities such as Wal-Mart to support their opposition to the proposed rule. We believe these examples present unrealistic scenarios to circumvent regulatory requirements. We also note that these scenarios would be evaluated and addressed through the FCA's examination process.

The ICBA further asserted that a large, publicly traded, multinational entity could qualify for System financing if it owns a few acres of land that are producing an agricultural commodity or could one day produce an agricultural commodity. This hypothetical comment raises a different issue than those implicated by our revisions to § 613.3010; the question of who is a ''bona fide farmer'' generally eligible for System financing is governed by § 613.3000(a)(1), a rule we are not changing. Therefore the comment is beyond the scope of this rulemaking.

H. The Horizons Project

A number of commenters criticized the rule as being part of the System's ''Horizons'' project. The Horizons project was undertaken by the System on its own initiative. As part of Horizons, System representatives came up with key findings concerning the evolving financial needs and business trends of farmers, rural businesses and rural communities. It is our understanding that System representatives offered specific legislative changes to Congress. FCA has taken no position on the System's legislative initiatives.

While System representatives provided FCA with the Horizons report,[26] we did not receive a formal petition for rulemaking requiring FCA to act. However, FCA is open to constructive suggestions from any source on how the System may better serve its intended customers. The evolution of processing and marketing business eligibility was an area reviewed by the Horizons project. FCA looked at processing and marketing issues independently and determined that our existing rules were excluding certain types of borrowers who we believe were intended to be financed under the Act. We then proposed a rule that would narrowly expand eligibility for certain specific types of entities whose operations were directly related to an agricultural producer's operations.

Moreover, many Banker commenters appear not to have read and/or understood our proposed rule. For example, we received comments such as:

> If the rule were adopted, the FCS would be allowed to make commercial loans to any business that provides any good or service to anyone who may be eligible to borrow from the FCS. Furthermore, it would allow FCS to make residential mortgage loans for high dollar properties and properties in urban and suburban housing markets with populations of up to 50,000.

While these may be items in the System's Horizons agenda, FCA did not propose to authorize loans to goods or services providers and did not make any proposal affecting residential mortgage lending authorities. Many of the more general comments about the sweeping breadth and effect of our proposed rule also seemed unrelated to the actual text of our proposal.

I. Transparency, Public Input, and FCA Oversight of the System

Opposition commenters also asserted that lending under the proposed rule would lack: (1) Transparency, (2) opportunities for the public to provide input and challenge a financing decision, and (3) adequate oversight by FCA. Many commenters criticized the proposed rule for not including procedures on how to make determinations about the control, authority, and dependent financial condition of the producers and borrowers.

Taken as a whole, these comments evidence a concern over the potential for abuse by System lenders under the rule. To address these concerns, we have added paragraphs (c) and (d) to the final rule, establishing new reporting requirements and internal controls. These provisions are more fully discussed in the section-by-section analysis. New paragraph (c) requires each System institution making processing and marketing loans under § 613.3010 to report on its processing and marketing lending in the Reports of Condition and Performance required to be filed with FCA at least quarterly. These reports are publicly available on FCA's Web site. New paragraph (d) requires the board of directors of each System institution making processing and marketing loans under § 613.3010 to adopt a policy and prescribe implementation of procedures on how to properly document and determine eligibility under § 613.3010.

However, it is unreasonable for commenters to argue that the public should have the ability to challenge an individual lending decision made by a System institution. Individual credit decisions made by System institutions on particular borrowers are not public information and are not made by popular public vote. At a minimum, such public involvement would violate any notion of borrower privacy. System

[26] The Farm Credit Council, *21st Century Rural America: New Horizons for U.S. Agriculture.* Available on the World Wide Web at: *http://www.fccouncil.com/uploads/Farm%20Credit%20Horizons%20Final%20Report.pdf.*

institutions make credit decisions after carefully considering the borrower's eligibility and creditworthiness as well as compliance with the statute, FCA regulations, board policies, management procedures, and sound business practices. While members of the public are free to (and sometimes do) contact FCA with inquiries about the eligibility or creditworthiness of System loans, it is FCA's role to oversee and ensure regulatory and statutory compliance. Where there is a question, FCA will evaluate the System lending decisions and will take appropriate actions to address safety and soundness concerns or regulatory violations.

Several Banker commenters criticized FCA's effectiveness as a regulatory agency, but provided no evidence to support or substantiate these claims. Many Bankers also raised the specter of ''taxpayer risk'' if the rule is implemented. However, as noted, the System and FCA operate with no taxpayer funds. The only ''risk'' to taxpayers the Bankers identify is the potential for Federal assistance if the System is in a financial crisis.

Approximately 22 years ago, at a time when the System was in a financial crisis, Congress transformed FCA into an arms-length regulator and gave it the same enforcement and supervisory authorities held by other financial institution regulators. Congress also created the Farm Credit System Insurance Corporation—which holds an insurance fund collected through premiums charged to System institutions—to ensure the payment of System obligations.

Today, the System is arguably financially healthier and better capitalized than at any time in its history. Since 1985, FCA has adopted many rules and taken many formal and informal supervisory actions to ensure that the System operates in a safe and sound manner. FCA's examination process ensures that each System institution receives the level of regulatory oversight needed on a timely basis so that problems may be identified and proactively addressed. The examination process centers on an ongoing oversight approach, involving both off-site and on-site activities. This ongoing oversight is accomplished through formal and informal contacts with institutions by examiners who monitor and analyze conditions in their assigned institutions. We believe that FCA has demonstrated its ability to effectively regulate the System and ensure it operates in a safe and sound manner.[27]

In addition, the Bankers do not explain why the rule—modestly expanding processing and marketing lending eligibility—would lead to more ''risky'' lending by the System. The rule allows the same type of loans—for agricultural enterprises—that the System already specializes in making. Moreover, the same commenters express concern that the System will take loans that the Bankers want to make; the Bankers do not explain how these loans can, at the same time, be desirable for commercial banks yet ''risky'' for a System lender.

J. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the FCA certified in the October 6, 2006, **Federal Register** notice that the proposed rule will not have a significant economic impact on a substantial number of small entities because each of the banks in the System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

The Financial Services Roundtable asserted that this certification was ''erroneous'' because the rule would affect a substantial number of small entities, including small commercial banks that compete against System lenders and small businesses that compete against entities financed by System lenders. However, 12 U.S.C. 603(b)(2) requires an initial regulatory flexibility analysis (RFA) that contains an estimate of the ''number of small entities to which the proposed rule will apply.'' Courts have clearly stated that under the plain language of the statute, the RFA applies only to regulated entities (in this case, System institutions) and not to small entities that may be indirectly affected. In considering a challenge to an Environmental Protection Agency (EPA) rule, the United States Court of Appeals for the District of Columbia stated that the ''statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply.' EPA's rule applies, by its terms, only to [regulated entities]. The rule will undoubtedly have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach that has already been rejected.'' [28] Therefore, FCA's certification was accurate.

IX. Section-by-Section Analysis

A. Section 613.3010(a)(1) and (a)(2)

These criteria are taken directly from FCA's existing rule. The Bankers did, however, argue that keeping the 50-percent provision is meaningless because no entity would ever have to meet this requirement in light of the new, less restrictive eligibility options. However, keeping the existing criteria is necessary because there are many entities that receive financing today under the 50-percent rule that will not qualify under any of the new additional provisions. There are eligible processing and marketing entities in which eligible borrowers own more than 50 percent of the stock but do not hold a majority of seats on the board of directors and therefore can not qualify under new paragraph (a)(3), do not produce at least 20 percent of the throughput and therefore can not qualify under new paragraph (a)(4), or the operation is not a direct extension or outgrowth (no integration of operations) of the eligible borrowers' production operations and therefore cannot qualify under new paragraph (a)(5).

System commenters suggested changing the ownership requirement in paragraph (a)(2) from ''more than 50-percent ownership'' to ''at least 50-percent ownership'' to accommodate situations where farmers and nonfarmers are equal owners. However, we believe the existing language provides an objective, bright line ownership test to determine control and do not believe the proposed change is necessary, particularly in light of the new eligibility criteria added by our final rule.

Therefore, we adopt § 613.3010(a)(1) and (a)(2) as proposed.

B. Section 613.3010(a)(3)—Majority Voting, Management, or Actual Control

Under proposed § 613.3010(a)(3), if eligible borrowers own 50 percent or less of the voting stock or equity and one or more of those eligible borrowers/

[27] *See* U.S. General Accounting Office letter to Senator Richard G. Lugar, February 28, 2002, (GAO–02–324R) and Farm Credit System: *Farm Credit Administration Effectively Addresses Identified Problems,* (GAO/GGD–94–14, Jan. 7, 1994).

[28] *Cement Kiln Recycling Coalition* v. *Environmental Protection Agency,* 255 F.3d 855, 869 (DC Cir. 2001) (citing *Mid-Tex Elec. Coop.,* 773 F.2d 327, 342–43 (DC Cir. 1985)).

owners regularly produce some portion of the throughput used in the processing or marketing operation, then an entity would be eligible if it could establish majority voting control, management control, or actual control. Bankers criticized the rule for not setting a minimum percentage floor for ownership. Rather than setting an arbitrary percentage number, the final rule requires either majority voting control or majority control of the board of directors (or similar body), ensuring eligible borrower control. This provision is essentially self-enforcing as to ownership interests; it is highly unlikely that control of an entity will be exercised by a 1-percent owner of a business.

1. Majority Voting Control

Proposed § 613.3010(a)(3)(i) provides that a legal entity is eligible for financing under this paragraph if eligible borrowers under § 613.3000(b) own 50 percent or less of the voting stock or equity, regularly produce some portion of the throughput used in the processing or marketing operation and ''exercise majority voting control over the entity.'' This is essentially a slight refinement of our existing 50-percent rule. An example of this is a corporation with separate classes of voting stock, where the eligible farmer-owned class of stock exercises actual majority voting control regardless of their overall percentage ownership of stock. Another example would be where holders of a majority of voting stock agree, by contract or otherwise, to allow eligible farmer-owners to exercise voting control.

This provision sets an ''objective'' standard, very much like the existing 50-percent test praised as essential by Banker commenters. However, the Financial Services Roundtable asserts that it is ''excessively vague'' and could be abused by an entity by giving majority voting control to a small minority of farmer owners until such time as the entity obtained a System loan, with majority control then reverting back to the majority. Under FCA's new or existing rule, we would consider an entity that temporarily manipulates its structure in this manner to be an ineligible borrower. To address this potential, new § 613.3010(d) requires each System institution, before making a loan to a legal entity under § 613.3010, to document the legal entity's plan and intent for maintaining eligible borrower ownership, control, throughput, and integration of operations, as applicable, during the duration of the loan. If the institution has reason to believe that majority voting control by eligible borrowers—or any other eligibility criteria—is only temporary, the institution is not authorized to make the loan.

2. Management Control and Actual Control

Proposed § 613.3010(a)(3)(ii) would have authorized financing for a legal entity in which eligible borrowers under § 613.3000(b) own 50 percent or less of the voting stock or equity, regularly produce some portion of the throughput used in the processing or marketing operation and ''exercise control over management of the legal entity, such as constituting a majority of the directors of a corporation, general partners of a limited partnership, or managing members of a limited liability company.'' Proposed § 613.3010(a)(3)(iii) would have authorized financing for a legal entity in which eligible borrowers under § 613.3000(b) own 50 percent or less of the voting stock or equity, regularly produce some portion of the throughput used in the processing or marketing operation and ''exercise the documented power and authority to directly determine and implement the policies, business practices, management, and decision-making process of the legal entity.''

Bankers criticized paragraphs (a)(3)(ii) and (a)(3)(iii) for being too subjective and asserted that one farmer on the board of a corporate entity could make an entity eligible for System financing. In response to these concerns, we have eliminated paragraph (a)(3)(iii) from the final rule and made paragraph (a)(3)(ii) a ''bright line'' test in the nature of the existing 50-percent rule. Final paragraph (a)(3)(ii) provides that the eligible borrowers:

> Constitute a majority of the directors of a corporation, general partners of a limited partnership, or managing members of a limited liability company who exercise control over the legal entity by determining and overseeing the policies, business practices, management, and decision-making process of the legal entity.

The provision also requires that the majority of eligible borrowers actually exercise ''control,'' using a definition derived directly from court decisions and banking statutes and regulations defining ''control,'' to avoid the concerns raised by the Financial Services Roundtable that the rule could be subverted through supermajority board voting or other manipulative practices.

C. Section 613.3010(a)(4)—Substantial Ownership Interest and Supply of Throughput

Section 613.3010(a)(4) will authorize financing for a legal entity in which eligible borrowers under § 613.3000(b) own at least 25 percent of the voting stock or equity, regularly produce 20 percent or more of the throughput used in the processing or marketing operation and maintain representation on the board of directors or in the applicable management structure. Under this provision, eligible borrower-owners do not need to exercise voting control over the entity because the substantial ownership requirement coupled with the 20-percent throughput requirement ensures that eligible borrowers have both a significant investment in the entity and the operation is ''directly related to'' eligible borrowers' operations. To further evidence the importance of farmer involvement and a direct relationship to the eligible borrower's production operation, the final rule includes a requirement that eligible borrowers be involved in directing the processing or marketing entity.

As a result of this addition, the criteria in proposed paragraph (a)(4) was reordered so that final paragraph (a)(4)(i) addresses ownership requirements; final paragraph (a)(4)(ii) addresses throughput requirements; and final paragraph (a)(4)(iii) addresses eligible borrower representation on the entity's board or management structure. The reordering of proposed paragraph (a)(4) improves the readability of the rule, but does not change the proposed requirement that eligible borrower-owners regularly produce at least 20 percent of the throughput used in the processing or marketing operation.

As discussed at length above in response to Bankers' criticisms, allowing an entity to be eligible with less than 50-percent farmer ownership does not violate the Act and we believe that the combining substantial ownership of the entity, substantial throughput, and involvement in overseeing the entity sufficiently evidences a direct relationship to an eligible borrower's production operation. The 25-percent ownership requirement in final paragraph (a)(4)(i) is consistent with our rules governing attribution of loans; when one entity owns 25 percent of another, System institutions must treat both entities as representing a single credit risk. Section 614.4359 of this chapter provides that ''for the purpose of applying the lending and leasing limit to the indebtedness of a borrower, loans to a related borrower

shall be combined with loans outstanding to the borrower and attributed to the borrower'' when the conditions set forth in the rule are met. A 25-percent ownership threshold is also used in a number of banking agency statutes and regulations for determining when someone has ''control'' over a legal entity.[29]

Moreover, Congress established 20-percent throughput as a meaningful threshold in sections 1.11(a)(2) and 2.4(a)(1) of the Act (12 U.S.C. 2019(a)(2) and 2075(a)(1)), placing a cap on the amount of loans System lenders may make where the applicants supply less than 20 percent of the throughput. Therefore, we believe it appropriate to conclude that Congress viewed loans in which the applicants (farmer-owners of an entity) supplied at least 20 percent of the throughput as clearly related to the applicants' production operations. For example, the farmer-owners of a typical ethanol plant would need to supply in excess of five million bushels of corn a year to meet the 20-percent throughput requirement.

The Financial Services Roundtable stated that the 20-percent throughput requirement ''is a mere fig leaf since the bulk of the entity's throughput will come from parties who are not eligible borrowers, such as large, stockholder-owned industrial corporations not eligible to borrow from the System.'' However, the term ''throughput'' refers to the raw materials produced in agricultural operations. Anyone (including a small or large corporate entity) engaged in producing agricultural products (the throughput used in processing or marketing operations) is, under FCA rules (and common meaning), a ''bona fide farmer'' eligible to borrow from the System.[30]

System commenters suggested that the throughput requirement could be satisfied if the throughput was supplied by any eligible borrower, not just the owners of the entity. However, we reject that suggestion because it would make the throughput requirement meaningless since virtually all ''throughput'' is produced by eligible borrowers. It is clear under the Act that the operations of the ''borrower'' (including the owners of a borrowing legal entity) must supply some of the throughput.

As proposed, paragraph (a)(4) required an eligible borrower-owner to ''supply'' 20 percent or more of the throughput used by the processing or marketing entity. In paragraph (a)(4)(ii) of the final rule, we changed ''supply'' to ''regularly produce'' in order to conform the language to paragraphs (a)(1), (a)(2), and (a)(3).

As noted above, to further strengthen the connection between the legal entity and the farmers' production operations, we added paragraph (a)(4)(iii) which requires owners that are eligible borrowers to maintain representation on the board of directors or in the applicable management structure of the legal entity. This requirement also addresses concerns from Bankers that System financing will focus on entities that involve large outside investors at the expense of those owned by local farmers and investors.

D. Section 613.3010(a)(5)—Extension or Outgrowth of Production Operations

Section 613.3010(a)(5) will authorize financing for a legal entity that regularly processes or markets some portion of an eligible borrower's throughput and whose operations are a direct extension or outgrowth of that eligible borrower's operation. This is intended to cover entities—regardless of ownership—in which an eligible borrower has significant involvement, that fulfill the eligible borrower's business needs, and that are functionally integrated with the eligible borrower's production operation. Under paragraph (a)(5), the legal entity's financial condition is necessarily dependent upon the continued involvement of the eligible borrower. This mutual interdependency in financial performance is further indicia that the processing and marketing operation is part, or an ''extension or outgrowth,'' of the eligible borrower's production operation.

We intended proposed paragraph (a)(5) to be a fairly narrow provision to meet the needs of borrowers in limited circumstances (primarily in family farming operations). However, the overwhelming bulk of negative comments focused on this provision. Most of the Banker commenters asserted that this provision would make eligible virtually any entity that did business with a farmer. This was not our intent.

As we discussed in the preamble to the proposed rule, many farming operations are evolving to include value-added processing and marketing operations. In many instances, value-added processing and marketing operations are formed by, and for the direct benefit of, eligible borrowers, their families, or other individuals with direct ties to an eligible borrower's production activities. In these instances, the processing or marketing operation is truly part of—or a ''direct extension or outgrowth'' of—the production operation. However, the ownership structures of these value-added operations are typically crafted to meet tax and liability concerns—rather than System eligibility requirements—and consequently may not satisfy the requirements of our current rule.

In a typical situation, a farmer produces an agricultural commodity and is a System borrower. One of the farmer's sons operates an integrated processing facility, using the farmer's resources, to process the commodity. For business, tax, and/or legal reasons, the son is the primary owner of the processing facility; since the son works full time at the processing plant, he is not a ''farmer'' and the processing entity is therefore not eligible under current FCA rules. New paragraph (a)(5) is intended to ensure that these types of integrated, family operations of System borrowers are eligible for System financing.

In order to avoid the ''unintended consequences'' suggested by the opposition commenters, we have revised new paragraph (a)(5) so that it more clearly reflects our original intent for this provision. As proposed, paragraph (a)(5) would have provided:

(5) Is a legal entity not eligible under paragraph (a)(1) of this section that is a direct extension or outgrowth of an eligible borrower's operation. To obtain financing for a legal entity under this paragraph, the eligible borrower must establish that:

(i) The legal entity was created and operates with the eligible borrower's active support and involvement,

(ii) The legal entity fulfills a business need and supports the operation of the eligible borrower through product branding or other value-added business activity directly related to the operations of the eligible borrower,

(iii) The legal entity and the eligible borrower coordinate to operate in a functionally integrated manner, and

(iv) The legal entity regularly processes or markets some portion of the eligible borrower's throughput.

Paragraph (a)(5) of the final rule reads:

(5) Is a legal entity not eligible under paragraph (a)(1) of this section that is a direct extension or outgrowth of an eligible borrower's operation and meets all of the following criteria:

(i) The legal entity was created for the primary purpose of processing or marketing the eligible borrower's throughput and would not exist but for the eligible borrower's involvement,

(ii) The legal entity fulfills a business need and supports the operation of the eligible borrower through product

[29] *See*, *e.g.*, 12 U.S.C. 1841(a)(2)(A), 371c(b)(3)(A), 1467a(a)(2)(A); 12 CFR 32.2(g), 40.3(g), 41.3(i), 215.2(c), 223.3(g), 225.2(e), 362.2(e), 574.4(a), 583.7(a).

[30] *See* 12 CFR 613.3000(a)(1).

branding or other value-added business activity directly related to the operations of the eligible borrower,

(iii) The legal entity and the eligible borrower coordinate to operate in a functionally integrated manner, and

(iv) The legal entity regularly receives throughput produced by the eligible borrower representing either:

(A) At least 20 percent of the throughput used by the legal entity in the processing or marketing operation; or

(B) At least 50 percent of the eligible borrower's total output of the commodity processed or marketed.

System commenters suggested that the requirement that ''the eligible borrower must establish'' eligibility criteria should be changed because it is the System lender's responsibility to ''establish'' eligibility of a borrower. We agree that it is always the System lender's obligation to establish and document a borrower's eligibility. The proposed language sought to ensure that the eligible borrower is sufficiently involved since the loan will be based on his or her credit need. However, we have now more firmly incorporated that concept into paragraph (a)(5)(i) and therefore are deleting this language to avoid confusion and because it is unnecessary.

Bankers commented that proposed paragraph (a)(5)(i) was vague and could be satisfied if an eligible borrower simply wrote a letter of support or provided other token ''support'' for the legal entity. However, as we stated in the proposed rule preamble, ''active support and involvement'' means more than a token investment of money, time, resources, or throughput. In order to satisfy the commenters concerns and to ensure that the rule is not interpreted in the manner suggested, we have clarified the requirements of paragraph (a)(5)(i) to more closely reflect our original intent. As adopted, in order to qualify for financing under paragraph (a)(5), the legal entity must have been created for the primary purpose of processing or marketing the eligible borrower's throughput and would not exist but for the eligible borrower's involvement. This very high threshold ensures that only those entities that are truly an ''extension or outgrowth'' of a particular eligible borrower's production operation can qualify under paragraph (a)(5).

System commenters also suggested changing the language in paragraph (a)(5)(i) from ''the'' eligible borrower to ''an'' eligible borrower so that, for example, when the son takes over the farming operation from the father, it does not destroy eligibility under this section. We believe that the generational transfer of a family farming operation will not destroy eligibility under new paragraph (a)(5). However, we decline to make the suggested change because of the potentially broad implications of the change. Section 613.3010(a)(5) is designed to provide financing to entities that are an extension or outgrowth of a particular eligible borrower's farming operation, helping him or her vertically integrate operations upward into value added activities.

The Bankers also assert that paragraph (a)(5)(ii)—under which the legal entity must fulfill a business need and support the operation of the eligible borrower through product branding or other value-added business activity directly related to the operations of the eligible borrower—is unduly vague. The Banker commenters suggested that the local hardware store or other main street businesses ''fulfill a business need'' of an eligible borrower, therefore meaning that all of those businesses would be eligible. First, as discussed above, retail stores such as the local hardware store are not ''processing or marketing'' operations and are therefore not eligible for financing under this rule. Second, an entity must meet ''all'' of the criteria of paragraph (a)(5) in order to be eligible; the bankers do not argue how such business would possibly meet the other required criteria. Therefore, we adopt paragraph (a)(5)(ii) as proposed.

Banker commenters made similar vagueness arguments about paragraph (a)(5)(iii), which requires the legal entity and the eligible borrower to coordinate to operate in a ''functionally integrated manner.'' This requires vertical integration of operations; vertical cooperation or other similar marketing agreements are not sufficient to meet this requirement. We also note that other regulators, such as the Department of Labor and the Internal Revenue Service (IRS), have adopted and implemented regulations dealing with ''functional integration'' or ''integration'' of businesses which include ''subjective'' facts and circumstances criteria; therefore, we believe that our rule is not unduly vague in comparison to those rules.[31] However, in order to address the commenters' concerns on this point, we have added new paragraph (d)(2), which specifically requires each System institution making processing or marketing loans under paragraph (a)(5) to have a procedure for determining functional integration. That procedure requires consideration of all relevant facts and circumstances, which include the extent to which:

- The operations share resources such as management, employees, facilities, and equipment;
- The operations are conducted in coordination with or reliance upon each other; and
- The eligible borrower and legal entity are dependent upon each other for economic success.

We have changed proposed paragraph (a)(5)(iv) from requiring the eligible borrower to supply ''some'' throughput (the statutory standard) to requiring that either: (1) The eligible borrower supply at least 20 percent of the throughput used in the processing or marketing operation; or (2) the throughput supplied by the eligible borrower to the processing or marketing operation constitutes at least 50 percent of the eligible borrower's total output of the commodity processed or marketed. Therefore, the throughput must be either significant to the processing or marketing operation or significant to the farmer's production operation (or both). Like the change to paragraph (a)(5)(i), this provision is intended to ensure that only those entities that are truly an ''extension or outgrowth'' of an eligible borrower's production operation can qualify. Ordinarily, particularly with a start-up operation, we would expect that eligible borrowers would supply most of the throughput for a processing or marketing operation under the criteria of (a)(5) and therefore we believe this change reflects our original intent in proposing the rule.

E. Section 613.3010(c)—Reporting Requirements

To ensure adequate oversight and disclosure of System lending under this section, we adopt a new paragraph (c), which provides:

Reporting requirements. Each System institution shall include information on loans made under authority of this section in the Reports of Condition and Performance required under § 621.12 of this chapter, in the format prescribed by FCA reporting instructions.

FCA makes System ''call report'' data publicly available through its Web site at *http://www.fca.gov*. Under § 621.13(a) of this chapter, System institutions must prepare Reports of Condition and Performance in accordance with FCA instructions. We anticipate issuing new reporting instructions covering processing and marketing loans made under each of the provisions of § 613.3010 contemporaneously with the effective date of this rule.

[31] *See, e.g.*, 26 U.S.C. 509(a)(3); 26 CFR 1.469–4T; 29 CFR 776.26, 784.123.

F. Section 613.3010(d)—Institution Policies

In order to address commenters' concerns over the proper application of our eligibility rules, new § 613.3010(d) requires the board of directors of each System institution making processing and marketing loans to legal entities under authority of this section to adopt a policy that addresses eligibility requirements for such legal entities as well as portfolio restrictions and reporting requirements. The final rule also requires each institution to establish procedures for implementing the board policy. Under paragraph (d)(1), the board-adopted policy must provide for procedures on how, at or before the time a loan is made, the institution will document:

- Eligible borrower ownership, control, throughput, integration of operations and other factors, as applicable, sufficient to establish eligibility of legal entities at the time a loan is made under this section; and
- Each legal entity's plan and intent for maintaining eligible borrower ownership, control, throughput, and integration of operations, as applicable, during the duration of the loan.

A number of commenters suggested that continuous monitoring of an entity—after a loan is made—would be necessary in order to ensure that the borrower retained eligibility. However, the Act authorizes System institutions to ''make'' loans to eligible borrowers. Therefore, eligibility for a System loan is always determined at or before the time the loan is ''made,'' (*i.e.*, before money is disbursed to a borrower with a legal obligation to repay). If an eligible ''farmer'' borrower stops farming 5 years into a 10-year term loan, the loan is not immediately due and the System lender is not obligated to immediately divest the loan. Instead, the borrower is not eligible for any new loan (including any refinancing of an existing loan) from the System lender. Similarly, the eligibility of a processing and marketing entity must be established at the time a loan is made; a new eligibility determination must be made every time the entity seeks additional System credit (including refinancing). However, we believe that an entity that intentionally manipulates its structure solely for eligibility purposes—with no intent or plan to meet eligibility criteria on an ongoing basis—is not an eligible borrower under our rules.

Section 613.3010(d)(1)(i) requires the institution to have formal procedures to ensure adequate documentation of the institution's determination that the borrower is eligible at the time a loan is made. We would expect such procedures to include an independent review of the entity's applicable corporate, organizational, marketing and sales documents that support eligibility conclusions.

Section 613.3010(d)(1)(ii) further requires each institution to document each borrowing entity's plan and intent for maintaining the eligibility conditions throughout the term of the loan. Each lender must be able to reasonably document—again most likely through reference to the entity's applicable corporate, organizational, marketing and sales documents—that the necessary eligible borrower ownership, control or integration is not a temporary or artificially created condition.

To further emphasize that the primary objective of the rule is to help farmers grow into value-added businesses and to address comments that System financing could unduly focus on large entities with limited farmer involvement, we also adopt § 613.3010(d)(2). New § 613.3010(d)(2) requires the board of directors of each System institution making processing and marketing loans to adopt a policy that ensures that the institution develops and implements procedures that encourage financing under paragraph (a)(4) of credit-worthy entities whose operations directly benefit producers, have local community investment support and provide accessible ownership opportunities for local farmers and ranchers. ''Accessible ownership opportunities'' could include, for example, those that enable participation in the business through minimum investment requirements that are reasonably attainable by individuals in the local community (*e.g.*, a $25,000 stock purchase minimum rather than $100,000).

The new procedures required by § 613.3010(d)(2) do not impose any additional eligibility criteria beyond those contained in § 613.3010(a) and cannot be used as a justification for denying credit to otherwise eligible borrowers. Instead, the requirement is intended to ensure that institutions encourage and enable financing opportunities for entities that are primarily owned by farmers and local investors. This encouragement may take a variety of forms, including targeted marketing, community outreach, technical assistance and other related services to assist with business and marketing plans and other strategic or operational needs of local processing or marketing businesses. There are obvious economic benefits of local ownership to rural communities and each institution's procedures should address how the institution will facilitate lending to those eligible entities.

While not a requirement of this rule, FCA generally encourages System institutions to find ways to help facilitate the creation and continuation of farmer-owned processing and marketing businesses. System institutions can help in a variety of ways, including partnering with industry groups, other lenders and government agencies (such as USDA) to promote farmer ownership and encourage a borrower's use of marketplace and government opportunities, including grants and other programs. System institutions can promote the use of federal, state, county, or local grant programs (such as the USDA's Sustainable Agriculture Research and Education Program, Rural Cooperative Development Grant Program, or Value-Added Producer Grant Program) to develop market research and feasibility studies. System institutions can also provide direct help by giving financial assistance (such as through ''matching grants'') to independent organizations that provide grants and other financial assistance to farmers.

As discussed above, many commenters were critical of the lack of guidance in § 613.3010(a)(5) for determining the key element of ''functional integration.'' After consideration of those comments, we adopt § 613.3010(d)(3), which requires each institution to have procedures for determining functional integration for loans made under paragraph (a)(5). The procedures must require the institution to consider ''all relevant facts and circumstances,'' which is a standard used in, for example, IRS rules for determining ''integration'' of corporate entities. The procedures implemented under paragraph (d)(3) must include, at a minimum, consideration of:

- The extent to which the operations share resources such as management, employees, facilities, and equipment;
- The extent to which the operations are conducted in coordination with or reliance upon each other; and
- The extent to which the eligible borrower and legal entity are dependent upon each other for economic success.

While ''functional integration'' may differ based on the ''relevant facts and circumstances'' of the operation, we would, at a minimum, expect an institution to find significant resource sharing, operational coordination, and economic interdependence in every ''functionally integrated'' operation. System lenders must also adequately document their findings supporting a

determination of ''functional integration.''

New paragraph (d)(4) requires adoption of portfolio restrictions necessary to comply with paragraph (b) (which caps the number of processing and marketing loans that can be made to borrowers who provide less than 20-percent throughput). Section 614.3010(d)(4) also requires formal adoption of any board-defined limits on financing provided under this section. For example, an institution's board should consider market, concentration, or other limiting factors on the institution's processing and marketing lending consistent with the institution's risk-bearing capacity.

Finally, new paragraph (d)(5) requires adoption of procedures for reporting requirements necessary to comply with new paragraph (c) as well as any internal board-defined reporting on financing provided under this section.

X. Technical Correction

We proposed to correct an omission that inadvertently occurred during the January 30, 1997, regulatory amendments by adding the words ''a legal entity or'' to the § 613.3000(a)(3) definition of ''[p]erson.'' This does not provide any additional authority and is in accord with our stated intent published in the 1997 **Federal Register** final rule preamble. We received no comments on this and we adopt the proposed revision as final.

XI. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 613

Agriculture, Banks, Banking, Credit, Rural areas.

■ For the reasons stated in the preamble, part 613 of chapter VI, title 12 of the Code of Federal Regulations is amended to read as follows:

PART 613—ELIGIBILITY AND SCOPE OF FINANCING

■ 1. The authority citation for part 613 continues to read as follows:

Authority: Secs. 1.5, 1.7, 1.9, 1.10, 1.11, 2.2, 2.4, 2.12, 3.1, 3.7, 3.8, 3.22, 4.18A, 4.25, 4.26, 4.27, 5.9, 5.17 of the Farm Credit Act (12 U.S.C. 2013, 2015, 2017, 2018, 2019, 2073, 2075, 2093, 2122, 2128, 2129, 2143, 2206a, 2211, 2212, 2213, 2243, 2252).

Subpart A—Financing Under Titles I and II of the Farm Credit Act

§ 613.3000 [Amended]

■ 2. Amend § 613.3000(a)(3) by adding the words ''a legal entity or'' before the words ''an individual''.

■ 3. Amend § 613.3010 by revising paragraph (a) and adding new paragraphs (c) and (d) to read as follows:

§ 613.3010 Financing for processing or marketing operations.

(a) *Eligible borrowers.* A borrower is eligible for financing for a processing or marketing operation under titles I and II of the Act only if the borrower:

(1) Is a bona fide farmer, rancher, or producer or harvester of aquatic products who regularly produces some portion of the throughput used in the processing or marketing operation; or

(2) Is a legal entity not eligible under paragraph (a)(1) of this section in which eligible borrowers under § 613.3000(b) own more than 50 percent of the voting stock or equity and regularly produce some portion of the throughput used in the processing or marketing operation; or

(3) Is a legal entity not eligible under paragraph (a)(1) of this section in which eligible borrowers under § 613.3000(b) own 50 percent or less of the voting stock or equity, regularly produce some portion of the throughput used in the processing or marketing operation and:

(i) Exercise majority voting control over the legal entity; or

(ii) Constitute a majority of the directors of a corporation, general partners of a limited partnership, or managing members of a limited liability company who exercise control over the legal entity by determining and overseeing the policies, business practices, management, and decision-making process of the legal entity; or

(4) Is a legal entity not eligible under paragraph (a)(1) of this section in which eligible borrowers under § 613.3000(b) meet all of the following criteria:

(i) Own at least 25 percent of the voting stock or equity in the processing or marketing operation;

(ii) Regularly produce 20 percent or more of the throughput used in the processing or marketing operation;

(iii) Maintain representation on the board of directors or in the applicable management structure of the entity.

(5) Is a legal entity not eligible under paragraph (a)(1) of this section that is a direct extension or outgrowth of an eligible borrower's operation and meets all of the following criteria:

(i) The legal entity was created for the primary purpose of processing or marketing the eligible borrower's throughput and would not exist but for the eligible borrower's involvement,

(ii) The legal entity fulfills a business need and supports the operation of the eligible borrower through product branding or other value-added business activity directly related to the operations of the eligible borrower,

(iii) The legal entity and the eligible borrower coordinate to operate in a functionally integrated manner, and

(iv) The legal entity regularly receives throughput produced by the eligible borrower representing either:

(A) At least 20 percent of the throughput used by the legal entity in the processing or marketing operation; or

(B) At least 50 percent of the eligible borrower's total output of the commodity processed or marketed.

* * * * *

(c) *Reporting requirements.* Each System institution shall include information on loans made under authority of this section in the Reports of Condition and Performance required under § 621.12 of this chapter, in the format prescribed by FCA reporting instructions.

(d) *Institution policies.* The board of directors of each System institution making processing and marketing loans to legal entities under authority of this section must adopt a policy that addresses eligibility requirements for such entities and ensures that the institution, at a minimum, develops and implements:

(1) Procedures on how, at or before the time a loan is made, the institution will document:

(i) Eligible borrower ownership, control, throughput, integration of operations and other factors, as applicable, sufficient to establish eligibility of legal entities at the time a loan is made under this section; and

(ii) Each legal entity's plan and intent for maintaining eligible borrower ownership, control, throughput, and integration of operations, as applicable, during the duration of the loan;

(2) Procedures that encourage financing under paragraph (a)(4) of this section of credit-worthy entities whose operations directly benefit producers, have local community investment support and provide accessible ownership opportunities for local farmers and ranchers.

(3) Procedures for determining functional integration for loans made

under paragraph (a)(5) of this section that require consideration of all relevant facts and circumstances, which include the extent to which:

(i) The operations share resources such as management, employees, facilities, and equipment;

(ii) The operations are conducted in coordination with or reliance upon each other; and

(iii) The eligible borrower and legal entity are dependent upon each other for economic success.

(4) Portfolio restrictions necessary to comply with paragraph (b) of this section and any board-defined limits on financing provided under this section; and

(5) Reporting requirements necessary to comply with paragraph (c) of this section and any board-defined reporting on financing provided under this section.

Dated: May 20, 2008.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. E8–11742 Filed 5–27–08; 8:45 am]

BILLING CODE 6705–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 700, 704, 705, 707, 708b, 711, 713, 716, 723, 760, and 792

Technical Amendments

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is amending a number of its regulations by making minor technical corrections and grammatical changes. The amendments delete duplicate words, add proper punctuations, and make other grammatically necessary corrections. The amendments are intended to provide helpful changes to NCUA's regulations.

DATES: This rule is effective May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Justin M. Anderson, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428 or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

A. Background

In 2007, NCUA internally reviewed its regulations as part of a publication process. NCUA used this opportunity to update and clarify existing regulations. The 2007 review revealed that minor grammatical revisions to certain regulations would be helpful.

B. Regulatory Changes

This rule provides minor grammatical changes and will not cause any regulatory changes.

C. Regulatory Procedures

Final Rule Under the Administrative Procedure Act

Generally, the Administrative Procedure Act (APA) requires a federal agency to provide the public with notice and the opportunity to comment on agency rulemakings. The amendments in this rule are not substantive but technical in that they make minor corrections, merely provide clarification or alert users of the regulations to other legal requirements or limitations. The APA permits an agency to forego the notice and comment period under certain circumstances, such as when a rulemaking is technical and not substantive. NCUA finds good cause that notice and public comment are unnecessary under Section 553(b)(3)(B) of the APA. 5 U.S.C. 553(b)(3)(B). NCUA also finds good cause to dispense with the 30-day delayed effective date requirement under Section 553(d)(3) of the APA. 5 U.S.C. 553(d)(3). The rule will, therefore, be effective immediately upon publication.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (those credit unions under ten million dollars in assets). This rule provides minor, technical changes to certain sections of NCUA's regulations. This rule will not have a significant economic impact on a substantial number of small credit unions, and, therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

NCUA has determined that this rule will not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the APA. 5 U.S.C. 551. The Office of Management and Budget has determined that this rule is not a major rule for purposes of SBREFA. As required by SBREFA, NCUA will file the appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

List of Subjects

12 CFR Part 700

Credit unions.

12 CFR Part 704

Credit unions, Surety bonds.

12 CFR Part 705

Community development, Credit unions, Loan programs—housing and community development.

12 CFR Part 707

Advertising, Consumer protection, Credit unions, Reporting and recordkeeping requirements, Truth in savings.

12 CFR Part 708b

Credit unions, Mergers of credit unions, Reporting and recordkeeping requirements.

12 CFR Part 711

Credit unions.

12 CFR Part 713

Bonds, Credit unions, Insurance.

12 CFR Part 716

Bank deposit insurance, Consumer protection, Credit unions, Privacy.

12 CFR Part 723

Credit unions, Loan programs—business, Reporting and recordkeeping requirements.

12 CFR Part 760

Credit unions, Flood insurance, Mortgages.

12 CFR Part 792

Confidential business information, Freedom of information, Government employees, Privacy.

By the National Credit Union Administration Board on May 20, 2008.

Mary Rupp,

Secretary of the Board.

■ For the reasons discussed above, NCUA is amending 12 CFR parts 700, 704, 705, 707, 708b, 710, 711, 713, 716, 723, 760, and 792 as follows:

PART 700—DEFINITIONS

■ 1. The authority citation for part 700 continues to read as follows:

Authority: 12 U.S.C. 1752, 1757(6), 1766.

§ 700.2 [Amended]

■ 2. Section 700.2 is amended by removing the words ''means a State'' and adding in their place the words ''means a state'', and by removing the word ''Territories'' and adding in its place the word ''territories''.

PART 704—CORPORATE CREDIT UNIONS

■ 3. The authority citation for part 704 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1781, 1789.

§ 704.8 [Amended]

■ 4. Section 704.8(a)(4) is amended by removing the word ''and'' after the phrase ''of this section;''.

PART 705—COMMUNITY DEVELOPMENT REVOLVING LOAN PROGRAM FOR CREDIT UNIONS

■ 5. The authority citation for part 705 continues to read as follows:

Authority: 12 U.S.C. 1772C–1; 42 U.S.C. 9822 and 9822 note.

■ 6. Section 705.5(b)(1) introductory text is amended by revising the last sentence to read as follows:

§ 705.5 Application for participation.

* * * * *

(b) * * *

(1) * * * A nonfederally insured credit union must include the following:

* * * * *

PART 707—TRUTH IN SAVINGS

■ 7. The authority citation for part 707 continues to read as follows:

Authority: 12 U.S.C. 4311.

■ 8. Section 707.8 is amended by revising paragraph (c)(5) to read as follows:

§ 707.8 Advertising.

* * * * *

(c) * * *

(5) *Effect of fees.* A statement that fees could reduce the earnings on the account.

* * * * *

PART 708b—MERGERS OF FEDERALLY-INSURED CREDIT UNIONS; VOLUNTARY TERMINATION OR CONVERSION OF INSURED STATUS

■ 9. The authority citation for part 708b continues to read as follows:

Authority: 12 U.S.C. 1752(7), 1766, 1785, 1786, 1789.

§ 708b.105 [Amended]

■ 10. Section 708b.105(b) is amended by removing the word ''Part'' and adding in its place ''part'' in the first sentence.

§ 708b.203 [Amended]

■ 11. Section 708b.203(e)(1) is amended by removing the duplicate word ''it'' appearing after the words ''credit union that''.

§ 708b.301 [Amended]

■ 12. Section 708b.301 is amended as follows:

■ A. Paragraph (c) is amended by adding a period after the parenthetical ''(Insert name of independent entity and address)'' in the first full paragraph beginning with ''The credit union must''.

■ B. Paragraph (c) is further amended by removing the word ''accounts'' and adding in its place the word ''account'' after the words ''if I use different'' in the second full paragraph beginning with ''I understand if''.

■ C. Paragraph (d)(5) is amended by removing the word ''inset'' and adding in its place the word ''insert'' in the parenthetical following the words ''a majority voted'' in the eighth paragraph beginning with ''(insert ''20% or more'')''.

§ 708b.302 [Amended]

■ 13. Section 708b.302 is amended as follows:

■ A. Paragraph (c) is amended by removing the word ''accounts'' and adding in its place the word ''account'' after the words ''if I use different'' in the second full paragraph beginning with ''I Understand if''.

■ B. Paragraph (d)(5) is amended by removing the word ''and'' and adding in its place the word ''an'' before the words ''entity independent'' in the first full paragraph beginning with ''The (insert name)''.

■ C. Paragraph (d)(5) is further amended by removing the word ''inset'' and adding in its place the word ''insert'' before the words ''in favor of'' in the eighth paragraph beginning with ''(insert ''20% or more'')''.

■ 14. Section 708b.303 is amended as follows:

■ A. Paragraph (b) is amended by revising the first sentence in the second full paragraph to read as set forth below.

■ B. Paragraph (c)(5) is amended by removing the word ''and'' and adding in its place the word ''an'' before the words ''entity independent'' in the first sentence.

§ 708b.303 Conversion of insurance through merger.

* * * * *

(b) * * *

I understand if the merger or conversion of the (insert name of merging credit union) into the (insert name of continuing credit union) is approved, the National Credit Union Administration share (deposit) insurance I now have, up to $100,000, or possibly more if I use different account structures, will terminate upon the effective date of the conversion.

* * *

* * * * *

PART 711—MANAGEMENT OFFICIAL INTERLOCKS

■ 16. The authority citation for part 711 continues to read as follows:

Authority: 12 U.S.C. 1757 and 3201–3208.

§ 711.2 [Amended]

■ 17. Section 711.2(j) is amended by removing the italicized phrase ''*Low- and moderate-income*'' and adding in its place the italicized phrase ''*Low and moderate-income*''.

PART 713—FIDELITY BOND AND INSURANCE COVERAGE FOR FEDERAL CREDIT UNIONS

■ 18. The authority citation for part 713 continues to read as follows:

Authority: 12 U.S.C. 1761A, 1761B, 1766(a), 1766(h), 1789(a)(11).

§ 713.4 [Amended]

■ 19. Section 713.4(a) is amended by removing the words ''Web site'' and adding in its place the word ''website''.

PART 716—PRIVACY OF CONSUMER FINANCIAL INFORMATION

■ 20. The authority citation for part 716 continues to read as follows:

Authority: 15 U.S.C. 6801 *et seq.*, 12 U.S.C. 1751 *et seq.*

§ 716.3 [Amended]

■ 21. Section 716.3 is amended as follows:

■ A. Paragraph (b)(2)(iii) is amended by removing the italicized words ''web sites'' and adding in their place the italicized word ''*websites*'' in the paragraph heading, removing the words ''web site'' and adding in their place the word ''website'' in the first sentence, and removing the word ''form'' and adding in its place with the word ''from'' after the words ''not distract attention'' in the first sentence.

■ B. Paragraph (e)(2)(iii) is amended by removing the parentheses from the sentence that begins ''(The individual'' and ends with ''institutions involved).''

PART 723—MEMBER BUSINESS LOANS

■ 22. The authority citation for part 723 continues to read as follows:

Authority: 12 U.S.C. 1756, 1757, 1757A, 1766, 1785, 1789.

§ 723.21 [Amended]

■ 23. Section 723.21 is amended as follows:

■ A. In the definition of *Construction or development loan,* Example 4 is amended by removing the word ''incoming'' in the fourth sentence and adding in its place the word ''income''.

■ B. The definition of *Net worth* is amended by removing the phrase ''low income-designated'' and adding in its place the phrase ''low-income designated'' in the fourth sentence.

PART 760—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

■ 24. The authority citation for part 760 continues to read as follows:

Authority: 12 U.S.C. 1757, 1789; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

§ 760.7 [Amended]

■ 25. Section 760.7 is amended by removing the comma before the words ''at any time during'' and adding a comma after the words ''not covered by flood insurance'' in the first sentence.

PART 792—REQUESTS FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT AND PRIVACY ACT, AND BY SUBPEONA; SECURITY PROCEEDURES FOR CLASSIFIED INFORMATION

■ 26. The authority citation for part 792 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552A, 552B; 12 U.S.C. 1752a(d), 1766, 1789, 1795f; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; E.O. 12958, 60 FR 19824, 3 CFR, 1995 Comp., p. 333.

§ 792.10 [Amended]

■ 27. Section 792.10(b) is amended by removing the words ''which meets'' and adding in their place the words ''that meet'' in the third sentence.

§ 792.16 [Amended]

■ 28. Section 792.16(a) is amended by adding a comma after the words ''extends the time'' and removing the comma after the words ''with written notice'' in the second sentence.

§ 792.28 [Amended]

■ 29. Section 792.28 is amended by moving the period outside the parenthetical ''(in case of partial denials)'' in the second sentence.

§ 792.50 [Amended]

■ 30. Section 792.50(a) is amended by removing the parenthetical phrase from the first sentence.

§ 792.51 [Amended]

■ 31. Section 792.51(b) is amended by removing the words ''Personnel Office'' wherever they appear in the fourth sentence and adding in their place the words ''Office of Human Resources''.

[FR Doc. E8–11736 Filed 5–27–08; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[DOD–2006–HA–0194; RIN 0720–AB07]

32 CFR Part 199

TRICARE; Certain Survivors of Deceased Active Duty Members; and Adoption Intermediaries

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This rule confirms as final a January 2007 interim final rule which implements two provisions of the National Defense Authorization Act for Fiscal Year 2006 (NDAA FY06). First, Section 715 of the NDAA FY06 extends the time frame certain dependents of active duty service members (ADSM) who die while on active duty for more than 30 days shall receive TRICARE medical benefits at active duty dependent payment rates. Second, Section 592 of the NDAA FY06 modifies the requirement for those intermediaries who provide adoption placements. Additionally, this final rule makes an administrative clarification to the following two eligibility provisions: those placed in the legal custody of a member or former member; and those placed in the home of a member or former member in anticipation of adoption. This clarification makes a distinction between the two groups and specifies that for placement into legal custody by court order, the court order must be for a period of 12 consecutive months.

DATES: *Effective Date:* This rule is effective June 27, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Ann N. Fazzini, (303) 676–3803 for questions regarding Section 715 as it relates to the TRICARE Basic Program; and also questions regarding Section 592. Mr. Michael Kottyan, (303) 676–3520 for questions regarding Section 715 as it relates to the Extended Health Care Option (ECHO). Mr. John Leininger, (303) 676–3613, for questions regarding TRICARE Prime Remote. Questions regarding payment of specific claims should be addressed to the appropriate TRICARE contractor.

SUPPLEMENTARY INFORMATION:

Background

I. In the **Federal Register** of January 19, 2007 (72 FR 2444), the Department of Defense published for public comment an interim final rule regarding: (1) Payment rates for dependents of deceased active duty service members; (2) Modification of requirement for certain intermediaries under certain authorities relating to adoptions; and, (3) Administrative change—court order/adoption placement. An overview of these three provision follows.

II. Payment Rates for Dependents of Deceased Active Duty Service Members. Dependents of active-duty members who died while on active duty have been always eligible for TRICARE; however, their payment rates/cost-sharing provisions have changed over time. Section 715 of the NDAA FY06 modified the cost-sharing provision for certain dependents of deceased active duty members. The reader is referred to the interim final rule published on January 19, 2007 (72 FR 2444), for

detailed information regarding this provision.

III. Modification of Requirement for Certain Intermediaries Under Certain Authorities Relating to Adoptions. Section 592 of the NDAA FY06 expands those intermediaries who perform adoption placement to include placement by any source authorized by State or local law to provide adoption placement. This expanded language mirrors the language found in Title 10, United States Code, Section 1052, reimbursement for adoption expenses, and provides consistency between personnel benefit policies in chapter 53 of Title 10, United States Code, and eligibility for TRICARE under chapter 55 of Title 10, United States Code. Effective date of the NDAA FY06 (and this provision) is January 6, 2006. The reader is referred to the interim final rule published on January 19, 2007 (72 FR 2444), for detailed information regarding this provision.

IV. Administrative Change—Court Order/Adoption Placement. This final rule clarifies the eligibility provisions for an unmarried person who is placed in the legal custody of the member or former member as a result of an order of a court of competent jurisdiction in the United States (or possession of the United States) by stating that the court order must be for a period of at least 12 consecutive months. We currently address a child who is placed in legal custody of a member or former member, but the language unintentionally omitted the 12 consecutive month period required by 10 U.S.C. 1072(2)(I)(i). This rule also clarifies that an unmarried person placed in legal custody of a member or former member is a category that is separate and distinct from those placed for adoption. We accomplish this by providing separate regulatory paragraphs for each group. The reader is referred to the interim final rule published on January 19, 2007 (72 FR 2444), for detailed information regarding this provision. Additionally, for historical information on these two groups, we refer the reader to the final rule that established these groups (64 FR 46133, August 24, 1999).

Review of Public Comments

Comment: One commenter applauded the enhanced benefit, but recommended further direction that this benefit only be extended upon the initiation and/or completion of an appropriate Line of Duty (LOD) determination. Generally, LOD determinations do not apply for battle injuries or battle-related deaths. This commenter requested that clarification be directed toward ADSM deaths that occur under in-garrison, non-combat operations.

Response: We appreciate the comment and note that the statutory language provides the benefit ''when a member dies while on active duty for a period of more than 30 days.'' There are no qualifiers or limitation on this provision; consequently, there is no statutory authority to apply LOD determinations.

Comment: A second commenter asked about the effective date of the provisions.

Response: For the payment rates for dependents of deceased active duty family members, the provision is effective with respect to those active duty service members whose death occurred on or after October 7, 2001. The modification of adoption intermediaries is effective January 6, 2006.

Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review''

Section 801 of title 5, United States Code (U.S.C.) and Executive Order (E.O.) 12866 require certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts.

This is not a major rule under 5 U.S.C. 801. It is a significant regulatory action but not economically significant and has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866.

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

The Regulatory Flexibility Act requires that each Federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. In addition, we certify that this final rule will not significantly affect a substantial number of small entities.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This final rule will not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 55).

Executive Order 13132, ''Federalism''

We have examined the impact of the rule under E.O. 13132 and it does not have policies that have federalism implications that would 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, therefore, consultation with State and local officials is not required.

List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

■ Accordingly, the interim final rule published January 19, 2007 (72 FR 2444), is confirmed as final without change.

Dated: May 19, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–11738 Filed 5–27–08; 8:45 am]

BILLING CODE 5001–06–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 STOUT (DDG 55) 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 28, 2008 and is applicable beginning March 26, 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 202–685–5075.

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 STOUT (DDG 55) 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 3(a), pertaining to the location of the forward masthead light in the forward quarter of the vessel, the placement of the after masthead light, and the horizontal distance between the forward and after masthead lights. The Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) 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 differently 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 STOUT (DDG 55).

■ 3. Table Five, of § 706.2 is amended by revising the following entry for USS STOUT (DDG 55), to read as follows:

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

TABLE FIVE

Vessel	Hull 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 mast-head light less than ½ ship's length aft of forward masthead Light. Annex I, sec. 3(a)	Percentage horizontal separation attained
*	*	*	*	*	*
USS STOUT	DDG 55		X	X	20.3
*	*	*	*	*	*

Approved: April 29, 2008.

M. Robb Hyde,

Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law).

[FR Doc. E8–11836 Filed 5–27–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0354]

Drawbridge Operation Regulations; Sacramento River, Rio Vista, CA, Drawbridge Maintenance

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Rio Vista Drawbridge across the Sacramento River, mile 12.8, at Rio Vista, CA. The deviation is necessary to allow the bridge owner, the California Department of Transportation (Caltrans), to conduct required maintenance of the drawspan. This deviation allows for a 4-hour notice for openings during nighttime.

DATES: This deviation is effective between 9 p.m. and 5 a.m., from May 27, 2008 through June 27, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0354 and are available online at *www.regulations.gov.* They are also available for inspection or copying two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and Commander (dpw), Eleventh Coast Guard District, Building 50–2, Coast Guard Island, Alameda, CA 94501–5100, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District, telephone (510) 437–3516.

SUPPLEMENTARY INFORMATION: Caltrans requested a temporary change to the operation of the Rio Vista Drawbridge, mile 12.8, Sacramento River, at Rio Vista, CA. The Rio Vista Drawbridge navigation span provides a vertical clearance of 17 feet above Mean High Water in the closed-to-navigation position. The draw opens on signal as required by 33 CFR 117.5. Navigation on the waterway consists of both commercial and recreational vessels.

The four-hour notice for openings during the maintenance period, between 9 p.m. and 5 a.m., from May 27, 2008 through June 27, 2008, will allow Caltrans to clear the drawspan of maintenance equipment so as not to delay approaching vessels. This temporary deviation has been coordinated with all affected waterway users. No objections to the proposed temporary deviation were raised.

Vessels that can transit the bridge, while in the closed-to-navigation position, may continue to do so at any time.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: May 19, 2008.

C.E. Bone,

Rear Admiral, U.S. Coast Guard Commander, Eleventh Coast Guard District.

[FR Doc. E8–11862 Filed 5–27–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0395]

RIN 1625–AA00

Safety Zone: Edenton 4th of July Celebration Firework Display, Edenton Bay, Edenton, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard will implement a safety zone during the Edenton 4th of July Celebration Firework Display, a fireworks display to be held over the waters of the Edenton Bay, Edenton, North Carolina, Vessel traffic in portions on the Edenton Bay adjacent to Edenton, North Carolina, will be restricted during the fireworks display.

DATES: This rule is effective July 4, 2008, from 8:30 p.m. to 9:30 p.m.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0395 and are available online at *www.regulations.gov*. They are also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and at Commander Sector North Carolina, 2301 East Fort Macon Road, Atlantic Beach, North Carolina 28512, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call C.D. Humphrey, Marine Event Coordinator, (252) 247–4569. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Publishing an NPRM would be impracticable and contrary to public interest because immediate action is needed to minimize potential danger to the public during the event. The necessary information to determine whether the marine event poses a threat to persons and vessels was not provided to the Coast Guard in sufficient time to publish an NPRM. The potential dangers posed by the pyrotechnic fireworks display make a safety zone necessary to provide for the safety of spectator craft and other vessels transiting the event area. The Coast Guard will issue a broadcast notice to mariners to advise mariners of the restriction and on have on-scene Coast Guard and local law enforcement vessels.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest, because immediate action is needed to ensure the safety of the event participants, spectator craft and other vessels transiting the event area. Advance notifications will be made to users of Edenton Bay, via marine information broadcasts, local notice to mariners, commercial radio stations and area newspapers.

Background and Purpose

On July 4, 2008, Chowan Edenton Optimist Club will sponsor the ''4th of July Celebration Firework Display'', on the waters of the Edenton Bay. The event will consist of a fireworks display launched from the eastern shore of Edenton Bay. Due to the need for vessel control during the event, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels.

Discussion of Rule

The Coast Guard is establishing a safety zone on specified waters of the Edenton Bay, Edenton, North Carolina. The regulated area includes all waters within a 300 yard radius of position 36°03′04″ N, 076°36′18″ W or approximately 150 yards east of the entrance to Queen Anne Creek, Edenton, North Carolina. The safety zone will be in effect from 8:30 p.m. to 9:30 p.m. on July 4, 2008. The effect will be to restrict general navigation in the regulated area during the fireworks display. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area during the enforcement period. The Patrol Commander will notify the public of specific enforcement times by Marine Radio Safety Broadcast. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary. Although this proposed regulation would prevent traffic from transiting a portion of the Edenton Bay adjacent to Edenton, North Carolina, during the event, the effects of this regulation would not be significant due to the limited duration that the regulated area would be in effect. Extensive advance notifications would be made to the maritime community via Local Notice to Mariners, marine information broadcast, and area newspapers, so mariners can adjust their plans accordingly. Vessel traffic would be able to transit the regulated area when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises

small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

The owners or operators of vessels intending to transit this section of the Edenton Bay will be impacted during the event.

This purposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be enforced for only a short period, from 8:30 p.m. to 9:30 p.m. on July 4, 2008. The regulated area will apply to a segment of the Edenton Bay adjacent to the Edenton waterfront. Marine traffic may be allowed to pass through the regulated area with the permission of the Coast Guard Patrol Commander. In the case where the Patrol Commander authorizes passage through the regulated area during the event, vessels will be required to proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the firework launch site. Before the enforcement period, we would issue maritime advisories so mariners can adjust their plans accordingly.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

■ For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T05–0395 to read as follows:

§ 165.T05–0395 Edenton Bay, Edenton, North Carolina.

(a) *Safety Zone.* The safety zone includes all waters within a 300 yard radius of position 36°03′04″ North, 076°36′18″ West, approximately one and fifty hundred yards east of the entrance to Queen Anne Creek, Edenton, North Carolina. All coordinates reference Datum NAD 1983.

(b) *Definitions.* (1) Coast Guard Patrol Commander means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Sector North Carolina.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector North Carolina with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant* includes all vessels participating in the ''4th of July Celebration'' under the auspices of the Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Sector North Carolina.

(c) *Safety Zone.* (1) Except for event participants and persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remaining the safety zone.

(2) The Operator of any vessel in the safety zone must:

(i) Stop the vessel immediately when directed to do so by any Official Patrol and then proceed only as directed.

(ii) Comply with the instructions of the Official Patrol.

(iii) (if authorized to proceed) Proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the event site.

(d) *Enforcement period.* This section will be enforced from 8:30 p.m. to 9:30 p.m. on July 4, 2008.

Dated: May 16, 2008.

June E. Ryan,

Captain, U.S. Coast Guard, Captain of the Port North Carolina.

[FR Doc. E8–11867 Filed 5–27–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0373]

RIN 1625–AA00

Safety Zone: Ambrose Light, Offshore Sandy Hook, NJ, Atlantic Ocean

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the waters of the Atlantic Ocean within a 250 yard radius of Ambrose Light (LLNR 720) located at position 40°27′00″ N, 073°48′00″ W, approximately 8.35 nautical miles east of Sandy Hook, NJ. This safety zone is necessary to provide for the safety of life, property and the environment on navigable waters of the United States from the hazards associated with the damaged structure and during survey and debris removal at the charted location of Ambrose Light that was recently damaged. This safety zone is intended to keep vessels a safe distance from Ambrose Light during the survey and debris removal operations.

DATES: This rule is effective from 11:59 p.m. on May 5, 2008 through 11:59 p.m. on November 1, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0373 and are available online at *www.regulations.gov.* They are also available for inspection or copying at two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and at Coast Guard Sector New York, Room 209, Staten Island, NY 10305 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Lieutenant Commander Mike McBrady, Waterways Management Division, Coast Guard Sector New York (718) 354–2353. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. A notice and comment period was not held for this rulemaking because the safety zone is needed in response to an emergency situation created when the Ambrose Light was struck and damaged by a vessel. A survey and debris removal operations are needed immediately to remove this hazard to navigation. Delaying the necessary survey and debris removal in order to conduct a notice and comment period would be contrary to the public interest.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** as immediate action is needed to protect vessels transiting the area from the hazards associated with the damaged light tower, area survey, and debris removal operations. Any delay in implementing this rule would be contrary to public interest since immediate action is needed to prevent vessels from transiting the area so as to avoid the potential hazards associated with the unstable light, the possibility of it collapsing, or a vessel grounding on the remains of Ambrose Light (LLNR 720).

Background and Purpose

On Saturday, November 3, 2007, the M/T AXEL SPIRIT allided with Ambrose Light (LLNR 720) in position 40°27′00″ N, 073°48′00″ W approximately 8.35 nautical miles east of Sandy Hook, NJ. Initial damage assessment indicates that the Ambrose Light is no longer watching properly and in danger of collapse, creating an additional hazard to vessels operating in the area. This safety zone is being created in response to this emergency situation in order to keep mariners away from the hazards associated with the damaged structure and from the hazards associated with survey and debris removal operations.

On November 26, 2007 we published a Temporary Final Rule in the **Federal Register** (72 FR 65886) titled ''Safety Zone: Ambrose Light, Offshore Sandy Hook, NJ, Atlantic Ocean'' establishing a temporary safety zone around Ambrose Light after it was initially struck. This safety zone was effective from November 5, 2007 until May 5, 2008. The Coast Guard's Civil Engineering Unit in Providence, Rhode Island does not expect to award the contract to remove the tower and associated debris until on, or about, May 1, 2008. It is expected that the removal operations will take about 75 days. This 180-day temporary rulemaking will

allow for the safe removal and provide for any expected delays due to weather, equipment malfunctions, etc. If the survey and debris removal is completed before November 1, 2008, the Coast Guard will cease enforcement of the safety zone.

Discussion of Rule

This rule will provide for the safety of vessel traffic in and around Ambrose Light (LLNR 720). This regulation establishes a temporary safety zone on the navigable waters of the Atlantic Ocean within a 250 yard radius of position 40°27′00″ N, 73°48′00″ W, approximately 8.35 nautical miles east of Sandy Hook, NJ. The rule described herein prohibits the transit of vessels through the safety zone unless specifically authorized by the Captain of the Port, New York. This safety zone is in effect from 11:59 p.m. on May 5, 2008 until 11:59 p.m. on November 1, 2008. The zone will be enforced during the entire effective period unless the survey, tower and debris removal operation is completed prior to November 1, 2008.

Marine traffic may transit safely outside of the zone during the enforcement period. The Captain of the Port New York will notify the maritime community of the safety zone by publication in the Local Notice to Mariners, Safety Voice Broadcasts, and on the internet at *http://homeport.uscg.mil/newyork.*

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this rule will be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This regulation may have some impact on the public, but the potential impact will be minimized for the following reason: Vessels may transit around the 250 yard safety zone.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit within a 250 yard radius of Ambrose Light (LLNR 720) at 40°27′00″ N, 73°48′00″ W approximately 8.35 nautical miles east of Sandy Hook, NJ. However, this safety zone is not expected to have a significant economic impact on a substantial number of small entities as vessels will be able to transit around the 250 yard safety zone.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. This rule fits category (34)(g) as it establishes a safety zone.

A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T01–165 to read as follows:

§ 165.T01–165 Safety Zone: Ambrose Light, Offshore Sandy Hook, NJ, Atlantic Ocean.

(a) *Location.* The following area is a Safety Zone: All navigable waters of the Atlantic Ocean within a 250 yard radius of Ambrose Light (LLNR 720) at position 40°27′00″ N, 73°48′00″ W, approximately 8.35 nautical miles east of Sandy Hook, NJ.

(b) *Effective Dates.* This regulation is effective from 11:59 p.m. on May 5, 2008 to 11:59 p.m. on November 1, 2008.

(c) *Definitions.* The following definition applies to this section: *On-scene representative,* means any commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, state, and federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port, New York.

(d) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port New York, or his on-scene representative.

Dated: May 5, 2008.

R.R. O'Brien, Jr.,

Captain, U.S. Coast Guard, Captain of the Port New York.

[FR Doc. E8–11868 Filed 5–27–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AG15

Disease Subject to Presumptive Service Connection; Correction

AGENCY: Department of Veterans Affairs.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to the regulations of the Department of Veterans Affairs (VA) that governs presumptive service connection for certain diseases from exposure to ionizing radiation during military service. This correction is required in order to amend a cross-reference in the regulation. No substantive change to the content of the regulations is being made by this correcting amendment.

DATES: *Effective Date:* May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Tracy Wang, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 910 Vermont Ave., NW., Washington, DC 20420, (202) 461–4902.

SUPPLEMENTARY INFORMATION: VA published a final rule in the **Federal Register** on April 27, 1993 (See 58 FR 25563), to implement Section 2 of the Veterans' Radiation Exposure Amendments of 1992, Public Law 102–578, which amended 38 U.S.C. 1112(c) to repeal the requirement that, to be presumed service connected, specified diseases of veterans who participated in a radiation-risk activity to become at least 10 percent disabling within 40 years after the veterans' last exposure to radiation. Accordingly, VA removed 38 CFR 3.309(d)(3) and redesignated § 3.309(d)(4) as the new § 3.309(d)(3). However, VA neglected to amend the reference to the redesignated § 3.309(d)(3) that appears at § 3.309(d)(3)(vii)(B). This document corrects that omission by removing ''(d)(4)(vii)(A)'' and adding, in its place, ''(d)(3)(vii)(A)''.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: May 20, 2008.

Robert McFetridge,

Assistant to the Secretary for Regulation Policy and Management.

■ For the reasons set out in the preamble, VA is correcting 38 CFR part 3 as follows.

PART 3—ADJUDICATION

■ 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

§ 3.309 [Corrected]

■ 2. In § 3.309(d)(3)(vii)(B), remove the phrase ''paragraph (d)(4)(vii)(A)'' and add, in its place, ''paragraph (d)(3)(vii)(A)''.

[FR Doc. E8–11725 Filed 5–27–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AL44

Survivors' and Dependents' Educational Assistance Program Period of Eligibility for Eligible Children and Other Miscellaneous Issues

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations governing the Survivors' and Dependents' Educational Assistance (DEA) program to implement statutory provisions in the Veterans Benefits and Health Care Improvement Act of 2000, the Veterans' Survivor Benefits Improvements Act of 2001, the Veterans Education and Benefits Expansion Act of 2001, the Veterans Benefits Act of 2002, and the Veterans Benefits Act of 2003. As a result of these statutory provisions, certain eligible children may choose the beginning date of their period of eligibility and eligible children who serve on active duty or in the National Guard may receive extensions to the ending date of their period of eligibility. These statutory provisions also allow VA to consider certain qualifying beneficiaries' original claims as having been filed retroactively to their eligibility dates. In addition, they allow certain eligible DEA beneficiaries to be paid for preparatory courses for tests required or used for admission to an institution of higher education or a graduate school. Further, these provisions permit eligible children to receive benefits for such preparatory courses even if the courses are taken before their 18th birthday. This document implements these provisions of law by amending pertinent regulations.

DATES: *Effective Date:* This final rule is effective May 28, 2008.

Applicability Date: Amendments in this final rule are applied retroactively to conform to the effective date of statutory provisions. For more information concerning the dates of applicability, see the supplementary information section of this notice.

FOR FURTHER INFORMATION CONTACT: Diane M. Walters, Management and Program Analyst, Education Service, Veterans Benefits Administration, Department of Veterans Affairs (225C), 810 Vermont Ave. NW., Washington DC 20420, (202) 461–9849. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This document amends 38 CFR 21.3021, 21.3041, and 21.4131 to include provisions implementing the Veterans Benefits and Health Care Improvement Act of 2000, the Veterans' Survivor Benefits Improvements Act of 2001, the Veterans Education and Benefits Expansion Act of 2001, the Veterans Benefits Act of 2002, and the Veterans Benefits Act of 2003. These provisions allow certain beneficiaries under the Survivors' and Dependents' Educational Assistance (DEA) program to elect the beginning date of their period of eligibility, to receive an adjusted effective date of payment by considering their claim to have been filed on their eligibility date, to extend their period of eligibility for qualifying periods of active duty service or National Guard duty, and to use DEA benefits for certain preparatory courses. This document also makes clarifying and technical revisions to these regulations, as well as to 38 CFR 21.3040 and 21.3135.

For consistency with other regulations, VA is amending § 21.3135(g) to clarify in paragraph (g)(2) that VA considers a stepchild to be a member of the veteran's household even when the stepchild is temporarily not living with the veteran, so long as the actions and intentions of the stepchild and veteran establish that normal family ties have been maintained during the temporary absence. In addition, the information relating to when a stepchild loses his or her eligibility if the stepchild is no longer a member of the veteran's household has been removed from existing paragraph (d) of § 21.3041 and placed more appropriately in paragraph (g) of § 21.3135 concerning reduction or discontinuance dates for awards of educational assistance allowance.

VA is defining the acronym ''P&T'' in 38 CFR 21.3021(p) (for purposes of 38 CFR 21, subpart C) as variously meaning permanent and total ''disability,'' permanently and totally ''disabled,'' or permanent and total ''rating,'' when any of these terms are used in reference to a veteran with a service-connected disability determined by VA to be total for the purposes of VA disability compensation where the impairment is reasonably certain to continue throughout the life of the disabled veteran. Other definitions added to § 21.3021 simply restate definitions provided by statute.

I. Children's DEA Period of Eligibility Beginning Date (Pub. L. 106–419, 107–14, and 107–330)

Under 38 U.S.C. 3512(a), an eligible child's period of eligibility generally begins when the child attains age 18, or on the successful completion of the child's secondary schooling, whichever first occurs, and ends on the child's 26th birthday. Prior to the enactment of the Veterans Benefits and Health Care Improvement Act of 2000 (Pub. L. 106–419), the beginning date of an eligible child's period of eligibility for DEA benefits was defined by statute. There were no circumstances in which the child could elect a beginning date. Effective November 1, 2000, Congress amended 38 U.S.C. 3512(a)(3) to allow certain eligible children to have an opportunity to elect the beginning date of their period of eligibility. The Veterans' Survivor Benefits Improvements Act of 2001 (Pub. L. 107–14) clarified within what time period these children are permitted to elect their beginning date, and the Veterans Benefits Act of 2002 (Pub. L.107–330) clarified the dates the child could elect and also instituted a default date if the child did not make an election within the prescribed time period. Both of these clarifying amendments to 38 U.S.C. 3512(a)(3) are effective retroactive to November 1, 2000. As provided in 38 U.S.C. 3512(a)(3), a child may elect his or her beginning date if—

- The service-connected death of the veteran-parent occurs after the child's 18th birthday and before the child's 26th birthday; or
- The effective date of the veteran-parent's P&T disability rating, or the notification to the veteran of such rating, is after the child's 18th birthday and before the child's 26th birthday.

Under 38 U.S.C. 3512(a)(3), VA is required to provide written notice to children who are entitled to elect the beginning date of their period of eligibility. The written notice must advise eligible children of their right to choose their beginning date and inform them that the deadline to make an election is 60 days from the date of VA's written notice. A child whose eligibility is based on the veteran-parent's death may elect as a beginning date any date between the date of the veteran's death and the date of VA's decision that the death was service-connected. A child whose eligibility is based on the veteran's P&T disability may elect the effective date of the P&T disability rating, the date of notification to the veteran of such rating, or any date in between those two dates. We have amended § 21.3041 to include a new paragraph (i), which describes VA's statutory duty to notify children of these rights. As required by the statute, VA will accept the child's election if it is received no later than 60 days from the date of VA's written notice to the child

and if it is in accordance with the choices VA identified in that notice as permissible under the statute. Pursuant to revised § 21.3041(a)(2) and (b)(2), if VA approves the date selected by the child, the child's period of eligibility will be extended beyond the child's 26th birthday to allow for a full 8 years of eligibility after the date selected. Under § 21.3041(i)(2), if an eligible child does not elect a beginning date within 60 days from the date of VA's written notice, the beginning date of his or her period of eligibility will default (in accordance with statutory provisions) to either the date of VA's decision that the veteran's death is service-connected or the date of VA's P&T rating decision, whichever is applicable.

To permit an otherwise eligible and entitled child an immediate award of educational assistance under 38 U.S.C. chapter 35, we added § 21.3041(i)(3) to provide that VA will award benefits by selecting as a beginning date the date of VA's decision that the—

- Veteran has a P&T disability in the case of a child whose eligibility is derived from a veteran with a P&T disability; or
- Veteran's death is service-connected in the case of a child whose eligibility is derived due to the veteran's death.

This procedure allows us to award benefits while concurrently notifying the child that he or she may elect another beginning date as described in the preceding paragraphs and specified in the written notice to the child. VA is doing this to expedite payment to eligible children already enrolled at an educational institution and incurring educational expenses. The beginning dates we select are the statutorily required dates when the child does not elect a beginning date within 60 days of our written notice informing the child that he or she may elect the beginning date. If the child does elect a beginning date within 60 days after our written notice, we will adjust the beginning date in accordance with the child's election.

II. Extended Period of Eligibility for Certain Eligible Children Ordered to Active Duty or Full-Time National Guard Duty After September 10, 2001 (Pub. L. 107–103 and 108–183)

In this final rule, 38 CFR 21.3041(h) implements 38 U.S.C. 3512(h) as amended by the Veterans Education and Benefits Expansion Act of 2001 (Pub. L. 107–103) and the Veterans Benefits Act of 2003 (Pub. L. 108–183). These statutory provisions are effective November 1, 2000, and apply to educational assistance under DEA for months after October 2000. The amendments provide that an eligible child's period of eligibility will be extended for the length of time equal in length to the time the child, during the period of eligibility otherwise applicable to such child, serves on active duty or is involuntarily ordered to full-time National Guard duty, plus an additional 4 months for each qualifying period of active duty service. This extension applies to children who are ordered to active duty after September 10, 2001, under sections 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10, U.S.C., or who are involuntarily ordered to full-time National Guard duty after September 10, 2001, under 32 U.S.C 502(f).

III. Adjusted Effective Date for Certain Eligible Persons (Pub. L. 106–419)

Based on the provisions in 38 U.S.C. 5113, as amended by the Veterans Benefits and Health Care Improvement Act of 2000 (Pub. L. 106–419), 38 CFR 21.4131(e) is amended to authorize an adjusted effective date for an award of DEA benefits when specific conditions exist. Generally, educational assistance cannot be awarded retroactively for any period earlier than 1 year prior to the date VA receives an original claim; however, this amendment provides for an exception effective as of November 1, 2000. If the following conditions are met, VA may consider the individual's original DEA application as having been filed on his or her eligibility date for the purpose of awarding retroactive benefits:

- An individual's DEA eligibility date is more than 1 year before the date of the initial rating decision establishing DEA eligibility;
- VA receives the individual's original claim within 1 year of the date VA made the rating decision establishing DEA eligibility;
- The individual claims educational assistance for pursuit of an approved program during a period that is more than 1 year prior to the date VA receives his or her original claim; and
- The original application is received by VA on or after November 1, 2000, or is pending action or available remedies as of that date.

IV. DEA Eligible Persons May Receive DEA Benefits for Preparatory Courses for Admission to Institutions of Higher Education and for Graduate School Entrance Exams (Pub. L. 106–419)

Effective November 1, 2000, the Veterans Benefits and Health Care Improvement Act of 2000 (Pub. L. 106–419) amended the definition of ''program of education'' in 38 U.S.C. 3501(a)(5) to permit DEA eligible persons to use DEA benefits for preparatory courses for admission to institutions of higher education and for graduate school entrance exams. In addition, the Act amended 38 U.S.C. 3512 to provide that eligible children may pursue these types of courses before their 18th birthday. This document amends the definition of ''program of education'' in 38 CFR 21.3021(h) to include preparatory courses for admission to institutions of higher education and for graduate school entrance exams as authorized programs of education for DEA eligible persons. The provision to permit eligible children under 18 to pursue these courses is included in 38 CFR 21.3041(a)(1)(ii) and (b)(1)(ii).

V. Technical Amendment

Current 38 CFR 21.3041(d)(3) prescribes a modified period of eligibility ending date for a child who served on active duty in the Armed Forces. Specifically, it provides that such a child's ending date is 8 years after the child's ''first unconditional discharge or release'' from duty in the Armed Forces. However, the governing statute, 38 U.S.C. 3512(a)(5), provides that the 8-year period of eligibility shall end after the child's ''first discharge or release'' from duty with the Armed Forces. The definition of ''discharge or release'' in 38 U.S.C. 101(18), as amended by Public Law 95–126 on October 8, 1977, makes retaining the word ''unconditional'' before ''discharge or release'' unnecessary. Thus, to make the current regulation conform to the statute, we have removed the word ''unconditional'' from ''unconditional discharge or release'' in this provision, which is now located in § 21.3041(c). We also removed 38 CFR 21.3042(c) because the paragraph is not necessary if the word ''unconditional'' is removed from ''unconditional discharge or release.''

Administrative Procedure Act

Substantive changes made by this final rule merely restate or interpret statutory requirements. Accordingly, there is a basis for dispensing with prior notice and comment and a delayed effective date under the provisions of 5 U.S.C. 553.

Paperwork Reduction Act of 1995

Provisions in 38 CFR 21.3041(i)(1) constitute a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The Office of Management and Budget (OMB) approved this collection of information under control number 2900–0703.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This final rule will have no such effect on State, local, and tribal governments, or the private sector.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a ''significant regulatory action,'' requiring review by OMB unless OMB waives such review, as any regulatory action 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 planned or taken 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.

The economic, interagency, economic, legal, and policy implications of this final rule have been examined and it has been determined that it is not a significant regulatory action under the Executive Order.

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule primarily affects only individuals. This rule reflects the statutory expansion of Survivors' and Dependents' Educational Assistance program eligibility by:

- Permitting certain eligible children to elect the beginning date of their DEA period of eligibility;
- Extending the period of eligibility for certain eligible children ordered to active duty or full-time National Guard duty;
- Allowing certain beneficiaries to receive DEA benefits retroactive to their eligibility date; and
- Allowing eligible beneficiaries to be paid for preparatory courses for tests required or used for admission to institutions of higher education and graduate schools.

Pursuant to 5 U.S.C. 605(b), this final rule, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604. Pursuant to 5 U.S.C. 603 and 604, an additional reason that those regulatory flexibility analyses requirements are not applicable to this final rule is that no notice of proposed rulemaking was required by law for this rulemaking.

Catalog of Federal Domestic Assistance Program Numbers

The Catalog of Federal Domestic Assistance number and title for the program affected by this final rule is 64.117, Survivors and Dependents Educational Assistance.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflicts of interests, Defense Department, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: May 20, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, the Department of Veterans Affairs amends 38 CFR part 21 (subparts C and D) as follows:

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart C—Survivors' and Dependents' Educational Assistance Under 38 U.S.C. Chapter 35

■ 1. The authority citation for part 21, subpart C continues to read as follows:

Authority: 38 U.S.C. 501(a), 512, 3500–3566, and as noted in specific sections.

■ 2. Amend § 21.3021 by:
■ a. Adding an introductory paragraph.
■ b. Revising paragraph (h).
■ c. Adding new paragraphs (m), (n), (o), (p), (q), (r), and (s).

The revision and additions read as follows:

§ 21.3021 Definitions.

For the purposes of subpart C and the payment of basic educational assistance under 38 U.S.C. chapter 35, the following definitions apply.

* * * * *

(h) *Program of education.* The term *program of education* means any curriculum or any combination of unit courses or subjects pursued at an educational institution that is generally accepted as necessary to fulfill the requirements for the attainment of a predetermined and identified educational, professional, or vocational objective. The term program of education also includes—

(1) A preparatory course for a test that is required or used for admission to an institution of higher education;

(2) A preparatory course for a test that is required or used for admission to a graduate school; and

(3) A licensing or certification test, the successful completion of which demonstrates an individual's possession of the knowledge or skill required to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession, provided such tests and the licensing or credentialing organizations or entities that offer such tests are approved by VA.

(Authority: 38 U.S.C. 3002(3), 3501 (a)(5))

* * * * *

(m) *Institution of higher education.* The term *institution of higher education* has the same meaning as provided in § 21.7020(b)(45).

(Authority: 38 U.S.C. 3002(3), 3501(a)(5))

(n) *Graduate school.* The term *graduate school* has the same meaning as provided in § 21.7020(b)(46).

(Authority: 38 U.S.C. 3002(3), 3501(a)(5))

(o) *Eligibility date.* The term *eligibility date* means the date on which an individual becomes an eligible person (as defined in paragraph (a) of this section).

(Authority: 38 U.S.C. 5113)

(p) *P&T* means permanent and total ''disability,'' permanently and totally ''disabled,'' or permanent and total ''rating,'' when any of these terms are used in reference to a veteran with a service-connected disability rating determined by VA to be total for the purposes of VA disability compensation where the impairment is reasonably certain to continue throughout the life of the disabled veteran.

(Authority: 38 U.S.C. 3501(a)(8))

(q) *Initial rating decision.* The term *initial rating decision* means, with respect to an eligible spouse or child, a decision made by VA that establishes for the person from whom such eligibility is derived—

(1) Service connection for the cause of the person's death;

(2) A service connected P&T disability; or

(3) For a member of the Armed Forces, a P&T disability incurred or aggravated in the line of duty in the active military, naval, or air service if the member is hospitalized or receiving outpatient medical care, services, or treatment, and is likely to be discharged or released from such service for such disability.

(Authority: 38 U.S.C. 5113)

(r) *Effective date of the P&T rating.* The term *effective date of the P&T rating* means the date from which VA considers that the veteran's P&T disability commenced for purposes of VA benefits, as determined by the initial rating decision.

(Authority: 38 U.S.C. 3512(d))

(s) *First finds.* The term *first finds* means the effective date of the P&T rating or the date VA first notifies the veteran of that rating, whichever is more advantageous to the child.

(Authority: 38 U.S.C. 3512(d))

* * * * *

§ 21.3040 [Amended]

■ 3. Amend paragraph (d) of § 21.3040 by removing ''§ 21.3041(e)(2).'' and adding, in its place, ''§ 21.3041(g)(2).''

■ 4. Revise § 21.3041 to read as follows:

§ 21.3041 Periods of eligibility; child.

(a) *Eligibility derived from a veteran with a P&T disability.* An eligible child's period of eligibility generally begins on the child's 18th birthday, or on the successful completion of the child's secondary schooling, whichever first occurs. The period of eligibility generally ends on the earlier of the date of the child's 26th birthday or the date the veteran is no longer P&T disabled. VA will extend an eligible child's period of eligibility for the reasons listed in paragraphs (g) and (h) of this section. See paragraph (c) of this section if the child serves on duty in the Armed Forces as an eligible child after his or her 18th birthday and before his or her 26th birthday. If the veteran dies while the P&T rating is in effect and before the eligible child's 26th birthday, see paragraph (b) of this section to determine the new period of eligibility. Exceptions to this general period of eligibility are as follows:

(1) *Period of eligibility may begin before the child's 18th birthday.* The period of eligibility may begin before the eligible child's 18th birthday for one of the reasons in paragraphs (a)(1)(i), (ii), or (iii) of this section. The period of eligibility ends on the earlier of the date the veteran is no longer rated P&T disabled or the date of the child's 26th birthday. See § 21.3135(h) if the veteran is no longer rated P&T disabled.

(i) The child completed compulsory school attendance under applicable State law (see § 21.3040(a) and (b));

(ii) The child is pursuing a course designed to prepare him or her for an examination required or used for entrance into an institution of higher education or a graduate school; or

(iii) The child is beyond his or her 14th birthday and has a physical or mental handicap (see § 21.3040(a)).

(Authority 38 U.S.C. 3512(a))

(2) *Period of eligibility may begin after the child's 18th birthday.* A child's period of eligibility may begin after his or her 18th birthday if VA first finds the veteran has a P&T disability after the child's 18th birthday but before the child's 26th birthday. See paragraph (e) of this section if an adopted child becomes eligible through qualifying as the veteran's child after VA first finds the veteran has a P&T disability. See paragraph (f) of this section if a stepchild becomes eligible through qualifying as the veteran's child after VA first finds the veteran is P&T disabled.

(i) *Beginning date if the effective date of the initial P&T rating is before the child's 18th birthday and notification to the veteran occurs after the child's 18th birthday and before his or her 26th birthday.* If the effective date of the P&T rating is before the child's 18th birthday, and the date of notification to the veteran occurs after the child's 18th birthday but before the child's 26th birthday, the child may elect the beginning date of his or her period of eligibility. (See paragraph (i) of this section for election requirements.) If the child elects a beginning date that is before his or her 18th birthday, the period of eligibility ends the earlier of the date that the veteran is no longer rated P&T disabled, or the date of the child's 26th birthday. If the child elects a beginning date after his or her 18th birthday, the period of eligibility ends the earlier of the date the veteran is no longer rated P&T disabled or 8 years after the beginning date the child elects. (See § 21.3135(h) if the veteran is no longer rated P&T disabled.) The child can elect as a beginning date either—

(A) The date of his or her 18th birthday;

(B) The date he or she completed compulsory school attendance under applicable State law (see § 21.3040(a) and (b)), if that date is on or after the effective date of the P&T rating and before his or her 18th birthday;

(C) The date he or she begins a course designed to prepare him or her for an examination required or used for entrance into an institution of higher education or a graduate school, if that date is on or after the effective date of the P&T rating and before the date of notification to the veteran of the P&T rating. If the child elects the beginning date of enrollment in such course, he or she may not receive educational assistance for pursuit of secondary schooling unless secondary school pursuit is otherwise authorized (see § 21.3040);

(D) The date VA notifies the veteran of the P&T rating; or

(E) Any date between the applicable date described in paragraphs (a)(2)(i)(A) through (C) of this section and the date in paragraph (a)(2)(i)(D) of this section.

(ii) *Beginning date if the effective date of the P&T rating is after the child's 18th birthday and before child's 26th birthday.* If the effective date of the P&T rating occurs after the child's 18th birthday but before the child's 26th birthday, the child may elect the beginning date of his or her period of eligibility. (See paragraph (i) of this section for election requirements.) The period of eligibility ends the earlier of the date the veteran is no longer rated P&T disabled, or 8 years after the beginning date the child elects. (See § 21.3135(h) if the veteran is no longer rated P&T disabled.) The child can elect as a beginning date—

(A) The effective date of the P&T rating;

(B) The date VA notifies the veteran of the veteran's P&T rating; or

(C) Any date in between.

(Authority: 38 U.S.C. 3512)

(b) *Eligibility derived as the result of veteran's death.* An eligible child's period of eligibility begins on the child's 18th birthday, or on the successful completion of the child's secondary schooling, whichever first occurs. The period of eligibility ends on the child's 26th birthday. VA will extend an eligible child's period of eligibility for reasons shown in paragraphs (g) and (h) of this section. See paragraph (c) of this section if the child serves on duty in the Armed Forces as an eligible child after his or her 18th birthday and before his

or her 26th birthday. Exceptions to this general period of eligibility are as follows:

(1) *Period of eligibility may begin before the child's 18th birthday.* The period of eligibility may begin before the eligible child's 18th birthday for one of the reasons in paragraphs (i), (ii), or (iii) of this paragraph. The ending date of the period of eligibility is the child's 26th birthday.

(i) The child completed compulsory school attendance under applicable State law (see § 21.3040(a) and (b));

(ii) The child is pursuing a course designed to prepare him or her for an examination required or used for entrance into an institution of higher education or a graduate school; or

(iii) The child is beyond his or her 14th birthday and has a physical or mental handicap (see § 21.3040(a)).

(Authority 38 U.S.C. 3512(a))

(2) *Period of eligibility may begin after the child's 18th birthday.* If the veteran's death occurs after the child's 18th birthday but before the child's 26th birthday, the child may elect the beginning date of his or her period of eligibility. The period of eligibility ends 8 years after the beginning date the child elects. See paragraph (i) of this section for election requirements. VA may extend the period of eligibility for one of the reasons shown in paragraph (g) or (h) of this section. See paragraph (c) of this section if the child serves in the Armed Forces as an eligible person after his or her 18th birthday and before his or her 26th birthday. The child can elect as a beginning date any date between the—

(i) Date of the veteran's death; or

(ii) Date of VA's decision that the veteran's death was service-connected.

(Authority: 38 U.S.C. 3512(a)(3))

(c) *Period of eligibility for a child who serves on duty in the Armed Forces as an eligible person.* If the child serves on duty in the Armed Forces as an eligible person (as defined in § 21.3021(a)(1)) after the child's 18th birthday and before the child's 26th birthday, the child is eligible for a modified ending date based on the provisions of this paragraph. Under the provisions of this paragraph, the period of eligibility ends 8 years after the date of the child's first discharge or release from such duty, or the child's 31st birthday, whichever is earlier. VA may extend the ending date for one of the reasons shown in paragraph (g) of this section. See paragraph (h) of this section if the child is ordered to active duty as a reservist.

(Authority: 38 U.S.C. 3512(a)(5))

(d) *Eligibility derived from a parent who is listed by the Armed Forces as missing in action, captured in the line of duty, or forcibly detained or interned in line of duty by a foreign government or power.* (1) If a child establishes eligibility through the provisions of § 21.3021(a)(1)(iv) after his or her 18th birthday but before his or her 26th birthday, the period of eligibility will end on the earliest of the following dates:

(i) When the parent is no longer listed as described in § 21.3021(a)(1)(iv);

(ii) Eight years after the date on which the child becomes eligible under such provisions; or

(iii) The child's 31st birthday.

(2) VA may extend the ending date for one of the reasons shown in paragraphs (g) or (h) of this section. See § 21.3135(i) if the child is enrolled in an educational institution and the child's ending date is based on paragraph (d)(1)(i) of this section. See paragraph (c) of this section if the child serves in the Armed Forces as an eligible person after his or her 18th birthday and before his or her 26th birthday.

(Authority: 38 U.S.C. 3512(a)(5))

(e) *Adopted child qualifies after VA firsts finds the veteran P&T disabled.* If an adopted child becomes eligible through qualifying as the veteran's child (see 38 CFR 3.57(c)) and the date the child so becomes eligible is after VA first finds the veteran is P&T disabled, the beginning date of eligibility is the date determined pursuant to paragraphs (a) through (d) of this section, but in no event before the date the adopted child qualifies as the veteran's child under § 3.57(c) of this chapter. The ending date is the child's 26th birthday. VA may extend the period of eligibility for one of the reasons in paragraph (g) or (h) of this section. See paragraph (c) of this section if the child serves on duty in the Armed Forces as an eligible person.

(Authority: 38 U.S.C. 3501)

(f) *Stepchild qualifies after VA first finds the veteran P&T disabled.* If a stepchild becomes eligible through qualifying as the veteran's child and a member of the veteran's household after VA first finds the veteran is P&T disabled, the beginning date of the period of eligibility is the date determined pursuant to paragraphs (a) through (d) of this section, but in no event before the date he or she becomes the veteran's stepchild and a member of the veteran's household. The ending date of the period of eligibility is the stepchild's 26th birthday. VA may extend the ending date for one of the reasons in paragraphs (g) or (h) of this section. See paragraph (c) of this section for the ending date of the period of eligibility if the stepchild serves on active duty in the Armed Forces as an eligible person. See § 21.3135(g) for award discontinuance dates if the veteran and the stepchild's natural or adopted parent divorce or the stepchild ceases to be a member of the veteran's household.

(g) *Extensions to ending dates.* (1) If an eligible child suspends pursuit of his or her program due to conditions that VA determined were beyond the child's control, VA may extend the period of eligibility ending date (see § 21.3043). VA cannot grant an extension beyond age 31 to those children whose period of eligibility ending date (as determined under paragraphs (a) through (f) of this section) is subject to an age limitation.

(2) If an eligible child's period of eligibility ending date (as determined under paragraphs (a) through (f), or (h) of this section) occurs while the child is enrolled in an educational institution, VA may extend the period of eligibility (extensions may be made beyond age 31)—

(i) To the end of the quarter or semester, for a child enrolled in an educational institution that regularly operates on the quarter or semester system; or

(ii) To the end of the course, not to exceed 12 weeks, for a child who completed a major portion of a course while enrolled in an educational institution that operates under other than a quarter or semester system.

(3) If an eligible child's period of eligibility ending date (as determined under paragraphs (a) through (f), or (h) of this section) occurs while the child is pursuing training in a training establishment (as defined in § 21.4200(c)), VA cannot extend the ending date.

(Authority: 38 U.S.C. 3512(a)(7)(c)).

(h) Notwithstanding any other provision of this section, if during an eligible child's period of eligibility, as determined in paragraphs (a) through (g) of this section, but after September 10, 2001, an eligible child is ordered to active duty or involuntarily ordered to full-time National Guard duty VA will grant an extension of the child's period of eligibility. The extension will be equal to the length of the period served plus an additional 4 months for each qualifying period and applies if after September 10, 2001, the eligible child is—

(i) Ordered to serve on active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10, United States Code; or

(ii) Involuntarily ordered to full-time National Guard duty under section 502(f) of title 32, United States Code.

(Authority: 38 U.S.C. 3512(h))

(i) *Elections.* (1) VA must provide written notice to certain eligible children informing them of their right to elect the beginning date of their period of eligibility. The written notice must identify the beginning dates the child may choose from and must contain a statement that the child must make the election within 60 days of the date of the written notice. An eligible child may elect his or her beginning date if—

(i) The effective date of the P&T rating is before the child's 18th birthday, and date of the notification to the veteran from whom the child derives eligibility occurs after the child's 18th birthday but before the child's 26th birthday (see paragraph (a)(2)(i) of this section);

(ii) The effective date of the P&T rating, or the date of notification to the veteran from whom the child derives eligibility, occurs after the child's 18th birthday but before the child's 26th birthday (see paragraph (a)(2)(ii) of this section);

(iii) The veteran's death occurs after the child's 18th birthday but before the child's 26th birthday (see paragraph (b)(2) of this section);

(iv) The child makes such election within 60 days of VA's written notice to the child informing him or her of the right to elect his or her beginning date; and

(v) The child's election is in accordance with the choices VA identified in the written notice described in paragraph (i)(1) of this section.

(2) If the child does not elect a beginning date within 60 days of VA's written notice informing him or her of the right to elect a beginning date, the period of eligibility beginning date will be whichever of the following applies-

(i) The date of VA's decision that the veteran has a P&T disability; or

(ii) The date of VA's decision that the veteran's death is service-connected.

(3) If upon review of the child's application VA determines the child is entitled to and eligible for an immediate award of educational assistance under 38 U.S.C. chapter 35, VA will for purposes of such award—

(i) Consider the beginning date of the child's period of eligibility to be the date of VA's decision that the—

(A) Veteran has a P&T disability in the case of a child whose eligibility is derived from a veteran with a P&T disability; or

(B) Veteran's death is service-connected in the case of a child whose eligibility is derived due to the veteran's death.

(ii) Notify the child of his or her right to elect a beginning date in accordance with paragraph (i)(1) of this section.

(iii) Adjust the child's beginning date based on the child's election if the child makes an election within 60 days after VA's written notice in accordance with paragraph (i)(1) of this section.

(Authority: 38 U.S.C. 3512(A)(3), (A)(4))

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0703).

§ 21.3042 [Amended]

■ 5. Amend § 21.3042 by removing paragraph (c).

■ 6. Amend § 21.3135 by revising paragraph (g) to read as follows:

§ 21.3135 Reduction or discontinuance dates for awards of educational assistance allowance.

* * * * *

(g) *Eligible stepchild ceases to be a stepchild or stepchild ceases to be a member of the veteran's household.* (1) If the child ceases to be the veteran's stepchild because the veteran and the stepchild's natural or adoptive parent divorce, the eligibility ending date is as follows:

(i) If the child ceases to be the veteran's stepchild while the child is not in training, the ending date of the child's period of eligibility is the date on which the child ceases to be the veteran's stepchild.

(ii) If the child ceases to be the veteran's stepchild while the child is training in a school organized on a term, semester, or quarter basis, the ending date of the child's eligibility is the last day of the term, semester, or quarter during which the child ceases to be the veteran's stepchild.

(iii) If the child ceases to be the veteran's stepchild while the child is training in a school not organized on a term, semester, or quarter basis, the ending date of the child's eligibility is the end of the course, or 12 weeks from the date on which the child ceases to be the veteran's stepchild, whichever is earlier.

(2) If the stepchild ceases to be a member of the veteran's household, he or she is no longer eligible. For purposes of this paragraph, VA considers a stepchild a member of the veteran's household even when the stepchild is temporarily not living with the veteran, so long as the actions and intentions of the stepchild and veteran establish that normal family ties have been maintained during the temporary absence. VA will determine the stepchild's eligibility ending date as follows:

(i) If the stepchild ceases to be a member of the veteran's household while the stepchild is not in training, the eligibility ending date is the date on which the stepchild ceases to be a member of the veteran's household.

(ii) If the stepchild ceases to be a member of the veteran's household while the stepchild is training in a school organized on a term, semester, or quarter basis, the ending date of the stepchild's eligibility is the last day of the term, semester, or quarter during which the stepchild ceases to be a member of the veteran's household.

(iii) If the stepchild ceases to be a member of the veteran's household while the stepchild is training in a school not organized on a term, semester, or quarter basis, the ending date of the stepchild's eligibility is the end of the course, or 12 weeks from the date on which the stepchild ceases to be a member of the veteran's household. See § 21.3041(f).

(Authority: 38 U.S C. 101(4)(a), 3501)

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Subpart D—Administration of Educational Assistance Programs

■ 7. The authority citation for part 21, subpart D continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 34, 35, 36, and as noted in specific sections.

■ 8. Amend § 21.4131 in paragraph (d)(1)(i)(A) by removing ''by § 21.3041(a) or (b) or by'' and adding, in its place, ''under § 21.3041 or under'' and by adding paragraph (e) to read as follows:

§ 21.4131 Commencing dates.

* * * * *

(e) *Adjusted effective date for award of educational assistance under 38 U.S.C. chapter 35 based on an original claim.* When determining the commencing date under § 21.4131(d)(1), the Secretary will consider an eligible person's application for Survivors' and Dependents' Educational Assistance under 38 U.S.C. chapter 35 as having been filed on his or her eligibility date if—

(1) The eligibility date is more than 1 year before the date of the initial rating decision that establishes either:

(i) The veteran's death is service-connected, or

(ii) The veteran has a P&T disability;

(2) The eligible person files his or her original application for benefits under

38 U.S.C. chapter 35 with VA within 1 year of the initial rating decision;

(3) The eligible person claims educational assistance for pursuit of an approved program of education for a period that is more than 1 year before the date VA receives his or her original claim;

(4) VA either:

(i) Received the original application on or after November 1, 2000; or

(ii) Received the original application and, as of November 1, 2000, either—

(A) Had not acted on it; or

(B) Had denied it in whole or in part, but the claimant remained entitled to pursue available administrative and judicial remedies as to the denial; and

(5) The eligible person would have been eligible to educational assistance under 38 U.S.C. chapter 35 if he or she had filed a claim on his or her eligibility date.

(Authority: 38 U.S.C. 5113; Pub. L. 106–419, 114 Stat. 1832)

* * * * *

[FR Doc. E8–11726 Filed 5–27–08; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0339; FRL–8363–7]

Fluopicolide; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of fluopicolide in or on vegetable, root, subgroup 1A, except sugar beet and carrot; vegetable, leaves of root and tuber, group 2; vegetable, bulb, group 3–07; and Brassica, head and stem, subgroup 5A. Interregional Research Project Number 4 (IR-4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA). In connection with a request for new uses of the active ingredient, fluopicolide, the Agency has also evaluated the toxicity and exposure databases for 2,6-dichlorobenzamide (BAM) which is a common metabolite/degradate of dichlobenil and fluopicolide. Further characterization of fluopicolide and its metabolite BAM, will be discussed herein of this document.

DATES: This regulation is effective May 28, 2008. Objections and requests for hearings must be received on or before July 28, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0339. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Barbara Madden, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6463; e-mail address: *madden.barbara@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

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

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

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0339 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before July 28, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–0339, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

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

II. Petition for Tolerance

In the **Federal Register** of June 27, 2007 (72 FR 35237) (FRL–8133–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7E7172) by IR-4, 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.627 be amended by establishing tolerances for residues of the fungicide fluopicolide, [2,6-dichloro-*N*-[[3-chloro-5-(trifluoromethyl)-2-pyridinyl]methyl]benzamide], in or on vegetable, root and tuber, group 1 at 0.2 parts per million (ppm); vegetable, leaves of root and tuber, group 2 at 12.0 ppm; vegetable, bulb, group 3 at 5.0 ppm; chive, fresh leaves at 5.0 ppm; chive, Chinese, fresh leaves at 5.0 ppm; daylily, bulb at 5.0 ppm; elegans hosta at 5.0 ppm; fritillaria, bulb at 5.0 ppm; fritillaria, leaves at 5.0 ppm; garlic, serpent, bulb at 5.0 ppm; kurrat at 5.0 ppm; lady's leek at 5.0 ppm; leek, wild at 5.0 ppm; lily, bulb at 5.0 ppm; onion, Beltsville bunching at 5.0 ppm; onion, Chinese, bulb at 5.0 ppm; onion, fresh at 5.0 ppm; onion, macrostem at 5.0 ppm; onion, pearl at 5.0 ppm; onion, potato, bulb at 5.0 ppm; onion, tree, tops at 5.0 ppm; shallot, bulb at 5.0 ppm; shallot, fresh leaves at 5.0 ppm; and brassica, head and stem, subgroup 5A at 5.0 ppm. The notice referenced a summary of the petition prepared by Valent Corporation, the registrant, which is available to the public in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petitions, EPA has revised certain proposed tolerance levels and corrected commodity definitions as follows:

1. The Agency determined that adequate data are available to support establishing a tolerance for the bulb vegetable crop group 3–07. IR-4 petitioned for a tolerance for bulb vegetable group 3 as well as individual tolerances on chive, fresh leaves; chive, Chinese, fresh leaves; daylily, bulb; elegans hosta; fritillaria, bulb; fritillaria, leaves; garlic, serpent, bulb; kurrat; lady's leek; leek, wild; lily, bulb; onion, Beltsville bunching onion; Chinese, bulb; onion, fresh; onion, macrostem; onion, pearl; onion, potato, bulb; onion, tree, tops; shallot, bulb; and shallot, fresh leaves (PP 7E7172). In the **Federal Register** of December 7, 2007 (72 FR 69150) (FRL–8340–6), EPA issued a final rule that revised the crop grouping regulations. As part of this action, EPA expanded and revised bulb vegetable group 3. Changes to crop group 3 (bulb vegetable) included adding new commodities, revising existing subgroups and creating new subgroups (including bulb vegetable crop group 3–07 consisting of the commodities requested in PP 7E7172 and cultivars, varieties, and/or hybrids of these).

EPA indicated in the December 7, 2007 final rule as well as the earlier May 23, 2007 proposed rule (72 FR 28920) that, for existing petitions for which a notice of filing had been published, the Agency would attempt to conform these petitions to the rule. Therefore, consistent with this rule, EPA is establishing tolerances on bulb vegetable crop group 3–07. Bulb vegetable crop group 3–07 consists of a variety of commodities for which tolerances were requested in PP 7E7172.

EPA concludes it is reasonable to revise the petitioned-for tolerances so that they agree with the recent crop grouping revisions because:

i. Although the subgroup includes several new commodities, these commodities were proposed as individual tolerances and are closely related minor crops which contribute little to overall dietary or aggregate exposure and risk;

ii. Fluopicolide exposure from these added commodities was considered when EPA conducted the dietary and aggregate risk assessments supporting this action and

iii. The representative commodities for the revised subgroup has not changed.

2. Based upon review of the data supporting PP 7E7172, EPA has also revised the tolerance levels for vegetable, root, subgroup 1A, except sugar beet and carrot to 0.15 ppm; vegetable, leaves of root and tuber, group 2 to 15.0 ppm; and vegetable, bulb, crop group 3–07 to 7.0 ppm. EPA revised these tolerance levels based on analyses of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's Guidance for Setting Pesticide Tolerances Based on Field Trial Data Standard Operating Procedure (SOP). EPA has also determined that it is not appropriate to establish tolerances on sugar beet and carrot at this time and revised the subgroup tolerance accordingly.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for residues of fluopicolide, [2,6-dichloro-*N*-[[3-chloro-5-(trifluoromethyl)-2-pyridinyl]methyl]benzamide] as an indicator of combined residues of fluopicolide and its metabolite BAM on vegetable, root, subgroup 1A, except sugar beet and carrot at 0.15 ppm; vegetable, leaves of root and tuber, group 2 at 15.0 ppm; vegetable, bulb, crop group 3–07 at 7.0 ppm; and brassica, head and stem, subgroup 5A at 5.0 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follow.

A. Toxicological Profile

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

information on the studies received and the nature of the adverse effects caused by fluopicolide and its metabolite BAM as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in documents entitled *Floupicolide: Human Health Risk Assessment for the Establishment of Tolerances* for use on root vegetables (subgroup 1A), leaves of root and tuber vegetables (group 2), bulb vegetables (group 3), and head and stem brassica (subgroup 5A) on pages 29–35; and *BAM as a Metabolite/Degradate of Fluopicolide and Dichlobenil. Human Health Risk Assessment for proposed uses of Fluopicolide* on tuberous and corm vegetables, leafy vegetables (except brassica), fruiting vegetables, cucurbit vegetables, grapes, turf, and ornamentals, and for indirect or inadvertent residues on the rotational crop wheat on pages 54–62. Each of these risk assessments is contained within in docket ID number EPA–HQ–OPP–2007–0339.

In general, the toxicology studies conducted on fluopicolide demonstrate few or no biologically significant toxic effects at relatively low-dose levels in animal studies and only mild or no toxic effects at high doses. The subchronic and chronic toxicity studies showed that the primary effects of fluopicolide are in the liver. The toxicological database indicates that technical grade fluopicolide has relatively low acute toxicity. Fluopicolide is not a dermal sensitizer, primary eye irritant, or primary skin irritant. Fluopicolide is also not neurotoxic, carcinogenic, nor mutagenic. Fluopicolide is not a developmental or reproductive toxicant. There is no evidence of increased susceptibility of rat or rabbit fetuses to *in utero* or post-natal exposure to fluopicolide. No toxic effects were observed in studies in which fluopicolide was administered by the dermal routes of exposure.

The rabbit developmental and rat chronic/carcinogenicity studies were considered co-critical for endpoint selection. The toxicological profile for fluopicolide suggests that increased durations of exposure (i.e., 90–day versus chronic) does not significantly increase the severity of observed effects. The rabbit developmental and rat chronic/cancer studies were therefore considered for all exposure scenarios.

BAM is a metabolite and/or environmental degradate of both the fungicide fluopicolide and the herbicide dichlobenil. Residues of BAM from uses of both fluopicolide and dichlobenil were considered when assessing BAM as a metabolite/degradate resulting from proposed uses of fluopicolide. BAM was assessed separately since there is no common toxicological effect for BAM and other fluopicolide residues of concern. The submitted acute and chronic studies on BAM were sufficient to evaluate human hazard potential. BAM demonstrated moderate acute toxicity via the oral route of exposure. In subchronic and chronic toxicity studies, the primary oral effects seen in the rat and dog were body weight changes. Adverse liver effects were also observed but at doses of BAM that were higher than those of dichlobenil. There is no evidence that BAM is either mutagenic or clastogenic nor is there evidence of endocrine mediated toxicity. BAM is considered to be neurotoxic. In the absence of carcinogenicity study data for a second species, the EPA has assumed that BAM's carcinogenic potential is similar to that of dichlobenil, the parent compound having the greatest carcinogenicity potential. Dichlobenil is classified as ''group C, possible human carcinogen.'' Quantification of cancer risk is based on the reference dose (RfD) approach which requires comparison of the chronic exposure to the RfD. Using this methodology will adequately account for all chronic toxic effects, including carcinogenicity, likely to result from exposure to dichlobenil and therefore to BAM.

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for fluopicolide and its metabolite BAM used for human risk assessment can be found at *http://www.regulations.gov* in documents entitled: *Fluopicolide Human Health Risk Assessment for the Establishment of Tolerances* for use on root vegetables (subgroup 1A), leaves of root and tuber vegetables (group 2), bulb vegetables (group 3), and head and stem brassica (subgroup 5A) on pages 10–11; and *BAM as a Metabolite/Degradate of Fluopicolide and Dichlobenil. Human Health Risk Assessment for proposed uses of Fluopicolide* on root vegetables (subgroup 1A), leaves of root and tuber vegetables (group 2), bulb vegetables (group 3), and head and stem brassica (subgroup 5A) on pages 3–4. Each of these risk assessments is contained within in docket ID number EPA–HQ–OPP–2007–0339.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to fluopicolide and its metabolite BAM, EPA considered exposure under the petitioned-for tolerances as well as all existing fluopicolide and its metabolite BAM tolerances in 40 CFR 180.627 and the exposures from BAM from existing dichlobenil tolerances under 180.231. EPA assessed dietary exposures from fluopicolide and its metabolite BAM in food as follows:

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

a. *Fluopicolide*. No effects were identified in the toxicological studies for fluopicolide; therefore, a quantitative acute dietary exposure assessment was not conducted.

b. *BAM*. In estimating acute dietary exposure to BAM, EPA used food consumption information from the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, maximum residues of BAM from fluopicolide and dichlobenil field trials on food commodities with established/pending tolerances were included in the assessment. The assessments used 100 percent crop treated (PCT) except for apples, blueberries, cherries, peaches, pears, and raspberries. No livestock tolerances are established or proposed for either fluopicolide or dichlobenil.

ii. *Chronic exposure*.—a. *Fluopicolide*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed all foods for which there are tolerances or for which tolerances are being established contain tolerance-level residues and 100 PCT.

b. *BAM*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed, maximum residues of BAM from fluopicolide and dichlobenil field trials on food commodities with established/pending tolerances were included in all foods for which there are tolerances. The assessments used 100 PCT except for apples, blueberries, cherries, cranberries, peaches, pears, and raspberries. No livestock tolerances are established or proposed for either fluopicolide or dichlobenil.

iii. *Cancer*. Fluopicolide has been classified as ''not likely to be carcinogenic to humans.'' Therefore a cancer dietary exposure assessment was not conducted for the parent fluopicolide. Additionally, EPA has determined BAM's potential for carcinogenicity is similar to that of dichlobenil, which is classified as ''group C, possible human carcinogen.'' Quantification of cancer risk is based on the reference dose (RfD) approach which requires comparison of the chronic exposure to the RfD. Using this methodology will adequately account for all chronic toxic effects, including carcinogenicity, likely to result from exposure to BAM. Therefore, a separate cancer exposure assessment was not conducted.

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

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

a. The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue.

b. The exposure estimate does not underestimate exposure for any significant subpopulation group.

c. Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency used PCT information as follows:

For the BAM acute assessment, maximum PCT estimates were used for the following commodities: Apples (2.5%), blueberries (2.5%), cherries (2.5%), peaches (2.5%), pears (2.5%) and raspberries (2.5%).

For the BAM chronic assessment, average PCT estimates were used for the following commodities: Apples (1%), blueberries (1%), cherries (1%), peaches (1%), pears (1%), raspberries (1%) and cranberries (45%).

EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available federal, state, and private market survey data for that use, averaging by year, averaging across all years, and rounding up to the nearest multiple of five percent except for those situations in which the average PCT is less than one. In those cases <1% is used as the average and <2.5% is used as the maximum. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the single maximum value reported overall from available Federal, State, and private market survey data on the existing use, across all years, and rounded up to the nearest multiple of five percent. In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), Proprietary Market Surveys, and the National Center for Food and Agriculture Policy (NCFAP) for the most recent six years.

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

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

No monitoring data were available for fluopicolide or BAM. Drinking water residues of fluopicolide (parent) were modeled for exposures resulting from uses on grapes, vegetables, and turf, which are the uses that are expected to yield the highest estimated environmental concentrations (EECs).

Drinking water residues for BAM were modeled for exposures resulting from the use currently registered on dichlobenil for control of nutsedge. This use is expected to yield the highest EECs for BAM.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW), the estimated drinking water concentrations (EDWCs) of fluopicolide for acute exposures are estimated to be 26.81 parts per billion (ppb) for surface water and 0.64 ppb for ground water. Chronic exposures are estimated to be 8.34 ppb for surface water and 0.64 ppb for ground water. Based on the PRZM/EXAMS and SCI-GROW models, the EDWCs of BAM for acute exposures are estimated to be 20.9 ppb for surface water and 56.2 for ground water. Chronic exposures are estimated to be 8.61 ppb for surface water and 56.2 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment for BAM, the water concentration value of 56.2 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 8.34 ppb and 56.2 were used to assess the contribution to drinking water for fluopicolide and BAM, respectively.

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

Fluopicolide is currently registered for the following uses that could result in residential exposures: Residential turf grass and recreational sites.The labels do not prohibit homeowners from using these products; therefore, residential handlers may receive short-term dermal and inhalation exposure to fluopicolide when mixing, loading and applying the formulations. Dermal exposure is likely for adults and children entering treated lawns. Toddlers may also experience exposure via incidental non-dietary ingestion during postapplication activities on treated turf.

EPA assessed residential exposure for fluopicolide using the following assumptions:

i. Handler exposure scenarios resulting from residential lawn applicators were assessed for 1. mix/load and spot application of liquid formulation (low-pressure hand sprayer), and 2. mix/load and broadcast application of liquid formulation (garden hose-end sprayer).

Post-application exposure scenarios resulting from lawn treatment were assessed for 1. adult and toddler postapplication dermal exposure, 2. toddlers' incidental ingestion of pesticide residues on lawns from hand-to-mouth transfer, 3. toddlers' object-to-mouth transfer from mouthing of pesticide-treated turfgrass, and 4. toddlers' incidental ingestion of soil from pesticide-treated residential areas. There are short and intermediate term exposures for fluopicolide.

BAM exposure estimates are based on fluopicolide use only since the use pattern for dichlobenil is not expected to result in scenarios with significant residential/non-occupational exposure. Exposure to BAM from fluopicolide uses on residential turfgrass and recreational sites, such as golf courses, has been evaluated. Residential handler exposure was not evaluated because the metabolite BAM is believed to form slowly in plants and soil after the product containing the parent (fluopicolide) has been applied.

EPA assessed residential exposure for BAM using the following assumptions:

ii. Post-application exposure scenarios resulting from lawn treatment were assessed for 1. adult and toddler postapplication dermal exposure, 2. toddlers' incidental ingestion of pesticide residues on lawns from hand-to-mouth transfer, 3. toddlers' object-to-mouth transfer from mouthing of pesticide-treated turfgrass, and 4. toddlers' incidental ingestion of soil from pesticide-treated residential areas. Short and intermediate term exposures for fluopicolide are expected.

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

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to fluopicolide (parent) and its metabolite BAM, and any other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that fluopicolide (parent) and its metabolite BAM has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative/*.

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity*. There is no evidence of increased susceptibility of rat or rabbit fetuses or pups to *in utero* or post-natal exposure to fluopicolide.

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

i. The toxicity database for fluopicolide is complete.

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

iii. There is no evidence that fluopicolide results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the two-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to fluopicolide in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral

exposure of toddlers. These assessments will not underestimate the exposure and risks posed by fluopicolide.

BAM: EPA is retaining the 10X FQPA SF for BAM for those exposure scenarios that do not rely on dichlobenil toxicity data. These scenarios are acute dietary for the general population including infants and children, females 13–49 years of age, chronic dietary, and incidental oral non-dietary. This is due to the incompleteness of the data base with regard to the systemic neurotoxic potential of BAM, including olfactory toxicity via the oral route of exposure.

For the dermal and inhalation routes of exposures, for which the Agency is relying on dichlobenil toxicity data. EPA has reduced the FQPA SF for BAM toxicity to 1X. The reasons for this are that, based on a comparison of toxicity via the intraperitoneal route of exposure, higher doses of BAM are needed to induce levels of olfactory toxicity that are similar to those caused by dichlobenil (Brandt *et al.* 1990; Brittebo *et al.* 1991; Eriksson and Brittebo 1995). Olfactory toxicity was the endpoint chosen for these exposure scenarios.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effect resulting from a single-oral exposure was identified and no acute dietary endpoint was selected. Therefore, fluopicolide is not expected to pose an acute risk. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to BAM will occupy 28% of the aPAD for all infants <1 year old and females 13–49 years old, the population groups receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to fluopicolide from food and water will utilize 11% of the cPAD for children 1–2 years old, and chronic exposure to BAM from food and water will utilize 93% of the cPAD for all infants <1 year old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of fluopicolide and its metabolite is not expected.

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

Fluopicolide is currently registered for uses that could result in short and intermediate term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term and intermediate-term residential exposures to fluopicolide. Using the exposure assumptions described in this unit for short-term and intermediate-term exposures, EPA has concluded the combined short-term and intermediate-term food, water, and residential exposures aggregated for fluopicolide result in aggregate MOEs of 300 for children 1–2 years.

As discussed in the unit for short-term and intermediate-term exposures, exposures to BAM may result based on use of fluopicolide only since the use pattens for dichlobenil are not expected to result in scenarios with significant residential/non-occupational exposure. Exposure to BAM from fluopicolide uses on residential turfgrass and recreational sites, such as golf courses, has been evaluated. The Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short and intermediate term residential exposures to BAM. Using the exposure assumptions described in this unit for short-term and intermediate-term exposures for BAM, EPA has concluded the combined short and intermediate term food, water, and residential exposures aggregated result in aggregate MOEs of 3200 for all infants <1 year old and 5,400 for children 1–2 years old.

4. *Aggregate cancer risk for U.S. population.* Fluopicolide has been classified as ''not likely to be carcinogenic to humans.'' As such, an estimate of cancer risk is not warranted for parent fluopicolide.

EPA has determined BAM's potential for carcinogenicity is similar to that of dichlobenil, which is classified as ''group C, possible human carcinogen.'' Quantification of cancer risk is based on the RfD approach which requires comparison of the chronic exposure to the RfD. Therefore, the chronic risks discussed in Unit III.E.2. are considered protective of both non-cancer and cancer effects.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology liquid chromatography mass spectrometry ((LC/MS/MS) method, Method RM-43C-2) is available to enforce the tolerance expression for fluopicolide. Enforcement methodology (LC/MS/MS Method, Methods 00782, 00782/M001, 00782/M002, and 00782/M003) is available to adequately enforce the tolerance expression for BAM. The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

No Codex, Canadian, or Mexican maximum residue limits (MRLs) or tolerances have been established for fluopicolide.

V. Conclusion

Therefore, tolerances are established for residues of fluopicolide, [2,6-dichloro-N-[[3-chloro-5-(trifluoromethyl)-2-pyridinyl]methyl]benzamide] as an indicator of combined residues of fluopicolide and its metabolite BAM on vegetable, root, subgroup 1A, except sugar beet and carrot at 0.15 ppm; vegetable, leaves of root and tuber, group 2 at 15.0 ppm; vegetable, bulb, crop group 3–07 at 7.0 ppm; and brassica, head and stem, subgroup 5A at 5.0 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: May 14, 2008.

Donald Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.627 is amended by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.627 Fluopicolide; tolerances for residues.

(a) * * *

Commodity	Parts per million
Brassica, head and stem, subgroup 5A	5.0
* * * * *	
Vegetable, bulb, crop group 3–07	7.0
* * * * *	
Vegetable, leaves of root and tuber, group 2	15.0
Vegetable, root, subgroup 1A, except sugar beet and carrot	0.15
* * * * *	

[FR Doc. E8–11853 Filed 5–27–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0309; FRL–8365–2]

Hexythiazox; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for combined residues of hexythiazox in or on corn, field, grain; corn, field, stover; and corn, field, forage. Gowan Company requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective May 28, 2008. Objections and requests for hearings must be received on or before July 28, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2005–0309. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are

available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Olga Odiott, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9369; e-mail address: *odiott.olga@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

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

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

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2005–0309 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before July 28, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2005–0309, by one of the following methods:

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

II. Petition for Tolerance

In the **Federal Register** of March 1, 2006 (71 FR 10506) (FRL–7756–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 5F6953) by Gowan Company, 370 South Main Street, Yuma, AZ 85364. The petition requested that 40 CFR 180.448 be amended by establishing tolerances for combined residues of the insecticide hexythiazox, trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety, in or on corn, field, grain at 0.05 parts per million (ppm); corn, field, stover at 2.0 ppm; and corn, field, forage at 2.0 ppm. That notice referenced a summary of the petition prepared by Gowan Company, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. Comments were received on the notice of filing. EPA's response to these comments is discussed in Unit IV.C.

Based upon review of the data supporting the petition, EPA has revised the tolerance levels to 0.02 ppm for corn, field, grain; 2.5 ppm for corn, field, stover; and 6.5 ppm for corn, field, forage. The reasons for these changes are explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for combined residues of hexythiazox on corn, field, grain at 0.02 ppm; corn, field, stover at 2.5 ppm; and corn, field, forage at 6.0 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

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

Hexythiazox has a low order of acute toxicity for the oral, dermal and inhalation routes of exposure. It produces mild eye irritation, is not a dermal irritant, and is negative for dermal sensitization. The target organs of hexythiazox are the liver and adrenal glands, with the dog being the most sensitive species. In a subchronic toxicity study in rats, increased liver and adrenal weights as well as adrenal histopathology (fatty degeneration of the adrenal zone fasciculata) were seen. In a 4–week range-finding study in dogs, effects included increased liver and adrenal weights (reported in the chronic dog study). Chronic studies in dogs, rats, and mice support the liver and adrenal effects seen in the subchronic studies. In the chronic dog study, increased liver and adrenal weights were observed, along with associated histopathology of the liver (hypertrophy) and adrenal glands (adrenal cortex hypertrophy). In the chronic feeding/carcinogenicity studies in rats and mice, effects included decreased body weight gain and increased liver weights. The effects of hexythiazox on the adrenal glands could be an indication of endocrine disruption. However, in all studies in which these effects were seen, a NOAEL was determined. The data provided no indication of increased susceptibility in rats or rabbits from *in utero* and post-natal exposure to hexythiazox. There was no evidence of carcinogenicity in male and female rats; however, there were increased incidences of malignant and combined benign/malignant liver tumors in female B6C3FT mice. Hexythiazox was not mutagenic in bacteria or Chinese hamster ovary (CHO) cells. It was negative for chromosomal aberrations in CHO and did not cause unscheduled DNA synthesis (UDS) in primary rat hepatocytes. In an acceptable micronucleus assay, there was no statistically significant increase in the frequency of micronucleated polychromatic erythrocytes in bone marrow of treated mice after any dose or treatment time. Hexythiazox has been found classified as nonmutagenic.

Specific information on the studies received and the nature of the adverse effects caused by hexythiazox as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in the final rule published in the **Federal Register** of December 30, 2005 (70 FR 77363) (FRL–7752–1).

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for hexythiazox used for human risk assessment can be found at *http://www.regulations.gov* in document *Hexythiazox- Human Health Risk Assessment for the Section 3 Registration for Application to Field Corn; 14- February-2008*, page 11 in docket ID number EPA–HQ–OPP–2005–0309.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to hexythiazox, EPA considered exposure under the petitioned-for tolerances as well as all existing hexythiazox tolerances in (40 CFR 180.448). EPA assessed dietary exposures from hexythiazox in food as follows:

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

In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA tolerance-level residues, 100% crop treated (PCT), and DEEM-FCID (ver 7.81) default processing factors for all plant and livestock residues.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA used PCT estimates, average field trial residues, experimentally determined processing factors when available, and anticipated livestock residues (dietary burden calculated using average field trial residues).

iii. *Cancer*. Cancer risk was assessed using the same estimates as discussed in Unit III.C.1.ii., chronic exposure.

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

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

Condition a. The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.

Condition b. The exposure estimate does not underestimate exposure for any significant subpopulation group.

Condition c. Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

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

The Agency used PCT information as follows:

1% for apples, cherries, and prunes; 5% for almonds, apricots, mint, peaches, pears, plums, and walnuts; 10% for dates, caneberries, and nectarines; 25% for strawberries; and 50% for hops.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency used projected percent crop treated (PPCT) information as follows:

15% for grapes and 18% for oranges.

EPA estimates PPCT for a new pesticide use by assuming that the PCT during the pesticide's initial five years of use on a specific site will not exceed the average PCT of the dominant pesticide (i.e., the one with the greatest PCT) on that site over the most recent surveys. Comparisons are only made among pesticides of the same pesticide types (i.e., the dominant insecticide on the use site is selected for comparison with a new insecticide). The PCTs included in the average may be each for the same pesticide or for different pesticides since the same or different pesticides may dominate for each year selected. Typically, EPA uses USDA/NASS as the source for raw PCT data because it is publicly available and does not have to be calculated from other available data sources. When a specific use site is not surveyed by USDA/NASS, EPA uses proprietary data and calculates the estimated PCT.

This estimated PPCT, based on the average PCT of the market leader, is appropriate for use in the chronic dietary risk assessment. This method of estimating a PPCT for a new use of a registered pesticide or a new pesticide produces a high-end estimate that is unlikely, in most cases, to be exceeded during the initial five years of actual use. The predominant factor that bears on whether the estimated PPCT could be exceeded is whether there are concerns with pest pressures as indicated in emergency exemption requests or other readily available information. All information currently available has been considered for hexythiazox, and it is the opinion of EPA that it is unlikely that the actual PCT for hexythiazox will exceed the estimated PPCT during the next five years.

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

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

Based on the Pesticide Root Zone Model /Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of hexythiazox

1. The EDWCs for acute exposures are estimated to be 4.23 parts per billion (ppb) for surface water and 0.00503 ppb for ground water.

2. The EDWCs for chronic exposures for non-cancer assessments are estimated to be 2.26 ppb for surface water and 0.00503 ppb for ground water.

3. The EDWCs for chronic exposures for cancer assessments are estimated to be 1.72 ppb for surface water and 0.00503 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model.

1. For acute dietary risk assessment, the water concentration value of 4.23 ppb was used to assess the contribution to drinking water.

2. For chronic dietary risk assessment, the water concentration of value 2.26 ppb was used to assess the contribution to drinking water.

3. For cancer dietary risk assessment, the water concentration of value 1.72 ppb was used to assess the contribution to drinking water.

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

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

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

substances that have a common mechanism of toxicity.''

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

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity*. The prenatal and postnatal toxicology data base indicates no increased susceptibility of rats or rabbits to in utero and/or postnatal exposure to hexythiazox.

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

i. The toxicity database for hexythiazox is adequate for selecting toxicity endpoints for risk assessment. The toxicity profile of hexythiazox can be characterized for all effects, including potential developmental, reproductive, and neurotoxic effects.

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

iii. There is no evidence that hexythiazox results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2–generation reproduction study.

iv. The concern for endocrine related effects (increase in ovarian weight and adrenal weights and/or adrenal pathology) seen in various species is low because there is a well established NOAEL protecting from the effects, no reproductive parameters were affected in the 2–generation reproduction study at the highest dose tested (180 mg/kg/day), there is no evidence of increased susceptibility of infants and children in the database and the doses selected for the cRfD and intermediate and long-term dermal and inhalation exposure assessments are based on the NOAELs protecting from the endocrine related effects. EPA concluded that the selected endpoints adequately account for these potential effects and no additional data are required.

v. There are no residual uncertainties identified in the exposure databases. Although the chronic food exposure assessment is refined, EPA believes that the assessment is based on reliable data and will not underestimate exposure/risk. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to hexythiazox in drinking water. These assessments will not underestimate the exposure and risks posed by hexythiazox.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk*. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to hexythiazox will occupy <1% of the aPAD for (females 13-49 years old) the population group receiving the greatest exposure.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to hexythiazox from food and water will utilize 1% of the cPAD for (children 1–2 years old) the population group receiving the greatest exposure. There are no residential uses for hexythiazox.

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

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

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

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

5. *Aggregate cancer risk for U.S. population*. Using the exposure assumptions described in this unit for chronic exposure, EPA has estimated increased cancer risk from exposure to hexythiazox at 2 in 1 million (2×10^{-6}). Based on a critical commodity analysis, the major contributors to the cancer risk were water (38% of total exposure), strawberry (20% of total exposure), and field corn syrup (16% of total exposure).

Under the reasonable certainty of no harm standard in FFDCA section 408(b)(2)(A)(ii), cancer risks must be no greater than negligible. EPA interprets negligible cancer risks to be risks within the range of an increased cancer risk of 1 in 1 million. Risks as high as 3 in 1 million have been considered to be within this risk range. EPA concludes that the estimated cancer risk for hexythiazox is within the negligible risk range. The Agency notes that hexythiazox has been classified as a possible human carcinogen based on increased incidence of liver tumors in female mice. No chemical-related oncogenic effects were reported in male mice or in male and female rats, and hexythiazox has been classified as nonmutagenic.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general

population or to infants and children from aggregate exposure to hexythiazox residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (Method AMR–985–87,) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no currently established CODEX, Canadian, or Mexican MRLs for residues of hexythiazox in/on the subject commodities.

C. Response to Comments

There was one comment received on the notice of filing. The commenter, B. Sachua, requested that a zero tolerance be set for hexythiazox based on the commenter's generalized criticisms of EPA's risk assessment process. EPA has responded to B. Sachua's generalized comments for hexythiazox and other chemicals on several occasions. (See the **Federal Register** of March 22, 2006 (71 FR 14409) (FRL–7768–3); and the **Federal Register** January 7, 2005 (70 FR 1349) (FRL–7691–4).

D. Revisions to Petitioned-For Tolerances

EPA revised the proposed tolerance levels (from 0.05 to 0.02 ppm for corn, field, grain; 2.0 to 2.5 ppm for corn, field, stover; and 2.0 to 6.5 ppm for corn, field, forage) based on the field trial data and the maximum residue limit (MRL) tolerance calculator.

V. Conclusion

Therefore, tolerances are established for combined residues of hexythiazox, trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (expressed as parent), in or on corn, field, grain at 0.02 ppm; corn, field, stover at 2.5 ppm; and corn, field, forage at 6.0 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: May 16, 2008.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.448 is amended by alphabetically adding the following commodities to the table in paragraph (c) to read as follows:

§ 180.448 Hexythiazox, tolerances for residues.

* * * * *

(c) * * *

Commodity	Parts per million
Corn, field, grain	0.02
Corn, field, stover	2.5
Corn, field, forage	6.0
* * *	* *

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[FR Doc. E8–11892 Filed 5–27–08; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 080515668–8669–01]

RIN 0648–AW82

Pacific Halibut Fisheries; Guideline Harvest Levels for the Guided Recreational Halibut Fishery; Correction

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

ACTION: Final rule; correcting amendments.

SUMMARY: This action corrects the regulatory text of a final rule published on August 8, 2003 (68 FR 47256), that implemented guideline harvest levels (GHLs) for the guided sport charter vessel fishery in the International Pacific Halibut Commission Regulatory Areas 2C and 3A. The table of GHLs as they relate to the total constant exploitation yield contains errors in the conversions from pounds to metric tons, and rounding errors for some metric equivalents. This action is necessary to correct the errors in that table.

DATES: Effective May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Julie Scheurer, (907) 586–7356.

SUPPLEMENTARY INFORMATION: A final rule published August 8, 2003 (68 FR 47256, RIN 0648–AK17), implemented guideline harvest level (GHL) measures for managing the harvest of Pacific halibut (*Hippoglossus stenolepis*) in the charter sport fishery in International Pacific Halibut Commission (IPHC) Regulatory Areas 2C and 3A in and off Alaska. This correcting amendment revises the table at 50 CFR 300.65(c)(1) that lists GHLs corresponding to different levels of the total constant exploitation yield set annually by the IPHC.

Need for Correction

The table at § 300.65(c)(1) contains three metric conversion errors, several rounding errors, and missing paragraph designations. Paragraphs (c)(1)(i) through (v) refer to different benchmark levels for the total constant exploitation yield for Area 2C. There are no similar paragraph designations for the benchmark levels for Area 3A. Paragraph designations are added for the Area 3A table entries for consistency. This final rule corrects the conversion to metric equivalent errors and rounding errors, adds new paragraph designations to paragraph (c)(1), and reorganizes the table into two columns instead of four for clarity and ease of reading.

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Acting Assistant Administrator for Fisheries finds there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be unnecessary. Notice and comment are unnecessary because this action makes only minor, non-substantive changes to the metric equivalents for the GHLs, and reorganizes the table to make it easier to read and understand. The IPHC conducts its analyses and sets limits using pounds. Likewise, Canadian and U.S. management agencies use pounds to measure and report halibut catch information. These corrections will not affect the results of analyses conducted to support management decisions in the halibut fishery nor change the total catch of halibut in the charter halibut fishery. This rule does not make any substantive change in the rights and obligations of charter vessel anglers managed under the GHL halibut regulations. No aspect of this action is controversial and no change in operating practices in the fishery is required. NMFS therefore determines that APA requirements for public notice and comment are unnecessary for this action and determines that this rule is not subject to the 30-day delay in effectiveness requirement at 5 U.S.C. 553(d).

This final rule complies with the Halibut Act and the North Pacific Fishery Management Council's authority to implement allocation measures for the management of the halibut fishery.

List of Subjects in 50 CFR Part 300

Fisheries, Fishing, Reporting and recordkeeping requirements, Treaties.

Dated: May 21, 2008.

Samuel D. Rauch III

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

■ For the reasons set out in the preamble, 50 CFR part 300 is corrected as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. The authority citation for 50 CFR part 300, subpart E, continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 2. In § 300.65, paragraph (c)(1) is revised to read as follows:

§ 300.65 Catch sharing plan and domestic management measures in waters in and off Alaska.

* * * * *

(c) * * *

(1) The annual GHLs for Regulatory Areas 2C and 3A are determined as follows:

If the Annual Total Constant Exploitation Yield for Halibut is More Than:	Then the GHL will be:
(i) Regulatory Area 2C	
(A) 9,027,000 lb (4,094.6 mt)	1,432,000 lb (649.5 mt)
(B) 7,965,000 lb (3,612.9 mt)	1,217,000 lb (552.0 mt)
(C) 6,903,000 lb (3,131.1 mt)	1,074,000 lb (487.2 mt)
(D) 5,841,000 lb (2,649.4 mt)	931,000 lb (422.3 mt)
(E) 4,779,000 lb (2,167.7 mt)	788,000 lb (357.4 mt)
(ii) Regulatory Area 3A	
(A) 21,581,000 lb (9,789.0 mt)	3,650,000 lb (1,655.6 mt)
(B) 19,042,000 lb (8,637.3 mt)	3,103,000 lb (1,407.5 mt)
(C) 16,504,000 lb (7,486.1 mt)	2,734,000 lb (1,240.1 mt)
(D) 13,964,000 lb (6,334.0 mt)	2,373,000 lb (1,076.4 mt)
(E) 11,425,000 lb (5,182.3 mt)	2,008,000 lb (910.8 mt)

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[FR Doc. E8–11881 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 300

[Docket No. 071031633–8385–02]

RIN 0648–AW23

Pacific Halibut Fisheries; Guided Sport Charter Vessel Fishery for Halibut

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

ACTION: Final rule.

SUMMARY: NMFS implements regulations to limit the harvest of Pacific halibut by guided sport charter vessel anglers in International Pacific Halibut Commission Area 2C of Southeast Alaska to the guideline harvest level (GHL) of 931,000 lb (422.3 mt). The intended effect of this action is to reduce the poundage of halibut harvested by the guided sport charter vessel sector in Area 2C to the GHL while minimizing adverse impacts on the charter fishery, its sport fishing clients, the coastal communities that serve as home ports for this fishery, and fisheries for other species. This final rule implements three restrictions for the guided sport charter vessel fishery for halibut in Area 2C: a one-fish daily bag limit, no harvest by the charter vessel guide and crew, and a line limit equal to the number of charter vessel anglers onboard, not to exceed six lines.

DATES: Effective June 1, 2008.

ADDRESSES: Copies of the Environmental Assessment (EA), Regulatory Impact Review (RIR), and Final Regulatory Flexibility Analysis (FRFA) prepared for this action may be obtained from the North Pacific Fishery Management Council (Council) at 605 West 4th, Suite 306, Anchorage, Alaska 99501–2252, 907–271–2809, or the NMFS Alaska Region, P.O. Box 21668, Juneau, Alaska 99802, Attn: Ellen Sebastian, and on the NMFS Alaska Region Web site at *http://www.noaa.fakr.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection of information requirements contained in this rule may be submitted to NMFS at the above address, and by e-mail to *David_Rostker@omb.eop.gov* or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Sue Salveson, 907–586–7228, or Julie Scheurer, 907–586–7356.

SUPPLEMENTARY INFORMATION: The International Pacific Halibut Commission (IPHC) and NMFS manage fishing for Pacific halibut (*Hippoglossus stenolepis*) through regulations established under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). The IPHC promulgates regulations governing the halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Convention). The IPHC's regulations are subject to approval by the Secretary of State with concurrence by the Secretary of Commerce (Secretary). After approval by the Secretaries of State and Commerce, the IPHC regulations are published in the **Federal Register** as annual management measures pursuant to 50 CFR 300.62. The annual management measures for 2008 were published on March 7, 2008 (73 FR 12280).

The Halibut Act also provides the Council with authority to recommend regulations to the Secretary to allocate harvesting privileges among U.S. fishermen. This process requires the Council to submit a recommendation to the Secretary as a proposed rule for publication in the **Federal Register** along with supporting analyses as required by other applicable law. The Council is developing a regulatory program to manage the guided sport charter vessel fishery for halibut. This final rule is a step toward the Council's effort to stabilize relative harvest between the Area 2C charter vessel and commercial halibut fisheries while a longer term management program is developed and implemented. The proposed longer term program under development currently includes a proposed limited entry program for charter businesses, a catch sharing plan, and compensated reallocation from the commercial to charter fishing sectors. This final rule is linked to the overall management of the halibut fisheries by the IPHC and a previous regulation approved by the Secretary that establishes a guideline harvest level (GHL) for managing the harvest of halibut by the guided sport charter vessel fishery (August 8, 2003; 68 FR 47256).

Background and Need for Action

The background and need for this action were described in the preamble of the proposed rule published in the **Federal Register** on December 31, 2007 (72 FR 74257). In summary, this final rule will implement a one-fish daily bag limit for guided sport charter vessel anglers in Area 2C to reduce the poundage of halibut harvested by the guided sport charter vessel sector in Area 2C to the GHL while minimizing adverse impacts on the charter fishery, its sport fishing clients, the coastal communities that serve as home ports for this fishery, and fisheries for other species.

Management of the Halibut Fisheries

A complete description of how the halibut fisheries are managed can be found in the preamble to the proposed rule. In short, the IPHC annually determines the amount of halibut that may be removed from the resource without causing biological or conservation problems on an area-by-area basis in all areas of Convention waters. The IPHC estimates the exploitable biomass and calculates the target amount of allowable mortality for a given area. This target level is called the total constant exploitation yield (CEY) and it represents the target level for total removals (in net pounds) for that area in the coming year. The IPHC subtracts estimates of all non-commercial removals (sport, subsistence, bycatch, and wastage) from the Total CEY. The remaining CEY, after the removals are subtracted, is the maximum catch or AFishery CEY'' for an area's directed commercial fixed gear fishery.

Guideline Harvest Level

A more thorough discussion of the development of the guideline harvest level (GHL) is provided in the preamble to the proposed rule (December 31, 2007; 72 FR 74257) and in the rule that first implemented the GHL (August 8, 2003; 68 FR 47256). The Area 2C GHL is established in regulations at 50 CFR 300.65(c) and is a benchmark for monitoring the charter vessel fishery relative to the commercial fishery and other sources of fishing mortality. The fishery is not closed when the GHL is reached, but it is the Council's policy that the charter vessel fishery should not exceed the GHL.

To accommodate fluctuations in halibut abundance, the Council adjusts the GHL step-wise according to the total CEY determined annually by the IPHC. Specifically, the Council linked a step-wise reduction in the GHL in any one year to the decrease in the total CEY as compared to the 1999–2000 stock abundance. Since 2003 when the GHL became effective, it has never been reduced below its maximum level because declines in the total CEY have not been sufficient to trigger the first step reduction of the GHL. This situation changed in 2008 when the total CEY for Area 2C was markedly reduced, resulting in a GHL of 931,000 lb (422.3 mt). If the CEY were to increase in the future, the GHL could increase up to a maximum of 1.432 million lb (649.5 mt) for Area 2C.

Recent Harvests of Halibut in Area 2C

The GHL was implemented in 2003, and the charter vessel fishery has exceeded the GHL for Area 2C every year since 2004. In 2006, the charter harvest exceeded its 2006 Area 2C GHL by 380,000 lb (172.4 mt) or 26.5 percent. In 2007, the Secretary of Commerce took regulatory action to reduce sport fish harvest of halibut in Area 2C by amending the two-fish bag limit with

the restriction that at least one of the two halibut retained could be no longer than 32 in (81.3 cm) with its head on. Alaska Department of Fish and Game (ADF&G) preliminary estimates of the Area 2C halibut harvest by the charter vessel fishery in 2007 again indicated that the GHL was exceeded, although by a smaller amount.

The Council recommended this final rule specifically to maintain the charter vessel fishery at its GHL. In June 2007, the Council adopted a preferred alternative that contained two options. The Council recommended that the selection between the options would depend on whether the CEY decreased substantially for 2008. Not knowing in June 2007 how the GHL might be affected by total CEY established by the IPHC in January 2008, the Council recommended a suite of charter vessel fishery restrictions if the GHL were to remain the same in 2008 (proposed rule Option A) and a more restrictive suite of restrictions if the GHL were to decrease in 2008 (proposed rule Option B).

At the IPHC annual meeting in January 2008, the IPHC set the 2008 total CEY for Area 2C was set at 6.5 million lb (2,948.4 mt). This is a 4.3 million lb (1,950.4 mt) reduction from the 2007 total CEY of 10.8 million lb (4,899.0 mt).

2008 GHL for Area 2C

NMFS published a notice of the guideline harvest levels for Areas 2C and 3A for 2008 on February 5, 2008 (73 FR 6709). As established by the original rule that implemented the GHL (August 8, 2003; 68 FR 47256), the GHL will step down if the IPHC reduces the CEY below certain benchmarks. The 2008 CEY resulted in a three-step reduction in the GHL for Area 2C. The 2008 GHL for Area 2C is 931,000 lb (422.3 mt).

The Action

With this final rule, NMFS implements the following management measures to restrict halibut harvest by the charter vessel sector to the GHL for Area 2C:

- The number of halibut caught and retained by each charter vessel angler in Area 2C is limited to no more than one halibut of any size per calendar day;
- A charter vessel guide, a charter vessel operator, and crew of a charter vessel must not catch and retain halibut during a charter vessel fishing trip; and
- The number of lines used to fish for halibut must not exceed six or the number of charter vessel anglers onboard the charter vessel, whichever is less.

No annual limit for individual anglers will be implemented in Area 2C for 2008. NMFS notes that a two-fish daily bag limit for sport fish anglers is established under annual IPHC regulations for all waters off Alaska. If an angler onboard a charter vessel in Area 2C retains a halibut, then that angler may retain only one additional halibut that day and only if that additional halibut was caught in an IPHC regulatory area other than Area 2C. This is most pertinent to charter vessels that may fish adjacent Areas 2C and 3A in a single day. While charter vessel guides, operators, and crew will be prohibited from catching and retaining halibut, they are not prohibited from demonstrating fishing techniques to their clients.

Summary of Comments

The proposed rule was published in the **Federal Register** on December 31, 2007 (72 FR 74257), and invited public comments until January 30, 2008. NMFS received 273 letters, e-mails, and faxes before the deadline containing 107 unique comments on the proposed rule. NMFS received 162 letters in favor, 102 letters in opposition, 8 letters in partial support, and one letter stating an ambiguous position on the proposed rule. Of the letters from which affiliations could be determined, 96 were from the commercial industry, 61 from the charter industry, 14 from local businesses, 2 from fisheries management organizations (IPHC and ADF&G), and 24 letters were received from anglers and members of the general public. Three form letters were received. Ten copies of one letter in support of the one-fish daily bag limit were received. One form letter was received from 51 individuals who opposed the proposed rule because it did not include a sunset provision. The third form letter was from 13 businesses that opposed the proposed rule citing negative economic effects to their communities. Additionally, two letters in favor of the proposed rule were received, one signed by 24 commercial fisherman, and another signed by 15 deckhands. Comments in favor of the rule generally expressed support for limiting the guided sport charter vessel sector harvest to the GHL to ensure conservation of the halibut stock and to avoid further reallocations from the commercial sector. Most comments against the rule cited economic hardship to businesses and communities, inability to retain clients who will choose to fish in other areas with more lenient restrictions, and the need for what was perceived by the commenters as a more equitable allocation split between the commercial and charter sectors, as reasons for their opposition.

Comments and Responses

Allocation Issue

Comment 1: NMFS should impose restrictions on the commercial fishing sector, including reducing commercial bycatch levels and the commercial set-line quota instead of limiting the halibut charter fishery.

Response: This rule is not designed to impose further restrictions on commercial fisheries that take halibut. The commercial fishery for halibut as well as the commercial fishery for groundfish that takes halibut as bycatch to the harvest of other species are limited to a specified amount of halibut mortality. Unlike the charter vessel fishery for halibut, these commercial fisheries are closed each year when their limits are reached.

Comment 2: All sectors need to stay within their allocations and measures should be implemented to restrict the charter sector to the GHL. Due to a declining estimate in biomass, and charter fishery overages of the GHL, the Area 2C commercial fishery has taken a 42 percent reduction in allowable harvest between 2006 and 2008. Achievement of IPHC's harvest goals and management objectives depends on implementation of the proposed action. To choose an option that won't hold the charter sector at or below the GHL would result in continued reallocation of the halibut resource. Option B in the proposed rule is the only option that will reduce harvest to the 2008 GHL.

Response: NMFS is implementing management measures in the final rule that are intended to reduce the Area 2C charter halibut harvest amount to the 2008 GHL.

Comment 3: Change how allocations are divided between the charter and commercial sectors.

Response: Establishing a new process for allocating Pacific halibut among different sectors is outside the scope of the proposed action; however, the Council is considering options for reallocating halibut between the commercial and charter sectors and received public testimony at its April 2008 meeting. Final action is scheduled for October 2008.

Comment 4: The Council has stated that its intent is to manage the charter halibut fishery to the GHL until a long term plan is adopted including a limited entry program for halibut charter businesses and potentially new regulations on the allocation of halibut

between the commercial and charter fisheries.

Response: NMFS agrees. See response to Comment 3.

Comment 5: The IFQ program has allowed commercial fisherman to fish shallower waters and deplete fish that sport fisherman would otherwise catch.

Response: Current data do not clearly indicate whether nearshore depletions are occurring, or what the causes, magnitude, and geographical distribution of nearshore depletions might be. While it is accurate that commercial fishermen may fish in areas that are accessible to sport fishermen, any localized depletions resulting from high halibut catch rates may be offset by egg and larval drift and migrations of juveniles and adults. Information about local biomass, immigration and emigration rates, seasonal changes, and the relationship of these factors with environmental characteristics is not available at a fine enough scale to indicate whether localized depletions are occurring in Area 2C.

This final rule is not expected to significantly impact the sustainability of the halibut stock. As discussed in the EA/RIR/IRFA, the IPHC sets catch limits for the commercial fishery in proportion to the amount of halibut that may be sustainably removed. This strategy protects against overharvest and distributes the fishing effort over the entire geographic range for halibut to prevent regional depletion. The IPHC does not expect small scale local depletion to have a significant biological effect on the resource as a whole.

Comment 6: There is no balance between the commercial and sport fisheries. Commercial catch is increasing while the charter industry is being faced with a cut. The proposed rule states that, ''from 1997 to 2006, the average annual removal of halibut was about 12.454 million pounds and of this, the commercial fishery harvested 76.7 percent or 9.522 million pounds per year. From 2004 to 2006, the average annual removal of halibut was 14.142 million pounds, and of this the commercial fishery harvested 73.8 percent or 10.437 million pounds per year.'' While it is true there has been some growth in the charter sector harvest, the commercial harvest did not decrease, but in fact, increased. While sport fish catch is being reduced, the commercial sector will be able to harvest 2.28 million pounds over the IPHC's CEY for 2008.

Response: The catch limit for the commercial halibut fishery and the guideline harvest level for the sport fishery are derived from the same estimate of total halibut biomass. The biomass allocation among areas is estimated from the annual setline survey data and estimates of bottom area. The catch limits are biologically based.

NMFS acknowledges that the commercial catch increased from the period 2000–2003 to somewhat higher levels in 2004–2006 (reflecting improved biological factors and technical improvements to the IPHC assessments in those years); however, it is incorrect that the commercial catch is increasing while the charter industry is being faced with a cut. IPHC data show that the commercial catch declined in each year from 2006 to 2008. Between 2007 and 2008, the commercial catch limit in Area 2C was reduced from 8,510,000 pounds in 2007 to 6,210,000 pounds in 2008. This is a reduction of 27 percent and follows a 20 percent reduction in the commercial catch limit in 2007 from the 2006 level.

Comment 7: The preliminary 2007 charter harvest estimate is 1.7 million pounds, only 270,000 pounds over the GHL. NMFS is giving poundage back to the commercial fleet and cutting the charter catch.

Response: As described in the preamble to this rule, the 2008 GHL was reduced to 931,000 lb. While the preliminary estimate of 2007 charter vessel harvest is 270,000 lb over the 2007 GHL, this level of harvest would exceed the 2008 GHL by about 770,000 lb. The one-fish daily limit implemented under this final rule is the only proposed measure that may adequately reduce harvest to the current GHL.

The commercial Area 2C Fishery CEY is set by the IPHC and includes a buffering provision for large changes in catch limits. The amount of this buffer does not affect the GHL and does not represent pounds of fish given back to the commercial sector at the expense of the charter sector.

The charter vessel GHL is established in regulations at § 300.65(c) and is adjusted in a stepwise manner based on the Total CEY established annually by the IPHC. The GHL table in regulations at § 300.65(c), adjusts the GHL to 931,000 lb when the Total CEY for Area 2C is more than 5.841 million lb, but less than 6.903 million lb. The IPHC set the 2008 Total CEY to 6.50 million lb, which is above 5.841 million lb. In 2007, the GHL was set at 1.432 million lb under § 300.65(c) and the 2007 Total CEY of 11.40 million lb. The difference between the 2008 GHL of 931,000 lb and the 2007 GHL of 1,432,000 lb is about 500,000 lb. This 500,000 is not cut from the 2007 GHL. Rather, the 2008 GHL is reduced consistent with the lower Total CEY in 2008 and the stepwise manner in which GHL is established under § 300.65(c).

Community Effects

Comment 8: Tourism benefits more Alaskans than commercial fishing. Tourism supports a wide variety of businesses that will be affected by reduced demand for halibut charter trips. Lodges and charter industry bring jobs and money to local communities and businesses, including Alaska Airlines and the Alaska Marine Highway System. Communities have invested a lot of money to encourage tourism and this rule will undermine those efforts.

Response: NMFS agrees that the charter industry is an important industry for many communities, generating jobs and revenue for the communities involved as well as direct employment for the guides and crew. A reduction in the daily bag limit for guided charter clients will affect those communities and their efforts to develop guided charter industries. The analysis indicates that the segment of the charter industry that caters to cruise ship tourists will not be impacted by changes to the daily bag limit to the same extent as the lodge-based guided charter businesses. Moreover, tourists on the four hour charter fishing trips associated with cruise ships often do not have enough time to harvest two halibut. Tourists coming to communities on cruise ships and choosing to take a charter trip for halibut will likely continue to do so and businesses that cater to these tourists will continue to benefit from their visits. NMFS acknowledges that independent or repeat tourists who book day vacations at lodges may consider the reduced halibut bag limit in their decision to book a vacation, along with considerations for alternative fishing or tourist opportunities that may be offered. The potential impact on bookings and demands for tourist activities is discussed in the analysis supporting this final rule, but quantitative estimates of how such impacts will influence demand for these services and commensurate impacts on local communities are unavailable.

Comment 9: Tourist hopes and expectations of catching a ''barn door'' (i.e., a very large halibut) are fading along with their willingness to pay for trips. Sufficient incentive must remain to attract visitors.

Response: A tourist's expectation to catch a large halibut still exists if the bag limit is one fish. This expectation and the fishing experience itself often are the key factors in deciding to board

a charter vessel, not the daily bag limit. Furthermore, for much of the charter fishing season, there are opportunities to catch other sport fish species during a trip. This contributes to one of the incentives to hire a charter vessel, which is to optimize the experience of sport fishing in Alaska by fishing for more than one species.

Comment 10: Announcing new regulations at the beginning of a season creates confusion and frustration and makes it hard to attract and retain business. The proposed restrictions on the charter fishery will negatively impact the ability of lodge owners to book trips and many lodges have already pre-booked vacations for the 2008 season.

Response: NMFS agrees that a change in charter fishing regulations in the months prior to a fishing season will be disruptive and may cause some clients to reconsider bookings. However, information about the potential for this action has been available since mid-2007. In June 2007, the Council announced its intention to adopt a one-fish bag limit if necessary to reduce the charter fishery harvest to the 2008 GHL. The proposed rule for this action was published in the **Federal Register** on December 31, 2007 (72 FR 74257), with a public comment period that closed on January 30, 2008. The results of the IPHC annual meeting were published on January 22, 2008, and included an Area 2C CEY that triggered a reduction in the GHL to 931,000 lb GHL. This reduced GHL prompted selection of the Council's proposed one-fish bag limit as the preferred management option to limit harvest to the GHL. NMFS took action to inform the public and charter industry about the proposed regulation changes as soon as possible through an information bulletin published on its Web site and a press release.

Comment 11: The proposed annual limit disproportionately affects multi-day lodge and charter operations while allowing cruise-based day charters, the sector that comprises the main growth of the industry, to continue. Both Options A and B would have profound negative effects on lodge-based charter operations.

Response: The EA/RIR/IRFA and the proposed rule acknowledged that the proposed actions may have greater adverse impacts on the lodge-based sector of the guided charter vessel industry than on the day-boat sector (see response to Comment 8).

Comment 12: This rule creates a marketing disadvantage for businesses in Area 2C and will discourage clients from coming to Southeast Alaska. Our businesses rely on repeat customers. Many of these customers will now go to fish in other areas.

Response: NMFS believes this comment applies primarily to the lodge-based segment of the guided charter industry. As indicated in the analysis, the cruise-based component relies primarily on people arriving in Alaska for one-time visits who have little opportunity to fish in other areas and are not likely to be repeat customers. NMFS acknowledges that lodge-based guided charter clients have more opportunities to substitute fishing experiences to other regions of Alaska or outside of Alaska. They also may shift to targeting a different species. Models are not available to predict the number of clients that will choose to not take a charter vessel trip in Area 2C as a direct result of this final rule, or to estimate the proportion of clients who would choose to maximize their experience with some other type of fishing experience. Other than acknowledging the potential for lost business, as was done in the EA/RIR/IRFA, NMFS cannot forecast the probability or extent to which this might occur.

Comment 13: The bag limit should be the same for the entire British Columbia and Alaska coastline so that no one area is more desirable than another to anglers.

Response: NMFS lacks the authority to manage halibut in British Columbia. This action is in response to concerns that are specific to Area 2C.

Comment 14: Small charter operations will not be able to survive this restriction.

Response: NMFS agrees that this action may have adverse impacts on charter businesses and that some may fail or leave the business. This possibility is mentioned in the analysis. Likewise, some businesses may benefit from reduced competition if other businesses close. NMFS does not agree that all small charter businesses will be forced to leave the business.

Alternative and Future Management Measures

Comment 15: Allow the proposed limited entry program (moratorium) for guided sport charter vessel businesses to go into place to preserve the current charter vessel fleet. The number of boats should be limited, not the number of fish.

Response: The Council adopted a proposal at its April 2007 meeting to limit the number of businesses and vessels permitted to participate in the guided sport charter vessel fishery for halibut. NMFS currently is developing a proposed rule to implement the Council's action. Publication of the proposed rule is scheduled for Spring 2008. Pending consideration of public comment and approval of the proposed limited entry program by the Secretary of Commerce, fishing under the limited entry program would begin in 2010.

A limited entry program would limit the number of businesses and vessels, but not the amount of halibut harvested. The amount of halibut harvested in this fishery would need to be regulated by other management measures, including GHL restrictions (if the GHL program is not replaced with a different allocation) or an individual fishing quota program designed specifically for the guided sport charter vessel fishery for halibut. Limited entry programs in commercial fisheries only weakly influence the amount of fish harvested because harvesters adapt by changing their fishing effort and methods. Ancillary regulations are needed to control the amount of harvest. If the number of halibut charter vessel businesses was limited, the fishery could still maximize harvest by modifying vessel size, capital inputs, number of trips, length of trips, and the number of people in a fishing party. Thus, harvest restrictions such as those implemented under this final rule are necessary because effort controls alone are not sufficient to reduce harvest.

Comment 16: Don't impose an annual catch limit; instead impose a one-fish daily limit and move toward a limited entry program.

Response: NMFS agrees that a one-fish daily bag limit is an appropriate management measure to limit the harvest of the guided sport charter vessel for halibut to the reduced GHL established for 2008. Even the most conservative annual catch limit considered by the Council (4 fish a year) would not result in a harvest reduction sufficient to meet the objective of this final rule. Thus, an annual catch limit is not included as a provision of the final rule. NMFS is developing a proposed rule to establish a limited entry program for the halibut guided sport charter vessel businesses and expects a proposed rule to be published in Spring 2008 for public review and comment. Also see response to Comment 15.

Comment 17: Under the moratorium [limited entry program], charter operators will have to buy their rights to fish while the original commercial IFQs were given away.

Response: The nature and restrictions of the proposed limited entry program for guided sport charter vessel businesses will be best addressed under the proposed rule to implement that program once it is published. However,

charter vessel business owners who initially qualify under the limited entry program for participation in the guided sport charter vessel fishery for halibut would not be required to purchase their privilege for ongoing participation. This is similar to the initial allocation of commercial IFQ.

Comment 18: With a new allocation decision and interim management plan due this October from the Council, it seems unnecessary to inflict serious harm on the charter industry in the meantime.

Response: NMFS disagrees that it is unnecessary to reduce the guided sport charter vessel fishery harvest of halibut to the GHL. The purpose of this final rule is to reduce harvest to the GHL, and to provide a measure of stability to the halibut industry and coastal communities while the Council develops a long-term plan for the charter sector. The Council has initiated additional analyses of sector allocations and a means for compensated reallocation of halibut from the commercial to the charter vessel halibut fishery that would allow the charter sector to grow. The Council also is exploring options for a share-based program for the charter halibut fishery. Pending timely Council action and Secretarial review and approval, regulations implementing alternative allocations and associated management measures are unlikely to be effective until 2010 or 2011, and would become effective concurrently or after a proposed limited entry program for halibut charter businesses is implemented if approved by the Secretary (see response to Comment 15). To wait several years to reduce the harvest in the halibut charter fishery to the GHL while longer term allocation solutions are developed and implemented would frustrate the IPHC's attempt to manage halibut mortality to the Total CEY based on projected charter fishery harvests at the GHL level, and would continue the ongoing *de facto* reallocation of halibut from the commercial sector to the charter sector.

NMFS acknowledges that a policy decision to maintain the charter fishery harvest at the GHL until such time a different allocation system is implemented will constrain the growth of charter sector harvest of halibut and impose costs on charter businesses. The EA/RIR/IRFA supporting the final rule addresses these costs, although the assessment of the economic effects is qualitative due to lack of data.

Comment 19: Develop a stable, long-term management plan for the halibut charter sector.

Response: NMFS agrees that a more stable management program for the halibut charter sector is necessary and is coordinating with the Council and other management agencies to accomplish this through a sequence of proposed management changes. The first step in this sequence is the proposed implementation of a limited entry program for halibut charter sector businesses. Also see response to Comment 18.

Comment 20: Develop a catch sharing plan for Area 2C.

Response: The Council is considering a catch sharing plan for the halibut charter vessel and commercial fishery sectors. The Council initially reviewed the alternatives for a catch sharing plan at its April 2008 meeting and final action is scheduled for October 2008. Also see responses to Comments 3, 18, and 19.

Comment 21: The Council is moving toward long-term solutions. To change management now will disrupt ongoing analyses.

Response: The Council and NMFS' management objective for the halibut guided sport charter vessel fishery since 2003 has been to maintain harvest amounts to the GHL. Since 2004, the charter vessel fishery in Area 2C has exceeded GHL by amounts that range between 122 percent and 136 percent. Until 2006, administrative and implementation issues delayed responsive management actions to reduce harvest of halibut in the Area 2C charter vessel fishery. In cooperation with ADF&G, these issues largely have been resolved and NMFS and the Council are moving forward to manage the charter vessel fishery consistent with management objectives set forth since 2003. NMFS disagrees that management of this fishery to reduce harvest to the GHL would disrupt ongoing analyses; this final rule does not change the long-term solutions for the charter vessel fishery under consideration by the Council nor does it prevent future management actions that the Council may wish to consider as new information becomes available. See also response to Comment 18.

Comment 22: Restrict the guided sport charter vessel fishery to only allow retention of halibut greater than 32 inches in length like the commercial sector in order to protect recruits of the halibut biomass. Halibut only twenty inches in length and weighing five pounds have been brought back to the dock by charter vessel anglers. Charter vessel anglers should also have a maximum poundage.

Response: Restricting the charter vessel fishery to retention of fish over 32 inches without other harvest constraints would not meet the intent of reducing harvest in this fishery to the GHL. Implementing a size limit in addition to the one-fish daily bag limit would be overly restrictive. Other reasons may exist to consider size restrictions in the charter fishery in the future, but not as a provision of this final rule.

NMFS notes that the Council did consider minimum size limits of 45 and 50 inches on a second fish (assuming a two-fish bag limit) as part of the EA/RIR/IRFA supporting this final rule. A key reason why the Council rejected alternatives with minimum size limits was the difficulty in measuring larger fish.

Comment 23: Maintain the status quo for the Area 2C charter harvest restrictions.

Response: NMFS disagrees. The estimated harvests under status quo (1.333 to 1.448 million lb) substantially exceed the GHL of 0.931 million lb. Thus, the status quo alternative would not achieve the policy objective of the Council, NMFS, and other management agencies to maintain charter sector harvest amounts to the GHL while longer term solutions are developed and implemented for stabilizing the allocation of halibut between the commercial and charter sectors.

Comment 24: Implement a compensated reallocation program to use taxpayer money to buy back IFQ for the sport fishery sector. It is only reasonable that the responsible government agencies fund this reallocation because they have been shortsighted and inactive in response to increasing charter demand.

Response: The Secretary of Commerce does not have statutory authority to use government funds to purchase halibut quota share (QS) or lease halibut IFQ for use in the charter vessel fishery; this would require congressional action and funding and was outside the scope of the proposed rule. NMFS notes that the Council is considering a provision that would allow charter vessel businesses to lease IFQ from commercial halibut QS holders. The Council is scheduled to take final action on this and other provisions supporting a compensated reallocation program for the charter and commercial fishing sectors at its October 2008 meeting.

Comment 25: Implement a charter individual fishing quota program. If charter IFQs had been enacted shortly after they were proposed in 1993, the rapid growth of the charter fleet could have been controlled.

Response: The Council did propose an IFQ program for the halibut charter sector in 2001, but NMFS declined to

publish a proposed rule to implement the Council's program for several reasons, including questions about the reliability of data supporting the proposed program. Had an acceptable IFQ program been implemented, NMFS agrees that the current allocation problems between the commercial and charter sectors could have been reduced and easier to address.

Comment 26: Consider a slot limit based on size or weight that both commercial and charter boats abide by to protect the long-term recruitment of future halibut stocks. It also would be much easier for the resource agencies to monitor and audit such a rule with at-sea inspections and audits of landed fish at processing facilities.

Response: The purpose of the final rule is to reduce the charter vessel fishery harvest to the GHL established for this fishery. Restricting the charter vessel fishery to size or weight limits without other harvest constraints would not meet the intent of reducing harvest to the GHL. The EA/RIR/IRFA developed by the Council did consider halibut slot limits; these were rejected because this approach could potentially result in an increased harvest, contrary to the objective of this final rule. Further, the options that would implement minimum size limits of 45 or 50 inches in length were rejected in large part because of the difficulty in measuring and releasing large fish without injuring them. There are safety concerns for crew and clients when attempting to measure large, heavy, muscular fish. Other reasons may exist to consider size or weight restrictions in the charter fishery in the future, but not as a provision of this final rule

Comment 27: Subsistence issues need to be addressed before this issue. The subsistence limits are too high and the amount of subsistence fish that is sold is not monitored.

Response: NMFS acknowledges that the halibut resource is fully utilized in Area 2C and that the three major categories of use are commercial, sport, and subsistence harvest. This final rule addresses an allocation issue between two of the larger users of halibut: the commercial and charter halibut fisheries, which account for 72 percent and 13 percent of total removals in Area 2C, respectively. While subsistence harvest of halibut is a source of mortality, it comprises the smallest use at 4 percent of total removals (See section 1.10.1 of the EA/RIR/IRFA). The Council, through regulations, established an allowed use of the halibut resource by subsistence users. The Council and NMFS disagree that the subsistence use of halibut is too high and must be further restricted prior to proceeding with this final rule.

NMFS acknowledges that monitoring catch and total mortality (retained and discard) in the subsistence fishery poses unique concerns and challenges and has asked ADF&G for estimates of subsistence removals to evaluate trends in subsistence harvests. Subsistence harvest is estimated using specialized survey methods tailored for that sector. ADF&G staff report that the subsistence harvest has remained relatively stable during recent years, which is another reason why NMFS does not believe that subsistence harvest needs to be reduced before taking this action.

Comment 28: Female halibut should all be catch and release. Discourage retention of small halibut. A rule should be developed to release sport caught halibut over 200 pounds.

Response: The comment presumes that large females contribute disproportionately to reproduction and that harvest of these females will substantially decrease juvenile halibut abundance. In 1999, the IPHC reviewed options for a maximum size limit of 60 inches (150 cm) in the commercial fishery and concluded that, based on the research at the time, it did not add substantial production to the stock. Applying the limit to the sport fishery would have an even smaller benefit because the sport fishery harvest is much smaller than commercial harvest, and also because this action would only apply to Area 2C. The halibut stock is managed as a single population throughout its entire range. See also the response to Comment 26.

Comment 29: The one-fish daily bag limit should be imposed on the whole state, not just one area.

Response: The harvest of halibut by the charter vessel fishery in Area 2C has exceeded the annual GHL each year since 2004 by significant amounts. Conversely, the charter vessel harvest of halibut in Area 3A has not exceeded the annual GHL and restrictions on this fishery are unwarranted at this time. NMFS recognizes that different restrictions for the charter vessel sector in different IPHC regulatory areas off Alaska may influence where potential clients choose to fish. However, applying different regulations and bag limits to different areas is a common practice in fishery management. Although a one-fish daily bag limit in Area 2C may change the demand for charter trips if anglers are unwilling to substitute other species, many clients associated with cruise vessels likely will continue to fish in Area 2C because their fishing time is limited to half-day trips, which may not provide enough time to harvest two halibut.

Comment 30: Implement the Federal prohibition on skipper and crew harvest of halibut. Making this a Federal regulation will relieve the restriction on skipper and crew harvest of other species. Skipper and crew harvest is abused, sold to restaurants, or used as a guarantee that clients will have fish to take home.

Response: NMFS notes the support for the part of the final rule that prohibits the catch and retention of halibut by charter vessel guides, operators, and crew. This action allows ADF&G to remove the emergency order that prevents skippers and crew from retaining any species of fish while on a saltwater charter trip. Thus, this rule could relieve a burden on crew compared to the previous emergency order. This prohibition also will help attain the management objective of limiting the charter vessel harvest of halibut in Area 2C to the GHL while minimizing adverse impacts on the charter fishery, its clients, and its home ports.

Comment 31: Modify the skipper and crew provision to allow personal use fishing before May 16 and after August 15, or some other dates outside the tourist season, for halibut. Making a special trip wastes resources. This would minimize the impact of the regulation on skipper and crew by compensating them and allowing them to catch fish for food while working.

Response: NMFS acknowledges that the prohibition on retention of halibut by charter vessel guides, operators, and crew could lead to higher operating costs for harvesting halibut for personal use. However, as noted in the response to Comment 30, this final rule will improve the opportunity for charter vessel guides, operators, and crew to retain non-halibut catch while clients are onboard, thus enhancing personal use fishing opportunities for species other than halibut.

Comment 32: Remove the prohibition on skipper and crew harvest. No one at ADF&G, the Council, or IPHC can say or prove that skipper and crew harvest was included in the original GHL calculations. Crew harvest records began voluntarily in 1998 with the logbook program. Uncertainty exists whether this harvest was included with ''other'' sport harvest and whether policy makers considered skipper and crew harvest as part of the GHL when it was established. Thus, it is unethical to continue this prohibition based on the GHL.

Response: The Council and NMFS, working with stakeholders, have

approved a prohibition on charter vessel guide, operator, and crew catch and retention of halibut as a preferred first tool for restricting harvest. Notwithstanding whether crew harvest of halibut was voluntarily reported in charter vessel logbooks submitted to ADF&G when the logbook program first was established, the Council and NMFS have specified their intent that this harvest be part of the existing GHL. As noted in Section 2.6.3.2 of the EA/RIR/FRFA supporting this final rule, the ADF&G estimates that the State prohibition on crew-caught halibut reduced harvest in the charter vessel fishery by between 78,000 lb and 84,000 lb in 2006. See also responses to Comments 30 and 31.

Comment 33: Maintain the status quo regulations and add a six-fish annual limit.

Response: The status quo restrictions on the Area 2C charter vessel fishery with a six-fish annual catch limit would not reduce harvest to the current GHL of 931,000 lb. Instead, this option would result in an estimated harvest of between 1.3 and 1.4 million pounds, an unacceptable overage of the GHL. A one-fish daily bag limit, the primary provision implemented by NMFS in this final rule, is the only management measure that may reduce the harvest to the GHL, as indicated by the analysis.

Enforcement and Recordkeeping and Reporting Requirements

Comment 34: Better enforcement and better data are needed for existing regulations. Many charter operators are not obeying restrictions because they know there is no enforcement in their area. As a result, harvest estimates are not accurate. Improve funding for better logbook analysis and more active enforcement by the USCG and NMFS. Many charter clients are transporting many more fish than allowed under the existing regulations.

Response: Significant effort is being made to improve reporting. ADF&G has made numerous changes to their logbook program in recent years. For example, ADF&G has conducted dockside checks and post season client verifications to validate logbooks. In addition, NMFS has coordinated with ADF&G to establish new logbook requirements that will further validate halibut harvest information recorded in the state's Saltwater Sport Fishing Charter Trip Logbook, including requiring the signatures of anglers to verify that the number of halibut caught and recorded is accurate. ADF&G supports this requirement as it will lead to more reliable logbook data and more accurate estimates of charter halibut harvest. NMFS believes that enhanced recordkeeping and reporting, together with ongoing cooperative monitoring and enforcement by State and Federal enforcement personnel as time and resources allow will serve as a deterrent to large scale violations of sport fish regulations.

Comment 35: There is a lack of monitoring and enforcement of commercial catch. The published commercial catch data are flawed and commercial fisherman are not being held to their targets.

Response: NMFS disagrees. Although no fishery is exempt from illegal fishing activity, NMFS believes that current monitoring and enforcement efforts are sufficient to maintain control of the commercial halibut fishery and that reported catch is sufficiently accurate for management of the fishery and the halibut resource. The commercial quota system for halibut is administered, regulated, and enforced by NMFS to insure harvests are within quota limits and to monitor and enforce the amount of quota that each commercial fisherman is allowed to harvest. Enforcement of halibut regulations for Alaska is accomplished through complementary efforts of NMFS Office for Law Enforcement (OLE), Alaska State enforcement agencies, and the U.S. Coast Guard.

Alaska Wildlife Troopers (Alaska Department of Public Safety) also perform inspections, audits, and patrol hours to monitor and enforce Federal commercial halibut fishery regulations under a Joint Enforcement Agreement between NOAA OLE and the Alaska Wildlife Troopers.

Comment 36: Many charter operators are illegal and do not comply with Alaska Statute 38.05. If we enforced this statute, there would be less of a problem with the charter harvest levels.

Response: The Secretary is not responsible for enforcing State of Alaska statutes. Comments regarding the enforcement of State statutes are more appropriately addressed to the State of Alaska.

Comment 37: Enforcement of the regulations is impossible. When considering enforcement of annual limits, charter operators cannot be held responsible for client actions because the operator doesn't know what the client may have previously harvested.

Response: NMFS believes that enforcement of this final rule is possible. This final rule does not include provisions for an annual catch limit. Thus, recordkeeping and reporting requirements proposed to monitor and enforce such a limit have been removed from the final rule. All other proposed federal recordkeeping requirements are retained to increase the accuracy of data collection and recorded information (see response to Comment 34).

Comment 38: Keep the angler signature provision. This will lead to more accurate reporting.

Response: NMFS agrees and has maintained this requirement (see response to Comment 34).

Comment 39: The current carcass retention provisions are unreasonable. On live-aboard charters, it is not reasonable to carry around whole fish for days when they could be processed and vacuum packed onboard. The current requirements create storage issues, reduce meat quality, and create a timing problem after returning to port to process fish and transport clients and their fish to the airport in time. Inspectors should be able to estimate the number of fish from the packages.

Response: This final rule does not require the retention of halibut carcasses. When the rule that implemented a 2-fish daily bag limit with one-fish under 32 inches in length went into effect in Area 2C in 2007, the carcass retention requirement was necessary to determine head-on length for enforcement purposes. This final rule will rescind the requirement at § 300.66(m) to retain carcasses onboard. However, IPHC regulations require that for Convention waters off the coast of Alaska no person shall possess onboard a fishing vessel, including charter vessels and pleasure craft, halibut that have been filleted, mutilated, or otherwise disfigured in any manner except that each halibut may be cut into no more than two ventral and two dorsal pieces, and two cheeks, all with skin on (paragraph (28)(2) of the Pacific Halibut Annual Management Measures; March 7, 2008; 73 FR 12280). This change allows enforcement officers to count the number of fish in possession by an angler.

Comment 40: NMFS should retain the requirement to bring halibut carcasses to shore for measurement. Accurate creel survey lengths are fundamental to estimating the catch of the charter fleet. Fish that are filleted at sea cannot be measured.

Response: NMFS agrees that carcass retention facilitates enforcement and more accurate data collection, but it is unnecessarily burdensome to charter operators given that this final rule does not implement a size limit on retained halibut. Further, charter operators have expressed concerns about disposal of carcasses at ports, time constraints, the diminished meat quality of fish that are not processed immediately, and limited

storage space onboard some vessels. These concerns were especially pronounced for charter operators who run multi-day trips or more than one trip in a day. To respond to these concerns and to address the need for better enforcement, the IPHC adopted a regulation that is described in the response to Comment 39.

Comment 41: The proposed paperwork requirement for monitoring the annual catch limit is burdensome and time consuming for operators and anglers. The requirement to print the angler name is redundant. It would be better to collect youth and senior angler information for inclusion in the database when issuing the harvest cards. Furthermore, the proposed requirement for anglers to retain their licenses for three years is unreasonable, the license paper is flimsy and hard to keep track of, and retention is a burden for clients.

Response: Under Option A, which would have implemented an annual catch limit for Area 2C, it would have been necessary for anglers to retain their licenses in the event that discrepancies arose in the logbook data. However, because NMFS is implementing Option B, the one-fish daily bag limit, the requirement to retain angler licenses is no longer necessary and has been removed from the final rule. Other requirements for recording the angler name and license number are retained to improve accuracy of recorded information. Also see response to Comment 34.

Comment 42: Issue harvest tags with licenses instead of the burdensome recordkeeping and reporting requirements proposed to monitor and enforce an annual catch limit.

Response: NMFS is not implementing the proposed annual catch limit because this management tool would not reduce the Area 2C charter vessel harvest to the 2008 GHL. Harvest tags are not required for the monitoring and enforcement of a one-fish daily bag limit.

Guideline Harvest Level

Comment 43: Rescind the GHL.

Response: Rescinding the GHL is outside the scope of this action. See Response to Comment 46.

Comment 44: Maintain the GHL and manage halibut charter vessel harvest to that level. The GHL was set at 125 percent of the charter vessel fishery's highest historic harvest to allow for growth in the industry. The GHL was exceeded in 2004–2007 and the charter fleet is still growing with an increased number of clients served, fishing trips, and active vessels.

Response: NMFS acknowledges the comment. This final rule does not change the GHL provisions, only the management measures necessary to control harvest to the GHL.

Comment 45: If the GHL doesn't increase with the CEY, why should the GHL decrease with the CEY? Commercial IFQ shareholders are afforded a buffering mechanism by the IPHC to soften the economic impacts of a rapidly declining CEY. The guided sport halibut fleet should be afforded similar buffering. Also, the stair step feature of the GHL is not compatible with the slow up/fast down (SUFD) policy of the IPHC.

Response: This rule was not designed to change either the 2008 GHL published in the **Federal Register** (73 FR 6709, February 5, 2008) or the GHL regulations at 50 CFR 300.65. The GHL ''stair steps'' down only during periods when the CEY established by the IPHC falls below benchmark levels in the GHL regulation. To change the GHL regulations would require separate rulemaking. The Council incorporated an element of buffering into the GHL rule by setting the maximum at 125 percent of the 1995–1999 average harvest to allow for growth in the charter industry. NMFS notes that, should the CEY increase from the 2008 level, the GHL could increase as well to a maximum of 1.432 million lb, consistent with the procedures described in regulations.

The SUFD procedure used by the IPHC is not incompatible with the stair step feature of the GHL. Federal regulations require certain levels for the GHL based on the annual Total CEY, not procedures used by the IPHC to derive that annual Total CEY.

Comment 46: The GHL setting process is flawed. The GHL is too low and needs to be changed. The GHL was proposed and implemented with only commercial interests voting on the Council. The GHL has been the same for 14 years and deserves some kind of update or allowance.

Response: The Council first began discussing the guided charter fishery for halibut in 1993. After 10 years of debate, the GHLs were established for Areas 2C and 3A (August 8, 2003; 68 FR 47259). This rule set the maximum GHL for Area 2C at 1.432 million lb (649.5 mt), and included a mechanism for reducing the GHL in years of low abundance as determined by the IPHC. Since implementation, the GHL has remained at its maximum level until this year when reduced stock abundance estimates triggered a reduction. Guided sport charter vessel harvest exceeded the maximum GHL in 2004, 2005, and 2006 and is estimated to have again exceeded the GHL in 2007. The maximum GHL cannot be increased without a change to regulations. Revising the GHL and the halibut sector allocations are beyond the scope of this final rule.

Comment 47: The GHL is just a guideline, not a hard cap.

Response: NMFS acknowledges that area-specific GHLs were established in 2003 as a guideline that, if exceeded, could prompt responsive management action to reduce charter vessel harvest amounts. The GHL has been exceeded since 2004. Thus, management action to reduce harvest to the GHL is completely within the management objective for the GHL provisions. The fact that a time lag exists between when a GHL overage occurs and responsive management action is implemented through rulemaking also was acknowledged when the GHLs were established.

Comment 48: Modify the final rule to accurately reflect the charter GHL that is associated with the IPHC-adopted Total CEY and the effect of Option B compared to that GHL, not the GHL of 1.217 million lb.

Response: NMFS agrees and has reported the new GHL of 931,000 lb (422.3 mt) in this final rule and its associated EA/RIR/FRFA. A notice of the 2008 GHLs for Areas 2C and 3A was published in the **Federal Register** on February 5, 2008 (73 FR 6709). When the proposed rule was written, NMFS anticipated that the IPHC might reduce the CEY, triggering a reduction in the GHL, and wrote the proposed rule in a manner to allow final action notwithstanding the reduction.

Comment 49: The proposal to simultaneously reduce the GHL and implement management measures to reduce harvest to the new GHL is contrary to the existing regulations regarding use of GHLs. Option B violates the Administrative Procedures Act (APA), and both options violate the purpose and intent of the charter fishery regulatory regime.

Response: NMFS disagrees. The Council recognized that the GHL might be adjusted downward from the maximum GHL that was in place when it recommended the management measures for this final rule in June 2007. Thus, the Council proposed two different sets of management measures; one if the GHL remained unchanged in 2008, and a second more restrictive set of management measures if GHL was reduced. Both sets of management measures were published in the **Federal Register** for public review and comment. The comment period on the proposed rule extended beyond the IPHC meeting in mid-January, when the new and reduced total halibut CEY of

6,500,000 lb (2,948.4 mt) for Area 2C was established for 2008. This CEY resulted in a reduced GHL based on existing regulations at 50 CFR 300.65(c). NMFS published a notice in the **Federal Register** of this downward adjustment on February 5, 2008 (73 FR 6709). This was a nondiscretionary action given that the regulations at 50 CFR 300.65 clearly established how the GHL steps down when Total CEY is reduced below certain benchmarks. Given that a one-fish bag limit was proposed by the Council if the GHL was reduced, analyzed in the EA/RIR/IRFA supporting this action, and noticed in the proposed rule under APA rulemaking procedures, NMFS believes the public had adequate notice and opportunity for review and comment on the actions implemented under this final rule and that this action is consistent with the APA and the GHL management provisions.

Applicability of the Rule

Comment 50: The proposed rule discriminates against anglers fishing from charter vessels, especially those who because of age, physical ability, or financial limits cannot operate or buy their own boat. It is not fair to discriminate against charter clients so the status quo should be maintained. Equal access and equal protection rights are being violated.

Response: NMFS does not agree that this rule discriminates against charter anglers because age, physical ability, and financial status are not the subject of this regulation. This final rule was designed to reduce the harvest of halibut in the charter vessel fishery to the GHL to address the current allocation problem between the halibut charter fishery and the commercial fishery. Recreational anglers who wish to fish from a charter vessel may still elect to do so. The final rule does not discriminate between U.S. citizens based on age, physical ability, or ownership of a vessel.

Comment 51: Support 6-fish annual catch limit for non-resident anglers only.

Response: NMFS disagrees. If this rule were applied only to non-resident anglers, then Federal management of this Federal resource would discriminate among U.S. citizens based on their state of residence. This would be contrary to the Halibut Act, contrary to basic rights and obligations in existing Federal law, and could not reasonably be considered necessary to promote conservation. Moreover, this action would not reduce charter harvest to the 2008 GHL and therefore would not accomplish the objective of this action.

Comment 52: Apply restrictions to self-guided anglers as well. The proposed action discriminates between sport fishermen with and without their own boats. Self-directed anglers are only held to the 2-fish daily limit. Include bare boat charters or self-guided trips in restriction. Including self-directed anglers in the 2-fish with size limits regulation would further decrease sport harvest. Self-directed harvest equals about 67 percent of the guided harvest. If all sport anglers in Area 2C were held to the limit, perhaps further restrictions would not be necessary.

Response: The Halibut Act under the Convention does not prevent the Secretary from tailoring a management action so that it addresses the concern that prompted action in a reasonable manner. The objective of this final rule is to reduce the harvest of halibut in the Area 2C guided sport charter vessel fishery to the GHL. The reason for this action is clearly indicated in the preambles to the proposed and final rules. The Council did not recommend limiting other recreational harvest, subsistence harvest, or bycatch and wastage in the commercial fishery because harvest data in the EA/RIR/IRFA show that removals from categories other than the guided charter vessel sector have remained relatively stable during the past 5 years and have not grown at the rate of the guided charter vessel fishery. Therefore, self-guided anglers were not considered part of the problem addressed by the Council and this final rule. Guided charter harvests rose each year from about 1.28 million pounds in 2003 to 2.03 million pounds in 2006. It is this information that prompted the Council to propose provisions to limit Area 2C charter vessel angler harvest consistent with the Halibut Act under the Convention.

Comment 53: Expand the proposed harvest restriction to all non-resident anglers, guided and unguided.

Response: Federal law prohibits applying different regulations to anglers based on state residency. The regulations will apply to all charter vessel anglers, regardless of state of residency. Expanding the restriction beyond the guided charter vessel fishery is beyond the scope of this action. See also responses to Comments 51 and 52.

Comment 54: Apply restrictions to all anglers, but only during June, July, and August, with more lenient restrictions during the rest of the season.

Response: NMFS interprets the comment as suggesting that the one-fish daily bag limit for charter vessel anglers be applied to both guided and unguided recreational anglers, and be limited for both to the months of June, July, and August. The application of the rule to the unguided sport fishery would not address the problem identified by the Council, or the objectives defined for this action.

Comment 55: The charter industry should not be considered part of the sport fishery. The charter and lodge fishers are, in effect, commercial fishers.

Response: Fish caught in commercial fisheries enter commerce, that is, they are sold to consumers, whereas fish caught in recreational fisheries are for personal consumption. This is a fundamental difference between commercial and sport fisheries and the reason why the guided sport charter vessel industry is not considered a commercial fishery.

Data and Data Quality

Comment 56: ADF&G catch data are flawed, and no scientific basis exists for imposing increased restrictions on the halibut charter fishery.

Response: The analysis supporting this final action uses sport fishing data collected by ADF&G through its postal survey, logbook program, and creel survey program. These data comprise the best scientific information available for the EA/RIR/IRFA and are appropriate for use in estimating the impact of the final rule on the charter halibut and commercial sectors. These data collection programs have been reviewed by the Council's Scientific and Statistical Committee and use statistical methods accepted by the scientific community to collect and extrapolate sport fishing information, including the disclosure of known statistical biases and verification of data collection methodology.

Comment 57: The Council motion for this action was based on the ADF&G's projection that the 2006 charter harvest was 46 percent over the GHL. ADF&G's final estimate for 2006 charter halibut catch was less than the initial estimate. Update the analysis to recognize that 2006 harvest was substantially lower than initially estimated.

Response: NMFS acknowledges that the preliminary estimate of 2006 charter halibut harvest in Area 2C was higher than the final estimate; however, both estimates were above the GHL of 1.432 million lb (649.5 mt). The preliminary estimate for 2006 was 2.029 million lb (920.3 mt), 42 percent over the GHL, and the final estimate was 1.804 million lb (818.3 mt), 26 percent over the GHL. This overage indicates the ongoing need for management measures to reduce harvest to the GHL. The EA/RIR/IRFA was updated to reflect the final harvest

estimate for the Area 2C halibut charter fishery (See Table A4–1).

Comment 58: The regulation that went into place in 2007 for a two-fish bag limit with one fish under 32 inches in length substantially reduced the guided sport charter vessel harvest of halibut. Data from 2007 are not yet available to evaluate the effectiveness of this regulation or the need for further restriction.

Response: The management measures implemented for the halibut charter fishery in 2007 were expected to reduce charter halibut harvest by 518,000 lb (235.0 mt). The preliminary estimate of charter halibut harvest in Area 2C for 2007 is 1.70 million lb (771.1 mt), plus or minus 15 percent (between 1.45 million lb (657.7 mt) and 1.96 million lb (889.0 mt)). Even at the lower end of this range, harvest was still slightly above the 2007 GHL. In 2008 a reduction in the Total CEY set by the IPHC triggered a reduction of the Area 2C GHL to 931,000 lb (422.3 mt). The 2007 rule would not reduce harvest enough to meet the new 2008 GHL. According to the analysis for this action, the one-fish daily bag limit is the only alternative analyzed that may reduce harvest enough to meet the new 2008 GHL.

Comment 59: Sport landings of halibut contribute minimally to the overall mortality in the fishery. Projections based on historical data indicate that halibut sport landings are stable and not likely to increase dramatically in the near future. Even the best recreational data collection programs can not accurately estimate harvest. As such, managers need to look at trends and not yearly estimates in setting limits.

Response: The guided sport charter vessel sector's contribution to overall mortality is not minimal and has been increasing. It was noted in the analysis that between 2002–2006, guided sport charter vessel harvests accounted for 13 percent of the removals from Area 2C, and were the second largest source of removals after commercial harvest. Table 17 of the analysis provides information on harvests from 1995 to 2006 for the guided and unguided components of the sport fishery. Unguided harvests have fluctuated between 0.723 million lb and 1.187 million lb with no clear increasing or decreasing trend. In contrast, guided sport charter vessel fishery harvests have increased. Between 1999 and 2006 guided harvest amounts rose each year from 0.938 million lb in 1999 to 2.035 million lb in 2006. The Area 2C charter fishery has consistently harvested more than the GHL. By Council policy, this necessitates corrective action to limit the charter fishery to the GHL.

Comment 60: Charter harvest is overestimated. Operators inflate logbook numbers in hopes of receiving extra quota share. Most charter fish are in the 5–10 lb range, much smaller than the 18–20 lb average that is used by ADF&G as an estimator.

Response: The analysis supporting this final action uses sport fishing data collected by ADF&G through its postal survey, logbook program, and creel survey program. These data comprise the best scientific information available for the EA/RIR/IRFA and are appropriate for use in estimating the impact of the final rule on the charter halibut and commercial sectors (see Comment 56). The weight estimates for the charter halibut fishery used in the analysis supporting this final rule were obtained from halibut measurements taken by the ADF&G creel survey that are extrapolated using a length-to-weight relationship published by the IPHC. These measurements are taken in port with a creel sampling technician and represent a sample of harvested halibut that have not been mutilated in such a way that they cannot be measured. Length information from all sampled ports is used in determining the average size of halibut for Area 2C. The proportion of harvested fish that are measured by ADF&G varies by port; however, these estimates provide the best available information about the size and weight composition of halibut harvested in the guided sport charter vessel fishery. These data collection programs have been reviewed by the Council's Scientific and Statistical Committee and use statistical methods accepted by the scientific community to collect and extrapolate sport fishing information, including the disclosure of known statistical biases and verification of data collection methodology.

Comment 61: Page ix of the Executive Summary of the EA/RIR/IRFA states that the analysis ''employs the best information available, in this case, 2006 ADF&G Saltwater Charter Vessel Logbook data.'' We believe this is erroneous. Most ADF&G data for the charter fishery comes from a combination of the Statewide Harvest Survey and logbook data.

Response: The ADF&G released its final estimate of the 2006 charter harvest in September 2007. This final estimate was based on the 2006 Statewide Harvest Survey. This new information became available after the Council's initial review of the analysis when it made its recommendations in June 2007. However, this new information was used to prepare Appendix IV to the EA/RIR/IRFA that was released in November 2007. This appendix updates the earlier results. The Secretary is considering this new information in making the final decision about this action. The wording in the Executive Summary of the November 2007 EA/RIR/IRFA was not updated to accurately reflect the full range of information being considered by the Secretary and will be corrected.

Comments Regarding the Economic Analysis

Comment 62: The analysis did not fully consider the economic effects on small businesses and coastal communities. The analysis is not based on the best available data.

Response: NMFS used data including the most recent logbook and statewide fishery survey information available from ADF&G, a 2005 study of the charter fishery in Sitka conducted by the McDowell Group, an analysis of charter anglers in South Central Alaska prepared by the University of Alaska, and the key informant interviews that were noted in the EA/RIR/IRFA. This is the best available information. However, the data available for the analysis of this action are limited. The information that would be necessary to provide a complete quantitative analysis of the impacts of this action on the commercial or charter boat sectors, and to estimate the impacts these sectors would have on the regional economy, is not available. This information would include survey-based models of anglers' behavioral responses to the regulation, detailed information on the revenues and costs of commercial and guided charter operations, a model of guided charter responses to changing client behavior, and income and employment impact multipliers for the regional communities in Southeast Alaska.

In the absence of more detailed information, the EA/RIR/FRFA provides a qualitative discussion of the impacts on the charter operations and on the communities dependent on them. Specific community concerns are reflected in the choice of the alternatives. Commenters have noted that the analysis recognizes that the options would have significant negative impacts on the guided charter fishery and might put some operators out of business, and that the notice of proposed rulemaking describes the disproportionate impact on lodge-based charter operations.

Comment 63: This final rule will have adverse economic impacts on Juneau area businesses. The guided sport charter vessel industry supports a wide variety of local businesses, including

restaurants, souvenir shops, hotels, fish processors, and outdoor stores.

Response: NMFS acknowledges that limitations on the charter vessel harvest of halibut in Area 2C could have an impact on demand for charter services and on local businesses supporting fishing opportunities. The analysis supporting this action assesses these impacts to the extent possible with the information available. See also response to Comment 62.

Comment 64: The Council does not understand and is unwilling to examine the true economic value of halibut to the guided sport charter vessel industry. There is no evidence that the charter fishery is growing exponentially. A thorough economic analysis of the guided sport charter vessel industry is needed before making decisions that affect the recreational fishing industry.

Response: The analysis does not claim that the guided charter fishery is growing exponentially. However, the charter industry has grown in recent years, in terms of pounds of fish harvested (see response to Comment 59), and in the number of businesses, vessels, and trips (see response to Comment 105). The EA/RIR/FRFA recognizes the value of halibut to the guided sport charter vessel fishery and to local communities dependent on the charter fishery, and acknowledges the potential for losses because of a one-fish bag limit.

Comment 65: The Council's intent in its motion was misrepresented in the purpose statement in the EA/RIR/IRFA and proposed rule, which state that the proposed measures to restrict charter halibut harvest if the GHL would be implemented if the GHL is reduced to 1.217 million lb in 2008. The Council motion only states, ''if the GHL is reduced,'' and does not specify the amount of the reduction.

Response: NMFS did not intend to misrepresent the Council's intent. At the time of the Council action, IPHC staff indicated that there was the potential for the Total CEY to fall below the point that would trigger a change in the GHL. However, the CEY established by the IPHC after its 2008 annual meeting was 6.5 million lb in Area 2C—a level low enough to trigger a three step drop in the GHL from 1.432 million lb to 0.931 million lb, effectively bypassing the 1.217 million lb level. The Council's intent is clear that it intended Option B to be implemented if the drop in the CEY was large enough to trigger any reduction in the GHL. At the time of the Council's action it was not anticipated that the GHL would stair step down more than one level.

Comment 66: A quantitative rather than qualitative analysis of the impacts to the guided sport charter vessel industry is needed. In the absence of a comprehensive economic analysis that accurately assesses the economic impact of all options to both guided recreational and commercial sectors, the Secretary has no meaningful economic data upon which to fairly base his decision. This supports continuation of the status quo until the analysis shortfalls are fully addressed. Although some quantitative estimates are made of the impact to longline fishermen, there is no quantitative discussion of adverse impacts on charter fishermen and there is no quantitative comparison of impacts to the longline and charter sectors.

Response: NMFS notes that there are fundamental differences between the longline and charter operations that affect the ability to estimate gross revenues impacts on the two sectors. The output of the commercial longline sector is halibut. The output of the commercial longline sector in Area 2C is small enough compared to overall output on the West Coast that the impact of changes in Area 2C production on Area 2C halibut prices are probably small. Under these conditions, NMFS has been able to estimate the gross revenues of the status quo and other alternatives on the commercial longline sector. However the situation is very different in the charter sector. The output in the charter sector is not halibut, but days of client fishing time. To estimate gross revenue changes in the guided charter fleets, NMFS would have to have separate demand models based on survey research, which would permit the determination of changes in client participation in the lodge-based and cruise ship-based industry segments in response to changes in the bag limit, and the competitive adaptations that the charter operations would make. The information necessary for these estimates for the charter sector is not available. NMFS did make inferences using survey research from South Central Alaska to the extent possible. NMFS notes that the gross revenue estimates provided for the longline sector are an incomplete quantitative analysis of that sector as well since they do not address the issue of the impact of the alternatives on the profitability of these fishing operations.

NMFS must choose a management option to restrict harvest to the GHL. To maintain the status quo would be, in fact, a choice of a particular policy to allow charter harvests to continue to exceed the GHL despite the current regulations in place. Status quo with respect to the regulations is not status quo in the fishery due to the growth of the guided sport charter vessel industry in Area 2C and the new stock information from the coastwide model.

Comment 67: There is no economic analysis of the cost of enforcement of an annual limit.

Response: The Regulatory Impact Review contains an economic analysis of the cost of enforcement of the annual limit in section 2.7.4.3. Additionally, this section references a discussion paper that was presented to the Council in October 2006 that contains a more thorough analysis of the cost of implementing and enforcing an annual limit. This discussion paper is available on the North Pacific Fishery Management Council's Web site at *http://www.fakr.noaa.gov/npfmc.* Enforcement issues and costs are discussed, as well as the estimated costs for compliance that would be imposed on the industry. However, because Option B was selected, NMFS is not implementing an annual limit. Therefore the costs associated with enforcing an annual limit will not apply. NMFS believes that sufficient information was provided to permit a decision among the alternatives.

Comment 68: The appropriate geographic scope of the analysis should be the coastal home ports for the guided sport charter vessel fleet, not the national economy.

Response: NMFS is required to examine net benefits to the Nation under Executive Order 12866. NMFS also examines regional and sector impacts in the analysis. However, in the section of the analysis referred to by this comment, NMFS explicitly examines the effects on net benefits to the Nation and makes the point that from a national perspective, the benefits of an alternative to one sector are likely to be offset by the costs to another. The analysis states that some impacts that adversely affect regional and community interests have distributive elements that prevent them from being considered either benefits or costs at the national level. This is a standard cost-benefit convention, in which the accounting stance affects evaluations of net benefits or costs. It considers the costs to local and regional interests. The choice of the preferred alternative, in fact, depends in part on local impact considerations evaluated in the analysis. For example, the analysis notes that Option 1 of Alternative 2 (one trip per vessel per day) would disproportionately impact small charter operators in major cruise ports and was thus rejected.

Comment 69: The cost of this action to the guided sport charter vessel industry is not justified by the benefit to the longline fishery. The rule will provide virtually no benefit to the commercial sector before it is superseded in 2010 by the long-term allocation program currently under development. The negative consequences of the proposed rule on the charter sector far outweigh any potential benefit to the commercial sector.

Response: While the Council is considering new management measures to replace those in this action, and while it has stated its intent to implement those measures in 2010, NMFS cannot assume that this will, in fact, take place, or that it will take place by 2010. The Council has not yet agreed on which management measures to implement and it may be several years before a decision is reached. The proposed program then would need to be approved by the Secretary of Commerce. The analysis suggests that the expected burden on the longline fishery and its consumers rises significantly in the years after 2010.

The objective of this action is to limit halibut harvest by the guided sport charter vessel industry to the GHL. Inherently and inevitably, this will constrain overall charter harvests and will have adverse economic impacts on charter fishing operations. NMFS notes that cost-benefit analysis, economic impact analysis, and evaluations of the costs and benefits to different sectors of the industry are only some of the factors that the Council and Secretary are required to take into account when they make policy decisions.

It is not possible to conduct a comprehensive quantitative cost and benefit analysis or compare quantitatively the benefits and costs to the commercial longline or charter industries, or to the regional economy with the information available, and such an analysis is not required before action can be taken.

There is limited information available on the economics of longline halibut fishing, charter operations that cater to cruise ship clients, and lodge-based operations. Similarly, there is limited information on how these types of operations interact with the local community and regional economies to generate secondary or indirect income and jobs in firms supplying the commercial firms or the guided charter operations and their clients. Given that lack of information, NMFS has used the best available scientific information.

Comment 70: Tables 56 and 58 in the EA/RIR/IRFA project hypothetical ex-vessel losses and consumers' surplus losses to the commercial fishery associated with guided sport catches over the period from 2006 to 2015. The following changes and revisions to these tables are necessary: (a) Change the 2006 guided sport catch estimates in Appendix IV to reflect the final 2006 catch estimate; (b) use a more appropriate projection for annual growth in the guided sport charter vessel industry; (c) account for the IPHC's practice of increasing and decreasing commercial harvest limits with a lag to changes in the CEY (the ''slow-up/fast-down'' or SUFD approach).

Response: Revised versions of Tables 56 and 58 have been added to Appendix IV. The revisions include the final 2006 guided sport charter vessel sector harvest, updated charter industry growth rates, the IPHC's 2008 CEY, and the 0.931 million lb GHL that will take effect in 2008 as a result of the lowered CEY. However, the tables were not prepared to provide predictions of actual revenue losses over the time period. The purpose of the original tables in the body of the text, and the revised versions in the appendix was to illustrate the potential magnitudes of the revenue losses that might accrue to the longline sector if a number of factors remain constant. The tables were not meant to provide forecasts. For example, the tables incorporate a number of simplifying factors such as constant values for the Total CEY, ex-vessel prices, commercial underage, and unguided sport fish catch. The tables do not estimate these values or incorporate official estimates from other agencies as these estimates change regularly and materially. As a result NMFS has not made change (c), and has made change (b) only to the extent of updating the growth rate to reflect new information for 2006.

Comment 71: The analysis does not address losses to recreational anglers denied access to halibut.

Response: It is accurate that the analysis focuses primarily on the impacts of the actions on the longline and charter industries, and the communities dependent on them. The analysis does not estimate the loss in consumers' surplus from the preferred alternative. The information to estimate this does not exist since models of angler behavior in Southeast Alaska are unavailable. The discussion in Section 2.7.5 indicates that recreational anglers can expect a reduction in their benefits from charter fishing from this action. The analysts based their assessments on modeling that had been done in other areas of Alaska. The analysis points out that clients would no longer be able to take a second fish, and has a long section discussing the impact in terms of the change in anglers' cost per fish, of the potential reduction in angler demand for fishing experiences in Southeast Alaska, and of the potential for anglers to shift to other activities in Southeast Alaska or in other areas.

Comment 72: The EA/RIR/IRFA identifies the lack of socioeconomic information on the charter fishery as a source of concern to the Council. If the Council lacks the socioeconomic information to adequately evaluate comparative loss scenarios, it does not have a valid problem statement, by definition. Commercial quota share values have not been reduced, contrary to the problem statement, and there has been no resultant economic hardship to the commercial sector. The analysis fails to use readily available information, including information on quota share prices, to address this issue.

Response: Although the Council and Secretary are always striving to obtain more information to assist in determinations, the Council had sufficient information to develop a problem statement. Furthermore, the analysis developed for this action, based on the best available information, provided the Council and Secretary with sufficient information to take action. See response to Comment 73 regarding trends in commercial quota share values.

Comment 73: Restrict the charter sector because their overages are reducing the commercial sector's allowance and devaluing purchased IFQs.

Response: NMFS examined a time series of the value of transferred quota share units from before the charter fishery began exceeding the GHL to the present and there was no evidence of a cause and effect relationship between harvest overages and the value of quota shares. The only trend these data demonstrated was an overall increase in the value of shares transferred from 2000 through 2007. Many factors contribute to valuation of quota shares at any particular time including cold storage holdings, timing within the fishing season, pre-season market prices, availability of lower interest loans, seller motivation, and whether the IFQ pounds are transferred with the quota share.

Comment 74: Commercial fishermen receive more money as supply declines. This is not the case for charter operators.

Response: NMFS agrees that market-driven prices paid to commercial halibut fishermen for halibut can

increase when supply becomes limited and market demand is high. This can offset quantity-driven revenue losses. It is unlikely that commercial fishermen will obtain higher prices for halibut as a result of this rule because the Area 2C commercial halibut fishery contributes only modestly to the overall coastwide halibut production.

The guided sport charter vessel industry is selling a fishing experience, one part of which is the possibility of catching halibut. NMFS agrees that a one-fish bag limit that reduces the amount of halibut an angler may catch and retain could reduce the price that charter operators can charge for their service. The actual impact on price is unclear and will depend, for example, on the ways that charter operations modify their services to adapt to the new limit.

Comment 75: The analysis incorrectly concludes that ''increases in regional expenditures associated with increases in charter-based sport fishing are likely to be offset by decreases in regional expenditures associated with commercial fishing.''

Response: This commenter refers to a statement in a paragraph in the analysis discussing net national benefits under Alternative 1. The analysis notes that the principal source of benefits from the charter fishery is the benefits to clients, because the competitive nature of the charter fishery is likely to drive profits close to zero. The author notes that it is unlikely that changes in regional expenditures will result in changes in net national benefits, in part because increased charter-based regional expenditures are likely to be offset by decreases in regional expenditures associated with commercial fishing. This is clearly advanced as one reason not to expect increased national benefits, in a cost-benefit analysis sense, from an expanding charter fishery. The author is using ''expenditures'' here as a proxy for sectoral activity and sectoral profits and rents—which he has already indicated are likely to be small. The author indicates that an offset is likely, not certain. The author clearly did not intend to assert a dollar for dollar offset. The language in the analysis has been modified to insert the words, ''at least partially'' before the word ''offset'' to clarify this.

Comment 76: Table 56 of the EA/RIR/IRFA assumes an inappropriate constant rate of growth in charter sector harvest when the actual data indicate that charter rates decreased in both 2006 and 2007. The analysis is inadequate, biased, devoid of data, and uses arbitrary assumptions, and speculative data and scenarios. The analysis depends on interviews with a small number of key informants instead of on a survey of 696 potentially affected charter vessel operators. NMFS has been remiss in not collecting, presenting, and evaluating the best available data.

Response: Table 56 has been revised in Appendix IV (Table A4–2) to assume a growth rate for the charter sector harvest of 5.7 percent. This is the growth rate that was observed from 1995 to 2006. The rate was adjusted down from an earlier estimate rate of 6.8 percent to reflect the lower final participation rate estimate for 2006 based on the Statewide Harvest Survey (SWHS).

Limited information was available for the preparation of this analysis. The analysts however, drew on available data and modified the analysis to reflect newer data as it became available (in particular, adding Appendix IV to update the analysis to take account of the SWHS information for 2006 that became available in the fall of 2007). The analysts consistently sought to ground the analysis in concrete numbers and information. As noted in the response to Comment 70, the results in this table are not meant to provide a forecast of future impacts, but to illustrate possible revenue losses under certain assumptions. The analysis is not biased; analysts sought to identify and qualitatively describe the impacts of the actions on all the parties. The key informant information was not used in place of or as a substitute for phone, mail or personal interview surveys. Key informant information was used to provide factual information and to provide context for information obtained from other sources. NMFS has drawn on the best available information to inform this discussion, including the most recent logbook and statewide fishery survey information available from the ADF&G, a 2005 study of the charter fishery in Sitka conducted by the McDowell Group, an analysis of charter anglers in South Central Alaska prepared by the University of Alaska, and the key informant interviews that were noted.

Conservation

Comment 77: Halibut harvest by the guided sport charter vessel fishery should be managed to stay below the GHL because of concerns about depletion of local stocks and the long term effects on local businesses. Overharvest by the charter sector requires subsistence and local sport anglers to travel farther to catch halibut.

Response: See response to Comment 15 concerning localized depletion. NMFS does not have data to confirm that short term localized depletions of halibut are due to focused harvest activity by one or more sectors.

Comment 78: There is no evidence that the proposed regulations will have any effect on halibut recovery or that the charter fishery has a negative effect on the fishery. NMFS should use the best available science.

Response: Neither the EA/RIR/IRFA nor the proposed rule for this action identify overfished halibut stocks as the problem, or halibut recovery as an objective of this action. The IPHC sets allowable commercial catch limits taking account of the status of the stocks and projections of overall removals by all sectors. The charter fishery is not subject to a harvest quota, but estimated charter harvests are subtracted from the Total CEY to determine the Fishery CEY that forms the basis of the catch limit for the commercial fishery. While the procedures used by the IPHC can lead to harvests in excess of the Total CEY in a year, over time they should constrain harvests to biologically sustainable levels.

Comment 79: The IPHC does not view this as a conservation issue. The IPHC would never allow an overharvest of the Total CEY if there was a conservation issue. It should be very clear that due to the conservative nature of IPHC harvest calculations, overharvest of the Area 2 Total CEY by 60 to 85 percent is possible without resulting in a conservation issue. The proposed rule deals with a pure allocation issue and does not present any resource conservation questions.

Response: NMFS agrees. The healthy status of the halibut stock is evidence that IPHC policies are conservative and successful.

Comment 80: Hunters and fishermen have strong conservation values and are willing to pay for conservation initiatives. Increasing restrictions will discourage people from participating in these activities and will undermine their support for conservation causes.

Response: NMFS believes that this comment refers to recreational hunters and fishermen who have been, and continue to be, an important source of funding and support for conservation programs. As user numbers increase, regulatory regimes governing sport, personal use, and subsistence harvests of fish and game have become much more restrictive and complex. Many programs, such as those that issue limited numbers of permits through lotteries, are much more restrictive than this action. However, hunters and fishermen have continued to be supportive of conservation. NMFS does

not believe that this action will appreciably reduce that support.

Comment 81: There is a conservation issue. The Area 2C stock is overfished and fishing needs to be limited to an extent that ensures the long term sustainability of the stock.

Response: NMFS disagrees. The best available evidence indicates that the Area 2C stock is not overfished and the IPHC has not made that determination. Overages of the GHL are accounted for in the methods the IPHC uses to set the annual commercial catch limit to ensure that the halibut stock is not overfished. NMFS agrees that fishing limits need to be adhered to, in order to maintain the long term health of the halibut stock, and has therefore proposed this rule to reduce the charter fleet harvest to the GHL.

Comment 82: Unconstrained growth of the charter industry threatens the health of the fishery. In any one year, CEY may be overharvested if the projected charter harvest is higher than the assumed GHL level. These overages result in adjustments to the CEY and commercial catch limit the following year. Thus the issue poses a potential conservation concern, as well as a reallocation of allowable harvest.

Response: NMFS agrees that if the guided charter fishery grows in any single year, halibut removals will exceed planned IPHC removals in the short run and the actual harvest rate may be greater than the rate on which the CEY for a year is based. However, in the medium and long term, the IPHC will adjust its harvest allowances for the commercial setline fishery to take account of changes in guided charter harvests. While this process will take place gradually over time, NMFS does not expect it to seriously affect the health of the halibut stock, unless the guided charter fishery were to grow at an unexpectedly high rate. Halibut are a long-lived species and the health of the stock depends less on removals in any single year (the short run) than it does on removals over a longer multiple-year period. The IPHC has also adopted conservative harvest policies to protect against resource damage. Furthermore, the environmental analysis prepared for this rule did not find that failure to limit the guided sport charter vessel halibut harvest to the GHL would cause significant environmental impacts on the resource.

Comment 83: We disagree with the statement in the Executive Summary of the EA/RIR/IRFA that states, ''none of the alternatives would affect the health of the halibut stock since the IPHC sets limits on total halibut removals.'' The IPHC does consider all removals, but if one sector continually over-harvests the amount the IPHC uses for the calculations when setting catch limits, damage to the resource occurs. The charter sector's harvest in excess of the GHL is one of the contributing factors to the biomass decline in Area 2C. The IPHC appropriately uses the associated GHL for the charter sector as determined by the Total CEY.

Response: NMFS agrees that the charter fishery has exceeded the GHL for several years and that is one of the primary reasons for taking this action. As stated in the response to Comment 81, the IPHC has not determined that the Area 2C stock is overfished (see also response to Comment 82).

Comment 84: Both the commercial and charter sectors are facing large cuts. These are necessary for the long term sustainability of the resource. Both sectors must reduce harvests and share in the conservation of the resource.

Response: The reduction in the 2008 Area 2C CEY will be shared by the commercial fishery, through the reduction in the Fishery CEY, and by the guided sport fishery, through the reduction of the GHL from 1.432 million lb to 0.931 million lb and the implementation of a one-fish daily limit. This reduction in the GHL is not a part of this action, but is a consequence of the final rule adopting the stair-stepped GHL that was promulgated on August 8, 2003 (68 FR 47256). Unguided angler harvests and subsistence harvests are not restricted; however, these have been relatively minor components of the overall harvest to date, accounting for an average of 11 percent of the harvest between them. Miscellaneous other uses have accounted for about 6 percent.

Coastwide Model and IPHC Issues

Comment 85: The coastwide model represents the best available scientific information and thus should be used for setting the CEY. It is not appropriate to use the coastwide model in some areas and the closed area model in others.

Response: NMFS agrees that the coastwide assessment is considered the best available science to estimate the entire biomass of the stock of Pacific halibut and that using this total biomass to estimate the Total CEY is the best approach available at this time. The IPHC adopted the coastwide assessment in 2008 after rigorous external review to evaluate the technical merit; this approach is used to estimate biomass in all IPHC management areas. The closed area model is no longer used by IPHC.

Comment 86: The GHL triggers were based on the 1999–2000 average Total CEY, which was calculated using the Closed Area assessment model. If we continued to use the Closed Area model, the Area 2C Total CEY would be 9.8 million pounds, well above the first stair step for the GHL. Careful review of the 2003 final rule for the GHL shows that there is no mention of which Total CEY the GHL must be based upon. Because both have been published by the IPHC, the Secretary has the discretion to choose which Total CEY to use. The GHL was established using the Closed Area model and should continue to be based on that model.

Response: The IPHC adopted the coastwide assessment in 2008 after rigorous external review to evaluate its technical merit. This approach is used to estimate biomass in all IPHC management areas. This assessment was used to make the IPHC's recommendations for the CEY that were approved by the Secretary.

The final rule establishing the GHLs for the halibut charter fishery in 2003 acknowledged that the Total CEY used to stair step the GHLs is ''the total target biomass that may be removed each year. The Commission sets the CEY based on the best available information and the professional judgment of the IPHC. As such, it may reflect uncertainty or changes in the stock assessment modeling'' (68 FR 47259, August 8, 2003). Thus, the 2003 GHL final rule is correctly silent on setting any requirement for how the CEYs should be determined, other than stating that it is up to the IPHC to use the best available information and its professional judgment.

NMFS continues to support the IPHC's decision to adopt the coastwide assessment as the best available science. Further, the resultant 2008 Total CEY and downward adjustment of GHL in Area 2C is based on the best available science and is consistent with the intent of the Council and NMFS when the GHLs were established in 2003.

Unintended Effects of the Rule

Comment 87: The proposed action will shift charter fishing effort to other groundfish species.

Response: NMFS acknowledges that this action may cause some charter businesses to modify their operations to provide alternative or supplementary fishing experiences for their clients. The environmental assessment reviewed the potential impacts on other species, such as salmon or rockfish, and found that they would not have significant impacts on those resources. These stocks are managed by the State of Alaska and NMFS using biological benchmarks that prompt agency response to constrain harvest to maintain sustainable stocks. Thus, an increase in sport harvest of

these species may lead to increased allocation problems between sport and commercial sectors. However, any such allocation problem would occur within the confines of the management measures established by Federal and State governments to maintain sustainable stocks.

Comment 88: The proposed limits on the charter fishery will result in increased catch and release or bycatch mortality as charter anglers try to catch the largest fish possible.

Response: NMFS acknowledges that this action may cause increased catch and release or bycatch mortality, but NMFS believes that the impact on the resource will not be significant. Appendix II of the EA/RIR/FRFA discusses the choice of a hook and release mortality rate for the Area 2C charter halibut fishery. It concludes that the overall estimate of hooking mortality is 4.8 percent. The environmental assessment took account of release mortality in its analysis of the various alternatives and did find that the preferred alternative (Alternative 2, Option 4) had the highest catch and release mortality of the alternatives. However, the analysis concluded that none of the alternatives would increase release mortality substantially above the status quo and did not find that any of the alternatives would have a significant impact on the halibut resource.

Comment 89: A one-fish annual limit will not impede an angler's ability to catch and release fish and will not keep anglers from fishing in Area 2C any more than the status quo. With a one-fish daily limit, anglers can keep fish of any size and will only lose the opportunity to keep a second fish smaller than 32 inches in length or about 11 pounds.

Response: NMFS acknowledges the comment.

Consistency With Other Laws

Comment 90: The intent of Executive Order 12962 is to provide guidance to NMFS to improve the potential productivity of aquatic resources for recreational fisheries. The proposed rule improves productivity for commercial fisheries.

Response: This rule does not violate Executive Order (E.O.) 12962. To the extent permitted by law, E.O. 12962 directs Federal agencies to improve the quality, function, sustainability, productivity, and distribution of aquatic resources for increased recreational fishing opportunities. This rule is promulgated to meet the management goals set forth in the Halibut Act under the Convention and implemented by the Secretary. These management goals include setting annual limits on the amount of halibut that may be removed without compromising the long-term sustainability of the halibut stock, including the achievement of maximum sustainable yield for halibut fisheries.

Comment 91: This rule does not comply with the Halibut Act which states that allocations shall be fair and equitable to all such fishermen. The fast down portion of the SUFD gives an advantage to the commercial sector that the charter sector does not receive.

Response: This final rule was not designed to change either the 2008 GHL published in the **Federal Register** (73 FR 6709, February 5, 2008) or the GHL regulations at 50 CFR 300.65. The GHL steps down only when the CEY established by the IPHC falls below benchmark levels in the GHL regulation. To change the GHL regulations would require separate rulemaking.

The ''slow-up/fast-down'' (SUFD) component of the IPHC's management regime is not necessarily advantageous to the commercial sector. It is designed to ameliorate the impacts of large changes in biomass. If the CEY is bigger than the previous year's catch limit, then the IPHC staff's recommended catch limit is only allowed to increase by 33 percent of the difference. If the CEY is less than the previous year's catch limit, the recommended catch limit reduction is limited to 50 percent of the difference. The commercial catch limit increases and decreases with changes in biomass, even with a static GHL, whereas changes to the charter sector's GHL occur in a stepwise manner only when specific CEY levels are established by the IPHC (see § 300.65(i)(1)).

NMFS believes the commercial longline fishery and guided sport charter vessel fishery situations are not comparable. The longline fishery is controlled by a hard cap that is extended, through the IFQ system, to individual longline fishermen. The hard cap is modified through time to reflect changes in the fishery biomass and the harvest by other sectors. The hard cap modification takes place gradually over a series of years. The guided sport charter fishery has not been subject to a hard cap, and this action will not impose a hard cap on the output of the guided sport fishery as a whole, or on individual businesses within it.

Miscellaneous

Comment 92: Halibut is a public resource and the public should not be denied the opportunity to fish for it.

Response: This final rule does not deny the public the opportunity to harvest halibut. Although this rule is designed to reduce the poundage of halibut harvested in Area 2C by the guided sport charter vessel fishery, it maintains the opportunity of charter vessel anglers to harvest one halibut per day, and has no effect on recreational anglers not fishing from a charter vessel. In addition, this final rule supports the management goals set forth in the Halibut Act under the Convention and the allocation objectives set forth by the Council and approved by the Secretary of Commerce. The management goals include setting annual limits on the amount of halibut that may be removed without compromising the long-term sustainability of the halibut stock, including the achievement of maximum sustainable yield for all halibut fisheries (commercial, subsistence, and sport). The allocation objectives are intended to limit the harvest of halibut in the charter fishery to the annual GHL.

Comment 93: There is no sunset provision for the rule. This goes against the Council motion to restrict charter harvest for 2008 only until the charter moratorium goes into place in 2009. There was a misunderstanding during the Council process that this regulation would continue indefinitely. Additional measures like the ''Permanent Solution,'' ''Compensated Reallocation,'' and ''Initial Allocation'' will also go into effect before 2009. The rule needs to go through the whole Council process again because of this misunderstanding on the duration of the measures. The public process requires clear and unambiguous language.

Response: NMFS disagrees that this final rule was intended by the Council to be effective only for 2008 and that the Council is required to reconsider this action to clarify this point. Although NMFS is developing a proposed rule to implement a limited entry program for charter vessel businesses, fishing under the proposed limited entry program would not occur before 2010 pending the rule's approval by the Secretary of Commerce. While the Council is considering other management programs for the charter vessel fishery for halibut, the schedule for Council action on these programs and the subsequent rulemaking process would not allow their implementation before 2010. NMFS intends to encourage Council consideration of changes to GHL measures in the event the annual GHL is adjusted upward or downward from the 2008 level with changes of Total CEY. Any such changes would require separate Council analysis and consideration, as well as subsequent rulemaking. This was the process intended by the Council when it voted

in June 2007 to adopt the actions implemented under this final rule.

Comment 94: Adjacent management areas will have more favorable management regimes in place that will further negatively affect Area 2C charter fisheries and the Council may need to review this issue in a manner that allows for adjustments in time for the 2009 fishery if biomass abundance supports an increase in the CEY.

Response: NMFS agrees. See response to Comment 93.

Comment 95: Much of the fish caught by sport anglers is wasted and the focus is on catching trophy fish for bragging rights, not the meat. Many charter clients take the fish home to give away or sell to pay for their trip.

Response: The purpose of this final rule is to reduce harvest of halibut in the Area 2C charter vessel fishery to the GHL. It is not intended to manage what anglers choose to do with legally harvested halibut; including choices of keeping or giving away harvested fish. It is illegal to commercially sell recreationally harvested halibut. Violators are subject to civil penalties and prosecution.

Comment 96: The six-line limit puts Area 2C at a disadvantage to other areas that can fish more lines. Larger boats that can accommodate more than six lines are safer and more cost effective to operate. These regulations put an undue hardship on Area 2C charter operations.

Response: NMFS recognizes that different restrictions for the charter vessel sector in different IPHC regulatory areas may influence where potential clients choose to fish. Line limits have been in place under State regulations since 1997. This regulation puts that line limit in Federal regulations.

Comment 97: The Sitka area Local Area Management Plan (LAMP) forces charter operators to fish beyond protected waters so fishing is more weather dependent. A one-fish daily limit combined with weather considerations could limit clients' opportunities to such an extent that a trip to Sitka would not be worthwhile.

Response: The EA/RIR/FRFA for this final rule acknowledges the possibility that consumer demand for charter vessel trips in Area 2C to fish for halibut could be impacted by the one-fish daily bag limit (see sections 2.6.3.4 and 2.7.3.4). The analysis also notes that Sitka may be less likely to experience this reduction in demand because it has greater potential for multi-species charter trips compared to Inside Passage communities such as Juneau or Ketchikan.

Comment 98: Two very large year classes will recruit into the fishery beginning in 2010, therefore this rule is unnecessary.

Response: The current stock assessment does suggest that two extremely large year classes—1999 and 2000—could grow to exploitable size over the next few years. These year classes appear to be larger than those in 1987 and 1988 that supported past higher harvests. It is important to note that size-at-age is smaller than 20 years ago. This has two important ramifications. First it means that the 1999 and 2000 year classes are only just beginning to reach the exploitable size range and therefore their true contribution to the population is still quite uncertain. Second, it means that for a given number of halibut, biomass will be lower than in the past. By assuming the size-at-age relationship remains the same as this year, then the projections for the exploitable biomass and spawning biomass are very optimistic and current declines are apt to reverse. However, the harvest rate should remain around 20 percent of the exploitable biomass so that when the biomass increases, higher Total CEY and commercial catch limits will follow. If the Total CEY is increased, current GHL regulations would allow for an increase of the GHL up to the maximum level of 1.432 million lb.

Comment 99: There is a commercial bias in the IPHC and North Pacific Fisheries Management Council. Since the 1980s the IPHC and Council have supported explosive growth in commercial harvest while stifling the charter sector. The charter vessel owners do not have representation in these bodies, therefore all decisions tend to favor the commercial sector.

Response: The IPHC and the Council are the bodies established by treaty and Congress and given the authority to make decisions and recommendations about the management of the halibut fisheries. They have made their decisions through transparent and public processes, and in a manner that is consistent with the requirements of the relevant statutes.

This final rule is an outgrowth of the 2003 GHL rule for the charter vessel fishery; annual changes to the GHL are linked directly to the Total CEY amount determined annually by the IPHC. The Council has the authority to consider and recommend management policy to address allocation issues among different domestic sector users of halibut off Alaska, including the commercial and charter vessel fisheries. In 1998 the Council initiated a public process to identify GHL management options and formed a GHL committee comprised of numerous representatives from the charter industry. This committee has evolved over time to develop longer term solutions for Council consideration that provide harvest stability between these two sectors. The Council has used the recommendations from this committee to formulate its GHL management options. Furthermore, the Secretary of Commerce reviews all Council policy recommendations and actions for consistency with the Halibut Act and Convention, as well as with other applicable law. NMFS does not believe that this final rule inappropriately favors the commercial fishing sector.

Comment 100: An annual limit is not needed because sport anglers are self-limiting. As fish stocks decline, fewer anglers go fishing and harvest decreases.

Response: This final rule does not establish an annual catch limit and instead relies primarily on a one-fish daily bag limit to reduce charter vessel harvest to the GHL. Harvest in the Area 2C charter vessel fishery has exceeded the GHL every year since 2004 and harvest amounts have consistently increased, although the rate of increase has varied from year to year. Given this trend and the current level of harvest, NMFS does not believe the charter vessel harvest of halibut in Area 2C would decrease to the GHL level without the limitations established in this final rule.

Comment 101: Clarify the definition of a charter vessel. The definition as written creates a loophole where a hired vessel may have a professional guide onboard who is not the ''operator'' of the vessel.

Response: NMFS agrees that the current definition of ''charter vessel'' is problematic. NMFS intends to address this problem under separate rulemaking as explained under Changes from the Proposed Rule, below.

Comment 102: Commercial setline fishermen provide consumers their only access to halibut unless they can afford an expensive trip to Alaska to catch their own.

Response: NMFS acknowledges the comment.

Comment 103: Halibut are resilient and survive well when caught and released properly. Support the one-fish bag limit and encourage catch and release fishing. Catch and release policies are in place elsewhere and do not limit tourist demand for fishing.

Response: NMFS acknowledges the comment. NMFS notes that Appendix II of the EA/RIR/IRFA reviews the available scientific information on hook and release mortality rates, and

recommended the use of a 5 percent rate for the analysis of regulatory restrictions on the Area 2C charter vessel fishery.

Comment 104: Charter operators don't have to pay anything for the fish they harvest whereas the commercial sector must purchase IFQs.

Response: NMFS acknowledges the comment.

Comment 105: Growth of charter industry is tapering and charter vessel catch is declining.

Response: Final harvest information from 2007, a year subject to new management measures, is not yet available. NMFS would expect that the rate of growth in the Area 2C halibut harvest by charter vessels to slow with increased harvest limitations, however, preliminary data suggests that the 2007 harvest still exceeded the 2007 GHL. Given the reduced GHL in 2008, harvest must be further limited by this final rule so that GHL is not again exceeded.

The data in the EA/RIR/FRFA supporting the final rule cover the period through 2006. The data available in the analysis show positive growth in the number of clients in every year but one since 2000, and accelerating growth in the number of clients in every year since 2002. The number of active vessels showed some decline from 2000 to 2002, but has increased in each year since then. The total number of trips by active vessels decreased from 2000 to 2002, but has increased in each year since then. Charter harvests of halibut have shown positive growth in every year from 2000 to 2006. In 2007 there were 403 active licensed guided charter businesses in Area 2C compared to 381 in 2005 and 395 in 2006. Likewise in 2007 there were 724 active vessels in Area 2C compared to 654 in 2005 and 680 in 2006, indicating continued growth in the industry.

Comment 106: More regulation of the charter fleet is not going to have an appreciable positive effect on the sport fishing in our area. Commercial fishing is what is hurting the stocks.

Response: The halibut stock is conservatively managed under the policies and catch limitations developed annually by the IPHC (see response to Comment 81). The objective of this final rule is to reduce the charter vessel harvest of halibut to the established GHL level while a longer term solution toward sector stability and resource allocation is developed and implemented.

Comment 107: An annual limit is draconian and would devastate the industry. If an annual limit is necessary, go with the six-fish limit.

Response: The final rule does not implement an annual harvest limit. NMFS acknowledges that the one-fish daily bag limit implemented under this final rule also will impose costs on the charter vessel sector (see responses to Comments 33, 62, 66, and 69 addressing impacts of the one-fish bag limit). However, these costs are necessary to maintain harvest within the GHL.

Changes From the Proposed Rule

The final rule is revised from the proposed rule (72 FR 74257) in that the option that was proposed to address the circumstance of a GHL reduction (Option B) was chosen because the total CEY recommended by the IPHC for Area 2C in 2008 required a reduction in the GHL for Area 2C in 2008. The selection of Option B required revisions to recordkeeping and recording requirements to ensure that sufficient information is collected to manage and enforce harvest limitations in Area 2C.

The following recordkeeping and recording information is required to enforce this final rule: charter vessel business owner license number, charter vessel guide license number, date, regulatory area fished, angler sport fishing license number and printed name, number of halibut retained, charter vessel guide signature, and charter vessel angler signature. Additionally, for charter vessels fishing for halibut in both Areas 2C and 3A in a single trip, separate logbook data sheets must be maintained for each area if halibut are caught and retained.

Three definitions are revised (charter vessel angler, charter vessel fishing trip, and charter vessel guide) and four definitions are added (charter vessel operator, charter vessel services, crew member, and sport fishing guide services) to clarify limitations and recordkeeping and reporting requirements. These revised and added definitions are derived from State of Alaska definitions used to define guided sport fishing activities and are intended to clarify who may and may not catch and retain halibut and who is responsible for recordkeeping and reporting requirements in § 300.65(d).

The definition of charter vessel is not revised by this rule. However, the definition of charter vessel is currently proposed for revision in the proposed rule to revise the subsistence halibut program (April 14, 2008; 73 FR 20008). Currently, the definition of charter vessel is: ''Charter vessel means a vessel used for hire in sport fishing for halibut, but not including a vessel without a hired operator.'' The new definition of charter vessel in the subsistence halibut program proposed rule is: ''Charter vessel means a vessel registered as a sport fishing guide vessel with the Alaska Department of Fish and Game.'' Due to comments received on the proposed rule to implement GHL management measures in Area 2C , and further consideration of the interactions between charter fishing and subsistence fishing, NMFS believes that the charter vessel definition proposed in the subsistence rule likely will need further refinement, including reference to charter vessel services and the specific regulations to which this definition would apply (*i.e.*, § 300.65(d) and (e)). Persons interested in commenting on the definition of charter vessel are referred to that proposed rule for more details.

The following requirements from the proposed rule for this action to implement GHL management measures in Area 2C were removed because an annual catch limit is not implemented in this final rule and these requirements were determined to be no longer necessary:

Angler license record and retention. NMFS has removed from the final rule the proposed requirements that anglers record the number of halibut caught and retained in Area 2C on the back of their licenses, and that they retain their licenses for three years.

Year-to-date halibut caught. To enforce an annual catch limit, NMFS proposed requiring that guides record in the logbook the number of halibut caught year-to-date as recorded on the back of the angler's license. This requirement no longer is needed.

Youth angler information. NMFS proposed requiring that youth names and birth dates be recorded in the logbook to better track and enforce an annual catch limit. Because no annual catch limit is being implemented, the date of birth for youth anglers will not be required in Federal regulations; however, the State of Alaska will still require that this information be recorded.

In addition, NMFS removes existing requirements for the retention of halibut carcasses. To help enforce the two-fish daily bag limit with size restrictions that went into place in Area 2C in 2007, NMFS prohibited mutilating or otherwise disfiguring a halibut carcass such that the head-on length could not be determined. This requirement to retain carcasses is no longer necessary with a one-fish daily bag limit and is removed from regulations at § 300.66(m). The IPHC adopted new standards in 2008 that were published in the annual management measures on March 7, 2008 (73 FR 12280). The new IPHC requirement for Alaska states that no person shall possess onboard a fishing vessel, including charter vessels

and pleasure craft, halibut that have been filleted, mutilated, or otherwise disfigured in any manner except that each halibut may be cut into no more than two ventral and two dorsal pieces, and two cheeks, all with skin on. This change allows enforcement officers to count the number of fish in possession by an angler.

The organization of § 300.65(d) is changed from the proposed rule to clarify the requirements for Areas 2C and 3A. In addition, numerous technical changes were made to clarify the regulatory intent and to ensure that consistent terminology is used. Finally a new prohibition (p) was added to § 300.66 to ensure that charter vessel operators, guides, anglers, and crew members do not refuse to present any identification card, U.S. Coast Guard operator's license, permit, license, or Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook upon the request of an authorized officer.

Classification

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866. This final rule complies with the Halibut Act and the Secretary's authority to implement allocation measures for the management of the halibut fishery.

A Final Regulatory Flexibility Analysis (FRFA) was prepared, as required by section 604 of the Regulatory Flexibility Act. The FRFA describes the impact of this rule on directly regulated small entities and compares that impact to the impacts of other alternatives that were considered. A copy of this analysis is available from NMFS (see **ADDRESSES**). A description of this action, an explanation for why it is being considered, the legal basis for this action, and changes made to the rule in response to public comments are discussed above.

In 2005, 381 charter businesses operated 654 charter vessels in Area 2C; in 2007, 403 businesses operated 724 vessels. All of these operations are assumed to be small entities, with annual gross revenues of less than the limit of $6.5 million dollars for charter vessels. The largest companies involved in the fishery, lodges or resorts that offer accommodations as well as an assortment of visitor activities, may be large entities under the Small Business Administration size standard. Key informant interviews have indicated that the largest of these companies may gross more than $6.5 million per year, but also that it was possible for all the entities involved in the charter vessel halibut of harvest to have grossed less than this amount. The number of small entities is likely to be overestimated because of the limited information on vessel ownership and operator revenues. However, it is likely that nearly all entities qualify as small businesses.

The proposed regulation was published in the **Federal Register** on December 31, 2007 (72 FR 74257). An Initial Regulatory Flexibility Analysis (IRFA) was prepared, and described in the classifications section of the preamble to the proposed rule. The public comment period ended on January 30, 2008. NMFS received 107 unique comments in 273 letters, faxes, and e-mails on the proposed rule and 21 comments that pertain directly to the IRFA and small entities regulated by this action. Summaries of the comments, and NMFS' responses, may be found in the preamble to this action.

NMFS examined two alternatives for this action: the no-action or status quo alternative, and the action alternative. Alternative 1, the status quo, would retain the two-fish bag limit with one of the two fish less than or equal to 32 inches (83.1 cm) in length, without changes. Alternative 2, the action alternative, had 13 options for different combinations of management measures to restrict the charter halibut harvest to the Area 2C GHL. The options included limiting vessels to one trip per day; restricting harvest by guide and crew while clients are onboard; limiting the number of lines to six per vessel, not to exceed the number of paying clients onboard; daily bag limits of one or two fish (including sub-options for size limit slots and specific months when the bag limit would apply); and annual harvest limits of four, five, or six fish per charter angler.

Two preferred options (Option A and Option B) were selected by considering different combinations of management measures that would minimize the impacts on small entities while still meeting the management objective of restricting the charter vessel harvest of halibut to the GHL. Option A, which would have been implemented if the 2008 GHL had been greater than 1.217 million lb, included the following measures in addition to the existing two halibut daily limit with size restrictions: (1) A prohibition on halibut harvest by charter vessel guides, operators, and crew while clients were onboard; (2) a limit on the number of fishing lines that may be used on a charter vessel of six or the number of charter vessel anglers onboard, whichever is less; and (3) an annual catch limit of four halibut per charter vessel angler. Option B is being implemented because the 2008 GHL fell below 1.217 million lb. It includes the same prohibition on guide and crew harvest and line limits as Option A. However, Option B includes a one-fish daily bag limit rather than the two-fish daily limit with size restrictions and the proposed four-fish annual harvest limit in Option A.

Other options would have had a smaller impact on the directly regulated guided charter operations because they would have reduced guided charter harvests less and had smaller impacts on demands for guided charter services. However, Option B was the only alternative that would have met the objectives of this action to reduce the guided charter harvest to the guideline harvest level. The guideline harvest level in 2008 is 0.931 million lb. The estimates of possible production under Option B ranged from 82 percent to 117 percent of the GHL. No other alternative or option had a range of estimated harvest levels that included the 2008 GHL.

Collection of Information

This rule includes a collection of information requirement subject to the Paperwork Reduction Act (PRA) and that has been approved by OMB under Control Number 0648–0575. The public reporting burden for charter vessel guide respondents to fill out and submit logbook data sheets is estimated to average four minutes per response. The public reporting burden for charter vessel anglers to sign the logbook is estimated to be one minute per response. These estimates include the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The total public reporting burden for this collection is estimated at 3,134 hours. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *David_Rostker@omb.eop.gov*, or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule, or group of related rules for which an agency is

required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, NMFS Alaska Region has developed an Internet site that provides easy access to details of this final rule, including links to the final rule, and frequently asked questions regarding Program. The Small Entity Compliance Guide for the Program is available on the Internet at *http://www.fakr.noaa.gov*. Copies of this final rule are available upon request from the NMFS, Alaska Regional Office (see **ADDRESSES**).

Executive Order 12962

This action is consistent with E.O. 12962 which directs Federal agencies to improve the quantity, function, sustainable productivity, and distribution of aquatic resources for increased recreational fishing opportunities ''to the extent permitted by law and where practicable.'' This E.O. does not diminish NMFS' responsibility to address allocation issues, nor does it require NMFS or the Council to limit their ability to manage recreational fisheries. E.O. 12962 provides guidance to NMFS to improve the potential productivity of aquatic resources for recreational fisheries. This rule does not diminish that productivity or countermand the intent of E.O. 12962.

Administrative Procedure Act

A June 1, 2008 effective date for this action is necessary to effectuate the Council's intent to limit the charter halibut sector's harvest to the federally mandated GHL, found at 50 CFR 300.65(c). If this action is not in place by the beginning of the peak season for the charter halibut sector (June, July, and August), the intent of the Council will be thwarted as this is time of peak harvest and when the harvest limitations would have its greatest impact. During the ''shoulder seasons,'' i.e., before and after June, July, and August, charter halibut fishing is occurring, but to a lesser extent, and hence the harvest limitations would have a smaller impact. Also, having the harvest limitations effective as of June 1, 2008, would avoid the confusion that could occur to the charter halibut industry and its clients if the rule became effective after the peak season had begun. It is for these reasons that NMFS finds that there is good cause to waive the 30-day delayed effectiveness period under 5 U.S.C. 553(d)(3) to the extent that it would allow for a June 1, 2008, effective date.

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 300

Fisheries, Fishing, Reporting and recordkeeping requirements, Treaties.

Dated: May 21, 2008.

Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, NMFS amends 15 CFR chapter IX, and 50 CFR chapter III as follows:

15 CFR Chapter IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, in the table in paragraph (b) under the entry ''*50 CFR*'', add an entry for ''300.65(d)'' in alphanumeric order to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
* * * * *	
50 CFR	
* * * * *	
300.65(d)	–0575
* * * * *	

50 CFR Chapter III

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 3. The authority citation for 50 CFR part 300, subpart E, continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 4. In § 300.61, add definitions for ''Area 3A'', ''Charter vessel angler'', ''Charter vessel fishing trip'', ''Charter vessel guide'', ''Charter vessel operator'', ''Charter vessel services'', ''Crew member'', and ''Sport fishing guide services'' in alphabetical order to read as follows:

§ 300.61 Definitions.

* * * * *

Area 3A means all waters between Area 2C and a line extending from the most northerly point on Cape Aklek (57°41′15″ N. latitude, 155°35′00″ W. longitude) to Cape Ikolik (57°17′17″ N. latitude, 154°47′18″ W. longitude), then along the Kodiak Island coastline to Cape Trinity (56°44′50″ N. latitude, 154°08′44″ W. longitude), then 140° true.

* * * * *

Charter vessel angler, for purposes of § 300.65(d), means a person, paying or nonpaying, using the services of a charter vessel guide.

Charter vessel fishing trip, for purposes of § 300.65(d), means the time period between the first deployment of fishing gear into the water from a charter vessel after any charter vessel angler in onboard and the offloading of one or more charter vessel anglers or any halibut from the charter vessel.

Charter vessel guide, for purposes of § 300.65(d), means a person who is required to have an annual sport guide license issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services.

Charter vessel operator, for purposes of § 300.65(d), means the person in control of the vessel during a Charter vessel fishing trip.

Charter vessel services, for purposes of § 300.65(d), means the use of a vessel by a charter vessel guide to provide assistance for compensation to a person who is sport fishing from that vessel.

* * * * *

Crew member, for purposes of § 300.65(d), means an assistant, deckhand, or similar person who works directly under the supervision of and on the same vessel as a charter vessel guide.

* * * * *

Sport fishing guide services, for purposes of § 300.65(d), means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by accompanying or directing such person who is sport fishing during any part of a charter vessel fishing trip. Sport fishing guide services does not include services provided by a crew member.

* * * * *

■ 5. In '' 300.65, revise paragraph (d) to read as follows:

§ 300.65 Catch sharing plan and domestic management measures in waters in and off Alaska.

* * * * *

(d) *Charter vessels in Area 2C and Area 3A*—(1) *General requirements*—(i) *Logbook submission.* Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook data sheets must be submitted to the appropriate Alaska Department of Fish and Game office according to the time schedule printed in the instructions at the beginning of the logbook.

(ii) The charter vessel guide is responsible for complying with the reporting requirements of this paragraph (d). The employer of the charter vessel guide is responsible for ensuring that the charter vessel guide complies with the reporting requirements of this paragraph (d).

(2) *Charter vessels in Area 2C*—(i) *Daily bag limit.* The number of halibut caught and retained by each charter vessel angler in Area 2C is limited to no more than one halibut per calendar day.

(ii) *Charter vessel guide and crew restriction.* A charter vessel guide, a charter vessel operator, and any crew member of a charter vessel must not catch and retain halibut during a charter fishing trip.

(iii) *Line limit.* The number of lines used to fish for halibut must not exceed six or the number of charter vessel anglers onboard the charter vessel, whichever is less.

(iv) *Recordkeeping and reporting requirements in Area 2C.* Each charter vessel angler and charter vessel guide onboard a charter vessel in Area 2C must comply with the following recordkeeping and reporting requirements (see paragraphs (d)(2)(iv)(A) and (B) of this section):

(A) *Charter vessel angler signature requirement.* At the end of a charter vessel fishing trip, each charter vessel angler who retains halibut caught in Area 2C must acknowledge that his or her information and the number of halibut retained (kept) are recorded correctly by signing the back of the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook data sheet on the line number that corresponds to the angler's information on the front of the logbook data sheet.

(B) *Charter vessel guide requirements.* For each charter vessel fishing trip in Area 2C, the charter vessel guide onboard the charter vessel is required to record the following information (see paragraphs (d)(2)(iv)(B)(*1*) through (*8*) of this section) in the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook:

(1) Business owner license number. The sport fishing operator business license number issued by the Alaska Department of Fish and Game to the charter vessel guide or the charter vessel guide's employer.

(2) Guide license number. The Alaska Department of Fish and Game sport fishing guide license number held by charter vessel guide who certified the logbook data sheet.

(3) Date. Month and day for each charter vessel fishing trip taken. A separate logbook data sheet is required for each charter vessel fishing trip if two or more trips were taken on the same day. A separate logbook data sheet is required for each calendar day that halibut are caught and retained during a multi-day trip.

(4) Regulatory area fished. Circle the regulatory area (Area 2C or Area 3A) where halibut were caught and retained during each charter vessel fishing trip. If halibut were caught and retained in Area 2C and Area 3A during the same charter vessel fishing trip, then a separate logbook data sheet must be used to record halibut caught and retained for each regulatory area.

(5) Angler sport fishing license number and printed name. Before a charter vessel fishing trip begins, record for each charter vessel angler the Alaska Sport Fishing License number for the current year, resident permanent license number, or disabled veteran license number, and print the name of each paying and nonpaying charter vessel angler onboard that will fish for halibut. Record the name of each youth angler under 16 years of age.

(6) Number of halibut retained. For each charter vessel angler, record the number of halibut caught and retained during the charter vessel fishing trip.

(7) Signature. At the end of a charter vessel fishing trip, acknowledge that the recorded information is correct by signing the logbook data sheet.

(8) Angler signature. The charter vessel guide is responsible for ensuring that anglers comply with the signature requirements at paragraph (d)(2)(iv)(A) of this section.

(3) *Charter vessels in Area 3A.* For each charter vessel fishing trip in Area 3A, the charter vessel guide onboard the charter vessel is required to record the regulatory area (Area 2C or Area 3A) where halibut were caught and kept by circling the appropriate area in the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook. If halibut were caught and retained in Area 2C and Area 3A during the same charter vessel fishing trip, then a separate logbook data sheet must be used to record halibut caught and retained for each regulatory area.

* * * * *

■ 6. In § 300.66, revise paragraph (m) and add paragraphs (n), (o), and (p) to read as follows:

§ 300.66 Prohibitions.

* * * * *

(m) Exceed any of the harvest or gear limitations specified at § 300.65(d).

(n) Fail to comply with the requirements at § 300.65(d).

(o) Fail to submit or submit inaccurate information on any report, license, catch card, application or statement required under § 300.65.

(p) Refuse to present any identification card, U.S. Coast Guard operator's license, permit, license, or Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip logbook upon the request of an authorized officer.

[FR Doc. 08–1301 Filed 5–22–08; 2:39 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106673–8011–02]

RIN 0648–XI14

Fisheries of the Exclusive Economic Zone Off Alaska; Yellowfin Sole by Vessels Participating in the Amendment 80 Limited Access Fishery in Bycatch Limitation Zone 1 of the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in Bycatch Limitation Zone 1 (Zone 1) of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2008 bycatch allowance of red king crab in Zone 1 specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), May 22, 2008, through 2400 hrs, A.l.t., December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 bycatch allowance of red king crab in Zone 1 specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery for the yellowfin sole fishery category in the BSAI is 6,100 animals as established by the 2008 and 2009 final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008).

In accordance with § 679.21(e)(7)(ii), the Administrator, Alaska Region, NMFS, has determined that the 2008 bycatch allowance of red king crab specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery in Zone 1 of the BSAI will be caught. Consequently, NMFS is prohibiting directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in Zone 1 of the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in Zone 1 of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of May 21, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: May 22, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 08–1299 Filed 5–22–08; 3:26 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 103
Wednesday, May 28, 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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AL63

Prevailing Rate Systems; Change in Nonappropriated Fund Federal Wage System Survey Schedule From Fiscal Year to Calendar Year

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management is issuing a proposed rule to change the annual schedule of nonappropriated fund (NAF) Federal Wage System wage surveys from a fiscal year cycle to a calendar year cycle. The purpose of this change is to move certain wage surveys to a different time of year and thus optimize the data collection process for those areas. In addition, this change would more evenly distribute the workload for the agency responsible for conducting NAF surveys.

DATES: We must receive comments on or before June 27, 2008.

ADDRESSES: Send or deliver comments to Charles D. Grimes III, Deputy Associate Director for Performance and Pay Systems, Strategic Human Resources Policy Division, U.S. Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415–8200; e-mail *pay-performance-policy@opm.gov;* or FAX: (202) 606–4264.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov;* or FAX: (202) 606–4264.

SUPPLEMENTARY INFORMATION: As required by law, Federal Wage System (FWS) wage surveys must be conducted on a 2-year cycle at annual intervals in each appropriated and nonappropriated fund (NAF) FWS wage area. A full-scale wage survey is conducted in the first year of the 2-year cycle and an interim (wage-change) survey is conducted between each two consecutive full-scale wage surveys. The U.S. Office of Personnel Management (OPM) is responsible for prescribing the beginning month of appropriated and NAF wage surveys and the fiscal year during which full-scale wage surveys are conducted.

This proposed rule would change the nationwide schedule of NAF regular wage surveys at appendix B to subpart B of part 532 of title 5, Code of Federal Regulations, from a fiscal year cycle to a calendar year cycle. Since a Federal fiscal year straddles two calendar years (i.e., October to September) and only some NAF wage surveys are conducted in the first part of the fiscal year, not all NAF wage areas would be affected by this change. In addition, the lead agency does not need to change the timing of all NAF surveys because many are already conducted at the optimum time, considering agency resources and timing of private sector pay adjustments. Therefore, about one-third of the NAF wage areas would experience no change in the timing of their wage surveys. In the remaining NAF wage areas, the changes in survey schedule would vary from wage area to wage area. In some of the remaining NAF wage areas the wage surveys would be conducted earlier in the year and in others the wage surveys would be conducted later in the year. We note that the adjustment period for this change would be lengthy and some wage areas would require multiple surveys to comply with the 2-year cycle law. However, changing to a calendar year cycle would significantly simplify the scheduling of NAF surveys.

The Federal Prevailing Rate Advisory Committee, the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, recommended by consensus that we adopt this change. This change would be effective in January 2009.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Linda M. Springer,

Director.

Accordingly, the U.S. Office of Personnel Management is proposing to amend 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

2. In appendix B to subpart B, revise paragraph (3) and the table to read as follows:

Appendix B to Subpart B of Part 532—Nationwide Schedule of Nonappropriated Fund Regular Wage Surveys

* * * * *

(3) Whether full-scale surveys will be conducted in odd or even numbered calendar years.

State	Wage area	Beginning month of survey	Calendar year of full-scale survey odd or even
Alabama	Calhoun	April	Even.
	Madison	April	Even.
	Montgomery	April	Odd.
Alaska	Anchorage	June	Even.
Arizona	Maricopa	October	Even.
	Pima	October	Even.

State	Wage area	Beginning month of survey	Calendar year of full-scale survey odd or even
	Yuma	October	Even.
Arkansas	Pulaski	April	Odd.
California	Kern	September	Odd.
	Los Angeles	September	Even.
	Monterey	September	Odd.
	Orange	September	Even.
	Riverside	September	Even.
	Sacramento	February	Odd.
	San Bernardino	September	Even.
	San Diego	September	Odd.
	San Joaquin	February	Odd.
	Santa Barbara	September	Even.
	Santa Clara	September	Odd.
	Solano	September	Odd.
	Ventura	September	Even.
Colorado	Arapahoe-Denver	July	Even.
	El Paso	July	Even.
Connecticut	New London	July	Even.
Delaware	Kent	August	Odd.
District of Columbia	Washington, DC	August	Even.
Florida	Bay	January	Even.
	Brevard	January	Odd.
	Miami-Dade	January	Odd.
	Duval	January	Odd.
	Escambia	January	Even.
	Hillsborough	January	Odd.
	Monroe	January	Odd.
	Okaloosa	January	Even.
	Orange	January	Even.
Georgia	Chatham	March	Odd.
	Clayton-Cobb-Fulton	June	Odd.
	Columbus	June	Odd.
	Dougherty	March	Odd.
	Houston	April	Odd.
	Lowndes	March	Odd.
	Richmond	April	Odd.
Guam	Guam	September	Even.
Hawaii	Honolulu	May	Even.
Idaho	Ada-Elmore	July	Odd.
Illinois	Lake	April	Even.
	St. Clair	April	Even.
Kansas	Leavenworth-Jackson-Johnson	April	Even.
	Sedgwick	April	Odd.
Kentucky	Christian-Montgomery	February	Even.
	Hardin-Jefferson	March	Even.
Louisiana	Bossier-Caddo	March	Odd.
	Orleans	June	Odd.
	Rapides	March	Odd.
Maine	Cumberland	October	Odd.
	York	October	Odd.
Maryland	Anne Arundel	August	Even.
	Charles-St. Mary's	August	Even.
	Frederick	August	Even.
	Harford	May	Even.
	Montgomery-Prince George's	August	Even.
Massachusetts	Hampden	October	Odd.
	Middlesex	October	Odd.
Michigan	Macomb	May	Odd.
Minnesota	Hennepin	July	Odd.
Mississippi	Harrison	March	Even.
	Lauderdale	March	Odd.
	Lowndes	March	Odd.
Montana	Cascade	July	Odd.
Nebraska	Douglas-Sarpy	April	Even.
Nevada	Churchill-Washoe	January	Even.
	Clark	January	Even.
New Jersey	Burlington	August	Odd.
	Monmouth	August	Odd.
	Morris	August	Odd.
New Mexico	Bernalillo	February	Odd.
	Curry	June	Odd.
	Dona Ana	February	Odd.

State	Wage area	Beginning month of survey	Calendar year of full-scale survey odd or even
New York	Jefferson	May	Odd.
	Kings-Queens	October	Even.
	Niagara	May	Odd.
	Orange	May	Odd.
North Carolina	Craven	March	Even.
	Cumberland	March	Even.
	Onslow	February	Even.
	Wayne	March	Even.
North Dakota	Grand Forks	July	Odd.
	Ward	July	Odd.
Ohio	Greene-Montgomery	April	Odd.
Oklahoma	Comanche	March	Even.
	Oklahoma	March	Even.
Pennsylvania	Allegheny	May	Odd.
	Cumberland	May	Even.
	Montgomery	August	Odd.
	York	May	Even.
Puerto Rico	Guaynabo-San Juan	February	Even.
Rhode Island	Newport	July	Even.
South Carolina	Charleston	February	Even.
	Richland	March	Even.
South Dakota	Pennington	June	Even.
Tennessee	Shelby	February	Even.
Texas	Bell	June	Odd.
	Bexar	June	Even.
	Dallas	June	Even.
	El Paso	February	Odd.
	McLennan	May	Odd.
	Nueces	June	Even.
	Tarrant	June	Even.
	Taylor	June	Odd.
	Tom Green	June	Odd.
	Wichita	March	Even.
Utah	Davis-Salt Lake-Weber	July	Odd.
Virginia	Alexandria-Arlington-Fairfax	August	Even.
	Chesterfield-Richmond	August	Odd.
	Hampton-Newport News	May	Even.
	Norfolk-Portsmouth-Virginia Beach	May	Even.
	Prince William	August	Even.
Washington	Kitsap	June	Even.
	Pierce	July	Even.
	Snohomish	July	Even.
	Spokane	July	Odd.
Wyoming	Laramie	July	Even.

* * * * *

[FR Doc. E8–11838 Filed 5–27–08; 8:45 am]
BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 145, 146, and 147

[Docket No. APHIS–2007–0042]

RIN 0579–AC78

National Poultry Improvement Plan and Auxiliary Provisions

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the National Poultry Improvement Plan (the Plan) and its auxiliary provisions by providing new or modified sampling and testing procedures for Plan participants and participating flocks. The proposed changes were voted on and approved by the voting delegates at the Plan's 2006 National Plan Conference. These changes would keep the provisions of the Plan current with changes in the poultry industry and provide for the use of new sampling and testing procedures.

DATES: We will consider all comments that we receive on or before July 28, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2007–0042* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2007–0042, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2007–0042.

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

please call (202) 690–2817 before coming.

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

FOR FURTHER INFORMATION CONTACT: Mr. Andrew R. Rhorer, Senior Coordinator, Poultry Improvement Staff, National Poultry Improvement Plan, Veterinary Services, APHIS, USDA, 1498 Klondike Road, Suite 101, Conyers, GA 30094–5104; (770) 922–3496.

SUPPLEMENTARY INFORMATION:

Background

The National Poultry Improvement Plan (NPIP, also referred to below as ''the Plan'') is a cooperative Federal-State-industry mechanism for controlling certain poultry diseases. The Plan consists of a variety of programs intended to prevent and control poultry diseases. Participation in all Plan programs is voluntary, but breeding flocks, hatcheries, and dealers must first qualify as ''U.S. Pullorum-Typhoid Clean'' as a condition for participating in the other Plan programs.

The Plan identifies States, flocks, hatcheries, dealers, and slaughter plants that meet certain disease control standards specified in the Plan's various programs. As a result, customers can buy poultry that has tested clean of certain diseases or that has been produced under disease-prevention conditions.

The regulations in 9 CFR parts 145, 146, and 147 (referred to below as the regulations) contain the provisions of the Plan. The Animal and Plant Health Inspection Service (APHIS, also referred to as ''the Service'') of the U.S. Department of Agriculture (USDA, also referred to as ''the Department'') amends these provisions from time to time to incorporate new scientific information and technologies within the Plan.

The proposed amendments discussed in this document are consistent with the recommendations approved by the voting delegates to the National Plan Conference that was held from September 7 to September 9, 2006. Participants in the 2006 National Plan Conference represented flockowners, breeders, hatcherymen, slaughter plants, and Official State Agencies from all cooperating States. The proposed amendments are discussed in detail below.

Definitions

We are proposing to amend the definition of *equivalent or equivalent requirements* in § 145.1 and the definition of *equivalent* in § 146.1. The definition for both these terms currently reads: ''Requirements which are equal to the program, conditions, criteria, or classifications with which compared, as determined by the Official State Agency and with the concurrence of the Service.'' We would add the words ''or exceed'' after the words ''equal to,'' in order to indicate that the requirements may also be more stringent or restrictive than the requirements with which they are being compared and still be considered equivalent. We would also add the words ''they are'' after the words ''with which'' for clarity.

We are also proposing to add to the regulations definitions of a body within the NPIP, the NPIP Technical Committee, and a position within the NPIP, the Senior Coordinator.

The NPIP Technical Committee would be defined in § 145.1 as: ''A committee made up of technical experts on poultry health, biosecurity, surveillance, and diagnostics. The committee consists of representatives from the poultry and egg industries, universities, and State and Federal governments and is appointed by the Senior Coordinator and approved by the General Conference Committee.'' The NPIP Technical Committee is currently referred to in the regulations in § 145.15; adding this definition will clarify what we mean by that term.

The regulations in § 147.43(d)(1) refer to the Senior Coordinator and his staff administering the provisions of the plan. The definition of *Senior Coordinator* that we are proposing to add to § 145.1 would indicate what roles the Senior Coordinator plays in administering the plan. The Senior Coordinator's duties might include, but would not necessarily be limited to:

- Serving as executive secretary of the General Conference Committee;
- Serving as chairperson of the Plan Conference described in § 147.47;
- Planning, organizing, and conducting the Plan Conference;
- Reviewing NPIP authorized laboratories as described in proposed § 147.51 (see the section headed ''Authorized Laboratories'' later in this document);
- Coordinating the State administration of the NPIP through periodic reviews of the administrative procedures of the Official State Agencies, according to the applicable provisions of the Plan and the Memorandum of Understanding required in §§ 145.2(a) and 146.2(a);
- Coordinating rulemaking to incorporate the proposed changes of the provisions approved at the Plan conference into the regulations in 9 CFR parts 145, 146, and 147;
- Directing the production of official NPIP publications;
- Proposing an annual budget for plan activities and the General Conference Committee; and
- Providing overall administration of the NPIP.

Contact Representatives

The regulations in §§ 145.2(a) and 146.2(a) state that the Department cooperates through a Memorandum of Understanding with the Official State Agency in the administration of the Plan. One key component of the Memorandum of Understanding is the Official State Agency's designation of a contact representative to serve as a liaison between the Service and the Official State Agency. The contact representative facilitates communication between the two organizations.

While we have requested that Official State Agencies designate contact representatives in their Memoranda of Understanding, we currently do not require them to do so in the regulations. However, because this position is crucial to the effective operation of the NPIP, we are proposing to make the designation of a contact representative by the Official State Agency a requirement. To accomplish this, we would add a sentence to the end of §§ 145.2(a) and 146.2(a) that would read as follows: ''In the Memorandum of Understanding, the Official State Agency must designate a contact representative to serve as a liaison between the Service and the Official State Agency.''

Official Tests for Avian Influenza

The regulations in §§ 145.14(d) and 146.13(b) set out the NPIP approved tests for avian influenza in breeding poultry and commercial poultry, respectively. These paragraphs provide for the use of the agar gel immunodiffusion (AGID) test, under the procedures set forth in § 147.9, and the enzyme-linked immunosorbent assay (ELISA). The AGID test must be conducted on all ELISA-positive samples. Positive tests by AGID or ELISA must be further tested by Federal Reference Laboratories. Final judgment may be based upon further sampling or culture results. In addition, the tests must be conducted using antigens or test kits approved by the Service. Test kits for ELISA must be licensed by the Service and approved by the Official State Agency, and tests must be performed in accordance with the recommendations of the producer or manufacturer.

Paragraph (b) of § 146.13 further requires that the official determination of a flock as positive for the H5 or H7 subtypes of low pathogenic avian influenza may be made only by the Service's National Veterinary Services Laboratories (NVSL). This paragraph also states that the AGID and ELISA tests may be performed either on egg yolk or blood samples. Otherwise, §§ 145.14(d) and 146.13(b) are substantively identical.

We are proposing to amend §§ 145.14(d) and 146.13(b) to include two agent detection tests in addition to the AGID and ELISA antibody detection tests. To accommodate the addition of the agent detection tests, we would reorganize §§ 145.14(d) and 146.13(b) by splitting each of those paragraphs into two subparagraphs. The requirements related to the antibody detection tests would then appear under the heading ''Antibody detection tests'' in §§ 145.13(d)(1) and 146.13(b)(1), respectively. We would indicate in both paragraphs that the AGID test must be conducted using reagents approved by the Department and the Official State Agency, and that it can be performed on egg yolk or blood samples. (The ELISA could still be performed on egg yolk or blood samples as long as it is performed in accordance with the recommendations of the producer or manufacturer.)

We are also proposing to add the new provisions for agent detection tests in §§ 145.14(d)(2) and 146.13(b)(2), respectively. Authorized laboratories would be allowed to perform tests that detect influenza A matrix gene or protein, but not tests that determine hemagglutinin or neuraminidase subtypes; all tests that determine those subtypes should be performed by National Animal Health Laboratory Network members, to ensure the reliability of their results. Samples for agent detection testing would be collected from naturally occurring flock mortality or clinically ill birds, to increase the sensitivity of the testing.

We would provide for the use of two agent detection tests: The real time reverse transcriptase/polymerase chain reaction (RRT–PCR) assay and the USDA-licensed type A influenza antigen capture immunoassay (ACIA). The RRT–PCR and the ACIA are rapid flock screening tools that can provide highly specific, scalable results on the same day (the RRT–PCR within 3 to 5 hours and the ACIA within 15 minutes). These tests would have significant value both as screening tests and as part of initial State response and containment plans to control avian influenza (as described in 9 CFR 56.10).

The RRT–PCR tests would have to be conducted using reagents approved by the Department and the Official State Agency. The RRT–PCR would have to be conducted using the NVSL official protocol for RRT–PCR (AVPR01510) and be conducted by personnel who have passed an NVSL proficiency test. Positive results from the RRT–PCR would have to be further tested by Federal Reference Laboratories using appropriate tests for confirmation. Final judgment could be based upon further sampling and appropriate tests for confirmation.

The USDA-licensed type A influenza ACIA would have to be conducted using test kits approved by the Department and the Official State Agency and would have to be conducted in accordance with the recommendations of the producer or manufacturer. Positives on the ACIA would have to be further tested by Federal Reference Laboratories using appropriate tests for confirmation. Final judgment could be based upon further sampling and appropriate tests for confirmation.

Finally, we would amend § 145.14(d) to indicate there as well that the official determination of a flock as positive for the H5 or H7 subtypes avian influenza may be made only by NVSL.

In a related change, we are proposing to move the requirements in § 145.15, ''Approved tests,'' to a new § 147.52. We would also add a new § 147.51 to describe the requirements for authorized laboratories; these proposed changes are discussed later in this document under the heading ''Authorized Laboratories.'' The new §§ 147.51 and 147.52 would be placed in a new subpart in 9 CFR part 147 to collect the provisions governing approval of laboratories and tests.

Diagnostic Surveillance Plan for H5/H7 Low Pathogenic Avian Influenza

In an interim rule published and effective September 26, 2006 (71 FR 53601–56333, Docket No. APHIS–2005–0109), we amended the regulations to establish a voluntary control program for the H5/H7 subtypes of low pathogenic avian influenza (H5/H7 LPAI) in commercial poultry—specifically, in table-egg layers, meat-type chickens, and meat-type turkeys. This voluntary control program includes a requirement for participating States to develop a diagnostic surveillance program that includes all poultry in the State, not just commercial poultry. The regulations governing the development of such a program are found in § 146.14. Participation in the voluntary control program is a condition for States and large producers to be eligible to receive 100 percent indemnity for costs related to an outbreak of H5/H7 LPAI under 9 CFR part 56.

We are proposing to add a new § 145.15 that duplicates the regulations in § 146.14 to ensure that participants in the NPIP for breeding poultry are aware that States participating in the voluntary control program must develop a diagnostic surveillance program that includes both breeding and commercial poultry.

Testing Requirements for U.S. Avian Influenza Clean Programs for Multiplier Egg-Type Chicken, Meat-Type Chicken, and Turkey Breeding Flocks

The regulations set out requirements for the U.S. Avian Influenza Clean classifications for multiplier egg-type chicken breeding flocks, multiplier meat-type chicken breeding flocks, and multiplier turkey breeding flocks at §§ 145.23(h)(2), 145.33(l)(2), and 145.43(g)(2), respectively. These paragraphs all require that, for a multiplier breeding flock to retain the U.S. Avian Influenza Clean classification, a sample of at least 30 birds must be tested negative at intervals of 180 days, or a sample of fewer than 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds is tested within each 180-day period.

However, due to the virulence of the avian influenza virus and the minute amount of infective fecal material and respiratory secretions required to transmit the virus and infect a flock, industry participants have determined that the 180-day interval between tests is too long to provide satisfactory assurance that the flocks being tested are U.S. Avian Influenza Clean for these types of poultry.

The U.S. Avian Influenza Clean programs for primary breeding flocks of egg-type chickens, meat-type chickens, and turkeys (in §§ 145.73(f)(1), 145.83(g)(1), and 145.43(g)(1), respectively) require testing every 90 days. We believe this interval is appropriate for all flocks of these types of poultry. Therefore, we are proposing to replace references to the 180-day testing interval in §§ 145.23(h)(2), 145.33(l)(2), and 145.43(g)(2) with references to a 90-day testing interval. We believe this change would help to ensure that flocks with the U.S. Avian Influenza Clean classification are free of avian influenza.

The regulations currently require that 30 birds be tested negative at intervals of 180 days. For multiplier breeding flocks of egg-type chickens and turkeys, we would retain the requirement that 30 birds be tested while reducing the

interval at which they are tested to 90 days. For multiplier breeding flocks of meat-type chickens, we would require that 15 birds be tested negative every 90 days. Egg-type chicken and turkey breeding flocks receive much more regular supervision than meat-type chicken breeding flocks, and those industries determined that testing the same number of birds over a shorter interval would be practical. The changes to the testing requirement for meat-type chicken breeding flocks would result in the same number of these birds being tested as are tested under the current regulations, but would still increase the assurance that the flocks tested are U.S. Avian Influenza Clean by providing more frequent results.

The waterfowl, exhibition poultry, and game bird breeding industry considered this change and determined that it is not appropriate at this time; multiplier waterfowl, exhibition poultry, and game bird breeding flocks participating in the U.S. Avian Influenza Clean program would continue to be tested at intervals of 180 days.

Option for Reporting Poultry Sales for Waterfowl, Exhibition Poultry, and Game Bird Breeding Flocks and Products

The regulations for the participation of waterfowl, exhibition poultry, and game bird breeding flocks in § 145.52 state that, subject to the approval of the Service and the Official State Agencies in the relevant States, participating flocks may report poultry sales by using printouts of computerized monthly shipping and receiving reports in lieu of Veterinary Services (VS) Form 9–3, ''Report of Sales of Hatching Eggs, Chicks, and Poults.'' The regulations do not state what information would need to be included in such monthly shipping and receiving reports if they are used in lieu of VS Form 9–3. We are proposing to add requirements for these monthly shipping and receiving reports to the regulations.

The regulations would state specifically that a hatchery invoice form (9–3I) approved by the Official State Agency and the Service may be used in lieu of VS Form 9–3 to identify poultry sales to clients. If the selling hatchery uses the 9–3I form, we would require that the following information be included on the form:

- The form number ''9–3I,'' printed or stamped on the invoice;
- The hatchery name and address;
- The date of shipment;
- The hatchery invoice number;
- The purchaser name and address;
- The quantity of products sold;
- Identification of the products by bird variety or by NPIP stock code as listed in the NPIP APHIS 91–55–078 appendix; and
- The appropriate NPIP illustrative design in § 145.10. One of the designs in § 145.10(b) or (g) would have to be used. The following information would have to be provided in or near the NPIP design:
  - The NPIP State number and NPIP hatchery approval number; and
  - The NPIP classification for which product is qualified (e.g., U.S. Pullorum-Typhoid Clean).

This change would ensure that reports provided in lieu of VS Form 9–3 would have standard information and make it easy to use such reports in place of that form.

New U.S. Avian Influenza Clean Classification for Ostrich, Emu, Rhea, and Cassowary Breeding Flocks and Products

Subpart F of 9 CFR part 145 contains the special Plan provisions for ostrich, emu, rhea, and cassowary breeding flocks and products. Section 145.63 contains the requirements for ostrich, emu, rhea, and cassowary breeding flocks to earn the U.S. Pullorum-Typhoid Clean classification. We are proposing to add a U.S. Avian Influenza Clean classification to § 145.63, in a new paragraph (b). This classification would be the basis from which the breeding-hatchery industry may conduct a program for the prevention and control of avian influenza. It would be intended to determine the presence of avian influenza in all ostrich, emu, rhea, and cassowary breeding flocks through routine serological surveillance of each participating breeding flock.

Acceptable tests would include antigen and antibody detection tests, as approved by the Official State Agency.

An ostrich, emu, rhea, or cassowary breeding flock, and the hatching eggs and chicks produced from it, would qualify for this classification when the Official State Agency determines that it has met one of the following requirements:

- It is a primary breeding flock in which 10 percent of the flock, up to a maximum of 30 birds, has been tested negative for type A influenza virus with all pens represented equally and when the tested birds are more than 4 months of age. Positive samples would be further tested by an authorized laboratory. To retain this classification, a sample of at least 30 birds would have to be tested negative at intervals of 180 days, or a sample of less than 10 percent of the birds up to a maximum of 30 birds could be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds are tested within each 180-day period.
- It is a multiplier breeding flock in which a minimum of 30 birds has been tested negative to type A influenza virus with all pens represented equally and when the tested birds are more than 4 months of age. Positive samples would be further tested by an authorized laboratory. To retain this classification, a sample of at least 30 birds would have to be tested negative at intervals of 180 days, or a sample of at least 10 percent of birds from each pen with all pens being represented would have to be tested negative at intervals of 180 days; or a sample of less than 10 percent of the birds could be tested, and found to be negative, at any one time if all pens are equally represented and a total of 10 percent of the birds are tested within each 180-day period.

These requirements are similar to the requirements in the U.S. Avian Influenza Clean classification for waterfowl, exhibition poultry, and game bird breeding flocks and products.

Audit Process for Commercial Poultry Slaughter Plants

In part 146, which contains the NPIP provisions for commercial poultry, § 146.11 sets out the process for inspecting participating slaughter plants. Paragraph (a) of § 146.11 requires each participating slaughter plant to be audited at least once annually or a sufficient number of times each year to satisfy the Official State Agency that the participating slaughter plant is in compliance with the provisions of 9 CFR part 146. Paragraph (b) provides that on-site inspections of any participating flocks and premises will be conducted if a State Inspector determines that a breach of testing has occurred for the Plan programs for which the flocks are certified. Paragraph (c) provides that the official H5/H7 LPAI testing records of all participating flocks and slaughter plants shall be examined annually by a State Inspector and that official H5/H7 LPAI testing records shall be maintained for 3 years.

The regulations currently do not provide any detail regarding the audit process described in paragraph (a). We are proposing to describe this process in detail in the regulations, to inform regulated parties, trading partners, and the general public regarding the information we examine and the consequences if an audit finds that a slaughter plant is not complying with the regulations.

The yearly audit would consist of an evaluation of 2 weeks' worth of records,

selected at random, of the following data:

• The actual flock slaughter date for each flock. This information would be required to come from a verifiable source. Verifiable sources would include electronic record systems that have oversight from the Department's Grain Inspection, Packers and Stockyards Administration or Food Safety and Inspection Service (FSIS) documents such as FSIS Form 9061–2.

• Laboratory test results for each flock slaughtered with the sample collection date and test result. The test would have to be NPIP-approved and performed in an authorized laboratory of the NPIP.

We would redesignate current paragraphs (b) and (c) as paragraphs (d) and (e), respectively, and add new paragraphs (b) and (c) to further describe the audit process. Under proposed paragraph (b), a flock would be considered to be not conforming to protocol if there are no test results available, if the flock was not tested within 21 days before slaughter, or if the test results for the flock were not returned before slaughter.

Under proposed paragraph (c), two or more flocks that are found to be not conforming to protocol in the yearly audit for a slaughter plant would be cause for a deficiency rating for that plant. However, if the root cause for the deficiency was identified, corrected, and documented, the plant would be eligible for an immediate reevaluation of 2 additional weeks' worth of records, again selected at random. If no more than one missed flock was identified in this reevaluation, the plant would be considered in compliance and no further action would be required. Plants found to be deficient would have to provide a written corrective action plan to the auditor within 2 weeks of receipt of the deficiency rating. A followup audit on the information in proposed paragraphs (a)(1) and (a)(2) would occur within 90 days from the receipt of the corrective action plan. Slaughter plants would retain their Plan classification and could continue to use the Plan emblem during this process. However, a failure on the followup audit could result in disbarment from participation in the NPIP according to the procedures in § 146.12.

Sampling at Commercial Meat-Type Turkey Slaughter Plants

The regulations in § 146.43(a) set out the requirements meat-type turkey slaughter plants must fulfill in order to qualify for the U.S. H5/H7 Avian Influenza Monitored classification. Paragraphs (a)(1) and (a)(2) offer two options for qualifying for the classification: The plant must either test a sample of a minimum of 60 birds each month for antibodies to type A avian influenza virus or have an ongoing active and diagnostic surveillance program for the H5/H7 subtypes of avian influenza in which the number of birds tested is equivalent to 60 each month and that is approved by the Official State Agency and the Service.

We are proposing to amend paragraph (a)(1) to indicate that a participating meat-type turkey slaughter plant may accept only meat-type turkeys from flocks where a minimum of 6 birds per flock has tested negative for antibodies to type A avian influenza virus with an approved test no more than 21 days prior to slaughter. This level of testing is sufficient to establish the meat-type turkey slaughter plant as U.S. H5/H7 Avian Influenza Monitored under the Plan.

The proposed provisions would also explicitly allow for testing at the flock level (prior to slaughter), an option that has been requested by the meat-type turkey industry. Testing at slaughter would still be authorized under paragraph § 146.43(a)(2), which allows slaughter plants to use any ongoing active and diagnostic surveillance program for the H5/H7 subtypes of avian influenza in which the number of birds tested is equivalent to the number required in paragraph (a)(1) and that is approved by the Official State Agency and the Service. Testing at slaughter could fulfill this requirement, subject to approval by the Official State Agency and the Service.

New U.S. H5/H7 Avian Influenza Classification for Raised-for-Release Upland Game Birds, Raised-for-Release Waterfowl, Commercial Upland Game Birds and Commercial Waterfowl

The regulations in 9 CFR part 146 provide for the participation of commercial table-egg layers, commercial meat-type chickens, and commercial meat-type turkeys in the NPIP and in the U.S. H5/H7 Avian Influenza Monitored classification. The commercial upland game bird and waterfowl industries and the raised-for-release upland game bird and waterfowl industries have expressed interest in controlling H5/H7 avian influenza in their flocks by participating in part 146 and in a U.S. H5/H7 Avian Influenza Monitored classification. In this document, we are proposing to provide for such a classification.

We would add provisions for the participation of these birds in the NPIP in a new Subpart E of part 146, titled ''Special Provisions for Commercial Upland Game Birds, Commercial Waterfowl, Raised-for-Release Upland Game Birds, and Raised-for-Release Waterfowl.'' Specifically, the subpart would provide for the participation of commercial upland game bird slaughter plants, commercial waterfowl slaughter plants, raised-for-release upland game bird premises, and raised-for-release waterfowl premises in the Plan. It would also describe the testing that would be required for commercial upland game bird and commercial waterfowl slaughter plants and raised-for-release upland game bird and waterfowl premises to achieve the U.S. H5/H7 Avian Influenza Monitored classification.

Section 146.51 of this new subpart would define the types of birds to which these special provisions would apply as follows:

Commercial upland game birds. Upland game bird pheasants, quail, or partridges grown under confinement for the primary purpose of producing meat for human consumption.

Commercial waterfowl. Domesticated ducks or geese grown under confinement for the primary purpose of producing meat for human consumption

Raised-for-release upland game birds. Pheasants, quail, and partridge that are raised under confinement for release in game preserves and are not breeding stock.

Raised-for-release waterfowl. Waterfowl that are raised under confinement for release in game preserves and are not breeding stock.

This section defines commercial upland game bird and commercial waterfowl slaughter plants as plants that are federally inspected or under State inspection that FSIS has recognized as equivalent to Federal inspection. It also defines *shift* as: ''The working period of a group of employees who are on duty at the same time.''

Section 146.52, ''Participation,'' would state that participating commercial upland game bird slaughter plants, commercial waterfowl slaughter plants, raised-for-release upland game bird premises, and raised-for-release waterfowl premises shall comply with applicable general provisions of subpart A of part 146 and the special provisions of proposed subpart E, which include the proposed testing requirements. However, the section would provide exemptions from the special provisions of subpart E for:

• Commercial waterfowl and commercial upland game bird slaughter plants that slaughter fewer than 50,000 birds annually.

• Raised-for-release upland game bird premises and raised-for-release

waterfowl premises that raise fewer than 25,000 birds annually.

The proposed size standard for commercial waterfowl and commercial upland game bird slaughter plants is consistent with the National Duck Council's definitions for such plants. The proposed size standard for raised-for-release upland game bird premises and raised-for-release waterfowl premises is consistent with the North American Gamebird Association's definition of a commercial premises of these types.

Section 146.53, ''Terminology and classification; slaughter plants and premises,'' would set out active surveillance requirements for participating commercial upland game bird slaughter plants, commercial waterfowl slaughter plants, raised-for-release upland game bird premises, and raised-for-release waterfowl premises.

Paragraph (a) would set out active surveillance requirements for commercial upland game bird slaughter plants and commercial waterfowl slaughter plants. The active surveillance requirements we are proposing to add in § 146.53(a) are intended for commercial upland game bird slaughter plants and commercial waterfowl slaughter plants that slaughter 50,000 or more of these types of poultry annually. However, smaller commercial upland game bird slaughter plants and commercial waterfowl slaughter plants are eligible to participate in the NPIP, as long as the State in which they are located participates in the NPIP. We believe that diagnostic surveillance in accordance with § 146.14 and inspections in accordance with § 146.11, which are required in the general provisions in subpart A, are adequate to determine whether H5/H7 LPAI is present on such premises.

Under paragraph (a) of proposed § 145.53, a commercial upland game bird slaughter plant or commercial waterfowl slaughter plant would be eligible for the U.S. H5/H7 Avian Influenza Monitored classification if it meets one of the following requirements:

- It is a commercial upland game bird slaughter plant or commercial waterfowl slaughter plant where a minimum of 11 birds per shift are tested negative for the H5/H7 subtypes of avian influenza at slaughter;
- It is a commercial upland game bird slaughter plant or commercial waterfowl slaughter plant that only accepts commercial upland game birds or commercial waterfowl from flocks where a minimum of 11 birds per flock have been tested negative for antibodies to the H5/H7 subtypes of avian influenza no more than 21 days prior to slaughter; or
- It is a commercial upland game bird slaughter plant or commercial waterfowl slaughter plant that has an ongoing active and passive surveillance program for H5/H7 subtypes of avian influenza that is approved by the Official State Agency and the Service.

Both of the first two of these proposed testing requirements would be sufficient to establish the commercial waterfowl or commercial upland game bird slaughter plants as U.S. H5/H7 Avian Influenza Monitored under the Plan, consistent with the other U.S. H5/H7 Avian Influenza Monitored classifications in 9 CFR part 146. Allowing participating slaughter plants to choose between them would give the slaughter plants some flexibility.

Any ongoing active and diagnostic surveillance program that is approved by the Official State Agency and APHIS would have to test a number of birds equivalent to the other two options, but this by itself would not be sufficient to secure approval for the program; the Official State Agency and APHIS would have to agree that the detailed testing plan for the alternate program is sufficient to establish a level of confidence for the detection of AI that is equivalent to that of the other two options. Allowing participating slaughter plants to develop an alternative ongoing active and diagnostic surveillance program of equivalent efficacy would give the plants some additional flexibility.

Paragraph (b) would set out active surveillance requirements for raised-for-release upland game bird premises and raised-for-release waterfowl premises. The active surveillance requirements we are proposing to add in § 146.53(b) are intended for raised-for-release upland game bird premises and raised-for-release waterfowl premises that raise 25,000 or more of these types of poultry annually. However, smaller raised-for-release upland game bird premises and raised-for-release waterfowl premises are eligible to participate in the NPIP, as long as the State in which they are located participates in the NPIP. We believe that diagnostic surveillance in accordance with § 146.14, which is required in the general provisions in subpart A, is adequate to monitor whether H5/H7 LPAI is present on such premises.

Under paragraph (b), a raised-for-release upland game bird premises or raised-for-release waterfowl premises would qualify for the U.S. H5/H7 Avian Influenza Monitored classification when the Official State Agency determines that a representative sample of 30 birds from the participating premises has been tested with negative results for the H5/H7 subtypes of avian influenza every 90 days. This testing would be for premises monitoring purposes and would not be intended to establish the premises as free of the H5/H7 subtypes of avian influenza.

Because this change would expand the ranks of commercial poultry producers who are eligible to participate in the Plan, we would amend the definition of *commercial meat-type flock* in § 146.1 to include commercial upland game birds and commercial waterfowl; amend § 146.3 to reflect the participation of the commercial upland game bird slaughter plants, commercial waterfowl slaughter plants, raised-for-release upland game bird premises, and raised-for-release waterfowl premises; make appropriate changes to § 146.6 to reflect the addition of the two new types of slaughter plants; and amend § 146.9 to indicate that the new participants may use the U.S. H5/H7 Avian Influenza Monitored illustrative design.

We would amend § 147.45 to indicate that each cooperating State is entitled to one delegate for the program we are proposing to describe in a new subpart E in 9 CFR part 146. (In addition, in a final rule that was published in the **Federal Register** on January 12, 2007 (72 FR 1416–1426, Docket No. APHIS–2006–0008), and effective on February 12, 2007, we added new subparts G and H for primary egg-type and meat-type chicken breeding flocks, but neglected to update § 147.45 to indicate that each cooperating State would be entitled to one delegate for each of these subparts. We are proposing to correct that error in this document.) We would also amend § 147.46(a) to establish a committee to give preliminary considerations to proposed changes falling in the field of commercial upland game birds and waterfowl and raised-for-release upland game birds and waterfowl.

Amendment to Standard AGID Test Procedure for Avian Influenza

The regulations in § 147.9(a) describe the standard AGID test procedure for avian influenza. Within § 147.9(a), paragraph (a)(4)(i)(F) describes two options for placing AGID antigen, AI AGID positive control antiserum, and test sera into wells formed in agar on a petri plate. Paragraph (a)(4)(i)(F)(*1*) describes a method (shown in figure 1) in which AGID antigen is placed in the center well, AI AGID positive control antiserum is placed in each of two opposite wells, and test sera are placed in each of the four remaining wells. Paragraph (a)(4)(i)(F)(*2*) describes a method (shown in figure 2) in which

AGID antigen is placed in the center well, AI AGID positive control antiserum is placed in each of three alternate peripheral wells, and test sera are placed in each of the three remaining wells.

BILLING CODE 3410–34–P

Figure 1.—Immunodiffusion test that uses AI AGID antigen in the center well, AI-positive control serum in wells A and D, and AI-negative test serum in wells B, C, E, and F

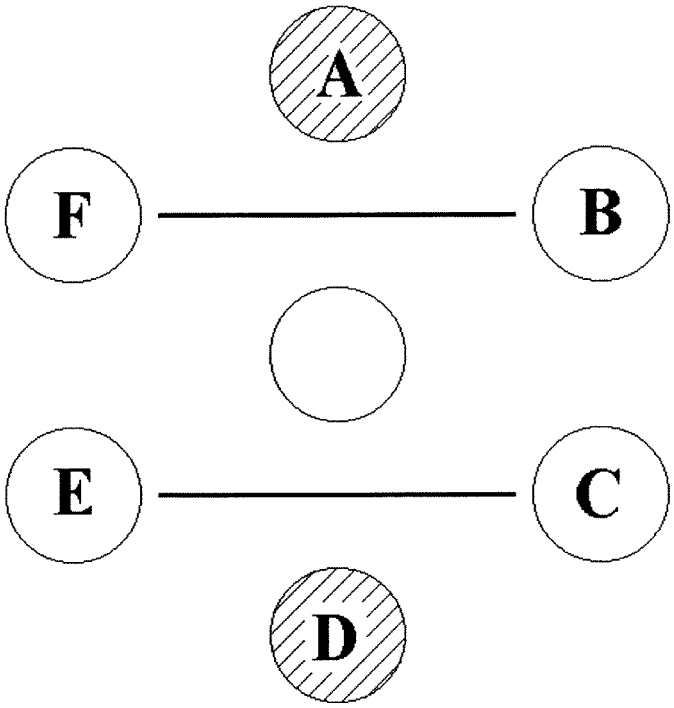
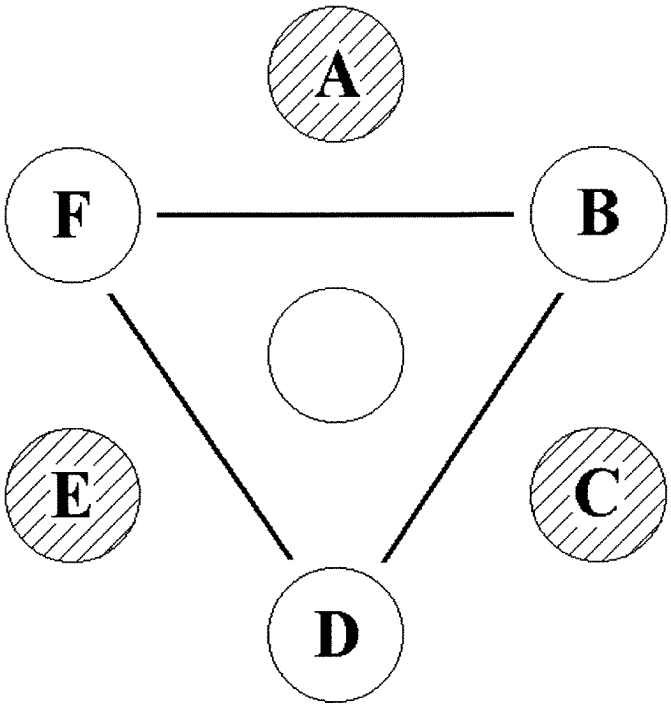


Figure 2.—Immunodiffusion test that has AI AGID antigen in the center well, AI-positive control serum in wells A, C, and E, and AI-negative test serum in wells B, D, and F



BILLING CODE 3410–34–C

The arrangement in figure 1 provides a positive control line on one side of the test serum, thus providing for the development of lines of identity; the arrangement in figure 2 provides a positive control line on each side of the test serum, thus providing for the development of lines of identity on both sides of each test serum. While most positive test sera will result in clear-cut evidence of a positive agar gel reaction, there are times early in AI infection when the test sera may only contain small amounts of antibody. This will cause the tips of the lines of identity to bend slightly inward, which is indicative of a weak positive on the AGID. Having two lines converging towards a test well provides a better opportunity to have an accurate and precise interpretation of the positive reaction or to distinguish a nonspecific reaction.

Therefore, we are proposing to remove the option described in paragraph (a)(4)(i)(F)(*1*) from the regulations. A revised (a)(4)(i)(F) would only set out the second option; figure 1 would be removed, and figures 2 and 3 would be redesignated as figures 1 and 2, respectively.

Laboratory Procedures for New Real-Time Polymerase Chain Reaction Test for Mycoplasma Gallisepticum

Subpart D of 9 CFR part 147 sets out procedures to follow when performing molecular examinations for Plan diseases. We are proposing to add a new description of the laboratory procedures recommended for the real-time polymerase chain reaction (PCR) test for *Mycoplasma gallisepticum* (MGLP ReTi) in § 147.31. The method described in proposed § 147.31 has been published in peer-reviewed journals and validated with over 1,200 samples. It has also been shown to be more sensitive than traditional isolation methods. Adding this testing procedure to the regulations would keep Plan molecular examination procedures current with recent science. A detailed description of the procedure can be found in the text of proposed § 147.31 that appears at the end of this document.

In a related change, we are proposing to add a new paragraph (b)(5) to § 145.14(b), which describes the official tests for *M. gallisepticum* and *M. synoviae.* This new paragraph would state that the official molecular examination procedures for *M. gallisepticum* and *M. synoviae* are the PCR test described in § 147.30 and the real-time PCR test described in proposed § 147.31. Adding this language in § 145.14(b)(5) would clearly indicate that the tests described in § 147.30 and proposed § 147.31 are considered official tests of the Plan.

Amendments to General Conference Committee Description

The regulations in § 147.43(d) describe the duties and functions of the General Conference Committee (GCC) of the National Poultry Improvement Plan in advising and administering the Plan. We are proposing to make two changes in this paragraph:

- Paragraph (d)(4) of § 147.43 provides that the GCC will recommend whether new proposals (i.e., proposals that have not been submitted as provided in § 147.44) should be considered by the delegates to the Plan Conference. We would add that the GCC will consider each proposal submitted as provided in § 147.44 and make recommendations to subpart Committees and the Conference, and that it will meet jointly with the NPIP Technical Committee and consider the technical aspects and accuracy of each proposal. These amendments would reflect current Plan operations.
- Paragraph (d)(6) provides that the GCC will serve as a forum for the study of problems relating to poultry health and as the need arises, to make specific recommendations to the Secretary of Agriculture concerning ways in which the Department may assist the industry in solving these problems. Because the GCC acts as an official advisory committee, we would remove the words ''a forum'' and replace them with the words ''an official advisory committee.''

Authorized Laboratories

In the definitions in §§ 145.1 and 146.1, *authorized laboratory* is defined as a laboratory designated by an Official State Agency, subject to review by the Service, to perform the blood testing and bacteriological examinations provided for in 9 CFR part 145. Under this definition, the Service's review will include, but will not necessarily be limited to, checking records, laboratory protocol, check-test proficiency, periodic duplicate samples, and peer review. A satisfactory review will result in the authorized laboratory being recognized by the Service as a nationally approved laboratory qualified to perform the blood testing and bacteriological examinations provided for in 9 CFR part 145 or the diagnostic assays provided for in 9 CFR part 146.

In this document, we are proposing to add more detailed requirements for authorized laboratories to the regulations. We would establish a new § 147.51 with the heading ''Authorized laboratory minimum requirements.'' This section would be added in a new subpart F with the heading ''Authorized laboratories and approval of tests.''

The introductory text of § 147.51 would state that the section contains minimum requirements that are intended to be the basis on which an authorized laboratory of the Plan can be evaluated to ensure that official Plan assays are performed and reported as described in 9 CFR part 147. A satisfactory evaluation would result in the laboratory being recognized by the NPIP office of the Service as an authorized laboratory qualified to perform the assays provided for in 9 CFR part 147. The minimum requirements would be the following:

- *Check-test proficiency.* The laboratory would have to use a regularly scheduled check test for each assay that it performs. The check test serves to ensure the integrity of the testing procedure as it is being performed in the laboratory.
- *Trained technicians.* The testing procedures at the laboratory would have to be run or overseen by a laboratory technician who has attended and satisfactorily completed Service-approved laboratory workshops for Plan-specific diseases within the past 3 years. This training requirement would ensure that the tests are being run consistently across authorized laboratories.
- *Laboratory protocol.* Official Plan assays would have to be performed and reported as described in 9 CFR part 147.
- *State site visit.* The Official State Agency would conduct a site visit and recordkeeping audit annually.
- *Service review.* Authorized laboratories would be reviewed by the NPIP staff every 3 years. The Service's review might include, but would not necessarily be limited to, checking records, laboratory protocol, check-test proficiency, technician training, and peer review. This requirement (with the exception of the Service checking technician training) is taken from the current definition of *authorized laboratory* in § 145.1.
- *Reporting.* A memorandum of understanding or other means would be used to establish testing and reporting criteria to the Official State Agency, including criteria that provide for reporting H5 and H7 low pathogenic avian influenza directly to the Service. *Salmonella pullorum* and *Mycoplasma* Plan disease reactors would have to be reported to the Official State Agency within 48 hours.
- *Verification.* Random samples could also be required to be submitted for verification as specified by the Official State Agency.

These requirements would ensure that authorized laboratories perform accurate and rigorous testing in the service of Plan programs.

To reflect this change, we would revise the definitions of *authorized laboratory* in §§ 145.1 and 146.1. The new definitions would read: ''An authorized laboratory is a laboratory that meets the requirements of § 147.51 and is thus qualified to perform the assays described in part 147 of this subchapter.''

Miscellaneous Change

In the January 2008 final rule mentioned earlier in this document, we removed and reserved paragraph (b) of § 147.11, which contained footnotes 8 through 11 in 9 CFR part 147. However, we neglected to redesignate the other footnotes in that part to reflect the removal of those four footnotes. In this proposal, we would correct that error by redesignating footnotes 12 through 24 as footnotes 8 through 20.

Executive Order 12866 and Regulatory Flexibility Act

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

We are proposing to amend the Plan and its auxiliary provisions by providing new or modified sampling and testing procedures for Plan participants and participating flocks. The proposed changes were voted on and approved by the voting delegates at the Plan's 2006 National Plan Conference. These changes would keep the provisions of the Plan current with changes in the poultry industry and provide for the use of new sampling and testing procedures.

The United States is the world's largest poultry producer, the second-largest egg producer, and the largest exporter of poultry meat. U.S. poultry meat production totals over 42 billion pounds annually; over four-fifths is broiler meat, most of the remainder is turkey meat, and a small fraction is other chicken meat. Cash receipts (see table 1) from sales of poultry and eggs (broilers, farm chickens, eggs, turkey, ducks, and other poultry) were about $28.9 billion in 2005 (with preliminary value for 2006 and forecasted value for 2007 being a little higher).[1] Of this total, 72 percent was from broilers, 14 percent from eggs, 11 percent from turkeys, and 3 percent from other poultry.

TABLE 1.—CASH RECEIPTS FOR POULTRY AND EGGS, UNITED STATES, 2000–05, 2006, AND 2007

Commodity	2002	2003	2004	2005	2006 P	2007 F
	$1,000					
Poultry/eggs	21,138,999	23,959,134	29,540,692	28,903,545	27,700,000	29,600,000
Broilers	13,437,700	15,214,945	20,446,096	20,901,934	19,000,000	20,100,000
Farm chickens	49,850	47,508	57,260	63,963	+	+
Chicken eggs	4,232,433	5,273,099	5,239,082	4,000,142	4,400,000	5,100,000
Turkeys	2,643,273	2,631,862	2,995,802	3,157,637	3,500,000	3,500,000
Ducks	15,300	19,200	20,900	21,390	+	+
Other poultry	760,443	772,521	781,553	758,479	800,000	900,000

P = preliminary, F = forecast, + = included in other poultry.
Source: USDA/Economic Research Service (ERS), Farm Income/Farm cash Receipts, 1924–2005, 2006P, and 2007F) *(http://www.ers.usda.gov/data/FarmIncome/finfidmuxls.htm).*

In terms of tonnage, poultry production and trade exceeds that of beef or pork. For instance, in 2006, the U.S. produced 41.4 billion pounds of poultry meat, compared with 26.2 billion pounds of beef and 21 billion pounds of pork. The U.S. also produced 6.5 billion dozen eggs in 2006. Per capita consumption of poultry meat (103.8 pounds in 2006) exceeds per capita consumption of both beef (65.7 pounds) and pork (49.3 pounds). Furthermore, the U.S. exports more poultry meat (5.8 billion pounds in 2006) than beef and veal (1.2 billion pounds) or pork (3 billion pounds).[2]

Broiler production is concentrated in a group of States stretching from Delaware south along the Atlantic coast to Georgia, then westward through Alabama, Mississippi, and Arkansas. The top broiler-producing State is Georgia, followed by Arkansas, Alabama, North Carolina, Mississippi, and Texas. Operations in these States account for over 65 percent of broiler cash receipts.

Most U.S. broiler production is conducted under contract with broiler processors. The grower normally supplies the grow-out house with all the necessary heating, cooling, feeding, and watering systems. The grower also supplies the labor needed in growing the birds. The broiler processor supplies the chicks, feed, and veterinary medicines. The processor schedules transportation of the birds from the farm to the slaughter plant. In many cases, the processor also supplies the crews who place broilers into cages for transportation to the slaughter plant.

The U.S. turkey industry produces over one-quarter of a billion birds annually, with the live weight of each bird averaging over 25 pounds. Production of turkeys is somewhat more scattered geographically than broiler production. The top five turkey-producing States are Minnesota, North Carolina, Missouri, Arkansas, and Virginia. The United States is by far the world's largest turkey producer, followed by the European Union. Even though exports are a major component of the U.S. turkey industry, the United States consumes more turkey per capita than any other country.

U.S. egg operations produce over 77 billion eggs annually. Over three-fourths of egg production is for human consumption (the table-egg market). The remainder of production is for the hatching market. These eggs are hatched to provide replacement birds for the egg-laying flocks and broiler chicks for grow-out operations. The top five egg-producing States are Iowa, Ohio, Pennsylvania, Indiana, and California.[3]

The United States is the world's largest exporter of poultry meat. Annual poultry meat exports totaled about 5.8 billion pounds in 2006, which is about 14.5 percent of U.S. production. (All trade statistics in this and the following

[1] USDA/Economic Research Service (ERS), Farm Income/Cash receipts, 2002–2007.

[2] USDA/ERS, Livestock, Dairy, and Poultry Outlook/LDP–M–158, August 20, 2007.

[3] USDA/ERS, Livestock, Dairy, and Poultry Outlook/LDP–M–158, August 20, 2007.

paragraph are for 2006.) Demand for U.S. poultry meat products has fluctuated over the last several years due to changing economic conditions and currency exchange rates in major importing countries. The largest importers of U.S. broiler products are Russia, Mexico, China, Canada, Hong Kong, Turkey, Taiwan, Angola, South Korea, and Ukraine. Together, these markets accounted for over 74 percent of U.S. poultry meat exports, on a quantity basis. The United States imports only small amounts of poultry meat, accounting for less than two-tenths of 1 percent of domestic production. Over 98 percent of imports come from Canada.

As in the case of poultry meat, U.S. exports of live poultry and exports of fresh shell eggs are widely distributed and significantly outweigh imports of these products. The United States exported 1.302 million eggs and imported 65.4 million eggs in 2006. The major importers of eggs are Canada, Mexico, Jamaica, United Kingdom, Hong Kong, Brazil, Trinidad and Tobago, Dominican Republic, Guyana, and Nicaragua. These countries altogether accounted for about 80 percent of U.S. egg exports. U.S. imports are mainly from Canada, China, France, and Taiwan. These countries together accounted for 91 percent of U.S. imports of eggs. The United States exported 51 million live poultry and imported 13.7 million live poultry in 2006. Major destinations include Canada, Mexico, China, Thailand, Peru, Colombia, Guatemala, Indonesia, Egypt, and El Salvador. These countries accounted for 70 percent of U.S. total live poultry exports. All U.S. imports of live poultry came from Canada, United Kingdom, and Italy.

The decision to participate in the NPIP program is voluntary. Being a participating flock in NPIP has many benefits. These include: The flock being recognized as a participating member of NPIP; the flock having an approval number which may be used on shipping labels, certificates, invoices, and other documents for identification purposes; the flock being listed in the official *NPIP Directory of Participants;* free listing in various State fair brochures; and receiving emergency disease management updates. Furthermore, being a participant in the NPIP allows for greater ease in moving hatching eggs and live birds within a State, across State lines, and into international markets. In fact, most countries will not accept hatching eggs, live birds, table eggs, or broilers unless they can be shown to be from a NPIP participant.

Any increased cost to NPIP participants due to the proposed rule would be minor compared to the expected benefits of the proposed program changes. Additional costs are likely to be minor because most of the participants already had been implementing these changes for several years. Even if additional tests were required, the additional number of birds tested would be very small compared to the size of flocks in the industry. Individual producers will continue to participate in the NPIP program only if the benefits they receive from participation outweigh the costs. Over 99 percent of poultry breeders and hatcheries, commercial table-egg layer flocks, and commercial meat-type chicken and turkey slaughter plants are Plan participants.

Impact on Small Entities

The Regulatory Flexibility Act requires that agencies consider the economic effects of their rules on small entities. According to the Small Business Administration's (SBA's) Office of Advocacy, regulations create economic disparities based on size when they have a significant economic impact on a substantial number of small entities.

Entities engaged in production of breeding stock and hatcheries would be affected by the rule. Currently there are four major firms that produce primary breeding stock of egg-type chickens, three breeders of meat-type chickens, two breeders of turkeys, and one firm producing breeding stock of both egg-type and meat-type chickens.[4] All of these are large facilities headquartered in the United States that operate in domestic and international markets, and would not be considered small entities. Few, if any, small producers would be directly affected by this proposed rule.

Broiler operations (North American Industry Classification System [NAICS] code 112320), turkey operations (NAICS 112330), hatcheries (NAICS 112340), and other poultry operations (112390) could also be affected by the proposed changes. All of these operations are considered to be small if they have annual sales of $750,000 or less (U.S. Small Business Administration Table of Small Business Size Standards, *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*). Commercial egg producers (NAICS 112310) are considered small if they have annual sales of not more than $11.5 million.

The broiler industry has evolved from small backyard flocks to fewer than 50 highly specialized, vertically integrated agribusiness firms. A measure of the changing structure is the number and size of chicken hatcheries. In 1973, there were 989 facilities that hatched all chickens in the United States. Those hatcheries had the capacity to incubate 436 million eggs at one time for an average capacity of 440,849 eggs. In 2006, there were 313 chicken hatcheries, with an incubator capacity of 910 million eggs for an average capacity of 2.9 million eggs. Similarly, there were 203 turkey hatching facilities with capacity to incubate 45 million eggs at one time, for an average capacity of 221,675 eggs. In 2006, there were 55 turkey hatcheries, with an incubator capacity of 39 million eggs for an average capacity of 703,927 eggs.[5]

We do not foresee any significant impact of the proposed rule on small entities. The NPIP is a voluntary program, so poultry producers can decide if it is beneficial for them to participate.

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

Executive Order 12372

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

Executive Order 12988

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

Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

[4] Mary E. Delany, *Genetic Diversity and Conservation of Poultry,* p.261, in W.M. Muir and S.E. Aggrey, *Poultry Genetics, Breeding and Biotechnology,* August 2003; Susanne Gura, *Livestock Genetics Companies: Concentration and Proprietary Strategies of an Emerging Power in the Global Economy (http://pastoralpeoples.org/docs/Livestock_genetics.pdf).*

[5] USDA, ERS, Hatchery Production, March 1975; Hatchery Production 2006 Summary, April 2007.

List of Subjects in 9 CFR Parts 145, 146, and 147

Animal diseases, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, we propose to amend 9 CFR parts 145, 146, and 147 as follows:

PART 145—NATIONAL POULTRY IMPROVEMENT PLAN FOR BREEDING POULTRY

1. The authority citation for part 145 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

2. Section 145.1 is amended as follows:

a. By revising the definition of *authorized laboratory* to read as set forth below.

b. By adding, in alphabetical order, new definitions of *NPIP Technical Committee* and *Senior Coordinator* to read as set forth below.

c. In the definition of *equivalent or equivalent requirements*, by adding the words ''or exceed'' after the words ''equal to'' and the words ''they are'' after the words ''with which.''

§ 145.1 Definitions.

* * * * *

Authorized laboratory. An authorized laboratory is a laboratory that meets the requirements of § 147.51 and is thus qualified to perform the assays described in part 147 of this subchapter.

* * * * *

NPIP Technical Committee. A committee made up of technical experts on poultry health, biosecurity, surveillance, and diagnostics. The committee consists of representatives from the poultry and egg industries, universities, and State and Federal governments and is appointed by the Senior Coordinator and approved by the General Conference Committee.

* * * * *

Senior Coordinator. An employee of the Service whose duties may include, but will not necessarily be limited to:

(1) Serving as executive secretary of the General Conference Committee;

(2) Serving as chairperson of the Plan Conference described in § 147.47;

(3) Planning, organizing, and conducting the Plan Conference;

(4) Reviewing NPIP authorized laboratories as described in § 147.51;

(5) Coordinating the State administration of the NPIP through periodic reviews of the administrative procedures of the Official State Agencies, according to the applicable provisions of the Plan and the Memorandum of Understanding;

(6) Coordinating rulemaking to incorporate the proposed changes of the provisions approved at the Plan conference into the regulations in parts 145, 146, and 147 of this subchapter;

(7) Directing the production of official NPIP publications;

(8) Proposing an annual budget for plan activities and the General Conference Committee; and

(9) Providing overall administration of the NPIP.

* * * * *

3. In § 145.2, paragraph (a) is amended by adding a new sentence at the end of the paragraph to read as follows:

§ 145.2 Administration.

(a) * * * In the Memorandum of Understanding, the Official State Agency must designate a contact representative to serve as a liaison between the Service and the Official State Agency.

* * * * *

4. Section 145.14 is amended as follows:

a. By adding a new paragraph (b)(5) to read as set forth below.

b. By revising paragraph (d) to read as set forth below.

§ 145.14 Blood testing.

* * * * *

(b) * * *

(5) The official molecular examination procedures for *Mycoplasma gallisepticum* and *M. synoviae* are the polymerase chain reaction (PCR) test described in § 147.30 of this subchapter and the real-time PCR test described in § 147.31 of this subchapter.

* * * * *

(d) *For avian influenza.* The official tests for avian influenza are described in paragraphs (d)(1) and (d)(2) of this section.

(1) *Antibody detection tests*—(i) *Enzyme-linked immunosorbent assay (ELISA).* ELISA must be conducted using test kits approved by the Department and the Official State Agency and must be conducted in accordance with the recommendations of the producer or manufacturer.

(ii) *The agar gel immunodiffusion (AGID) test.* (A) The AGID test must be conducted on all ELISA-positive samples.

(B) The AGID test must be conducted using reagents approved by the Department and the Official State Agency.

(C) Standard test procedures for the AGID test for avian influenza are set forth in § 147.9 of this subchapter. The test can be conducted on egg yolk or blood samples.

(D) Positive tests for the AGID must be further tested by Federal Reference Laboratories using appropriate tests for confirmation. Final judgment may be based upon further sampling and appropriate tests for confirmation.

(2) *Agent detection tests.* Tests that detect influenza A matrix gene or protein may be performed by an authorized laboratory. Tests that determine hemagglutinin or neuraminidase subtypes may not be performed by an authorized laboratory. Samples for agent detection testing should be collected from naturally occurring flock mortality or clinically ill birds.

(i) *The real time reverse transcriptase/polymerase chain reaction (RRT–PCR) assay.* (A) The RRT–PCR tests must be conducted using reagents approved by the Department and the Official State Agency. The RRT–PCR must be conducted using the National Veterinary Services Laboratories (NVSL) official protocol for RRT–PCR (AVPR01510) and must be conducted by personnel who have passed an NVSL proficiency test.

(B) Positive results from the RRT–PCR must be further tested by Federal Reference Laboratories using appropriate tests for confirmation. Final judgment may be based upon further sampling and appropriate tests for confirmation.

(ii) *USDA-licensed type A influenza antigen capture immunoassay (ACIA).* (A) The USDA-licensed type A influenza ACIA must be conducted using test kits approved by the Department and the Official State Agency and must be conducted in accordance with the recommendations of the producer or manufacturer.

(B) Positive results from the ACIA must be further tested by Federal Reference Laboratories using appropriate tests for confirmation. Final judgment may be based upon further sampling and appropriate tests for confirmation.

(3) The official determination of a flock as positive for the H5 or H7 subtypes of avian influenza may be made only by NVSL.

* * * * *

5. Section 145.15 is revised to read as follows:

§ 145.15 Diagnostic surveillance program for low pathogenic avian influenza.

(a) The Official State Agency must develop a diagnostic surveillance program for H5/H7 low pathogenic avian influenza for all poultry in the State. The exact provisions of the program are at the discretion of the States. The Service will use the standards in paragraph (b) of this

section in assessing individual State plans for adequacy, including the specific provisions that the State developed. The standards should be used by States in developing those plans.

(b) Avian influenza must be a disease reportable to the responsible State authority (State veterinarian, etc.) by all licensed veterinarians. To accomplish this, all laboratories (private, State, and university laboratories) that perform diagnostic procedures on poultry must examine all submitted cases of unexplained respiratory disease, egg production drops, and mortality for avian influenza by both an approved serological test and an approved antigen detection test. Memoranda of understanding or other means must be used to establish testing and reporting criteria (including criteria that provide for reporting H5 and H7 low pathogenic avian influenza directly to the Service) and approved testing methods. In addition, States should conduct outreach to poultry producers, especially owners of smaller flocks, regarding the importance of prompt reporting of clinical symptoms consistent with avian influenza.

§ 145.23 [Amended]

6. In § 145.23, paragraphs (h)(2)(i) and (h)(2)(ii) are amended by removing the number ''180'' and replacing it with the number ''90'' each time it occurs.

§ 145.33 [Amended]

7. In § 145.33, paragraphs (l)(2)(i) and (l)(2)(ii) are amended by removing the number ''30'' and replacing it with the number ''15'' each time it occurs; and by removing the number ''180'' and replacing it with the number ''90'' each time it occurs

§ 145.43 [Amended]

8. In § 145.43, paragraphs (g)(2)(i) and (g)(2)(ii) are amended by removing the number ''180'' and replacing it with the number ''90'' each time it occurs.

9. In § 145.52, paragraph (c) is revised to read as follows:

§ 145.52 Participation.

* * * * *

(c) Subject to the approval of the Service and the Official State Agencies in the importing and exporting States, participating flocks may report poultry sales to importing States by using either VS Form 9–3, ''Report of Sales of Hatching Eggs, Chicks, and Poults'' or by using a hatchery invoice form (9–3I) approved by the Official State Agency and the Service to identify poultry sales to clients. If the selling hatchery uses the 9–3I form, the following information must be included on the form:

(1) The form number ''9–3I'', printed or stamped on the invoice;

(2) The hatchery name and address;

(3) The date of shipment;

(4) The hatchery invoice number;

(5) The purchaser name and address;

(6) The quantity of products sold;

(7) Identification of the products by bird variety or by NPIP stock code as listed in the NPIP APHIS 91–55–078 appendix; and

(8) The appropriate NPIP illustrative design in § 145.10. One of the designs in § 145.10(b) or (g) must be used. The following information must be provided in or near the NPIP design:

(i) The NPIP State number and NPIP hatchery approval number; and

(ii) The NPIP classification for which product is qualified (*e.g.*, U.S. Pullorum-Typhoid Clean).

* * * * *

10. In § 145.63, a new paragraph (b) is added to read as follows:

§ 145.63 Terminology and classification; flocks and products.

* * * * *

(b) *U.S. Avian Influenza Clean.* This program is intended to be the basis from which the breeding-hatchery industry may conduct a program for the prevention and control of avian influenza. It is intended to determine the presence of avian influenza in all ostrich, emu, rhea, and cassowary breeding flocks through routine serological surveillance of each participating breeding flock. Acceptable tests include antigen and antibody detection tests, as approved by the Official State Agency. A flock, and the hatching eggs and chicks produced from it, will qualify for this classification when the Official State Agency determines that it has met one of the following requirements:

(1) It is a primary breeding flock in which 10 percent of the flock, up to a maximum of 30 birds, has been tested negative for type A influenza virus with all pens represented equally and when the tested birds are more than 4 months of age. Positive samples shall be further tested by an authorized laboratory. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 180 days, or

(ii) A sample of less than 10 percent of the birds up to a maximum of 30 birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 30 birds are tested within each 180-day period.

(2) It is a multiplier breeding flock in which a minimum of 30 birds has been tested negative to type A influenza virus with all pens represented equally and when the tested birds are more than 4 months of age. Positive samples shall be further tested by an authorized laboratory. To retain this classification:

(i) A sample of at least 30 birds must be tested negative at intervals of 180 days, or

(ii) A sample of at least 10 percent of birds from each pen with all pens being represented must be tested negative at intervals of 180 days; or

(iii) A sample of less than 10 percent of the birds may be tested, and found to be negative, at any one time if all pens are equally represented and a total of 10 percent of the birds are tested within each 180-day period.

PART 146—NATIONAL POULTRY IMPROVEMENT PLAN FOR COMMERCIAL POULTRY

11. The authority citation for part 146 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

12. Section 146.1 is amended as follows:

a. By revising the definition of *authorized laboratory* and the first sentence of the definition of *commercial meat-type flock* to read as set forth below.

b. In the definition of *equivalent*, by adding the words ''or exceed'' after the words ''equal to'' and the words ''they are'' after the words ''with which.''

§ 146.1 Definitions.

* * * * *

Authorized laboratory. An authorized laboratory is a laboratory that meets the requirements of § 147.51 and is thus qualified to perform the assays described in part 147 of this subchapter.

* * * * *

Commercial meat-type flock. All of the meat-type chickens, meat-type turkeys, commercial upland game birds, or commercial waterfowl on one farm.

* * *

* * * * *

13. In § 146.2, paragraph (a) is amended by adding a new sentence at the end of the paragraph to read as follows:

§ 146.2 Administration.

(a) * * * In the Memorandum of Understanding, the Official State Agency must designate a contact representative to serve as a liaison between the Service and the Official State Agency.

* * * * *

14. Section 146.3 is amended by revising paragraph (a) and the first

sentence of paragraph (c) to read as follows:

§ 146.3 Participation.

(a) Any table-egg producer, raised-for-release upland game bird premises, and raised-for-release waterfowl premises and any commercial upland game bird, commercial waterfowl, meat-type chicken or meat-type turkey slaughter plant, including its affiliated flocks, may participate in the Plan when the producer or plant has demonstrated, to the satisfaction of the Official State Agency, that its facilities, personnel, and practices are adequate for carrying out the relevant special provisions of this part and has signed an agreement with the Official State Agency to comply with the relevant special provisions of this part.

* * * * *

(c) A participating slaughter plant shall participate with all of the commercial upland game bird, commercial waterfowl, meat-type chicken and/or meat-type turkey flocks that are processed at the facility, including affiliated flocks. * * *

* * * * *

15. Section 146.6 is revised to read as follows:

§ 146.6 Specific provisions for participating slaughter plants.

(a) Only commercial upland game bird, commercial waterfowl, meat-type chicken, and meat-type turkey slaughter plants that are under continuous inspection by the Food Safety and Inspection Service of the Department or under State inspection that the Food Safety and Inspection Service has recognized as equivalent to Federal inspection may participate in the Plan.

(b) To participate in the Plan, meat-type chicken, meat-type turkey, and commercial upland game bird and commercial waterfowl slaughter plants must follow the relevant special provisions in §§ 146.33(a), 146.43(a), and 146.53(a), respectively, for sample collection and flock monitoring, unless they are exempted from the special provisions under §§ 146.32(b), 146.42(b), or 146.52(b), respectively.

§ 146.9 [Amended]

16. In § 146.9, paragraph (a) is amended by removing the word ''and'' and adding the words '', and 146.53(a) and (b)'' at the end of the second sentence, before the period.

17. Section 146.11 is amended as follows:

a. By revising paragraph (a) to read as set forth below.

b. By redesignating paragraphs (b) and (c) as (d) and (e), respectively.

c. By adding new paragraphs (b) and (c) to read as set forth below.

§ 146.11 Inspections.

(a) Each participating slaughter plant shall be audited at least once annually or a sufficient number of times each year to satisfy the Official State Agency that the participating slaughter plant is in compliance with the provisions of this part. The yearly audit will consist of an evaluation of 2 weeks' worth of records, selected at random, of the following data:

(1) The actual flock slaughter date for each flock. This information must come from a verifiable source. Verifiable sources include electronic record systems that have oversight from the Department's Grain Inspectors, Packers and Stockyards Administration or Food Safety and Inspection Service (FSIS) documents such as FSIS Form 9061–2.

(2) Laboratory test results for each flock slaughtered with the sample collection date and test result. The test must be NPIP approved and performed in an authorized laboratory of the NPIP.

(b) A flock will be considered to be not conforming to protocol if there are no test results available, if the flock was not tested within 21 days before slaughter, or if the test results for the flocks were not returned before slaughter.

(c) Two or more flocks that are found to be not conforming to protocol in the yearly audit for a slaughter plant shall be cause for a deficiency rating for that plant. However, if the root cause for the deficiency was identified, corrected, and documented, the plant will be eligible for an immediate reevaluation of 2 additional weeks' worth of records, again selected at random. If no more than one missed flock is identified in this reevaluation, the plant will be considered in compliance and no further action will be required. Plants found to be deficient must provide a written corrective action plan to the auditor within 2 weeks of receipt of the deficiency rating. A followup audit on the information in paragraphs (a)(1) and (a)(2) of this section will occur within 90 days from the receipt of the corrective action plan. Slaughter plants will retain their classification and may continue to use the Plan emblem in § 149.9(a) during this process. A failure on the followup audit may result in disbarment from participation according to the procedures in § 146.12.

* * * * *

18. In § 146.13, paragraph (b) is revised to read as follows:

§ 146.13 Testing.

* * * * *

(b) *Avian influenza.* The official tests for avian influenza are described in paragraphs (b)(1) and (b)(2) of this section:

(1) *Antibody detection tests*—(i) *Enzyme-linked immunosorbent assay (ELISA).* ELISA must be conducted using test kits approved by the Department and the Official State Agency and must be conducted in accordance with the recommendations of the producer or manufacturer.

(ii) *The agar gel immunodiffusion (AGID) test.* (A) The AGID test must be conducted on all ELISA-positive samples.

(B) The AGID test must be conducted using reagents approved by the Department and the Official State Agency.

(C) Standard test procedures for the AGID test for avian influenza are set forth in § 147.9 of this subchapter. The test can be conducted on egg yolk or blood samples.

(D) Positive tests for the AGID must be further tested by Federal Reference Laboratories using appropriate tests for confirmation. Final judgment may be based upon further sampling and appropriate tests for confirmation.

(2) *Agent detection tests.* Tests that detect influenza A matrix gene or protein may be performed by an authorized laboratory. Tests that determine hemagglutinin or neuraminidase subtypes may not be performed by an authorized laboratory. Samples for this testing should be collected from naturally occurring flock mortality or clinically ill birds.

(i) *The real time reverse transcriptase/polymerase chain reaction (RRT–PCR) assay.* (A) The RRT–PCR tests must be conducted using reagents approved by the Department and the Official State Agency. The RRT–PCR must be conducted using the National Veterinary Services Laboratories (NVSL) official protocol for RRT–PCR (AVPR01510) and must be conducted by personnel who have passed an NVSL proficiency test.

(B) Positive results from the RRT–PCR must be further tested by Federal Reference Laboratories using appropriate tests for confirmation. Final judgment may be based upon further sampling and appropriate tests for confirmation.

(ii) *USDA-licensed type A influenza antigen capture immunoassay (ACIA).* (A) The USDA-licensed type A influenza ACIA must be conducted using test kits approved by the Department and the Official State Agency and must be conducted in accordance with the recommendations of the producer or manufacturer.

(B) Positive results from the ACIA must be further tested by Federal Reference Laboratories using appropriate tests for confirmation. Final judgment may be based upon further sampling and appropriate tests for confirmation.

(3) The official determination of a flock as positive for the H5 or H7 subtypes avian influenza may be made only by NVSL.

19. In § 146.43, in paragraph (a)(1), the first sentence is revised to read as follows:

§ 146.43 Terminology and classification; meat-type turkey slaughter plants.

* * * * *

(a) * * *

(1) It is a meat-type turkey slaughter plant that accepts only meat-type turkeys from flocks where a minimum of 6 birds per flock has tested negative for antibodies to type A avian influenza virus with an approved test no more than 21 days prior to slaughter. * * * * * * * * *

20. A new subpart E, ''Special Provisions for Commercial Upland Game Birds, Commercial Waterfowl, Raised-for-Release Upland Game Birds, and Raised-for-Release Waterfowl,'' §§ 146.51 through 146.53, is added to read as follows:

Subpart E—Special Provisions for Commercial Upland Game Birds, Commercial Waterfowl, Raised-for-Release Upland Game Birds, and Raised-for-Release Waterfowl

Sec.

146.51 Definitions.
146.52 Participation.
146.53 Terminology and classification; slaughter plants and premises.

Subpart E—Special Provisions for Commercial Upland Game Birds, Commercial Waterfowl, Raised-for-Release Upland Game Birds, and Raised-for-Release Waterfowl

§ 146.51 Definitions.

Commercial upland game bird slaughter plant. A commercial upland game bird slaughter plant that is federally inspected or under State inspection that the U.S. Department of Agriculture's Food Safety and Inspection Service has recognized as equivalent to Federal inspection.

Commercial upland game birds. Upland game bird pheasants, quail, or partridges grown under confinement for the primary purpose of producing meat for human consumption.

Commercial waterfowl. Domesticated ducks or geese grown under confinement for the primary purpose of producing meat for human consumption.

Commercial waterfowl slaughter plant. A commercial waterfowl slaughter plant that is federally inspected or under State inspection that the U.S. Department of Agriculture's Food Safety and Inspection Service has recognized as equivalent to Federal inspection.

Raised-for-release upland game birds. Pheasants, quail, and partridge that are raised under confinement for release in game preserves and are not breeding stock.

Raised-for-release waterfowl. Waterfowl that are raised under confinement for release in game preserves and are not breeding stock.

Shift. The working period of a group of employees who are on duty at the same time.

§ 146.52 Participation.

(a) Participating commercial upland game bird slaughter plants, commercial waterfowl slaughter plants, raised-for-release upland game bird premises, and raised-for-release waterfowl premises shall comply with the applicable general provisions of Subpart A of this part and the special provisions of this subpart E.

(b) Commercial waterfowl and commercial upland game bird slaughter plants that slaughter fewer than 50,000 birds annually are exempt from the special provisions of this subpart E.

(c) Raised-for-release upland game bird premises and raised-for-release waterfowl premises that raise fewer than 25,000 birds annually are exempt from the special provisions of this subpart E.

§ 146.53 Terminology and classification; slaughter plants and premises.

Participating flocks which have met the respective requirements specified in this section may be designated by the following terms and the corresponding designs illustrated in § 146.9 of this part:

(a) *U.S. H5/H7 Avian Influenza Monitored.* This program is intended to be the basis from which the commercial waterfowl and commercial upland game bird industry may conduct a program to monitor for the H5/H7 subtypes of avian influenza. It is intended to determine the presence of the H5/H7 subtypes of avian influenza in commercial waterfowl and commercial upland game birds through routine surveillance of each participating slaughter plant. A slaughter plant will qualify for this classification when the Official State Agency determines that it has met one of the following requirements:

(1) It is a commercial upland game bird slaughter plant or commercial waterfowl slaughter plant where a minimum of 11 birds per shift are tested negative for the H5/H7 subtypes of avian influenza at slaughter;

(2) It is a commercial upland game bird slaughter plant or commercial waterfowl slaughter plant that only accepts commercial upland game birds or commercial waterfowl from flocks where a minimum of 11 birds per flock have been tested negative for antibodies to the H5/H7 subtypes of avian influenza no more than 21 days prior to slaughter; or

(3) It is a commercial upland game bird slaughter plant or commercial waterfowl slaughter plant that has an ongoing active and passive surveillance program for H5/H7 subtypes of avian influenza that is approved by the Official State Agency and the Service.

(b) *U.S. H5/H7 Avian Influenza Monitored.* This program is intended to be the basis from which the raised-for-release upland game bird and raised-for-release waterfowl industries may conduct a program to monitor for the H5/H7 subtypes of avian influenza. It is intended to determine the presence of the H5/H7 subtypes of avian influenza through routine surveillance of each participating premises. A premises will qualify for the classification when the Official State Agency determines that a representative sample of 30 birds from the participating premises has been tested with negative results for the H5/H7 subtypes of avian influenza every 90 days.

PART 147—AUXILIARY PROVISIONS ON NATIONAL POULTRY IMPROVEMENT PLAN

21. The authority citation continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

22. Section 147.9 is amended as follows:

a. By revising paragraph (a)(4)(i)(F) to read as follows.

b. By removing figure 1.

c. By redesignating figures 2 and 3 as figures 1 and 2, respectively.

§ 147.9 Standard test procedures for avian influenza.

(a) * * *

(4) * * *

(i) * * *

(F) To prepare the wells, place 50 µl of avian influenza AGID antigen in the center well using a micropipette with an attached pipette tip. Place 50 µl AI AGID positive control antiserum in each of three alternate peripheral wells, and add 50 µl per well of test sera in the three remaining wells. This arrangement provides a positive control line on each

side of the test serum, thus providing for the development of lines of identity on both sides of each test serum (see figure 1).

Note: A pattern can be included with positive, weak positive, and negative reference serum in the test sera wells to aid in the interpretation of results (see figure 2).

* * * * *

§§ 147.12, 147.14, 147.15, 147.16, 147.30 [Amended]

23. Sections 147.12, 147.14, 147.15, 147.16, and 147.30 are amended by redesignating footnotes 12 through and 24 as footnotes 8 through 20, respectively.

24. A new § 147.31 is added to read as follows:

§ 147.31 Laboratory procedures recommended for the real-time polymerase chain reaction test for Mycoplasma gallisepticum (MGLP ReTi).

(a) *DNA extraction.* Use Qiagen Qiamp Mini Kit for DNA extraction or equivalent validated technique/procedure. This kit utilizes the following methods: 100 µl of swab suspension incubates with 10 µl of proteinase K and 400 µl of lysis buffer at 56 °C for 10 minutes. Following incubation, 100 µl of 100 percent ethanol is added to lysate. Wash and centrifuge following extraction kit recommendations.

(b) *Primer selection.* A forward primer mglpU26 (5′–CTA GAG GGT TGG ACA GTT ATG–3′) located at nucleotide positions 765,566 to 765,586 of the *M. gallisepticum* R strain genome sequence; a reverse primer mglp164 (5′–GCT GCA CTA AAT GAT ACG TCA AA–3′) located at nucleotide positions 765,448 to 765,470 of the *M. gallisepticum* R strain genome sequence; and a Taqman dual-labeled probe mglpprobe (5′–FAM–CAG TCA TTA ACA ACT TAC CAC CAG AAT CTG–BHQ1–3′) located at nucleotide positions 765,491 to 765,520 of the *M. gallisepticum* R strain genome should be used to amplify a 13-bp fragment of the lp gene.

(c) *MGLP ReTi.* Primers and probe should be utilized in a 25 µl reaction containing 12.5 µl of Quantitect Probe PCR 2X mix (Qiagen, Valencia, CA),[21] primers to a final concentration of 0.5 µmolar, and probe to a final concentration of 0.1 µmolar, 1 µl of HK–UNG Thermolabile Uracil N–glycosylase (Epicentre, Madison, WI), 2 µl of water, and 5 µl of template. The reaction can be performed in a SmartCycler (Cepheid, Sunnyvale, CA) or other equivalent validated platform procedure for real-time thermocycler at 50 °C for 2 minutes; 95 °C for 15 minutes with optics OFF; and 40 cycles of 94 °C for 15 seconds followed by 60 °C for 60 seconds with optics ON.

(d) *Determination of positive.* For each MGLP ReTi assay reaction, the threshold cycle number (CT value) was determined to be the PCR cycle number at which the fluorescence of the reaction exceeded 30 units of fluorescence. For all samples tested, any MGLP reaction that has a recorded CT value was considered positive, while any MGLP reaction that had no recorded CT value was considered negative.

(e) *Controls.* Proper controls should be used when conducting the MGLP ReTi assay as an official test of the Plan. Positive, quantitative, extraction, and internal controls are commercially available from GTCAllison, LLC, Mocksville, NC.

25. Section 147.43 is amended as follows:

a. By revising paragraph (d)(4) to read as set forth below.

b. In paragraph (d)(6), by removing the words ''a forum'' and adding the words ''an official advisory committee'' in their place.

§ 147.43 General Conference Committee.

* * * * *

(d) * * *

(4) Consider each proposal submitted as provided in § 147.44 and make recommendations to subpart Committees and the Conference. Meet jointly with the NPIP Technical Committee and consider the technical aspects and accuracy of each proposal. Recommend whether new proposals (i.e., proposals that have not been submitted as provided in § 147.44) should be considered by the delegates to the Plan Conference.

* * * * *

26. In § 147.45, the first sentence is revised to read as follows:

§ 147.45 Official delegates.

Each cooperating State shall be entitled to one official delegate for each of the programs prescribed in subparts B, C, D, E, F, G, and H of part 145 of this chapter and for each of the programs prescribed in subparts B, C, D, and E of part 146 of this chapter in which it has one or more participants at the time of the Conference. * * *

27. In § 147.46, a new paragraph (a)(9) is added to read as follows:

§ 147.46 Committee consideration of proposed changes.

(a) * * *

(9) Commercial upland game birds and waterfowl and raised-for-release upland game birds and waterfowl.

* * * * *

28. A new Subpart F, ''Authorized Laboratories and Approved Tests,'' §§ 147.51 and 147.52, is added to read as follows:

Subpart F—Authorized Laboratories and Approved Tests

Sec.

147.51 Authorized laboratory minimum requirements.
147.52 Approved tests.

Subpart F—Authorized Laboratories and Approved Tests

§ 147.51 Authorized laboratory minimum requirements.

These minimum requirements are intended to be the basis on which an authorized laboratory of the Plan can be evaluated to ensure that official Plan assays are performed and reported as described in this part. A satisfactory evaluation will result in the laboratory being recognized by the NPIP office of the Service as an authorized laboratory qualified to perform the assays provided for in this part.

(a) *Check-test proficiency.* The laboratory must use a regularly scheduled check test for each assay that it performs.

(b) *Trained technicians.* The testing procedures at the laboratory must be run or overseen by a laboratory technician who has attended and satisfactorily completed Service-approved laboratory workshops for Plan-specific diseases within the past 3 years.

(c) *Laboratory protocol.* Official Plan assays must be performed and reported as described in this part.

(d) *State site visit.* The Official State Agency will conduct a site visit and recordkeeping audit annually.

(e) *Service review.* Authorized laboratories will be reviewed by the Service (NPIP staff) every 3 years. The Service's review may include, but will not necessarily be limited to, checking records, laboratory protocol, check-test proficiency, technician training, and peer review.

(f) *Reporting.* (1) A memorandum of understanding or other means shall be used to establish testing and reporting criteria to the Official State Agency, including criteria that provide for reporting H5 and H7 low pathogenic avian influenza directly to the Service.

(2) *Salmonella pullorum* and *Mycoplasma* Plan disease reactors must be reported to the Official State Agency within 48 hours.

(g) *Verification.* Random samples may also be required to be submitted for

[21] Trade names are used in these procedures solely for the purpose of providing specific information. Mention of a trade name does not constitute a guarantee or warranty of the product by the U.S. Department of Agriculture or an endorsement over other products not mentioned.

verification as specified by the Official State Agency.

§ 147.52 Approved tests.

(a) The procedures for the bacteriological examination of poultry and poultry environments described in this part are approved tests for use in the NPIP. In addition, all tests that use veterinary biologics (e.g., antiserum and other products of biological origin) that are licensed or produced by the Service and used as described in this part are approved for use in the NPIP.

(b) Diagnostic test kits that are not licensed by the Service (e.g., bacteriological culturing kits) may be approved through the following procedure:

(1) The sensitivity of the kit will be estimated in at least three authorized laboratories selected by the Service by testing known positive samples, as determined by the official NPIP procedures found in Subparts A, B, C, and D of this part. If certain conditions or interfering substances are known to affect the performance of the kit, appropriate samples will be included so that the magnitude and significance of the effect(s) can be evaluated.

(2) The specificity of the kit will be estimated in at least three authorized laboratories selected by the Service by testing known negative samples, as determined by the official NPIP procedures found in this part. If certain conditions or interfering substances are known to affect the performance of the kit, appropriate samples will be included so that the magnitude and significance of the effect(s) can be evaluated.

(3) The kit will be provided to the cooperating laboratories in its final form and include the instructions for use. The cooperating laboratories must perform the assay exactly as stated in the supplied instructions. Each laboratory must test a panel of at least 25 known positive clinical samples supplied by the manufacturer of the test kit. In addition, each laboratory will be asked to test 50 known negative clinical samples obtained from several sources, to provide a representative sampling of the general population. The identity of the samples must be coded so that the cooperating laboratories are blinded to identity and classification. Each sample must be provided in duplicate or triplicate, so that error and repeatability data may be generated.

(4) Cooperating laboratories will submit to the kit manufacturer all raw data regarding the assay response. Each sample tested will be reported as positive or negative, and the official NPIP procedure used to classify the sample must be submitted in addition to the assay response value.

(5) The findings of the cooperating laboratories will be evaluated by the NPIP technical committee, and the technical committee will make a recommendation regarding whether to approve the test kit to the General Conference Committee. If the technical committee recommends approval, the final approval will be granted in accordance with the procedures described in §§ 147.46 and 147.47.

Done in Washington, DC, this 20th day of May 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–11739 Filed 5–27–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM01–8–010]

Revised Public Utility Filing Requirements for Electric Quarterly Reports

May 19, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice seeking comments on proposed revisions to Electric Quarterly Report (EQR) data dictionary.

SUMMARY: In this notice, the Federal Energy Regulatory Commission (Commission) proposes to revise the EQR Data Dictionary to clarify the definition of Contract Commencement date. If adopted, this proposal will make reporting this information less burdensome and more accessible.

DATES: Comments on the proposal are due June 27, 2008.

ADDRESSES: You may submit comments on the proposal, identified by Docket No. RM01–8–010, by one of the following methods:

- *Agency Web Site: http://www.ferc.gov.* Follow the instructions for submitting comments via the eFiling link found in the Comment Procedures Section of the preamble.
- *Mail:* Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426. Please refer to the Comment Procedures Section of the preamble for additional information on how to file paper comments.

FOR FURTHER INFORMATION CONTACT:

Michelle Veloso (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8363.

Gary D. Cohen (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8321.

SUPPLEMENTARY INFROMATION:

1. The Commission is proposing to revise the Electric Quarterly Report (EQR) Data Dictionary to clarify the definition of Contract Commencement Date in Field 22.

Background

2. On April 25, 2002, the Commission issued Order No. 2001, a Final Rule establishing revised public utility filing requirements.[1] This rule revised the Commission's filing requirements to require companies subject to the Commission's regulations under section 205 of the Federal Power Act[2] to file quarterly reports that: (1) Provide data identifying the utility on whose behalf the report is being filed (ID Data); (2) summarize pertinent data about the utility's currently effective contracts (Contract Data); and (3) summarize data about wholesale power sales the utility made during the reporting period (Transaction Data). The requirement to file EQRs replaced the requirement to file quarterly transaction reports summarizing a utility's market-based rate transactions and sales agreements that conformed to the utility's tariff.

3. In Order No. 2001, the Commission also adopted a new section in its regulations, 18 CFR 35.10b, which requires that the EQRs are to be prepared in conformance with the Commission's software and guidance posted and available from the Commission website. This obviates the need to revise 18 CFR 35.10b to implement revisions to the software and

[1] *Revised Public Utility Filing Requirements,* Order No. 2001, 67 FR 31043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (Apr. 25, 2002), *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, *reconsideration and clarification denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filings,* Order No. 2001–C, 101 FERC ¶ 61,314 (2002), Order No. 2001–D, *order directing filings,* 102 FERC 61,334, Order No. 2001–E, *order refining filing requirements,* 105 FERC ¶ 61,352 (2003), *clarification order,* Order No.2001–F, 106 FERC ¶ 61,060 (2004), *order adopting EQR Data Dictionary,* Order No. 2001–G, 120 FERC ¶ 61,270 (2007), *order on reh'g and clarification,* Order No. 2001–H, 121 FERC ¶ 61,289 (2007).

[2] 16 U.S.C. 824d.

guidance. Since the issuance of Order No. 2001, as need has arisen, the Commission has issued orders to resolve questions raised by EQR users and has directed Staff to issue additional guidance.

4. On September 24, 2007, the Commission issued Order No. 2001–G, adopting an EQR Data Dictionary that collected in one document the definitions of certain terms and values used in filing EQR data (previously provided in Commission orders and in guidance materials posted at the Commission's website) and providing formal definitions for fields that were previously undefined. On December 20, 2007, the Commission issued Order No. 2001–H, which addressed a pending request for rehearing and clarifying the information to be reported in several EQR data fields.

5. In Order 2001–H, the Commission defined Contract Commencement Date, (Field 22 in the Contract Data section of the EQR), as:

> The date the terms of the contract reported in the EQR were effective. If the terms reported in the Contract Data section of the EQR became effective or if service under those terms began on multiple dates (*i.e.:* due to an amendment), the date to be reported as the Commencement Date is the date when service began pursuant to the most recent amendment to the terms reported in the Contract Data section of the EQR.[3]

6. On February 26, 2008, the Commission held an EQR Technical Conference to ''review the EQR Data Dictionary and address questions from EQR users.'' [4] During this technical conference, Contract Commencement Date was a topic of considerable discussion.

7. On March 3, 2008, the Commission issued notice of a proposal to revise the EQR Data Dictionary to clarify the requirement to report all ancillary service transactions, consistent with the Commission's decision in Order No. 697 [5] that information about third party sales of ancillary services at market-based rates should be reported in EQR filings, rather than being reported on a separate OASIS-like Internet site.[6]

8. On April 10, 2008, in its response to the March 2008 Notice, Edison Electric Institute (EEI) included comments related to the definition of Commencement Date in Field 22.[7] Those issues are more pertinent to the notice we are issuing in the instant subdocket (*i.e.*, RM08–1–010) than to the March 2008 Notice. We address those comments here.

Discussion

9. In Order No. 2001–H, the Commission clarified the information that should be reported in the Contract Execution Date and Contract Commencement Date fields. The Commission's findings on the information that should be reported in the Contract Execution Date and Contract Commencement Date fields was based on commenters' argument that Contract Execution Date (Field No. 21) should reflect the date the contract was originally signed.

10. In Order No. 2001–G, the Commission determined that the date a contract was ''materially amended'' was to be reported as the Contract Execution Date. Commenters argued that it would be helpful if, despite contract revisions, the Contract Execution Date would remain the date the contract was first executed, for the entire life of the contract.[8] It was argued that this would help EQR users understand exactly what contract was being referenced. In response to these concerns, in Order No. 2001–H, the Commission was persuaded to have the Contract Execution Date stay unchanged for the life of the contract.[9] In addition, given the Commission's interest in tracking the date of contract revisions, Order No. 2001–H provided that amendment dates would be reported in the Contract Commencement Date field. Thus, the Commission determined in Order No. 2001–H that Contract Commencement Date should report ''[t]he date the terms of the contract reported in the EQR were effective.'' [10] The terms of each contract reported in the EQR are represented by the thirty-one fields in each record of the Contract Data Section. The Commission determined that any changes in the reporting of these thirty-one fields would require a change in the Contract Commencement Date field.

11. At the February 2008 Technical Conference, Commission staff highlighted for EQR users the import of the changes adopted by the Commission in Order Nos. 2001–G and 2001–H. Although Order No. 2001–H was unchallenged when issued, some filers expressed concern at the February 2008 Technical Conference about the portion of the definition of Contract Commencement Date that describes using ''the date when service began pursuant to the most recent amendment.'' In addition, several participants were concerned that it would be difficult to identify the exact date when ''service'' begins.

12. The Contract Commencement Date is intended to reflect the effective date of either the contract or the most recent amendment. The language in question was added for clarity in two respects. First, where no effective date is provided in the contract or the amendment, the EQR filer should use the date service began under the contract as a substitute. Second, if there have been a number of amendments to the contract, the filer should use the date of the amendment that accounted for the most recent change in the terms reported in the EQR.

13. In its comments on the March 2008 Notice, EEI encouraged the Commission to confirm that Field 22 needs to be completed in conformance with the new definition only for contracts amended after January 1, 2008. EEI also suggests that the Commission should refine the definition of Contract Commencement Date so that revisions to Customer Company Name, Company DUNS Number, or Customer DUNS Number would not trigger a need for a revised Contract Commencement Date. EEI also suggests that Field 22 be given a different name that would better reflect the information that would be reported in this field.[11]

14. As a result of the discussions at the EQR Technical Conference and the points raised in the EEI comments in Docket No. RM01–8–009, the Commission invites comments on the following proposed definition of Contract Commencement Date:

> The date the terms of the contract reported in the Contract Products section of the EQR (Field Nos. 26 through 45) were effective. If the terms reported in the Contract Data section of the EQR became effective on multiple dates (*i.e.:* due to one or more amendments), the date to be reported as the Commencement Date is the date the most recent amendment became effective. If the contract or the most recent reported amendment does not have an effective date, the date when service began pursuant to the contract or most recent reported amendment may be used. If the terms of the contract reported in the Contract Products section

[3] Order 2001–H, Data Dictionary at Field 22. There were no requests for rehearing or appeal filed in response to Order No. 2001–H.

[4] *See Notice of Electric Quarterly Reports Technical Conference,* January 7, 2008 (*http://www.ferc.gov/EventCalendar/Files/20080108075834-RM01–8–000TC.pdf*).

[5] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, 72 FR 39904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (June 21, 2007), *clarifying order,* 121 FERC ¶ 61,260 (2007).

[6] *Revised Public Utility Filing Requirements for Electric Quarterly Reports,* 73 FR 12983 (Mar. 11, 2008), FERC Stats. & Regs. ¶ 35,557 (Mar. 3, 2008) (March 2008 Notice).

[7] EEI Comments, Docket No. RM08–1–009 (filed April 10, 2007).

[8] *See* Order No. 2001–H at P 8–9.

[9] *Id.* at P 10.

[10] *Id.* at Data Dictionary, Field 22.

[11] EEI suggests that Field 22 be labeled as ''Latest Modification Date.''

have not been amended since January 1, 2008, the initial date the contract became effective may be used.

15. The new definition clarifies the Commission's intention regarding the effective date of amendment. It also limits the types of changes that would require a new date to those affecting the products and services under the contract (the terms provided in Field Nos. 26 through 45); changes in the name of the counterparties to the contract, Field Nos. 15 and 16, for example, are not included. The new definition also allows the original contract commencement date to be used if the contract has not been amended since January 1, 2008, to simplify compliance with the revised requirement.

16. The Commission also invites comments regarding renaming Field 22 to ''Commencement Date of Contract Terms'' to reflect this revised definition.

Comment Procedures

17. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due June 27, 2008. Comments must refer to Docket No. RM01–8–010, and must include the commenter's name, the organization they represent, if applicable, and their address. Comments may be filed either in electronic or paper format.

18. Comments may 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 and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. 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.

19. 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.

Document Availability

20. 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 the Commission's Home Page (*http://www.ferc.gov*) and in the Commission'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.

21. From the Commission's Home Page on the Internet, this information is available in the eLibrary. The full text of this document is available in the eLibrary both 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.

22. User assistance is available for eLibrary and the Commission's Web site during our normal business hours. For assistance contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

By direction of the Commission.

Kimberly D. Bose,

Secretary.

Attachment A—Proposed Revisions to Electric Quarterly Report Data Dictionary Version 1.1 (issued December 21, 2007)

EQR DATA DICTIONARY

Field #	Field	Required	Value	Definition
			ID Data	
1	Filer Unique Identifier.	✓	FR1	(Respondent)—An identifier (i.e., ''FR1'') used to designate a record containing Respondent identification information in a comma-delimited (csv) file that is imported into the EQR filing. Only one record with the FR1 identifier may be imported into an EQR for a given quarter.
1	Filer Unique Identifier.	✓	FS# (where ''#'' is an integer).	(Seller)—An identifier (e.g., ''FS1'', ''FS2'') used to designate a record containing Seller identification information in a comma-delimited (csv) file that is imported into the EQR filing. One record for each seller company may be imported into an EQR for a given quarter.
1	Filer Unique Identifier.	✓	FA1	(Agent)—An identifier (i.e., ''FA1'') used to designate a record containing Agent identification information in a comma-delimited (csv) file that is imported into the EQR filing. Only one record with the FA1 identifier may be imported into an EQR for a given quarter.
2	Company Name	✓	Unrestricted text (100 characters).	(Respondent)—The name of the company taking responsibility for complying with the Commission's regulations related to the EQR.
2	Company Name	✓	Unrestricted text (100 characters).	(Seller)—The name of the company that is authorized to make sales as indicated in the company's FERC tariff(s). This name may be the same as the Company Name of the Respondent.
2	Company Name	✓	Unrestricted text (100 characters).	(Agent)—The name of the entity completing the EQR filing. The Agent's Company Name need not be the name of the company under Commission jurisdiction.
3	Company DUNS Number.	for Respondent and Seller.	Nine digit number	The unique nine digit number assigned by Dun and Bradstreet to the company identified in Field Number 2.
4	Contact Name	✓	Unrestricted text (50 characters).	(Respondent)—Name of the person at the Respondent's company taking responsibility for compliance with the Commission's EQR regulations.

EQR DATA DICTIONARY—Continued

Field #	Field	Required	Value	Definition
4	Contact Name	✓	Unrestricted text (50 characters).	(Seller)—The name of the contact for the company authorized to make sales as indicated in the company's FERC tariff(s). This name may be the same as the Contact Name of the Respondent.
4	Contact Name	✓	Unrestricted text (50 characters).	(Agent)—Name of the contact for the Agent, usually the person who prepares the filing.
5	Contact Title	✓	Unrestricted text (50 characters).	Title of contact identified in Field Number 4.
6	Contact Address	✓	Unrestricted text	Street address for contact identified in Field Number 4.
7	Contact City	✓	Unrestricted text (30 characters).	City for the contact identified in Field Number 4.
8	Contact State	✓	Unrestricted text (2 characters).	Two character state or province abbreviations for the contact identified in Field Number 4.
9	Contact Zip	✓	Unrestricted text (10 characters).	Zip code for the contact identified in Field Number 4.
10	Contact Country Name.	✓	CA—Canada, MX—Mexico, US—United States, UK—United Kingdom.	Country (USA, Canada, Mexico, or United Kingdom) for contact address identified in Field Number 4.
11	Contact Phone	✓	Unrestricted text (20 characters).	Phone number of contact identified in Field Number 4.
12	Contact E-Mail	✓	Unrestricted text	E-mail address of contact identified in Field Number 4.
13	Filing Quarter	✓	YYYYMM	A six digit reference number used by the EQR software to indicate the quarter and year of the filing for the purpose of importing data from csv files. The first 4 numbers represent the year (e.g. 2007). The last 2 numbers represent the last month of the quarter (e.g., 03=1st quarter; 06=2nd quarter, 09=3rd quarter, 12=4th quarter).
			Contract Data	
14	Contract Unique ID	✓	An integer proceeded by the letter "C" (only used when importing contract data).	An identifier beginning with the letter "C" and followed by a number (e.g., "C1", "C2") used to designate a record containing contract information in a comma-delimited (csv) file that is imported into the EQR filing. One record for each contract product may be imported into an EQR for a given quarter.
15	Seller Company Name.	✓	Unrestricted text (100 characters).	The name of the company that is authorized to make sales as indicated in the company's FERC tariff(s). This name must match the name provided as a Seller's "Company Name" in Field Number 2 of the ID Data (Seller Data).
16	Customer Company Name.	✓	Unrestricted text (70 characters).	The name of the counterparty.
17	Customer DUNS Number.	✓	Nine digit number	The unique nine digit number assigned by Dun and Bradstreet to the company identified in Field Number 16.
18	Contract Affiliate	✓	Y (Yes), N (No)	The customer is an affiliate if it controls, is controlled by or is under common control with the seller. This includes a division that operates as a functional unit. A customer of a seller who is an Exempt Wholesale Generator may be defined as an affiliate under the Public Utility Holding Company Act and the FPA.
19	FERC Tariff Reference.	✓	Unrestricted text (60 characters).	The FERC tariff reference cites the document that specifies the terms and conditions under which a Seller is authorized to make transmission sales, power sales or sales of related jurisdictional services at cost-based rates or at market-based rates. If the sales are market-based, the tariff that is specified in the FERC order granting the Seller Market Based Rate Authority must be listed.
20	Contract Service Agreement ID.	✓	Unrestricted text (30 characters).	Unique identifier given to each service agreement that can be used by the filing company to produce the agreement, if requested. The identifier may be the number assigned by FERC for those service agreements that have been filed with and accepted by the Commission, or it may be generated as part of an internal identification system.
21	Contract Execution Date.	✓	YYYYMMDD	The date the contract was signed. If the parties signed on different dates, use the most recent date signed.

EQR DATA DICTIONARY—Continued

Field #	Field	Required	Value	Definition
22	Commencement Date of Contract Terms.	✓	YYYYMMDD	The date the terms of the contract reported in the Contract Products section of the EQR (Field Nos. 26 through 45) were effective. If the terms reported in the Contract Data section of the EQR became effective on multiple dates (i.e.: due to one or more amendments), the date to be reported as the Commencement Date is the date the most recent amendment became effective. If the contract or the most recent reported amendment does not have an effective date, the date when service began pursuant to the contract or most recent amendment may be used. If the terms of the contract reported in the Contract Products section have not been amended since January 1, 2008, the initial date the contract became effective may be used.
23	Contract Termination Date.	If specified in the contract.	YYYYMMDD	The date that the contract expires.
24	Actual Termination Date Extension.	If contract terminated.	YYYYMMDD	The date the contract actually terminates.
25	Provision Description.	✓	Unrestricted text	Description of terms that provide for the continuation of the contract.
26	Class Name	✓		See definitions of each class name below.
26	Class Name	✓	F—Firm	For transmission sales, a service or product that always has priority over non-firm service. For power sales, a service or product that is not interruptible for economic reasons.
26	Class Name	✓	NF—Non-firm	For transmission sales, a service that is reserved and/or scheduled on an as-available basis and is subject to curtailment or interruption at a lesser priority compared to Firm service. For an energy sale, a service or product for which delivery or receipt of the energy may be interrupted for any reason or no reason, without liability on the part of either the buyer or seller.
26	Class Name	✓	UP—Unit Power Sale.	Designates a dedicated sale of energy and capacity from one or more than one specified generation unit(s).
26	Class Name	✓	N/A—Not Applicable.	To be used only when the other available Class Names do not apply.
27	Term Name	✓	LT—Long Term, ST—Short Term, N/A—Not Applicable.	Contracts with durations of one year or greater are long-term. Contracts with shorter durations are short-term.
28	Increment Name	✓		See definitions for each increment below.
28	Increment Name	✓	H—Hourly	Terms of the contract (if specifically noted in the contract) set for up to 6 consecutive hours (≤6 consecutive hours).
28	Increment Name	✓	D—Daily	Terms of the contract (if specifically noted in the contract) set for more than 6 and up to 60 consecutive hours (>6 and ≤60 consecutive hours).
28	Increment Name	✓	W—Weekly	Terms of the contract (if specifically noted in the contract) set for over 60 consecutive hours and up to 168 consecutive hours (>60 and <168 consecutive hours).
28	Increment Name	✓	M—Monthly	Terms of the contract (if specifically noted in the contract) set for more than 168 consecutive hours up to, but not including, one year (>168 consecutive hours and <1 year).
28	Increment Name	✓	Y—Yearly	Terms of the contract (if specifically noted in the contract) set for one year or more (≥1 year).
28	Increment Name	✓	N/A—Not Applicable.	Terms of the contract do not specify an increment.
29	Increment Peaking Name.	✓		See definitions for each increment peaking name below.
29	Increment Peaking Name.	✓	FP—Full Period	The product described may be sold during those hours designated as on-peak and off-peak in the NERC region of the point of delivery.
29	Increment Peaking Name.	✓	OP—Off-Peak	The product described may be sold only during those hours designated as off-peak in the NERC region of the point of delivery.
29	Increment Peaking Name.	✓	P—Peak	The product described may be sold only during those hours designated as on-peak in the NERC region of the point of delivery.
29	Increment Peaking Name.	✓	N/A—Not Applicable.	To be used only when the increment peaking name is not specified in the contract.
30	Product Type Name	✓		See definitions for each product type below.
30	Product Type Name	✓	CB—Cost Based	Energy or capacity sold under a FERC-approved cost-based rate tariff.

EQR DATA DICTIONARY—Continued

Field #	Field	Required	Value	Definition
30	Product Type Name	✓	CR—Capacity Reassignment.	An agreement under which a transmission provider sells, assigns or transfers all or portion of its rights to an eligible customer.
30	Product Type Name	✓	MB—Market Based	Energy or capacity sold under the seller's FERC-approved market-based rate tariff.
30	Product Type Name	✓	T—Transmission	The product is sold under a FERC-approved transmission tariff.
30	Product Type Name	✓	Other	The product cannot be characterized by the other product type names.
31	Product Name	✓	See Product Name Table, Appendix A.	Description of product being offered.
32	Quantity	If specified in the contract.	Number with up to 4 decimals.	Quantity for the contract product identified.
33	Units	If specified in the contract.	See Units Table, Appendix E.	Measure stated in the contract for the product sold.
34	Rate	One of four rate fields (34, 35, 36, or 37) must be included.	Number with up to 4 decimals.	The charge for the product per unit as stated in the contract.
35	Rate Minimum	One of four rate fields (34, 35, 36, or 37) must be included.	Number with up to 4 decimals.	Minimum rate to be charged per the contract, if a range is specified.
36	Rate Maximum	One of four rate fields (34, 35, 36, or 37) must be included.	Number with up to 4 decimals.	Maximum rate to be charged per the contract, if a range is specified.
37	Rate Description	One of four rate fields (34, 35, 36, or 37) must be included.	Unrestricted text	Text description of rate. If the rate is currently available on the FERC website, a citation of the FERC Accession Number and the relevant FERC tariff including page number or section may be included instead of providing the entire rate algorithm. If the rate is not available on the FERC website, include the rate algorithm, if rate is calculated. If the algorithm would exceed the 150 character field limit, it may be provided in a descriptive summary (including bases and methods of calculations) with a detailed citation of the relevant FERC tariff including page number and section. If more than 150 characters are required, the contract product may be repeated in a subsequent line of data until the rate is adequately described.
38	Rate Units	If specified in the contract.	See Rate Units Table, Appendix F.	Measure stated in the contract for the product sold.
39	Point of Receipt Balancing Authority (PORBA).	If specified in the contract.	See Balancing Authority Table, Appendix B.	The registered NERC Balancing Authority (formerly called NERC Control Area) where service begins for a transmission or transmission-related jurisdictional sale. The Balancing Authority will be identified with the abbreviation used in OASIS applications. If receipt occurs at a trading hub specified in the EQR software, the term ''Hub'' should be used.
40	Point of Receipt Specific Location (PORSL).	If specified in the contract.	Unrestricted text (50 characters). If ''HUB'' is selected for PORCA, see Hub Table, Appendix C.	The specific location at which the product is received if designated in the contract. If receipt occurs at a trading hub, a standardized hub name must be used. If more points of receipt are listed in the contract than can fit into the 50 character space, a description of the collection of points may be used. ''Various,'' alone, is unacceptable unless the contract itself uses that terminology.
41	Point of Delivery Balancing Authority (PODBA).	If specified in the contract.	See Balancing Authority Table, Appendix B.	The registered NERC Balancing Authority (formerly called NERC Control Area) where a jurisdictional product is delivered and/or service ends for a transmission or transmission-related jurisdictional sale. The Balancing Authority will be identified with the abbreviation used in OASIS applications. If delivery occurs at the interconnection of two control areas, the control area that the product is entering should be used. If delivery occurs at a trading hub specified in the EQR software, the term ''Hub'' should be used.

EQR DATA DICTIONARY—Continued

Field #	Field	Required	Value	Definition
42	Point of Delivery Specific Location (PODSL).	If specified in the contract.	Unrestricted text (50 characters). If "HUB" is selected for PODCA, see Hub Table, Appendix C.	The specific location at which the product is delivered if designated in the contract. If receipt occurs at a trading hub, a standardized hub name must be used.
43	Begin Date	If specified in the contract.	YYYYMMDDHHMM	First date for the sale of the product at the rate specified.
44	End Date	If specified in the contract.	YYYYMMDDHHMM	Last date for the sale of the product at the rate specified.
45	Time Zone	✓	See Time Zone Table, Appendix D.	The time zone in which the sales will be made under the contract.
		Transaction Data		
46	Transaction Unique ID.	✓	An integer proceeded by the letter "T" (only used when importing transaction data).	An identifier beginning with the letter "T" and followed by a number (e.g., "T1", "T2") used to designate a record containing transaction information in a comma-delimited (csv) file that is imported into the EQR filing. One record for each transaction record may be imported into an EQR for a given quarter. A new transaction record must be used every time a price changes in a sale.
47	Seller Company Name.	✓	Unrestricted text (100 Characters).	The name of the company that is authorized to make sales as indicated in the company's FERC tariff(s). This name must match the name provided as a Seller's "Company Name" in Field 2 of the ID Data (Seller Data).
48	Customer Company Name.	✓	Unrestricted text (70 Characters).	The name of the counterparty.
49	Customer DUNS Number.	✓	Nine digit number	The unique nine digit number assigned by Dun and Bradstreet to the counterparty to the contract.
50	FERC Tariff Reference.	✓	Unrestricted text (60 Characters).	The FERC tariff reference cites the document that specifies the terms and conditions under which a Seller is authorized to make transmission sales, power sales or sales of related jurisdictional services at cost-based rates or at market-based rates. If the sales are market-based, the tariff that is specified in the FERC order granting the Seller Market Based Rate Authority must be listed.
51	Contract Service Agreement ID.	✓	Unrestricted text (30 Characters).	Unique identifier given to each service agreement that can be used by the filing company to produce the agreement, if requested. The identifier may be the number assigned by FERC for those service agreements that have been filed and approved by the Commission, or it may be generated as part of an internal identification system.
52	Transaction Unique Identifier.	✓	Unrestricted text (24 Characters).	Unique reference number assigned by the seller for each transaction.
53	Transaction Begin Date.	✓	YYYYMMDDHHMM (csv import), MMDDYYYYHHMM (manual entry).	First date and time the product is sold during the quarter.
54	Transaction End Date.	✓	YYYYMMDDHHMM (csv import), MMDDYYYYHHMM (manual entry).	Last date and time the product is sold during the quarter.
55	Time Zone	✓	See Time Zone Table, Appendix D.	The time zone in which the sales will be made under the contract.
56	Point of Delivery Balancing Authority (PODBA).	✓	See Balancing Authority Table, Appendix B.	The registered NERC Balancing Authority (formerly called NERC Control Area) abbreviation used in OASIS applications.
57	Point of Delivery Specific Location (PODSL).	✓	Unrestricted text (50 characters). If "HUB" is selected for PODBA, see Hub Table, Appendix C.	The specific location at which the product is delivered. If receipt occurs at a trading hub, a standardized hub name must be used.
58	Class Name	✓		See class name definitions below.

EQR DATA DICTIONARY—Continued

Field #	Field	Required	Value	Definition
58	Class Name	✓	F—Firm	A sale, service or product that is not interruptible for economic reasons.
58	Class Name	✓	NF—Non-firm	A sale for which delivery or receipt of the energy may be interrupted for any reason or no reason, without liability on the part of either the buyer or seller.
58	Class Name	✓	UP—Unit Power Sale.	Designates a dedicated sale of energy and capacity from one or more than one specified generation unit(s).
58	Class Name	✓	BA—Billing Adjustment.	Designates an incremental material change to one or more transactions due to a change in settlement results. ''BA'' may be used in a refiling after the next quarter's filing is due to reflect the receipt of new information. It may not be used to correct an inaccurate filing.
58	Class Name	✓	N/A—Not Applicable.	To be used only when the other available class names do not apply.
59	Term Name	✓	LT—Long Term, ST—Short Term, N/A—Not Applicable.	Power sales transactions with durations of one year or greater are long-term. Transactions with shorter durations are short-term.
60	Increment Name	✓		See increment name definitions below.
60	Increment Name	✓	H—Hourly	Terms of the particular sale set for up to 6 consecutive hours (≤ 6 consecutive hours) Includes LMP based sales in ISO/RTO markets.
60	Increment Name	✓	D—Daily	Terms of the particular sale set for more than 6 and up to 60 consecutive hours (>6 and ≤ 60 consecutive hours) Includes sales over a peak or off-peak block during a single day.
60	Increment Name	✓	W—Weekly	Terms of the particular sale set for over 60 consecutive hours and up to 168 consecutive hours (>60 and ≤ 168 consecutive hours). Includes sales for a full week and sales for peak and off-peak blocks over a particular week.
60	Increment Name	✓	M—Monthly	Terms of the particular sale set for set for more than 168 consecutive hours up to, but not including, one year (>168 consecutive hours and < 1 year). Includes sales for full month or multi-week sales during a given month.
60	Increment Name	✓	Y—Yearly	Terms of the particular sale set for one year or more (≥ 1 year). Includes all long-term contracts with defined pricing terms (fixed-price, formula, or index).
60	Increment Name	✓	N/A—Not Applicable.	To be used only when other available increment names do not apply.
61	Increment Peaking Name.	✓		See definitions for increment peaking below.
61	Increment Peaking Name.	✓	FP—Full Period	The product described was sold during Peak and Off-Peak hours.
61	Increment Peaking Name.	✓	OP—Off-Peak	The product described was sold only during those hours designated as off-peak in the NERC region of the point of delivery.
61	Increment Peaking Name.	✓	P—Peak	The product described was sold only during those hours designated as on-peak in the NERC region of the point of delivery.
61	Increment Peaking Name.	✓	N/A—Not Applicable.	To be used only when the other available increment peaking names do not apply.
62	Product Name	✓	See Product Names, Table, Appendix A.	Description of product being offered.
63	Transaction Quantity.	✓	Number with up to 4 decimals.	The quantity of the product in this transaction.
64	Price	✓	Number with up to 6 decimals.	Actual price charged for the product per unit. The price reported cannot be averaged or otherwise aggregated.
65	Rate Units	✓	See Rate Units Table, Appendix F.	Measure appropriate to the price of the product sold.
66	Total Transmission Charge.	✓	Number with up to 2 decimals.	Payments received for transmission services when explicitly identified.
67	Total Transaction Charge.	✓	Number with up to 2 decimals.	Transaction Quantity (Field 63) times Price (Field 64) plus Total Transmission Charge (Field 66).

EQR DATA DICTIONARY

Product Name	Contract product	Transaction product	Definition
Appendix A. Product Names			
BLACK START SERVICE.	✓	✓	Service available after a system-wide blackout where a generator participates in system restoration activities without the availability of an outside electric supply (ancillary Service).
BOOKED OUT POWER.		✓	Energy or capacity contractually committed bilaterally for delivery but not actually delivered due to some offsetting or countervailing trade (Transaction only).
CAPACITY	✓	✓	A quantity of demand that is charged on a $/KW or $/MW basis.
CUSTOMER CHARGE.	✓	✓	Fixed contractual charges assessed on a per customer basis that could include billing service.
DIRECT ASSIGNMENT FACILITIES CHARGE.	✓		Charges for facilities or portions of facilities that are constructed or used for the sole use/benefit of a particular customer.
EMERGENCY ENERGY.	✓		Contractual provisions to supply energy or capacity to another entity during critical situations.
ENERGY	✓	✓	A quantity of electricity that is sold or transmitted over a period of time.
ENERGY IMBALANCE.	✓	✓	Service provided when a difference occurs between the scheduled and the actual delivery of energy to a load obligation.
EXCHANGE	✓	✓	Transaction whereby the receiver accepts delivery of energy for a supplier's account and returns energy at times, rates, and in amounts as mutually agreed if the receiver is not an RTO/ISO.
FUEL CHARGE	✓	✓	Charge based on the cost or amount of fuel used for generation.
GRANDFATHERED BUNDLED.	✓	✓	Services provided for bundled transmission, ancillary services and energy under contracts effective prior to Order No. 888's OATTs.
INTERCONNECTION AGREEMENT.	✓		Contract that provides the terms and conditions for a generator, distribution system owner, transmission owner, transmission provider, or transmission system to physically connect to a transmission system or distribution system.
MEMBERSHIP AGREEMENT.	✓		Agreement to participate and be subject to rules of a system operator.
MUST RUN AGREEMENT.	✓		An agreement that requires a unit to run.
NEGOTIATED-RATE TRANSMISSION.	✓	✓	Transmission performed under a negotiated rate contract (applies only to merchant transmission companies).
NETWORK	✓		Transmission service under contract providing network service.
NETWORK OPERATING AGREEMENT.	✓		An executed agreement that contains the terms and conditions under which a network customer operates its facilities and the technical and operational matters associated with the implementation of network integration transmission service.
OTHER	✓	✓	Product name not otherwise included.
POINT-TO-POINT AGREEMENT.	✓		Transmission service under contract between specified Points of Receipt and Delivery.
REACTIVE SUPPLY & VOLTAGE CONTROL.	✓	✓	Production or absorption of reactive power to maintain voltage levels on transmission systems (Ancillary Service).
REAL POWER TRANSMISSION LOSS.	✓	✓	The loss of energy, resulting from transporting power over a transmission system.
REGULATION & FREQUENCY RESPONSE.	✓	✓	Service providing for continuous balancing of resources (generation and interchange) with load, and for maintaining scheduled interconnection frequency by committing on-line generation where output is raised or lowered and by other non-generation resources capable of providing this service as necessary to follow the moment-by-moment changes in load (Ancillary Service).
REQUIREMENTS SERVICE.	✓	✓	Firm, load-following power supply necessary to serve a specified share of customer's aggregate load during the term of the agreement. Requirements service may include some or all of the energy, capacity and ancillary service products. (If the components of the requirements service are priced separately, they should be reported separately in the transactions tab.)
SCHEDULE SYSTEM CONTROL & DISPATCH.	✓	✓	Scheduling, confirming and implementing an interchange schedule with other Balancing Authorities, including intermediary Balancing Authorities providing transmission service, and ensuring operational security during the interchange transaction (Ancillary Service).
SPINNING RESERVE	✓	✓	Unloaded synchronized generating capacity that is immediately responsive to system frequency and that is capable of being loaded in a short time period or non-generation resources capable of providing this service (Ancillary Service).
SUPPLEMENTAL RESERVE.	✓	✓	Service needed to serve load in the event of a system contingency, available with greater delay than SPINNING RESERVE. This service may be provided by generating units that are on-line but unloaded, by quick-start generation, or by interruptible load or other non-generation resources capable of providing this service (Ancillary Service).
SYSTEM OPERATING AGREEMENTS.	✓		An executed agreement that contains the terms and conditions under which a system or network customer shall operate its facilities and the technical and operational matters associated with the implementation of network.
TOLLING ENERGY	✓	✓	Energy sold from a plant whereby the buyer provides fuel to a generator (seller) and receives power in return for pre-established fees.

EQR DATA DICTIONARY—Continued

Product Name	Contract product	Transaction product	Definition
TRANSMISSION OWNERS AGREEMENT.	✓		The agreement that establishes the terms and conditions under which a transmission owner transfers operational control over designated transmission facilities.
UPLIFT	✓	✓	A make-whole payment by an RTO/ISO to a utility.

EQR DATA DICTIONARY

Balancing authority	Abbreviation	Outside US *
Appendix B. Balancing Authority		
AESC, LLC—Wheatland CIN	AEWC	
Alabama Electric Cooperative, Inc.	AEC	
Alberta Electric System Operator	AESO	✓
Alliant Energy Corporate Services, LLC—East	ALTE	
Alliant Energy Corporate Services, LLC—West	ALTW	
Ameren Transmission	AMRN	
Ameren Transmission. Illinois	AMIL	
Ameren Transmission. Missouri	AMMO	
American Transmission Systems, Inc.	FE	
Aquila Networks—Kansas	WPEK	
Aquila Networks—Missouri Public Service	MPS	
Aquila Networks—West Plains Dispatch	WPEC	
Arizona Public Service Company	AZPS	
Associated Electric Cooperative, Inc.	AECI	
Avista Corp.	AVA	
Batesville Balancing Authority	BBA	
Big Rivers Electric Corp.	BREC	
Board of Public Utilities	KACY	
Bonneville Power Administration Transmission	BPAT	
British Columbia Transmission Corporation	BCTC	✓
California Independent System Operator	CISO	
Carolina Power & Light Company—CPLW	CPLW	
Carolina Power and Light Company—East	CPLE	
Central and Southwest	CSWS	
Central Illinois Light Co	CILC	
Chelan County PUD	CHPD	
Cinergy Corporation	CIN	
City of Homestead	HST	
City of Independence P & L Dept.	INDN	
City of Tallahassee	TAL	
City Water Light & Power	CWLP	
Cleco Power LLC	CLEC	
Columbia Water & Light	CWLD	
Comision Federal de Electricidad	CFE	✓
Constellation Energy Control and Dispatch—Arkansas	PUPP	
Constellation Energy Control and Dispatch—City of Benton, AR	BUBA	
Constellation Energy Control and Dispatch—City of Ruston, LA	DERS	
Constellation Energy Control and Dispatch—Conway, Arkansas	CNWY	
Constellation Energy Control and Dispatch—Gila River	GRMA	
Constellation Energy Control and Dispatch—Harquehala	HGMA	
Constellation Energy Control and Dispatch—North Little Rock, AR	DENL	
Constellation Energy Control and Dispatch—West Memphis, Arkansas	WMUC	
Dairyland Power Cooperative	DPC	
DECA, LLC—Arlington Valley	DEAA	
Duke Energy Corporation	DUK	
East Kentucky Power Cooperative, Inc.	EKPC	
El Paso Electric	EPE	
Electric Energy, Inc.	EEI	
Empire District Electric Co., The	EDE	
Entergy	EES	
ERCOT ISO	ERCO	
Florida Municipal Power Pool	FMPP	
Florida Power & Light	FPL	
Florida Power Corporation	FPC	
Gainesville Regional Utilities	GVL	
Georgia System Operations Corporation	GSOC	
Georgia Transmission Corporation	GTC	
Grand River Dam Authority	GRDA	

EQR DATA DICTIONARY—Continued

Balancing authority	Abbreviation	Outside US *
Grant County PUD No. 2	GCPD	
Great River Energy	GRE	
Great River Energy	GREC	
Great River Energy	GREN	
Great River Energy	GRES	
GridAmerica	GA	
Hoosier Energy	HE	
Hydro-Quebec, TransEnergie	HQT	✓
Idaho Power Company	IPCO	
Illinois Power Co.	IP	
Illinois Power Co.	IPRV	
Imperial Irrigation District	IID	
Indianapolis Power & Light Company	IPL	
ISO New England Inc.	ISNE	
JEA	JEA	
Kansas City Power & Light, Co	KCPL	
Lafayette Utilities System	LAFA	
LG & E Energy Transmission Services	LGEE	
Lincoln Electric System	LES	
Los Angeles Department of Water and Power	LDWP	
Louisiana Energy & Power Authority	LEPA	
Louisiana Generating, LLC	LAGN	
Madison Gas and Electric Company	MGE	
Manitoba Hydro Electric Board, Transmission Services	MHEB	✓
Michigan Electric Coordinated System	MECS	
Michigan Electric Coordinated System—CONS	CONS	
Michigan Electric Coordinated System—DECO	DECO	
MidAmerican Energy Company	MEC	
Midwest ISO	MISO	
Minnesota Power, Inc.	MP	
Montana-Dakota Utilities Co.	MDU	
Muscatine Power and Water	MPW	
Nebraska Public Power District	NPPD	
Nevada Power Company	NEVP	
New Brunswick Power Corporation	NBPC	✓
New Horizons Electric Cooperative	NHC1	
New York Independent System Operator	NYIS	
North American Electric Reliability Council	TEST	
Northern Indiana Public Service Company	NIPS	
Northern States Power Company	NSP	
NorthWestern Energy	NWMT	
Ohio Valley Electric Corporation	OVEC	
Oklahoma Gas and Electric	OKGE	
Ontario—Independent Electricity Market Operator	IMO	✓
OPPD CA/TP	OPPD	
Otter Tail Power Company	OTP	
P.U.D. No. 1 of Douglas County	DOPD	
PacifiCorp-East	PACE	
PacifiCorp-West	PACW	
PJM Interconnection	PJM	
Portland General Electric	PGE	
Public Service Company of Colorado	PSCO	
Public Service Company of New Mexico	PNM	
Puget Sound Energy Transmission	PSEI	
Reedy Creek Improvement District	RC	
Sacramento Municipal Utility District	SMUD	
Salt River Project	SRP	
Santee Cooper	SC	
SaskPower Grid Control Centre	SPC	✓
Seattle City Light	SCL	
Seminole Electric Cooperative	SEC	
Sierra Pacific Power Co.—Transmission	SPPC	
South Carolina Electric & Gas Company	SCEG	
South Mississippi Electric Power Association	SME	
South Mississippi Electric Power Association	SMEE	
Southeastern Power Administration—Hartwell	SEHA	
Southeastern Power Administration—Russell	SERU	
Southeastern Power Administration—Thurmond	SETH	
Southern Company Services, Inc.	SOCO	
Southern Illinois Power Cooperative	SIPC	
Southern Indiana Gas & Electric Co.	SIGE	

EQR DATA DICTIONARY—Continued

Balancing authority	Abbreviation	Outside US *
Southern Minnesota Municipal Power Agency	SMP	
Southwest Power Pool	SWPP	
Southwestern Power Administration	SPA	
Southwestern Public Service Company	SPS	
Sunflower Electric Power Corporation	SECI	
Tacoma Power	TPWR	
Tampa Electric Company	TEC	
Tennessee Valley Authority ESO	TVA	
Trading Hub	HUB	
TRANSLink Management Company	TLKN	
Tucson Electric Power Company	TEPC	
Turlock Irrigation District	TIDC	
Upper Peninsula Power Co.	UPPC	
Utilities Commission, City of New Smyrna Beach	NSB	
Westar Energy—MoPEP Cities	MOWR	
Western Area Power Administration—Colorado-Missouri	WACM	
Western Area Power Administration—Lower Colorado	WALC	
Western Area Power Administration—Upper Great Plains East	WAUE	
Western Area Power Administration—Upper Great Plains West	WAUW	
Western Farmers Electric Cooperative	WFEC	
Western Resources dba Westar Energy	WR	
Wisconsin Energy Corporation	WEC	
Wisconsin Public Service Corporation	WPS	
Yadkin, Inc.	YAD	

* Balancing authorities outside the United States may only be used in the Contract Data section to identify specified receipt/delivery points in jurisdictional transmission contracts.

EQR DATA DICTIONARY

HUB	Definition
Appendix C. Hub	
ADHUB	The aggregated Locational Marginal Price (''LMP'') nodes defined by PJM Interconnection, LLC as the AEP/Dayton Hub.
AEPGenHub	The aggregated Locational Marginal Price (''LMP'') nodes defined by PJM Interconnection, LLC as the AEPGenHub.
COB	The set of delivery points along the California-Oregon commonly identified as and agreed to by the counterparties to constitute the COB Hub.
Cinergy (into)	The set of delivery points commonly identified as and agreed to by the counterparties to constitute delivery into the Cinergy balancing authority.
Cinergy Hub (MISO)	The aggregated Elemental Pricing nodes (''Epnodes'') defined by the Midwest Independent Transmission System Operator, Inc., as Cinergy Hub (MISO).
Entergy (into)	The set of delivery points commonly identified as and agreed to by the counterparties to constitute delivery into the Entergy balancing authority.
FE Hub	The aggregated Elemental Pricing nodes (''Epnodes'') defined by the Midwest Independent Transmission System Operator, Inc., as FE Hub (MISO).
Four Corners	The set of delivery points at the Four Corners power plant commonly identified as and agreed to by the counterparties to constitute the Four Corners Hub.
Illinois Hub (MISO)	The aggregated Elemental Pricing nodes (''Epnodes'') defined by the Midwest Independent Transmission System Operator, Inc., as Illinois Hub (MISO).
Mead	The set of delivery points at or near Hoover Dam commonly identified as and agreed to by the counterparties to constitute the Mead Hub.
Michigan Hub (MISO)	The aggregated Elemental Pricing nodes (''Epnodes'') defined by the Midwest Independent Transmission System Operator, Inc., as Michigan Hub (MISO).
Mid-Columbia (Mid–C)	The set of delivery points along the Columbia River commonly identified as and agreed to by the counterparties to constitute the Mid-Columbia Hub.
Minnesota Hub (MISO)	The aggregated Elemental Pricing nodes (''Epnodes'') defined by the Midwest Independent Transmission System Operator, Inc., as Minnesota Hub (MISO).
NEPOOL (Mass Hub)	The aggregated Locational Marginal Price (''LMP'') nodes defined by ISO New England Inc., as Mass Hub.
NIHUB	The aggregated Locational Marginal Price (''LMP'') nodes defined by PJM Interconnection, LLC as the Northern Illinois Hub.
NOB	The set of delivery points along the Nevada-Oregon border commonly identified as and agreed to by the counterparties to constitute the NOB Hub.
NP15	The set of delivery points north of Path 15 on the California transmission grid commonly identified as and agreed to by the counterparties to constitute the NP15 Hub.
NWMT	The set of delivery points commonly identified as and agreed to by the counterparties to constitute delivery into the Northwestern Energy Montana balancing authority.
PJM East Hub	The aggregated Locational Marginal Price nodes (''LMP'') defined by PJM Interconnection, LLC as the PJM East Hub.

EQR DATA DICTIONARY—Continued

HUB	Definition
PJM South Hub	The aggregated Locational Marginal Price (“LMP”) nodes defined by PJM Interconnection, LLC as the PJM South Hub.
PJM West Hub	The aggregated Locational Marginal Price (“LMP”) nodes defined by PJM Interconnection, LLC as the PJM Western Hub.
Palo Verde	The switch yard at the Palo Verde nuclear power station west of Phoenix in Arizona. Palo Verde Hub includes the Hassayampa switchyard 2 miles south of Palo Verde.
SOCO (into)	The set of delivery points commonly identified as and agreed to by the counterparties to constitute delivery into the Southern Company balancing authority.
SP15	The set of delivery points south of Path 15 on the California transmission grid commonly identified as and agreed to by the counterparties to constitute the SP15 Hub.
TVA (into)	The set of delivery points commonly identified as and agreed to by the counterparties to constitute delivery into the Tennessee Valley Authority balancing authority.
ZP26	The set of delivery points associated with Path 26 on the California transmission grid commonly identified as and agreed to by the counterparties to constitute the ZP26 Hub.

EQR DATA DICTIONARY

Time zone	Definition
Appendix D. Time Zone	
AD	Atlantic Daylight
AP	Atlantic Prevailing
AS	Atlantic Standard
CD	Central Daylight
CP	Central Prevailing
CS	Central Standard
ED	Eastern Daylight
EP	Eastern Prevailing
ES	Eastern Standard
MD	Mountain Daylight
MP	Mountain Prevailing
MS	Mountain Standard
NA	Not Applicable
PD	Pacific Daylight
PP	Pacific Prevailing
PS	Pacific Standard
UT	Universal Time

EQR DATA DICTIONARY

Units	Definition
Appendix E. Units	
KV	Kilovolt
KVA	Kilovolt Amperes
KVR	Kilovar
KW	Kilowatt
KWH	Kilowatt Hour
KW–DAY	Kilowatt Day
KW–MO	Kilowatt Month
KW–WK	Kilowatt Week
KW–YR	Kilowatt Year
MVAR–YR	Megavar Year
MW	Megawatt
MWH	Megawatt Hour
MW–DAY	Megawatt Day
MW–MO	Megawatt Month
MW–WK	Megawatt Week
MW–YR	Megawatt Year
RKVA	Reactive Kilovolt Amperes
FLAT RATE	Flat Rate

EQR DATA DICTIONARY

Rate units	Definition
Appendix F. Rate Units	
$/KV	dollars per kilovolt
$/KVA	dollars per kilovolt amperes
$/KVR	dollars per kilovar
$/KW	dollars per kilowatt
$/KWH	dollars per kilowatt hour
$/KW–DAY	dollars per kilowatt day
$/KW–MO	dollars per kilowatt month
$/KW–WK	dollars per kilowatt week
$/KW–YR	dollars per kilowatt year
$/MW	dollars per megawatt
$/MWH	dollars per megawatt hour
$/MW–DAY	dollars per megawatt day
$/MW–MO	dollars per megawatt month
$/MW–WK	dollars per megawatt week
$/MW–YR	dollars per megawatt year
$/MVAR–YR	dollars per megavar year
$/RKVA	dollars per reactive kilovar amperes
CENTS	cents
CENTS/KVR	cents per kilovolt amperes
CENTS/KWH	cents per kilowatt hour
FLAT RATE	rate not specified in any other units

[FR Doc. E8–11861 Filed 5–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2007–0075]

RIN 1625–AA00

Safety Zone: Port of Ponce, Puerto Rico

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish moving and fixed safety zones around all vessels carrying Liquefied Natural Gas (LNG) cargo in the waters of the Caribbean Sea and Bahia de Ponce, Puerto Rico. This action will protect the public from the inherent dangers of this highly volatile material by requiring vessel traffic to maintain a safe distance from LNG vessels operating near shore.

DATES: Comments and related material must reach the Coast Guard on or before July 28, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2007–0075 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) Online: *http://www.regulations.gov.*

(2) Mail: Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(3) Hand delivery: Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday,

except Federal holidays. The telephone number is 202–366–9329.

(4) Fax: 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Ensign Rachael E. Love, Sector San Juan, Prevention Department, Waterways & Facilities Division, at (787) 289–2071. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2007–0075), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time. Enter the docket number for this rulemaking (USCG.2007–0075) in the search box, and click ''GO>>''. You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or the Sector San Juan, Prevention Department between 7:30 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://DocketsInfo.dot.gov.*

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

This rule is necessary to provide for the safety of life at sea by excluding vessel traffic from the waters immediately adjacent to liquefied natural gas (LNG) carriers. LNG in any quantity poses a risk of fire or explosion due to its highly volatile nature. LNG carried by tank ships in bulk quantities can be hazardous to a port if sufficient precaution is not taken to reduce this risk. The proposed rule would require vessel traffic to maintain a 100-yard separation from LNG vessels transiting the harbor and 150-foot separation from LNG vessels moored pier-side. The purpose of this rule is to minimize the risk of vessel collision or allision with an LNG carrier, thereby reducing the risk of fire or explosion.

Discussion of Proposed Rule

This proposed rule would establish the following moving and fixed safety zones: A 100-yard zone surrounding all LNG vessels transiting north of Latitude 17°54′00″ N en route to or from the Puerto de Ponce waterfront facility in Bahia de Ponce, Puerto Rico; and a 150-foot zone surrounding all LNG vessels moored at the Puerto de Ponce waterfront facility in Bahia de Ponce, Puerto Rico. The Coast Guard will notify the public of effective periods by providing a broadcast notice to mariners on VHF Marine Band Radio, Channel 22A (156.8 MHz).

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary due to the infrequent arrival of LNG carriers and the small amount of commercial vessel traffic in Bahia de Ponce.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit a portion of Bahia de Ponce when an LNG vessel is transiting the harbor or moored at the Puerto de Ponce waterfront facility. This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons: The Port of Ponce receives only a few commercial vessel arrivals per week, and recreational boating traffic can easily transit around the regulated area.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement

Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding and participating in this rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment. A preliminary ''Environmental Analysis Check List'' supporting this preliminary determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Safety measures, and Waterways.

Words of Issuance and Proposed Regulatory Text

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.771 to read as follows:

§ 165.771 Safety Zone; Bahia de Ponce, Puerto Rico.

(a) *Location.* The following area is established as a safety zone during the specified conditions:

(1) A 100 yard radius around any vessel carrying liquefied natural gas (LNG) cargo while transiting north of Latitude 17°54′00″ N in the waters of the Caribbean Sea and the Bahia de Ponce, on approach to or departure from the Puerto de Ponce waterfront facility in Bahia de Ponce.

(2) The waters within 150 feet of any vessel carrying LNG cargo while moored at the Puerto de Ponce waterfront facility in Bahia de Ponce, between berths 4 and 7 at approximate position 17°58′12″ N, 066°37′08″ W.

(b) *Definitions.* The following definitions apply to this section:

Designated Representative means Coast Guard Patrol Commander including Coast Guard coxswains, petty officers and other officers operating

Coast Guard vessels and federal, state, and local officers designated by or assisting the COTP San Juan in the enforcement of the safety zone.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, anchoring, mooring or transiting in these zones is prohibited unless authorized by the Coast Guard Captain of the Port or a designated representative. Persons and vessels desiring to transit the Regulated Area may contact the U.S. Coast Guard Captain of the Port San Juan at telephone number 787–289–2041 or on VHF channel 16 (156.8 MHz).

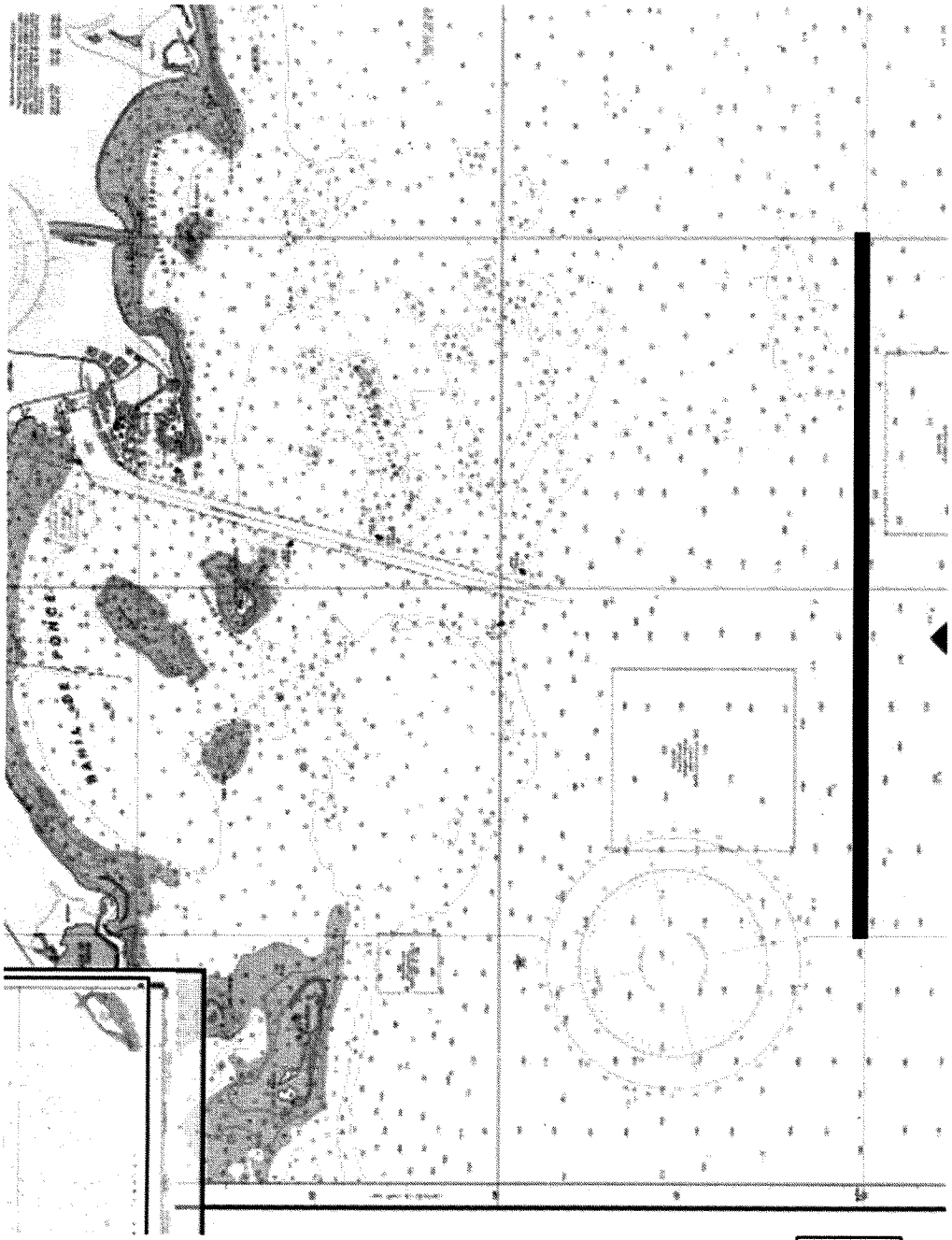
(d) *Enforcement periods.* The Coast Guard will notify the maritime community of effective periods via a broadcast notice to mariners on VHF Marine Band Radio, Channel 22A (156.8 MHz).

Dated: May 2, 2008.

R.R. Rodriguez,

Commander, U.S. Coast Guard, Acting Captain of the Port San Juan.

BILLING CODE 4910–15–P



[FR Doc. E8–11864 Filed 5–27–08; 8:45 am]
BILLING CODE 4910–15–C

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2007–0115]

RIN 1625–AA87

Security Zone; Escorted Vessels, Charleston, SC, Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Interim rule with request for comments.

SUMMARY: The Coast Guard is establishing a security zone around any vessel being escorted by one or more Coast Guard, State, or local law enforcement assets on the navigable waters of the Captain of the Port Zone, Charleston, South Carolina. This action is necessary to ensure the safe transit of escorted vessels as well as the safety and security of personnel and port facilities. No vessel or person is allowed inside the security zone unless authorized by the Captain of the Port or a designated representative.

DATES: This interim rule is effective May 28, 2008. Comments and related material must reach the Docket Management Facility on or before June 27, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2007–0115 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) Online: *http://www.regulations.gov.*

(2) Mail: Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(3) Hand delivery: Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) Fax: 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call LT Calvin Summers at Sector Charleston (843) 720–3273. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2007–0115), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. For example, we may ask you to resubmit your comment if we are not able to read your original submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time. Enter the docket number for this rulemaking (USCG–2007–0115) in the Search box, and click ''Go >>.''. You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays or the Coast Guard Sector Charleston (WWM), 196 Tradd Street, Charleston, South Carolina 29401 between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://DocketsInfo.dot.gov.*

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Publishing a NPRM and delaying the effective date would be contrary to public interest since the security zones around escorted vessels are necessary to ensure the safe transit of the escorted vessels as well as the public. Certain vessel movements are more vulnerable to terrorist acts and it would be contrary to the public interest to publish an NPRM that would delay the effective date of this rule. The Coast Guard coordinates escorts for vessels in the Captain of the Port Zone Charleston, South Carolina for the port's safety and security. Recently, recreational boaters have endangered themselves and others by not following the verbal guidance of on-scene law enforcement officials. To ensure safe boating, it is imperative that a standard exclusionary zone be broadcast and safe speeds be followed for all escorted vessels.

For the same reasons above, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Background and Purpose

The terrorist attacks of September 2001 heightened the need for development of various security measures throughout the seaports of the United States, particularly around vessels and facilities whose presence or

movement creates a heightened vulnerability to terrorist acts; or those for which the consequences of terrorist acts represent a threat to national security. The President of the United States has found that the security of the United States is and continues to be endangered following the attacks of September 11 (E.O. 13,273, 67 FR 56215, Sep. 3, 2002 and 72 FR 54205, Sep. 21, 2007). Additionally, national security and intelligence officials continue to warn that future terrorist attacks are likely.

The ports within the Captain of the Port (COTP) Charleston frequently receive vessels that require additional security, including, but not limited to, vessels carrying sensitive Department of Defense cargoes, vessels carrying dangerous cargoes, and foreign naval vessels. The COTP has determined that these vessels have a significant vulnerability to subversive activity by other vessels or persons, or, in some cases, themselves pose a risk to a port and the public within the COTP Zone, as described in 33 CFR 3.35–15. This rule enables the COTP Charleston to provide effective port security, while minimizing the public's confusion and easing the administrative burden of implementing separate temporary security zone rules for each escorted vessel.

Discussion of Rule

This rule establishes a security zone that prohibits persons and vessels from coming within 300 yards of all escorted vessels within the navigable waters of the COTP Charleston unless authorized by the Coast Guard COTP, or a COTP designated representative.

Persons or vessels that receive permission to enter the security zone must proceed at a minimum safe speed and must comply with all orders issued by the COTP or a designated representative. No vessel or person may come within 50 yards of any escorted vessel. An escorted vessel will be defined as a vessel, other than a large U.S. naval vessel as defined in 33 CFR 165.2015, that is accompanied by one or more Coast Guard assets or other Federal, State or local law enforcement agency assets clearly identifiable by lights, vessel markings, or with agency insignia as listed below:

Coast Guard surface or air asset displaying the Coast Guard insignia.

State and/or local law enforcement asset displaying the applicable agency markings and/or equipment associated with the agency.

When escorted vessels are moored, dayboards or other visual indications such as lights or buoys may be used. In all cases, broadcast notice to mariners will be issued to advise mariners of these restrictions.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. The limited geographic area impacted by the security zone will not restrict the movement or routine operation of commercial or recreational vessels through the Ports within the Captain of the Port Zone Charleston.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit in the vicinity of escorted vessels. This rule would not have a significant impact on a substantial number of small entities because the zones are limited in size, in most cases leaving ample space for vessels to navigate around them. The zones will not significantly impact commercial and passenger vessel traffic patterns, and mariners will be notified of the zones via Broadcast Notice to Mariners. Where such space is not available and security conditions permit, the COTP will attempt to provide flexibility for individual vessels to transit through the zones as needed.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

Words of Issuance and Regulatory Text

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add 165.769 to read as follows:

§ 165.769 Security Zone; Escorted Vessels, Charleston, South Carolina, Captain of the Port.

(a) *Definitions.* The following definitions apply to this section:

COTP means Captain of the Port Charleston, SC.

Designated representatives means Coast Guard Patrol Commanders including Coast Guard coxswains, petty officers and other officers operating Coast Guard vessels, and federal, state, and local officers designated by or assisting the COTP, in the enforcement of the security zone.

Escorted vessel means a vessel, other than a large U.S. naval vessel as defined in 33 CFR 165.2015, that is accompanied by one or more Coast Guard assets or other Federal, State or local law enforcement agency assets clearly identifiable by lights, vessel markings, or with agency insignia as listed below:

Coast Guard surface or air asset displaying the Coast Guard insignia.

State and/or local law enforcement asset displaying the applicable agency markings and/or equipment associated with the agency.

When escorted vessels are moored, dayboards or other visual indications such as lights or buoys may be used. In all cases, broadcast notice to mariners will be issued to advise mariners of these restrictions.

Minimum safe speed means the speed at which a vessel proceeds when it is fully off plane, completely settled in the water and not creating excessive wake. Due to the different speeds at which vessels of different sizes and configurations may travel while in compliance with this definition, no specific speed is assigned to minimum safe speed. In no instance should minimum safe speed be interpreted as a speed less than that required for a particular vessel to maintain steerageway. A vessel is not proceeding at minimum safe speed if it is:

(1) On a plane;

(2) In the process of coming up onto or coming off a plane; or

(3) Creating an excessive wake.

(b) *Regulated Area.* All navigable waters, as defined in 33 CFR 2.36, within the Captain of the Port Zone, Charleston, South Carolina 33 CFR 3.35–15.

(c) *Security Zone.* A 300-yard security zone is established around each escorted vessel within the regulated area described in paragraph (b) of this section. This is a moving security zone when the escorted vessel is in transit and becomes a fixed zone when the escorted vessel is anchored or moored. A security zone will not extend beyond the boundary of the regulated area in this section.

(d) *Regulations.* (1) The general regulations for security zones contained in § 165.33 of this part applies to this section.

(2) A vessel may request the permission of the COTP Charleston or a designated representative to enter the security zone described in paragraph (c) of this section. If permitted to enter the security zone, a vessel must proceed at the minimum safe speed and must comply with the orders of the COTP or a designated representative. No vessel or person may enter the inner 50-yard portion of the security zone closest to the vessel.

(e) *Notice of Security Zone.* The COTP will inform the public of the existence or status of the security zones around escorted vessels in the regulated area by Broadcast Notice to Mariners. Coast Guard assets or other Federal, State or local law enforcement agency assets will be clearly identified by lights, vessel markings, or with agency insignia. When escorted vessels are moored, dayboards or other visual indications such as lights or buoys may be used.

(f) *Contact Information.* The COTP Charleston may be reached via phone at (843) 724–7616. Any on scene Coast Guard or designated representative assets may be reached via VHF–FM channel 16.

Dated: May 15, 2008.

M. F. McAllister,

Captain, U.S. Coast Guard, Captain of the Port, Charleston, South Carolina.

[FR Doc. E8–11863 Filed 5–27–08; 8:45 am]

BILLING CODE 4910–15–P

LEGAL SERVICES CORPORATION

45 CFR Parts 1606 and 1623

Termination, Limited Reductions in Funding, and Debarment Procedures; Recompetition; Suspension Procedures

AGENCY: Legal Services Corporation.

ACTION: Notice of Rulemaking Workshop; correction.

SUMMARY: LSC recently published a notice regarding a Rulemaking Workshop it is conducting in connection with its rulemaking to consider revisions to its regulations on termination and suspension. The date for the Workshop listed in that notice has changed.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, Vice President and General Counsel, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; (202) 295–1620 (phone); 202–337–6831 (fax) or *vfortuno@lsc.gov.*

SUPPLEMENTARY INFORMATION: On May 13, 2008, the Legal Services Corporation published a notice in the **Federal Register** that it will be convening a Rulemaking Workshop in connection with its open rulemaking to consider revisions to 45 CFR part 1606, Termination and Debarment Procedures; Recompetition, and 45 CFR part 1623, Suspension. (73 FR 27483). That notice stated that the Workshop was going to occur on Tuesday, June 17, 2008. The date for the Workshop has been rescheduled to Thursday, June 26, 2008.

Victor M. Fortuno,

Vice President and General Counsel.

[FR Doc. E8–11873 Filed 5–27–08; 8:45 am]

BILLING CODE 7050–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 08–65; FCC 08–126]

Assessment and Collection of Regulatory Fees For Fiscal Year 2008

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission will revise its Schedule of Regulatory Fees in order to recover the amount of regulatory fees that Congress has required it to collect for fiscal year 2008. Section 9 of the Communications Act of 1934, as amended, provides for the annual assessment and collection of regulatory fees under sections 9(b)(2) and 9(b)(3), respectively, for annual ''Mandatory Adjustments'' and ''Permitted Amendments'' to the Schedule of Regulatory Fees.

DATES: Comments are due May 30, 2008, and reply comments are due June 6, 2008.

ADDRESSES: You may submit comments, identified by MD Docket No. 08–65, by any of the following 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.
- *E-mail: ecfs@fcc.gov.* Include MD Docket No. 08–65 in the subject line of the message.
- *Mail:* 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.

FOR FURTHER INFORMATION CONTACT: Mika Savir, Office of Managing Director at (202) 418–0384.

SUPPLEMENTARY INFORMATION:

Adopted: May 7, 2008.

Released: May 8, 2008.

By the Commission:

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I. Introduction

1. Section 9 of the Communications Act of 1934, as amended (''the Act''), requires the Commission to assess fees to recover the regulatory costs associated with the Commission's enforcement, policy and rulemaking, user information, and international activities.[1] In this Notice of Proposed Rulemaking (''Notice''), we propose to collect $312,000,000 in regulatory fees for Fiscal Year (''FY'') 2008. In this proceeding we seek comment on several regulatory fee issues for FY 2008 and also announce the new lock box address for payments to the Commission.

II. Discussion

2. In this Notice, we seek comment on the development of FY 2008 regulatory fees collected pursuant to section 9 of the Act. For FY 2008, we propose to retain the established methods and policies that the Commission has used to collect regulatory fees in the past except as discussed below. For the FY 2008 regulatory fee cycle, we propose to retain most of the administrative measures used for notification, assessment, and pre-billing of regulatory fees of previous years. As we have in previous years, we seek comment on ways to improve the Commission's administrative processes for notifying entities of their regulatory fee obligations and collecting their payments.

3. The Commission is obligated to collect $312,000,000 in regulatory fees during FY 2008 to fund the Commission's operations. Consistent with our established practice, we intend to collect these fees in the August-September 2008 time frame in order to collect the required amount by the end of the fiscal year.

A. FY 2008 Regulatory Fee Assessment Methodology—Development of FY 2008 Regulatory Fees

1. Calculation of Revenue and Fee Requirements

4. For our FY 2008 regulatory fee assessment, we propose to use essentially the same section 9 regulatory fee assessment methodology adopted for FY 2007, except as discussed below. Each fiscal year, the Commission proportionally allocates to fee categories the total amount that must be collected through our section 9 regulatory fees.[2] Consistent with past practice, we propose to divide the FY 2008 payment amount by the number of payment units in each fee category to calculate the unit fee. For cases involving small fees, we propose to divide the resulting unit fee by the term of the license. We propose to round these fees consistent with the requirements of section 9(b)(2) of the Act. We seek comment on these proposals.

2. Additional Adjustments to Payment Units

a. Commercial Mobile Radio Service (''CMRS'') Messaging Service

5. CMRS Messaging Services, which replaced the CMRS One-Way Paging fee category in FY 1997, includes all narrowband services.[3] Since FY 2002, we have proposed to continue our policy of maintaining the CMRS Messaging Service regulatory fee at the rate that was first established in FY 2002[4] (*i.e.*, $0.08 per subscriber), noting that the subscriber base in this industry has declined significantly.[5] We found that maintaining the CMRS Messaging regulatory fee rate at $0.08 per subscriber, rather than allowing it to increase, was the appropriate level of relief to be afforded to the messaging industry.[6] In this NPRM we propose to maintain the messaging service regulatory fee at $0.08 per subscriber. We seek comment on this proposal. Commenters suggesting a different approach, *i.e.*, a proposal other than keeping the fee at $0.08 per subscriber, should provide industry data to support their position.

b. Regulatory Fee Obligations for AM Expanded Band Broadcasters

6. The Commission initiated the migration of existing standard band AM stations to the expanded band to reduce interference and congestion in the existing standard band.[7] AM expanded band radio stations, in the 1610–1700 kHz range, are currently exempt from payment of regulatory fees as a matter of policy. Standard band AM stations, in the 540–1600 kHz range, are subject to regulatory fees. Our decision several years ago not to require section 9 regulatory fee payments for AM expanded band stations was not a permanent exemption from regulatory

[1] 47 U.S.C. 159.

[2] *See* Appendix C for the proposed FY 2008 regulatory fee assessment methodology, including a comparison to the FY 2007 results.

[3] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1997,* MD Docket No. 96–186, Report and Order, 12 FCC Rcd 17161, 17184–85, para. 60 (1997) (*''FY 1997 Report and Order''*).

[4] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2003,* MD Docket No. 03–83, Report and Order, 18 FCC Rcd 15985, 15992, para. 21 (2003) (*''FY 2003 Report and Order''*).

[5] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2007,* MD Docket No. 07–81, Notice of Proposed Rulemaking, 22 FCC Rcd 7975, 7978, para. 7 (2007) (*''FY 2007 NPRM''*). The subscriber base in the paging industry declined 83 percent from 40.8 million to 7.1 million, from FY 1997 to FY 2007, according to FY 2007 collection data, as of September 30, 2007.

[6] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2007,* MD Docket No. 07–81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712, 15715, para. 9 (2007) (*''FY 2007 Report and Order''*).

[7] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2005 and Assessment and Collection of Regulatory Fees for Fiscal Year 2004, MD* Docket Nos. 05–59 and 04–73, Report and Order and Order on Reconsideration, 20 FCC Rcd 12259, 12267, para. 25 (2005) (*''FY 2005 Report and Order''*).

fees for AM expanded band radio service.[8]

7. We now seek comment on the most efficient methods of assessing a regulatory fee on expanded band AM licenses. We seek comment particularly regarding those instances where the licensee chooses to retain the expanded band service while giving up the standard band station.[9] We also seek comment on whether we should impose a separate regulatory fee on an expanded band licensee that holds a standard band license and continues to operate both stations (*i.e.*, the licensee is not migrating to the expanded band but is keeping two licenses).

B. International Bearer Circuits

8. In our *FY 2006 NPRM*,[10] we noted that VSNL Telecommunications (US) Inc. (''VSNL'') had filed a Petition for Rulemaking urging the Commission to revise its regulatory fee methodology for bearer circuits;[11] and that we issued a public notice designating the proceeding as RM–11312 and requesting comment on the petition.[12] We stated in our *FY 2006 Report and Order* that the issues presented in the Petition warrant consideration separately from the Commission's annual regulatory fee proceeding.[13] In our *FY 2007 NPRM,* we received a set of joint comments filed by seven submarine cable landing licensees urging the Commission to take similar action.[14] We grant VSNL's petition and seek comment herein on the methodology used to calculate regulatory fees for providers of international bearer circuits. We seek comment on whether the Commission should retain the current methodology used to these regulatory fees, or change or modify the methodology (and if so, how?).

C. Administrative and Operational Issues

9. We seek comment on the administrative and operational processes used to collect the annual section 9 regulatory fees. These issues do not affect the amount of regulatory fees parties are obligated to submit; however, the administrative and operational issues affect the process of submitting payment. We invite comment on ways to improve these processes.

1. Use of Fee Filer

10. We continue to encourage regulatees to use the Commission's online electronic Fee Filer application. Using the Commission's Fee Filer application reduces paperwork burdens on payors because it eliminates the need to file a paper FCC Form 159. It also allows payors to make a single payment for pre-billed and non-billed regulatory fees. Regulatees submitting more than ten (10) Form 159–Cs are strongly encouraged to use Fee Filer when sending their regulatory fee payment.

11. Regulatees who file their FCC Form 159 information online via Fee Filer may choose to pay by online ACH debit from a bank account, by online credit card, by check or money order, by wire, or by credit card on paper. Payors wishing to remit payment via check, money order, wire, or credit card on paper must print a Fee Filer-generated Form 159–E Remittance Voucher to accompany payment, in lieu of Form 159. We note that Fee Filer will accept credit card payments of up to $99,999.99; the FCC accepts ACH debits (via Fee Filer) from a bank account in any denomination. All online payments are considered received by the FCC at the time that the FCC accepts the payor's bank account information or authorizes the payor's credit card.

2. New Lock Box Bank

12. We advise all regulatees that the Commission has a new lock box bank. All lock box payments to the Commission for FY 2008 will be processed by U.S. Bank, St. Louis, Missouri, and payable to the FCC. For all regulatory fees, the address is: Federal Communications Commission, Regulatory Fees, P.O. Box 979084, St. Louis, MO 63197–9000.

3. New Receiving Bank for Wire Payments

13. We also advise all regulatees that the Commission has a new receiving bank for wire payments. The new receiving bank is the Federal Reserve Bank, New York, New York (TREAS NYC). When making a wire transfer, regulatees must fax a copy of their completed remittance instrument to U.S. Bank, St. Louis, Missouri at (314) 418–4232 at least one hour before initiating the wire transfer (but on the same business day), so as to not delay crediting their account. Wire transfers initiated after 6:00 p.m. (EDT) will be credited the next business day. Complete instructions for making wire payments are posted at *http://www.fcc.gov/fees/wiretrans.html.*

4. Proposals for Notification and Collection of Regulatory Fees

14. *Public Notices and fact sheets.* In this section, we seek comment on the administrative processes that the Commission uses to notify regulatees and collect regulatory fees. Each year we post public notices and fact sheets pertaining to regulatory fees on our Web site. These documents contain information about the payment due date and the regulatory fee payment procedures. We will continue to post this information on *http://www.fcc.gov/fees/regfees.html.* We seek comment on ways to improve our regulatory fee public notices and fact sheets.

15. Regulatees are expected to pay their yearly regulatory fees by filing FCC Form 159 or by accessing the Commission's online Fee Filer application.[15] As a general practice, we will not send regulatory fee material to regulatees via surface mail. However, in the event that regulatees do not have access to the Internet, we will mail public notices and other relevant material upon request. Regulatees and the general public may request such information by contacting the FCC Financial Operations Help Desk at (877) 480–3201, Option 4. We seek comment on ways to improve our administrative processes.

16. *Pre-bills.* We will not send public notices and fact sheets to regulatees en masse; however, we propose to continue to send specific regulatory fee pre-bills or assessment notifications via surface mail to the select fee categories discussed below.[16] Pre-bills are hardcopy billing statements that the Commission mails to certain regulatees. The Commission currently sends pre-bills to interstate telecommunications service providers (''ITSPs''), satellite space station licensees (both geostationary and non-geostationary), to

[8] F*Y 2005 Report and Order,* 20 FCC Rcd at 12267, para. 25.

[9] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2005,* MD Docket No. 05–59, Notice of Proposed Rulemaking, 20 FCC Rcd 3885, 3896, para. 36 (2005).

[10] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2006,* MD Docket No. 06–68, Notice of Proposed Rulemaking, 21 FCC Rcd 3708, 3718, n.20 (2006) (*''FY 2006 NPRM''*).

[11] *See* Petition for Rulemaking of VSNL Telecommunications (US) Inc., RM–11312 (filed Feb. 6, 2006) (''VSNL Petition'').

[12] *See* Consumer and Governmental Affairs Bureau, Reference Information Center, *Public Notice,* Report No. 2759 (rel. Feb. 15, 2006).

[13] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2006,* MD Docket No. 06–68, Report and Order, 21 FCC Rcd 8092, 8098–99, para. 18 (2006) (*''FY 2006 Report and Order''*).

[14] *See* Joint Comments at 1.

[15] *http://www.fcc.gov/fees/feefiler.html.*

[16] An assessment is a proposed statement of the amount of regulatory fees owed by an entity to the Commission (or proposed subscriber count to be ascribed for purposes of setting the entity's regulatory fee) but it is not entered into the Commission's accounting system as a current debt. A pre-bill is considered an account receivable in the Commission's accounting system. Pre-bills reflect the amount owed and have a payment due date of the last day of the regulatory fee payment window. Consequently, if a pre-bill is not paid by the due date, it becomes delinquent and is subject to our debt collection procedures. *See also* 47 CFR 1.1161(c), 1.1164(f)(5), and 1.1910.

holders of Cable Television Relay Service (''CARS'') licenses, and earth station licensees. The remaining regulatees do not receive pre-bills. We seek comment on ways to improve this practice. Commenters should discuss whether we should add other regulatory fee categories to our pre-bill procedures.

a. Interstate Telecommunications Service Providers (''ITSPs'')

17. In FY 2001, we began mailing pre-completed FCC Form 159–W assessments to carriers in an effort to assist them in paying their ITSP regulatory fee. The fee amount on FCC Form 159–W was calculated from the FCC Form 499–A worksheet. Beginning in FY 2004, we mailed the completed FCC Form 159–W as a pre-bill, rather than as an assessment of amount due. Other than the manner in which Form 159– payments were entered into our financial system, carriers experienced no procedural changes regarding the use of the FCC Form 159–W when submitting payment of their ITSP regulatory fees. We seek comment on whether we should continue this pre-billing process for ITSPs in FY 2008.

18. In FY 2007, we adopted a proposal to round lines 14 (total subject revenues) and 16 (total regulatory fee owed) on FCC Form 159–W to the nearest dollar. This revision enabled the Commission to process the ITSP regulatory fee payments more quickly because rounding was no longer a hindrance that slowed the processing of payments. In FY 2008, we will continue to round lines 14 and 16 on FCC Form 159–W to the nearest dollar. We seek comment on other ways that we can improve our pre-billing initiative for ITSPs.

b. Satellite Space Station Licensees

19. Beginning in FY 2004, we mailed regulatory fee pre-bills via surface mail to licensees in our two satellite space station service categories. Specifically, geostationary orbit space station (''GSO'') licensees received bills requesting regulatory fee payment for satellites that (1) were licensed by the Commission and operational on or before October 1 of the respective fiscal year; and (2) were not co-located with and technically identical to another operational satellite on that date (*i.e.*, were not functioning as a spare satellite). Non-geostationary orbit space station (''NGSO'') licensees received pre-bills requesting regulatory fee payment for systems that were licensed by the Commission and operational on or before October 1 of the respective fiscal year.

20. For FY 2008, we propose to continue mailing pre-bills for our GSO and NGSO satellite space station categories. We seek comment on this proposal. We emphasize that the pre-bills that we propose to generate for our GSO and NGSO licensees will only be for the satellite or system aspects of their respective operations. GSO and NGSO licensees typically have regulatory fee obligations in other service categories (*e.g.*, earth stations, broadcast facilities), and we expect satellite operators to meet their full fee payment obligation for all of their FCC holdings. We seek comment on our proposal to generate regulatory fee pre-bills for our two satellite space station service categories.

c. Media Services Licensees

21. Beginning in FY 2003, we sent fee assessment notifications via surface mail to media services entities on a per-facility basis. The notifications provided the assessed fee amount for the facility in question, as well as the data attributes that determined the fee amount. We have since refined this initiative with improved results.[17] We propose to continue our assessment initiative for media services licensees in FY 2008.[18] We seek comment on this proposal.

22. Consistent with procedures used last year, we propose to mail assessment notifications to licensees to their primary record of contact populated in our Consolidated Database System (''CDBS'') and to their secondary record of contact, if available. We seek comment on this proposal. We will continue to make the Commission-authorized Web site available to licensees to update or correct any information concerning their facilities and to amend their fee-exempt status, if need be.[19] If there is a change of address for the facility, it is the licensee's responsibility to make the address change in the Media Bureau's CDBS system, as well as in the Commission's Registration System (''CORES'').

23. Under our proposal, licensees must still submit a completed FCC Form 159 Remittance Advice with their fee payments. The assessment notifications, whether in the form of a letter or postcard, cannot be used as a substitute for a completed Form 159.

d. CMRS Cellular and Mobile Services Assessments

24. As we have done in prior years, we propose to mail an assessment letter to Commercial Mobile Radio Service (''CMRS'') providers using data from the Numbering Resource Utilization Forecast (''NRUF'') report that is based on ''assigned'' number counts that have been adjusted for porting to net Type 0 ports (''in'' and ''out'').[20] This letter will include a listing of the carrier's Operating Company Numbers (''OCNs'') upon which the assessment is based.[21] Consistent with existing practice, the letters will not include OCNs with their respective assigned number counts, but rather, an aggregate total of assigned numbers for each carrier. We also propose to continue our procedure of giving entities an opportunity to revise their subscriber counts by sending two rounds of assessment letters—an initial assessment and a final assessment letter. We seek comment on this proposal.

25. If the number of subscribers on the initial assessment letter differs from the subscriber count the service provider provided on its NRUF form, the carrier can correct its subscriber count by returning the assessment letter or by contacting the Commission and stating a reason for the change, such as the purchase or the sale of a subsidiary, including the date of the transaction, and any other information that will help to justify a reason for the change. If we receive no response or correction to our initial assessment letter, we will expect the fee payment to be based on the number of subscribers listed on the initial assessment. We will review all responses to initial assessment letters and determine whether a change in the number of subscribers is warranted. We

[17] Some of those refinements have been to provide licensees with a Commission-authorized Web site to update or correct any information concerning their facilities, and to amend their fee-exempt status, if need be. Also, our notifications now provide licensees with a telephone number to call in the event that they need customer assistance. The notifications themselves have been refined so that licensees of fewer than four facilities receive individual fee assessment postcards for their facilities; whereas licensees of four or more facilities now receive a single assessment letter that lists all of their facilities and the associated regulatory fee obligation for each facility.

[18] We again propose to issue fee assessments for AM and FM Radio Stations, AM and FM Construction Permits, FM Translators/Boosters, VHF and UHF Television Stations, VHF and UHF Television Construction Permits, Satellite Television Stations, Low Power Television (''LPTV'') Stations and LPTV Translators/Boosters, to the extent that applicants, permittees and licensees of such facilities do not qualify as government entities or non-profit entities. Fee assessments have not been issued for broadcast auxiliary stations in prior years, nor will they be issued in FY 2008.

[19] The Commission-authorized Web site for media services licensees is *http://www.fccfees.com.*

[20] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2005 and Assessment and Collection of Regulatory Fees for Fiscal Year 2004,* MD Docket Nos. 05–59 and 04–73, Report and Order and Order on Reconsideration, 20 FCC Rcd 12259, 12264, para. 38–44 (2005).

[21] Id.

will then generate and mail a final assessment letter. The final assessment letter will inform carriers as to whether or not we accept the changed number of subscribers. As in previous years, operators will certify their subscriber counts in Block 30 of the FCC Form 159 Remittance Advice when making their regulatory fee payments. We seek comment on our current procedures of assessing CMRS subscriber counts (for NRUF filers) and other ways to improve the process.

26. Some carriers may not be sent a letter of assessment because they had not filed the NRUF form. We propose that these carriers compute their fee payment using the standard methodology [22] that is currently in place for CMRS Wireless services (*e.g.*, compute their subscriber counts as of December 31, 2007), and submit their payment accordingly on FCC Form 159. The Commission may audit the number of subscribers for which regulatory fees are paid, whether a carrier receives an assessment letter or computes the subscriber count itself. In the event that the Commission determines that the number of subscribers is inaccurate or that an insufficient reason is given for making a correction on the initial assessment letter, the Commission will assess the carrier for the difference between what was paid and what should have been paid.

27. We, therefore, propose to (1) derive the subscriber count from NRUF data based on ''assigned'' number counts that have been adjusted for porting to net Type 0 ports (''in'' and ''out''); (2) provide carriers with an opportunity to revise their subscriber counts at the time when the initial assessment letter is mailed; and (3) require carriers to confirm their subscriber counts at the aggregate level using data in the NRUF report. We seek comment on these proposals.

e. Cable Television Subscribers

28. We propose to continue to permit cable television operators to base their regulatory fee payment on their company's aggregate year-end subscriber count, rather than requiring them to sub-report subscriber counts on a per community unit identifier (''CUID'') basis on the FCC Form 159 Remittance Advice. We seek comment on this proposal. Operators, after providing their company's aggregate subscriber count in Block 25A of the FCC Form 159, will still be required to certify the accuracy of the subscriber count in Block 30. This practice has worked well for the Commission the past three fiscal years and has eased administrative burdens for the cable television industry.

29. Beginning in FY 2006, we sent an electronic message to e-mail addresses populated in the Media Bureau's Cable Operations and Licensing System (''COALS'') to notify them of the amount and due date of regulatory fees for basic cable television subscribers. We propose to continue this effort for FY 2008, but we are not sure if this notification practice is effective. We seek comment on whether this practice of sending electronic e-mail notification to cable operators should be continued.

5. Streamlined Regulatory Fee Payment Process for CMRS Cellular and Mobile Providers

30. In FY 2006, we streamlined the CMRS payment process by eliminating the requirement for CMRS providers to identify their individual calls signs when making their regulatory fee payment, requiring instead for CMRS providers to pay their regulatory fees only at the aggregate subscriber level without having to identify their various call signs.[23] We propose to continue this practice in FY 2008. We seek comment on this proposal. In addition, to lessen the administrative burden on licensees, we proposed in FY 2007 to consolidate the CMRS cellular and CMRS mobile fee categories into one fee category and as one fee code, thereby eliminating the requirement for CMRS providers to separate their subscriber counts into CMRS cellular and CMRS mobile fee categories during the regulatory fee payment process. This consolidation of fee categories enabled the Commission to process payments more quickly and accurately. For FY 2008, we propose to continue this practice of combining the CMRS cellular and CMRS mobile fee categories into one regulatory fee category. We seek comment on this proposal.

6. Future Streamlining of the Regulatory Fee Assessment and Collection Process

31. We continue to welcome comments concerning our commitment to reviewing, streamlining, and modernizing our statutorily required fee assessment and collection procedures. Our areas of particular interest include: (1) The process for notifying licensees about changes in the annual Schedule of Regulatory Fees and how it can be improved; (2) the most effective way to disseminate regulatory fee assessments and bills, *e.g.*, through surface mail, e-mail, list server using Listserv, online Web site, or some other mechanism; (3) the fee payment process, including how the agency's online regulatory fee filing system (Fee Filer) can be enhanced; (4) the timing of fee payments, including whether we should alter the existing section 9 regulatory fee payment window in any way; and (5) the timing of fee assessments and pre-bills.

III. Procedural Matters

A. Payment of Regulatory Fees

1. De Minimis Fee Payment Liability

32. Consistent with past practice, regulatees whose total FY 2008 regulatory fee liability, including all categories of fees for which payment is due, amounts to less than $10 will be exempted from payment of FY 2008 regulatory fees.

2. Standard Fee Calculations and Payment Dates

33. The Commission will, for the convenience of payers, accept fee payments made in advance of the window for the payment of regulatory fees. Licensees are reminded that, under our current rules, the responsibility for payment of fees by service category is as follows: [24]

- *Media Services:* Regulatory fees must be paid for initial construction permits that were granted on or before October 1, 2007 for AM/FM radio stations, VHF/UHF television stations and satellite television stations. Regulatory fees must be paid for all broadcast facility licenses granted on or before October 1, 2007. In instances where a permit or license is transferred or assigned after October 1, 2007, responsibility for payment rests with the holder of the permit or license as of the fee due date.
- *Wireline (Common Carrier) Services:* Regulatory fees must be paid for authorizations that were granted on or before October 1, 2007. In instances where a permit or license is transferred or assigned after October 1, 2007, responsibility for payment rests with the holder of the permit or license as of the fee due date.
- *Wireless Services:* CMRS cellular, mobile, and messaging services (fees based upon a subscriber, unit or circuit

[22] Federal Communications Commission, *Regulatory Fees Fact Sheet: What You Owe—Commercial Wireless Services for FY 2005* at 1 (rel. Jul. 2005).

[23] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2006,* MD Docket No. 06–68, Report and Order, 21 FCC Rcd 8092, 8105, para. 48 (2006).

[24] As we noted earlier in our request for comments in possible adjustments to payment units, *e.g.*, para. 6–12, we seek comment addressing several areas in our regulatory fees. Such comments may result in modification of the fee calculations discussed above and the methodology stated below. *See, e.g.*, note 24.

count): Regulatory fees must be paid for authorizations that were granted on or before October 1, 2007. The number of subscribers, units or circuits on December 31, 2007 will be used as the basis from which to calculate the fee payment.

• The first eleven regulatory fee categories in our Schedule of Regulatory Fees (*see* Attachment D) pay what we refer to as ''small multi-year wireless regulatory fees.'' Entities pay these regulatory fees in advance for the entire amount of their five-year or ten-year term of initial license, and only pay regulatory fees again when the license is renewed or a new license is obtained. We include these eleven categories in our Schedule of Regulatory Fees to publicize our estimates of the number of ''small multi-year wireless'' licenses that will be renewed or newly obtained in FY 2008.

• *Multichannel Video Programming Distributor Services (cable television operators and CARS licensees):* Regulatory fees must be paid for the number of basic cable television subscribers as of December 31, 2007.[25] Regulatory fees also must be paid for CARS licenses that were granted on or before October 1, 2007. In instances where a CARS license is transferred or assigned after October 1, 2007, responsibility for payment rests with the holder of the license as of the fee due date.

• *International Services:* Regulatory fees must be paid for earth stations, geostationary orbit space stations and non-geostationary orbit satellite systems that were licensed and operational on or before October 1, 2007. In instances where a license is transferred or assigned after October 1, 2007, responsibility for payment rests with the holder of the license as of the fee due date. Regulatory fees must be paid for international bearer circuits based on the number of active circuits as of December 31, 2007.[26]

[25] Cable television system operators should compute their basic subscribers as follows: Number of single family dwellings + number of individual households in multiple dwelling unit (apartments, condominiums, mobile home parks, *etc.*) paying at the basic subscriber rate + bulk rate customers + courtesy and free service. Note: Bulk-Rate Customers = Total annual bulk-rate charge divided by basic annual subscription rate for individual households. Operators may base their count on ''a typical day in the last full week'' of December 2007, rather than on a count as of December 31, 2007. *But see* para. 8–12 above.

[26] Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active international bearer circuits in any transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. Non-common carrier submarine cable operators are also to pay fees for any and all international bearer circuits sold on an indefeasible right of use (''IRU'') basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. Non-common carrier submarine cable operators are also to pay fees for any and all international bearer circuits provided as a private line service to an international common carrier authorized by the Commission to provide U.S. international common carrier services. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2001,* MD Docket No. 01–76, Report and Order, 16 FCC Rcd 13525, 13593 (2001); *Regulatory Fees Fact Sheet: What You Owe—International and Satellite Services Licensees for FY 2004* at 3 (rel. July 2004) (the fact sheet is available on the FCC Web site at: (*http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–249904A4.pdf*).

B. Enforcement

34. Regulatory fee payment must be received and stamped at the lockbox bank by the last day of the regulatory fee filing window, and not merely postmarked by the last day of the window. As a reminder to all licensees, section 9(c) of the Act requires us to impose an additional charge as a penalty for late payment of any regulatory fee.[27] A late payment penalty of 25 percent of the amount of the required regulatory fee will be assessed on the first day following the deadline date for filing of these fees. Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including the Commission's Red Light Rule [28] and the provisions set forth in the Debt Collection Improvement Act of 1996 (''DCIA'').[29] We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the related debt pursuant to the DCIA and section 1.1940(d) of the Commission's rules.[30] These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. In case of partial payments (underpayments) of regulatory fees, the licensee will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, then the 25 percent late charge penalty (and other charges and/or sanctions, as appropriate) will be assessed on the portion that is not paid in a timely manner.

35. We will withhold action on any applications or other requests for benefits filed by anyone who is delinquent in any non-tax debts owed to the Commission (including regulatory fees) and will ultimately dismiss those applications or other requests if payment of the delinquent debt or other satisfactory arrangement for payment is not made.[31] Failure to pay regulatory fees can also result in the initiation of a proceeding to revoke any and all authorizations held by the entity responsible for paying the delinquent fee(s).[32]

C. Initial Regulatory Flexibility Analysis

36. An initial regulatory flexibility analysis (''IRFA'') is contained in Attachment A of the Appendix. Comments to the IRFA must be identified as responses to the IRFA and filed by the deadlines for comments on the Notice. The Commission will send a copy of the Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

D. Initial Paperwork Reduction Act Analysis

37. This Notice does not contain proposed or modified information collections subject to the Paperwork Reduction Act of 1995 (''PRA''), Public Law 104–13. This Notice does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198.[33] The forms already required by the Commission's regulatory fee process have been approved by the Office of Management and Budget under information collection 3060–0589.

E. Ex Parte Rules

38. This is as a ''permit-but-disclose'' proceeding subject to the requirements under section 1.1206(b) of the Commission's rules.[34] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded

[27] 47 U.S.C. 159(c).

[28] *See* 47 CFR 1.1910.

[29] Delinquent debt owed to the Commission triggers application of the ''red light rule'' which requires offsets or holds on pending disbursements. 47 CFR 1.1910. In 2004, the Commission adopted rules implementing the requirements of the DCIA. *See Amendment of Parts 0 and 1 of the Commission's Rules,* MD Docket No. 02–339, Report and Order, 19 FCC Rcd 6540 (2004); 47 CFR part 1, subpart O, Collection of Claims Owed the United States.

[30] 47 CFR 1.1940(d).

[31] *See* 47 CFR 1.1161(c), 1.1164(f)(5), and 1.1910.

[32] *See also* para. 122, below.

[33] *See* 44 U.S.C. 3506(c)(4).

[34] *See* 47 CFR 1.1206(b); see also 47 CFR 1.1202, 1.1203.

that a memorandum summarizing a presentation must contain a summary of the substance of the presentation 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.[35] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

F. Filing Requirements

39. *Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,[36] interested parties may file 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) procedures for filing paper copies.[37]

40. *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 or 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.

41. *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 we continue 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 should be addressed to 445 12th Street, SW., Washington, DC 20554.

42. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available free online, via ECFS. Documents will be available electronically in ASCII, Word, and/or Adobe Acrobat.

43. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (''PDF'') at *http://www.fcc.gov.*

IV. Order

44. In WT Docket No. 03–66 (the *''BRS/EBS Proceeding''*), the Commission sought comment on proposed changes to the regulatory fee structure for BRS.[38] In 2006, the Commission adopted a new regulatory fee structure for BRS (the *''2006 Decision''*).[39] Specifically, as noted in the *FY 2007 NPRM*, the Commission adopted a megahertz-based approach for BRS regulatory fees and, using a concept similar to the Commission's annual scale of regulatory fees for broadcast television stations, established in the *2006 Decision* three rate tiers based on the BTA ranking of each license.[40] Under the *2006 Decision*, BRS regulatory fees will use a MHz-based formula with three tiers of fees by markets. Instead of a flat fee amount per BRS license, BRS licensees will pay a fee in one of three fee categories based on Basic Trading Areas (''BTA'') ranked by population size.[41] The highest fee will be assessed to licenses in BTAs ranked 1–60, licenses in BTAs ranked 61–200 will have a lesser fee, and licenses for BTAs ranked 201–493 will pay the lowest fee.[42]

45. In the *FY 2007 NPRM*, we sought comment on the implementation of the new BRS fee structure. Specifically, we invited commenters to suggest a simple method of calculating BRS regulatory fees that incorporates the complexity of using both elements of the *2006 Decision*, namely, the three rate tiers, to be based on the BTA ranking of each license, and the per megahertz fee.[43] In particular, we invited comment on a formula or method for calculating regulatory fees that incorporates the *2006 Decision* in a manner ''sensitive to rural operators in less densely populated areas.[44]

46. In a *Further Notice of Proposed Rulemaking*, we proposed to use a weighted average approach based on the *2006 Decision* to establish three tiers of regulatory fees using a 3:2:1 ratio, *i.e.*, 3x for Tier 1, 2x for Tier 2, and 1x for Tier 3, where x equals the base fee amount (Pro-rated FY Revenue Requirement for BRS divided by the weighted total number of BRS payment units).[45] In adopting three fee tiers for

[35] *See* 47 CFR 1.1206(b)(2).

[36] *See id.* section 1.415, 1.419.

[37] *See Electronic Filing of Documents in Rulemaking Proceedings,* 13 FCC Rcd 11322 (1998).

[38] *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands*, WT Docket No. 03–66, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14296, para. 357 (2004) (*''BRS/EBS Report and Order and FNPRM''*).

[39] *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands,* WT Docket No. 03–66, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, 5756–59, para. 367–376 (2006) (*''2006 Decision''*).

[40] *See FY 2007 NPRM, 22 FCC Rcd at 7978, para. 8 n.8, citing the 2006 Decision.* The three tiers are based on three categories of Basic Trading Areas (''BTA'') population rankings: BTAs 1–60, BTAs 61–200, and BTAs 201–493. For BRS licensees that are licensed by geographic licensed service area (''GSA''), the BTA is the geographic center point of where its GSA is located. *See 2006 Decision,* 21 FCC Rcd at 5759, para. 376.

[41] *See 2006 Decision,* 21 FCC Rcd at 5759, para. 376.

[42] *Id.*

[43] *FY 2007 NPRM,* 22 FCC Rcd at 7978, para. 8.

[44] *Id.*

[45] *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07–81, Report and Order and Further Notice of Proposed

Continued

BRS, the Commission considered that BTAs ranked 1–60 generally have a population of greater than one million, BTAs ranked 61–200 generally have population of 250,000 to one million, and BTAs ranked 201–493 have a population of less than 250,000.[46]

47. The second element of the *2006 Decision* involved setting a fee per megahertz of licensed BRS spectrum. However, throughout the nation, BTA-by-BTA, the BRS radio service and its licensees are in the midst of a multi-year transition to a new band plan that, among other things, is modifying the amount of spectrum designated and licensed for BRS.[47] Given the complexities associated with this ''moving target,'' we tentatively concluded that the public interest would be best served by implementing the fee per megahertz approach after the BRS transition concludes nationwide.[48]

48. Comments on the *2007 FNPRM* were filed by WCA [49] and by the law firm of Blooston, Mordkofsky, Dickens, Duffy, & Prendergast, LLP (''BloostonLaw'').[50] WCA continues to advocate basing regulatory fees on a licensee's MHz/population, which the Commission has previously rejected.[51] WCA also advocates making no changes until the transition is complete.[52] BloostonLaw argues that there is insufficient information in the record to conclude that this proposal would benefit rural operators.[53] BloostonLaw also contends that the fee should be based on the population within the licensee's geographic service area.[54]

49. After reviewing the record, we now conclude that we will continue the current practice of charging a flat fee per license until the BRS/EBS transition to the new band plan. Neither of the commenters supported the proposal contained in the *2007 FNPRM*. Furthermore, WCA urges that no changes be made until the transition is complete. We also note that the transition is proceeding quickly. Transition initiation plans have been filed in 355 out of 493 BTAs, and the transition has been completed in 207 BTAs.[55] Any changes we adopt could not take effect until we adopt the changes, the Commission sends a report to Congress, and 90 days passes. If the transition is complete in 2009 or 2010, which seems possible, the interim system proposed in the *2007 FNPRM* could only be in place for one year. This effort would risk confusing licensees, and we believe that devoting Commission resources to implementing this interim system would be difficult to justify. Accordingly, we conclude that we will maintain the current system of charging a flat, per-license fee until the transition to the new band plan is complete.

V. Ordering Clauses

50. Accordingly, *It is Ordered* that, pursuant to sections 4(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 159, and 303(r), this Notice of Proposed Rulemaking and Order is hereby adopted.

51. *It is Further Ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, Shall Send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison.

Attachment A—Initial Regulatory Flexibility Analysis

52. As required by the Regulatory Flexibility Act (''RFA''),[56] the Commission has prepared this Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on small entities by the policies and rules in the present NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before the dates indicated on the first page of this NPRM. The Commission will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[57] In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.[58]

I. Need for, and Objectives of, the Proposed Rules

53. This rulemaking proceeding is initiated to obtain comments concerning the Commission's proposed amendment of its Schedule of Regulatory Fees in the amount of $312,000,000, the amount that Congress has required the Commission to recover. The Commission seeks to collect the necessary amount through its proposed Schedule of Regulatory Fees in the most efficient manner possible and without undue public burden.

II. Legal Basis

54. This action, including publication of proposed rules, is authorized under sections (4)(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended.[59]

III. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

55. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[60] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [61] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[62] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[63]

Rulemaking, 22 FCC Rcd 15712, 15726–15727, para. 46–50 (2007) (*''2007 FNPRM''*).

[46] *Id.,* 22 FCC Rcd at 15724–15725, para. 49.

[47] The transition plan creates a process for relocating Educational Broadband Service (''EBS'') licensees and BRS licensees from their current channel locations to their new spectrum blocks in the Lower Band Segment (''LBS''), Middle band Segment (''MBS''), or Upper Band Segment (''UBS''). The transition occurs by BTA and is undertaken by a proponent or multiple proponents. A proponent(s) must pay the cost of transitioning EBS licensees. The transition occurs in the following three phases: the Initiation Phase, the Transition Planning Phase, and the Transition Completion Phase.

[48] *FY 2007 FNPRM,* 22 FCC Rcd at 15727, para. 50.

[49] Comments of the Wireless Communications Association International, Inc., MD Docket No. 07–81 (filed Sep. 17, 2007) (''WCA Comments'').

[50] Comments, Blooston, Mordkofsky, Dickens, Duffy, & Prendergast, LLP, MD Docket No. 07–81 (filed Sep. 17, 2007) (''BloostonLaw Comments'').

[51] WCA Comments at 3–5.

[52] WCA Comments at 1.

[53] BloostonLaw Comments at 1–3.

[54] *Id.* at 3–4.

[55] As of 2/1/08.

[56] 5 U.S.C. 603. The RFA, 5 U.S.C. 601–612 has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (''CWAAA''). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA'').

[57] 5 U.S.C. 603(a).

[58] *Id.*

[59] 47 U.S.C. 154(i) and (j), 159, and 303(r).

[60] 5 U.S.C. 603(b)(3).

[61] 5 U.S.C. 601(6).

[62] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[63] 15 U.S.C. 632.

56. *Small Businesses.* Nationwide, there are a total of 22.4 million small businesses, according to SBA data.[64]

57. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.[65]

58. *Small Governmental Jurisdictions.* The term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' [66] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[67] We estimate that, of this total, 84,377 entities were ''small governmental jurisdictions.'' [68] Thus, we estimate that most governmental jurisdictions are small.

59. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' [69] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.[70] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

60. *Incumbent Local Exchange Carriers (''ILECs'').* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[71] According to Commission data,[72] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

61. *Competitive Local Exchange Carriers (''CLECs''), Competitive Access Providers (''CAPs''), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.''* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[73] According to Commission data,[74] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 94 have more than 1,500 employees. In addition, 12 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are ''Other Local Service Providers.'' Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities that may be affected by our proposed action.

62. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[75] According to Commission data,[76] 143 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 141 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our proposed action.

63. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[77] According to Commission data,[78] 770 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 747 have 1,500 or fewer employees and 23 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed action.

64. *Payphone Service Providers (''PSPs'').* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[79] According to Commission data,[80] 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our proposed action.

65. *Interexchange Carriers (''IXCs'').* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[81] According to Commission data,[82] 316 carriers have

[64] *See* SBA, Programs and Services, SBA Pamphlet No. CO–0028, at p. 40 (July 2002).

[65] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[66] 5 U.S.C. 601(5).

[67] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, p. 272, Table 415.

[68] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[69] 15 U.S.C. 632.

[70] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small-business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (''Small Business Act''); 5 U.S.C. 601(3) (''RFA''). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. *See* 13 CFR 121.102(b).

[71] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517110.

[72] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *''Trends in Telephone Service''* at Table 5.3, Page 5–5 (June 2005) (*''Trends in Telephone Service''*). This source uses data that are current as of October 1, 2004.

[73] 13 CFR 121.201, NAICS code 517110.

[74] ''Trends in Telephone Service'' at Table 5.3.

[75] 13 CFR 121.201, NAICS code 517310.

[76] ''Trends in Telephone Service'' at Table 5.3.

[77] 13 CFR 121.201, NAICS code 517310.

[78] ''Trends in Telephone Service'' at Table 5.3.

[79] 3 CFR 121.201, NAICS code 517110.

[80] ''Trends in Telephone Service'' at Table 5.3.

[81] 13 CFR 121.201, NAICS code 517110.

[82] ''Trends in Telephone Service'' at Table 5.3.

reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

66. *Operator Service Providers (''OSPs'').* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[83] According to Commission data,[84] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action.

67. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[85] According to Commission data,[86] 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 88 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by our proposed action.

68. *800 and 800-Like Service Subscribers.*[87] Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (''toll free'') subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[88] The most reliable source of information regarding the number of these service subscribers appears to be data the Commission receives from Database Service Management on the 800, 866, 877, and 888 numbers in use.[89] According to our data, at the end of December 2004, the number of 800 numbers assigned was 7,540,453; the number of 888 numbers assigned was 5,947,789; the number of 877 numbers assigned was 4,805,568; and the number of 866 numbers assigned was 5,011,291. We do not have data specifying the number of these subscribers that are independently owned and operated or have 1,500 or fewer employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,540,453 or fewer small entity 800 subscribers; 5,947,789 or fewer small entity 888 subscribers; 4,805,568 or fewer small entity 877 subscribers, and 5,011,291 or fewer entity 866 subscribers.

69. *International Service Providers.* There is no small business size standard developed specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad census categories of ''Satellite Telecommunications'' and ''Other Telecommunications.'' Under both categories, such a business is small if it has $13.5 million or less in average annual receipts.[90]

70. The first category of Satellite Telecommunications ''comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [91] For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.[92] Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999.[93] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

71. The second category of Other Telecommunications ''comprises establishments primarily engaged in (1) providing specialized telecommunications applications, such as satellite tracking, communications telemetry, and radar station operations; or (2) providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems.'' [94] For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.[95] Of this total, 259 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999.[96] Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

72. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' [97] and ''Cellular and Other Wireless Telecommunications.'' [98] Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.[99] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[100] Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that

[83] 13 CFR 121.201, NAICS code 517110.

[84] ''Trends in Telephone Service'' at Table 5.3.

[85] 13 CFR 121.201, NAICS code 517310.

[86] ''Trends in Telephone Service'' at Table 5.3.

[87] We include all toll-free number subscribers in this category.

[88] 13 CFR 121.201, NAICS code 517310.

[89] ''Trends in Telephone Service'' at Tables 18.4, 18.5, 18.6, and 18.7.

[90] 13 CFR 121.201, NAICS codes 517410 and 517910.

[91] U.S. Census Bureau, 2002 NAICS Definitions, ''517410 Satellite Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[92] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517410.

[93] *Id.* An additional 38 firms had annual receipts of $25 million or more.

[94] U.S. Census Bureau, 2002 NAICS Definitions, ''517910 Other Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[95] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517910.

[96] *Id.* An additional 14 firms had annual receipts of $25 million or more.

[97] 13 CFR 121.201, NAICS code 517211.

[98] 13 CFR 121.201, NAICS code 517212.

[99] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211.

[100] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

operated for the entire year.[101] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[102] Thus, under this second category and size standard, the majority of firms can, again, be considered small.

73. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments ''primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.'' [103] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less.[104] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[105] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999.[106] Thus, under this size standard, the great majority of firms can be considered small entities.

74. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' [107] and ''Cellular and Other Wireless Telecommunications.'' [108] Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.[109] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[110] Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.[111] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[112] Thus, under this second category and size standard, the majority of firms can, again, be considered small.

75. *Common Carrier Paging.* As noted, the SBA has developed a small business size standard for wireless firms within the broad economic census categories of ''Cellular and Other Wireless Telecommunications.'' [113] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, U.S. Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[114] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[115] Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

76. In addition, in the *Paging Second Report and Order*, the Commission adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[116] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[117] The SBA has approved this definition.[118] An auction of Metropolitan Economic Area (''MEA'') licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.[119] Fifty-seven companies claiming small business status won 440 licenses.[120] An auction of MEA and Economic Area (''EA'') licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[121] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[122] Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 408 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services.[123] Of these, we estimate that 589 are small, under the SBA-approved small business size standard.[124] We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

77. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (''WCS'') auction as an entity

[101] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 5, NAICS code 517212.

[102] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[103] Office of Management and Budget, North American Industry Classification System, p. 515 (1997). NAICS code 518111, ''On-Line Information Services.''

[104] 13 CFR 121.201, NAICS code 518111.

[105] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191.

[106] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191.

[107] 13 CFR 121.201, NAICS code 517211.

[108] 13 CFR 121.201, NAICS code 517212.

[109] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211.

[110] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[111] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212.

[112] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[113] 13 CFR 121.201, NAICS code 517212.

[114] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321.

[115] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321. The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1000 employees or more.''

[116] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* Second Report and Order, 12 FCC Rcd 2732, 2811–2812, paras. 178–181 (*''Paging Second Report and Order''*); *see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085–10088, paras. 98–107 (1999).

[117] *Paging Second Report and Order,* 12 FCC Rcd at 2811, para. 179.

[118] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (''WTB''), FCC (Dec. 2, 1998) (*''Alvarez Letter 1998''*).

[119] *See* ''929 and 931 MHz Paging Auction Closes,'' Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[120] *See id.*

[121] *See* ''Lower and Upper Paging Band Auction Closes,'' Public Notice, 16 FCC Rcd 21821 (WTB 2002).

[122] *See* ''Lower and Upper Paging Bands Auction Closes,'' Public Notice, 18 FCC Rcd 11154 (WTB 2003).

[123] ''Trends in Telephone Service'' at Table 5.3.

[124] 13 CFR 121.201, NAICS code 517211.

with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years.[125] The SBA has approved these definitions.[126] The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

78. *1670–1675 MHz Services.* An auction for one license in the 1670–1675 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

79. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size standard for ''Cellular and Other Wireless Telecommunications'' services.[127] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[128] According to *Trends in Telephone Service* data, 437 carriers reported that they were engaged in wireless telephony.[129] We have estimated that 260 of these are small under the SBA small business size standard.

80. *Broadband Personal Communications Service.* The broadband personal communications services (''PCS'') spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[130] For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[131] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[132] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[133] On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[134]

81. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses.[135] Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction No. 58. There were 24 winning bidders for 217 licenses.[136] Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.[137] Of the 14 winning bidders, six were designated entities.[138]

82. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less.[139] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[140] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.[141] A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[142] A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[143] The SBA has approved these small business size standards.[144] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[145] Three of these claimed status as a small or very small entity and won 311 licenses.

83. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[146] The Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[147] A ''very small business'' is defined as an entity that,

[125] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS),* Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[126] *See Alvarez Letter 1998.*

[127] 13 CFR 121.201, NAICS code 517212.

[128] 13 CFR 121.201, NAICS code 517212.

[129] ''Trends in Telephone Service'' at Table 5.3.

[130] *See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap,* Report and Order, 11 FCC Rcd 7824, 7850–7852, paras. 57–60 (1996) (*''PCS Report and Order''*); *see also* 47 CFR 24.720(b).

[131] *See PCS Report and Order,* 11 FCC Rcd at 7852, para. 60.

[132] *See Alvarez Letter 1998.*

[133] FCC News, ''Broadband PCS, D, E and F Block Auction Closes,'' No. 71744 (rel. Jan. 14, 1997).

[134] *See* ''C, D, E, and F Block Broadband PCS Auction Closes,'' *Public Notice,* 14 FCC Rcd 6688 (WTB 1999).

[135] *See* ''C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,'' *Public Notice*, 16 FCC Rcd 2339 (2001).

[136] *See* ''Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,'' *Public Notice*, 20 FCC Rcd 3703 (2005).

[137] *See* ''Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71,'' *Public Notice*, 22 FCC Rcd 9247 (2007).

[138] *Id.*

[139] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

[140] *See* ''Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674,'' *Public Notice*, PNWL 94–004 (rel. Aug. 2, 1994); ''Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787,'' *Public Notice*, PNWL 94–27 (rel. Nov. 9, 1994).

[141] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (''*Narrowband PCS Second Report and Order*'').

[142] *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

[143] *Id.*

[144] *See Alvarez Letter 1998.*

[145] *See* ''Narrowband PCS Auction Closes,'' *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

[146] *See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59),* Report and Order, 17 FCC Rcd 1022 (2002) (''*Channels 52–59 Report and Order*'').

[147] *See Channels 52–59 Report and Order*, 17 FCC Rcd at 1087–88, para. 172.

together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[148] Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (''MSA/RSA'') licenses. The third category is ''entrepreneur,'' which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[149] The SBA approved these small size standards.[150] An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.[151] A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.[152] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[153] On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

84. The Commission recently reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order.*[154] An auction of 700 MHz licenses commenced January 24, 2008. For the Lower 700 MHz band, 176 licenses over Economic Areas in the A Block, 734 licenses over Cellular Market Areas in the B Block, and 176 licenses over EAs in the E Block are available for licensing.[155] Winning bidders may be eligible for small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years), or very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years).

85. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order,* the Commission revised its rules regarding Upper 700 MHz licenses. On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band are available for licensing: 12 licenses over Regional Economic Area Groupings (''REAGs'') in the C Block, and one nationwide license in the D Block.[156] Winning bidders may be eligible for small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years), or very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years).

86. *700 MHz Guard Band Licenses.* In the 700 MHz Guard Band Order, the Commission adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[157] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[158] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[159] SBA approval of these definitions is not required.[160] An auction of 52 Major Economic Area (''MEA'') licenses commenced on September 6, 2000, and closed on September 21, 2000.[161] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[162]

87. *Specialized Mobile Radio.* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[163] The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[164] The SBA has approved these small business size standards for the 900 MHz Service.[165] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[166] A second auction for the 800

[148] *See id.*

[149] *See id,* 17 FCC Rcd at 1088, para. 173.

[150] *See* Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, WTB, FCC (Aug. 10, 1999) (''*Alvarez Letter 1999*'').

[151] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

[152] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

[153] *See id.*

[154] *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, Second Report and Order, FCC 07–132 (2007) (''*700 MHz Second Report and Order*'').

[155] *See* ''Auction of 700 MHz Band Licenses Scheduled for January 16, 2008; Comment Sought on Competitive Bidding Procedures For Auction 73,'' *Public Notice*, FCC Rcd 15004 (WTB 2007).

[156] *See id.*

[157] *See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000) (''*746–764 MHz Band Second Report and Order*'').

[158] *See 746–764 MHz Band Second Report and Order*, 15 FCC Rcd at 5343, para. 108.

[159] *See id.*

[160] *See id.*, 15 FCC Rcd 5299, 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

[161] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice*, 15 FCC Rcd 18026 (2000).

[162] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

[163] 47 CFR 90.814(b)(1).

[164] 47 CFR 90.814(b)(1).

[165] *See Alvarez Letter 1999.*

[166] *See* ''Correction to Public Notice DA 96–586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major

Continued

MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[167]

88. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard.[168] In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.[169] Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

89. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

90. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[170] The Commission estimates that most such licensees are small businesses under the SBA's small business standard.

91. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz Third Report and Order, the Commission adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[171] This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[172] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[173] The SBA has approved these small size standards.[174] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[175] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (''EAG'') Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[176] Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[177] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[178] The Commission conducted a fourth auction in 2007 with three of the five winning bidders claiming small or very small business status.[179]

92. *Private Land Mobile Radio (''PLMR'').* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any such entity employing no more than 1,500 persons.[180] The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.[181]

93. The Commission's 1994 Annual Report on PLMRs [182] indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that the revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

94. *Fixed Microwave Services.* Fixed microwave services include common carrier,[183] private operational-fixed,[184]

Trading Areas,'' *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

[167] *See* ''Multi-Radio Service Auction Closes,'' *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

[168] *See* ''800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced,'' *Public Notice*, 15 FCC Rcd 17162 (2000).

[169] *See* ''800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,'' *Public Notice*, 16 FCC Rcd 1736 (2000).

[170] 13 CFR 121.201, NAICS code 517212.

[171] *Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943, 11068–70, paras. 291–295 (1997).

[172] *Id.* at 11068, para. 291.

[173] *Id.*

[174] *See* Letter from Aida Alvarez, Administrator, SBA, to Daniel Phythyon, Chief, WTB, FCC (Jan. 6, 1998) (''*Alvarez to Phythyon Letter 1998*'').

[175] *See generally* ''220 MHz Service Auction Closes,'' *Public Notice*, 14 FCC Rcd 605 (1998).

[176] *See* ''FCC Announces It Is Prepared To Grant 654 Phase II 220 MHz Licenses After Final Payment Is Made,'' *Public Notice*, 14 FCC Rcd 1085 (1999).

[177] *See* ''Phase II 220 MHz Service Spectrum Auction Closes,'' *Public Notice*, 14 FCC Rcd 11218 (1999).

[178] *See* ''Multi-Radio Service Auction Closes,'' *Public Notice*, 17 FCC Rcd 1446 (2002).

[179] *See* ''Auction of Phase II 220 MHz Service Spectrum Licenses Closes,'' *Public Notice*, 22 FCC Rcd 11573 (WTB 2007).

[180] *See* 13 CFR 121.201, NAICS code 517212.

[181] *See generally* 13 CFR 121.201.

[182] Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at para. 116.

[183] *See* 47 CFR 101 et seq. (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[184] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-

and broadcast auxiliary radio services.[185] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees.[186] The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

95. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of $40 million or less in the three previous calendar years.[187] An additional size standard for ''very small business'' is: An entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[188] The SBA has approved these small business size standards.[189] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

96. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (''LMDS'') is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[190] The auction of the 986 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[191] An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[192] The SBA has approved these small business size standards in the context of LMDS auctions.[193] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

97. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (''MSAs'').[194] Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, the Commission defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[195] In the *218–219 MHz Report and Order and Memorandum Opinion and Order,* we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[196] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.[197] The SBA has approved of these definitions.[198] A subsequent auction is not yet scheduled. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps most, of the licenses may be awarded to small businesses.

98. *Location and Monitoring Service (''LMS'').* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[199] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million.[200] These definitions have been approved by the SBA.[201] An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned,

Fixed Microwave services. *See* 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[185] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

[186] 13 CFR 121.201, NAICS code 517212.

[187] *See Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands*, ET Docket No. 95–183, Report and Order, 12 FCC Rcd 18600 (1997).

[188] *Id.*

[189] *See* Letter from Aida Alvarez, Administrator, SBA, to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb. 4, 1998); *See* Letter from Hector Barreto, Administrator, SBA, to Margaret Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Jan. 18, 2002).

[190] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689–90, para. 348 (1997) (''*LMDS Second Report and Order*'').

[191] *See LMDS Second Report and Order*, 12 FCC Rcd at 12689–90, para. 348.

[192] *See id.*

[193] *See Alvarez to Phythyon Letter 1998.*

[194] *See* ''Interactive Video and Data Service (IVDS) Applications Accepted for Filing,'' *Public Notice*, 9 FCC Rcd 6227 (1994).

[195] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

[196] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).*

[197] *Id.*

[198] *See Alvarez to Phythyon Letter 1998.*

[199] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd 15182, 15192, para. 20 (1998) (''*Automatic Vehicle Monitoring Systems Second Report and Order*''); *see also* 47 CFR 90.1103.

[200] *Automatic Vehicle Monitoring Systems Second Report and Order*, 13 FCC Rcd at 15192, para. 20; *see also* 47 CFR 90.1103.

[201] *See Alvarez Letter 1998.*

289 licenses were sold to four small businesses.

99. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[202] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (''BETRS'').[203] In the present context, we will use the SBA's small business size standard applicable to ''Cellular and Other Wireless Telecommunications,'' *i.e.*, an entity employing no more than 1,500 persons.[204] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

100. *Air-Ground Radiotelephone Service.*[205] The Commission has previously used the SBA's small business definition applicable to ''Cellular and Other Wireless Telecommunications,'' *i.e.*, an entity employing no more than 1,500 persons.[206] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million.[207] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[208] These definitions were approved by the SBA.[209] In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

101. *Aviation and Marine Radio Services.* There are approximately 26,162 aviation, 34,555 marine (ship), and 3,296 marine (coast) licensees.[210] The Commission has not developed a small business size standard specifically applicable to all licensees. For purposes of this analysis, we will use the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees.[211] We are unable to determine how many of those licensed fall under this standard. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 62,969 licensees that are small businesses under the SBA standard.[212] In December 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For this auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million.[213] Further, the Commission made available Automated Maritime Telecommunications System (''AMTS'') licenses in Auctions 57 and 61.[214] Winning bidders could claim status as a very small business or a very small business. A very small business for this service is defined as an entity with attributed average annual gross revenues that do not exceed $3 million for the preceding three years, and a small business is defined as an entity with attributed average annual gross revenues of more than $3 million but less than $15 million for the preceding three years.[215] Three of the winning bidders in Auction 57 qualified as small or very small businesses, while three winning entities in Auction 61 qualified as very small businesses.

102. *Offshore Radiotelephone Service.* This service operates on several ultra high frequencies (''UHF'') television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[216] There is presently 1 licensee in this service. We do not have information whether that licensee would qualify as small under the SBA's small business size standard for ''Cellular and Other Wireless Telecommunications'' services.[217] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[218]

103. *Multiple Address Systems (''MAS'').* Entities using MAS spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years.[219] ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years.[220] The SBA has approved of these definitions.[221] The majority of these entities will most likely be licensed in bands where the Commission has

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[202] The service is defined in section 22.99 of the Commission's Rules, 47 CFR 22.99.

[203] BETRS is defined in section 22.757 and 22.759 of the Commission's Rules, 47 CFR 22.757 and 22.759.

[204] 13 CFR 121.201, NAICS code 517212.

[205] The service is defined in section 22.99 of the Commission's Rules, 47 CFR 22.99.

[206] 13 CFR 121.201, NAICS codes 517212.

[207] *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket Nos. 03–103 and 05–42, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, para. 28–42 (2005).

[208] *Id.*

[209] *See* Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, WTB, FCC (Sept. 19, 2005).

[210] Vessels that are not required by law to carry a radio and do not make international voyages or communications are not required to obtain an individual license. *See* Amendment of Parts 80 and 87 of the Commission's Rules to Permit Operation of Certain Domestic Ship and Aircraft Radio Stations Without Individual Licenses, *Report and Order*, WT Docket No. 96–82, 11 FCC Rcd 14849 (1996).

[211] 13 CFR 121.201, NAICS code 517212.

[212] A licensee may have a license in more than one category.

[213] *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92–257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[214] *See* ''Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,'' *Public Notice*, 19 FCC Rcd 9518 (WTB 2004); ''Auction of Automated Maritime Telecommunications System Licenses Scheduled for August 3, 2005, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures for Auction No. 61,'' *Public Notice*, 20 FCC Rcd 7811 (WTB 2005).

[215] 47 CFR 80.1252.

[216] This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 CFR 22.1001–22.1037.

[217] 13 CFR 121.201, NAICS code 517212.

[218] *Id.*

[219] *See Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008, para. 123 (2000).

[220] *Id.*

[221] *See Alvarez Letter 1999.*

implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001.[222] Seven winning bidders claimed status as small or very small businesses and won 611 licenses. On May 18, 2005, the Commission completed an auction (Auction No. 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

104. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the small business size standard developed by the SBA would be more appropriate. The applicable size standard in this instance appears to be that of ''Cellular and Other Wireless Telecommunications''. This definition provides that a small entity is any such entity employing no more than 1,500 persons.[223] The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

105. *1.4 GHz Band Licensees.* The Commission conducted an auction of 64 1.4 GHz band licenses, beginning on February 7, 2007,[224] and closing on March 8, 2007.[225] In that auction, the Commission defined ''small business'' as an entity that, together with its affiliates and controlling interests, had average gross revenues that exceed $15 million but do not exceed $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years.[226] Neither of the two winning bidders sought designated entity status.[227]

106. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of ''Cellular and Other Wireless Telecommunications'' companies. This category provides that such a company is small if it employs no more than 1,500 persons.[228] For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.[229] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[230] Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.[231] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[232] Thus, under this second category and size standard, the majority of firms can, again, be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent [233] and TRW, Inc. It is our understanding that Teligent and its related companies have fewer than 1,500 employees, though this may change in the future. TRW is not a small entity. There are approximately 122 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 122 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

107. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[234] ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[235] The SBA has approved these definitions.[236] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

108. *Broadband Radio Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (''MDS'') and Multichannel Multipoint Distribution Service (''MMDS'') systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (''BRS'') and Educational Broadband Service (''EBS'') (previously referred to as the Instructional Television Fixed Service (''ITFS'')).[237] In connection with the 1996 BRS auction, the Commission established a small business size

[222] *See* ''Multiple Address Systems Spectrum Auction Closes,'' *Public Notice*, 16 FCC Rcd 21011 (2001).

[223] *See* 13 CFR 121.201, NAICS code 517212.

[224] *See* ''Auction of 1.4 GHz Bands Licenses Scheduled for February 7, 2007,'' *Public Notice,* 21 FCC Rcd 12393 (WTB 2006).

[225] *See* ''Auction of 1.4 GHz Band Licenses Closes; Winning Bidders Announced for Auction No. 69,'' *Public Notice,* 22 FCC Rcd 4714 (2007) (''Auction No. 69 Closing PN'').

[226] *Id.,* Attachment C.

[227] *See* Auction No. 69 Closing PN.

[228] 13 CFR 121.201, NAICS code 517212.

[229] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211.

[230] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[231] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212.

[232] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[233] Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

[234] *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz,* Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000) (''*24 GHz Report and Order*''); *see also* 47 CFR 101.538(a)(2).

[235] *24 GHz Report and Order,* 15 FCC Rcd at 16967, para. 77; *see also* 47 CFR 101.538(a)(1).

[236] *See* Letter from Gary M. Jackson, Assistant Administrator, SBA, to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, WTB, FCC (July 28, 2000).

[237] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* MM Docket No. 94–131 and PP Docket No. 93–253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (''*MDS Auction R&O*'').

standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[238] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (''BTAs''). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[239] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

109. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in annual receipts.[240] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[241] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[242] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[243] Thus, we estimate that at least 1,932 licensees are small businesses.

110. *Television Broadcasting.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' [244] The SBA has created a small business size standard for Television Broadcasting entities, which is: such firms having $13 million or less in annual receipts.[245] According to Commission staff review of the BIA Financial Network, Inc., Media Access Pro Television Database as of December 7, 2007, about 825 (66 percent) of the 1,250 commercial television stations in the United States have revenues of $13 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business controlaffiliations [246] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

111. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

112. There are also 2,117 low power television stations (''LPTV'').[247] Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

113. *Radio Broadcasting.* The SBA defines a radio broadcast entity that has $6 million or less in annual receipts as a small business.[248] Business concerns included in this industry are those ''primarily engaged in broadcasting aural programs by radio to the public.[249] According to Commission staff review of the BIA Publications, Inc., Master Access Radio Analyzer Database, as of May 16, 2003, about 10,427 of the 10,945 commercial radio stations in the United States have revenue of $6 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations [250] are included.[251] Our estimate, therefore likely overstates the number of small businesses that might be affected by our action.

114. *Auxiliary, Special Broadcast and Other Program Distribution Services.* This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.[252]

115. The Commission estimates that there are approximately 5,618 FM translators and boosters.[253] The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial

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[238] 47 CFR 21.961(b)(1).

[239] 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard.

[240] 13 CFR 121.201, NAICS code 517510.

[241] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510.

[242] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[243] The term ''small entity'' within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). We do not collect annual revenue data on EBS licensees.

[244] U.S. Census Bureau, 2002 NAICS Definitions, ''515120 Television Broadcasting'' (partial definition); *http://www.census.gov/epcd/naics02/def/NDEF515.HTM.*

[245] 13 CFR 121.201, NAICS code 515120.

[246] ''Concerns are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 21.103(a)(1).

[247] *FCC News Release,* ''Broadcast Station Totals as of September 30, 2007.''

[248] *See* OMB, North American Industry Classification System: United States, 1997, at 509 (1997) (Radio Stations) (NAICS code 515112).

[249] *Id.*

[250] ''Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.'' 13 CFR 121.103(a)(1).

[251] ''SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size.'' 13 CFR 121(a)(4).

[252] 13 CFR 121.201, NAICS codes 513111 and 513112.

[253] *See* supra note 242.

translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business ($6.5 million for a radio station or $13.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.[254]

116. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.'' [255] The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: All such firms having $13.5 million or less in annual receipts.[256] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[257] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[258] Thus, under this size standard, the majority of firms can be considered small.

117. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[259] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[260] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[261] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.[262] Thus, under this second size standard, most cable systems are small.

118. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [263] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[264] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[265] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[266] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

119. *Open Video Services.* Open Video Service (''OVS'') systems provide subscription services.[267] The SBA has created a small business size standard for Cable and Other Program Distribution.[268] This standard provides that a small entity is one with $13.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[269] Affiliates of Residential Communications Network, Inc. (''RCN'') received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies proposed herein.

120. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: All such firms having $13.5 million or less in annual receipts.[270] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[271] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[272] Thus, under this size standard, the majority of firms can be considered small.

121. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very

[254] 15 U.S.C. 632.

[255] U.S. Census Bureau, 2002 NAICS Definitions, ''517510 Cable and Other Program Distribution''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[256] 256 13 CFR 121.201, NAICS code 517510.

[257] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510.

[258] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[259] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[260] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2; Warren Communications News, *Television & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[261] 47 CFR 76.901(c).

[262] Warren Communications News, *Television & Cable Factbook 2006,* ''U.S. Cable Systems by Subscriber Size,'' page F–2. The data do not include 718 systems for which classifying data were not available.

[263] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[264] 47 CFR 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* 16 FCC Rcd 2225 (Cable Services Bureau, 2001).

[265] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[266] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[267] *See* 47 U.S.C. 573.

[268] 13 CFR 121.201, NAICS code 517510.

[269] *See http://www.fcc.gov/csb/ovs/csovscer.html.*

[270] 13 CFR 121.201, NAICS code 517510.

[271] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510.

[272] *Id.* An additional 61 firms had annual receipts of $25 million or more.

small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[273] These definitions were approved by the SBA.[274] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[275] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[276]

122. *Amateur Radio Service.* These licensees are held by individuals in a noncommercial capacity; these licensees are not small entities.

123. *Aviation and Marine Services.* Small businesses in the aviation and marine radio services use a very high frequency (''VHF'') marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees.[277] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[278] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

124. *Personal Radio Services.* Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.[279] These services include Citizen Band Radio Service (''CB''), General Mobile Radio Service (''GMRS''), Radio Control Radio Service (''R/C''), Family Radio Service (''FRS''), Wireless Medical Telemetry Service (''WMTS''), Medical Implant Communications Service (''MICS''), Low Power Radio Service (''LPRS''), and Multi-Use Radio Service (''MURS'').[280] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being proposed. Since all such entities are wireless, we apply the definition of cellular and other wireless telecommunications, pursuant to which a small entity is defined as employing 1,500 or fewer persons.[281] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by the proposed rules.

125. *Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[282] There are a total of approximately 127,540 licensees in these services. Governmental entities [283] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[284]

[273] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2–12.7 GHz Band,* ET Docket No. 98–206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[274] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

[275] *See* ''Multichannel Video Distribution and Data Service Auction Closes,'' *Public Notice,* 19 FCC Rcd 1834 (2004).

[276] *See* ''Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,'' *Public Notice,* 20 FCC Rcd 19807 (2005).

[277] 13 CFR 121.201, NAICS code 517212.

[278] *Amendment of the Commission's Rules Concerning Maritime Communications,* Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[279] 47 CFR Part 90.

[280] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by Subpart D, Subpart A, Subpart C, Subpart B, Subpart H, Subpart I, Subpart G, and Subpart J, respectively, of Part 95 of the Commission's rules. *See generally* 47 CFR Part 95.

[281] 13 CFR 121.201, NAICS Code 517212.

[282] With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's Rules, 47 CFR 90.15–90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (''EMRS'') use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 CFR 90.15–90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 CFR 90.33–90.55.

[283] 47 CFR 1.1162.

[284] 5 U.S.C. 601(5).

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

126. With certain exceptions, the Commission's Schedule of Regulatory Fees applies to all Commission licensees and regulatees. Most licensees will be required to count the number of licenses or call signs authorized, complete and submit an FCC Form 159 Remittance Advice, and pay a regulatory fee based on the number of licenses or call signs.[285] Interstate telephone service providers must compute their annual regulatory fee based on their interstate and international end-user revenue using information they already supply to the Commission in compliance with the Form 499–A, Telecommunications Reporting Worksheet, and they must complete and submit the FCC Form 159. Compliance with the fee schedule will require some licensees to tabulate the number of units (*e.g.*, cellular telephones, pagers, cable TV subscribers) they have in service, and complete and submit an FCC Form 159. Licensees ordinarily will keep a list of the number of units they have in service as part of their normal business practices. No additional outside professional skills are required to complete the FCC Form 159, and it can be completed by the employees responsible for an entity's business records.

127. Each licensee must submit the FCC Form 159 to the Commission's lockbox bank after computing the number of units subject to the fee. Licensees may also file electronically to minimize the burden of submitting multiple copies of the FCC Form 159. Applicants who pay small fees in advance and provide fee information as part of their application must use FCC Form 159.

128. Licensees and regulatees are advised that failure to submit the required regulatory fee in a timely manner will subject the licensee or regulatee to a late payment penalty of 25 percent in addition to the required fee.[286] If payment is not received, new or pending applications may be dismissed, and existing authorizations may be subject to rescission.[287] Further, in accordance with the DCIA, federal agencies may bar a person or entity from obtaining a federal loan or loan insurance guarantee if that person or entity fails to pay a delinquent debt owed to any federal agency.[288] Nonpayment of regulatory fees is a debt owed the United States pursuant to 31 U.S.C. 3711 *et seq.* and the DCIA. Appropriate enforcement measures as well as administrative and judicial remedies, may be exercised by the Commission. Debts owed to the Commission may result in a person or entity being denied a federal loan or loan guarantee pending before another federal agency until such obligations are paid.[289]

129. The Commission's rules currently provide for relief in exceptional circumstances. Persons or entities may request a waiver, reduction or deferment of payment of the regulatory fee.[290] However, timely submission of the required regulatory fee must accompany requests for waivers or reductions. This will avoid any late payment penalty if the request is denied. The fee will be refunded if the request is granted. In exceptional and compelling instances (where payment of the regulatory fee along with the waiver or reduction request could result in reduction of service to a community or other financial hardship to the licensee), the Commission will defer payment in response to a request filed with the appropriate supporting documentation.

V. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

130. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[291] In the *NPRM,* we have sought comment on alternatives that might simplify our fee procedures or otherwise benefit filers, including small entities, while remaining consistent with our statutory responsibilities in this proceeding.

131. Several categories of licensees and regulatees are exempt from payment of regulatory fees. Also, waiver procedures provide regulatees, including small entity regulatees, relief in exceptional circumstances.

VI. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

132. None.

Attachment B—Sources of Payment Unit Estimates for FY 2008

In order to calculate individual service fees for FY 2008, we adjusted FY 2007 payment units for each service to more accurately reflect expected FY 2008 payment liabilities. We obtained our updated estimates through a variety of means. For example, we used Commission licensee data bases, actual prior year payment records and industry and trade association projections when available. The databases we consulted include our Universal Licensing System (''ULS''), International Bureau Filing System (''IBFS''), Consolidated Database System (''CDBS'') and Cable Operations and Licensing System (''COALS''), as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone Service* and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast.*

We tried to obtain verification for these estimates from multiple sources and, in all cases; we compared FY 2008 estimates with actual FY 2007 payment units to ensure that our revised estimates were reasonable. Where appropriate, we adjusted and/or rounded our final estimates to take into consideration the fact that certain variables that impact on the number of payment units cannot yet be estimated exactly. These include an unknown

[285] See 47 CFR 1.1162 for the general exemptions from regulatory fees. *E.g.,* Amateur radio licensees (except applicants for vanity call signs) and operators in other non-licensed services (*e.g.,* Personal Radio, part 15, ship and aircraft). Governments and non-profit (exempt under section 501(c) of the Internal Revenue Code) entities are exempt from payment of regulatory fees and need not submit payment. Non-commercial educational broadcast licensees are exempt from regulatory fees as are licensees of auxiliary broadcast services such as low power auxiliary stations, television auxiliary service stations, remote pickup stations and aural broadcast auxiliary stations where such licenses are used in conjunction with commonly owned non-commercial educational stations. Emergency Alert System licenses for auxiliary service facilities are also exempt as are instructional television fixed service licensees. Regulatory fees are automatically waived for the licensee of any translator station that: (1) Is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from members of the community served for support. Receive only earth station permittees are exempt from payment of regulatory fees. A regulatee will be relieved of its fee payment requirement if its total fee due, including all categories of fees for which payment is due by the entity, amounts to less than $10.

[286] 47 CFR 1.1164.

[287] 47 CFR 1.1164(c).

[288] Public Law 104–134, 110 Stat. 1321 (1996).

[289] 31 U.S.C. 7701(c)(2)(B).

[290] 47 CFR 1.1166.

[291] 5 U.S.C. 603.

number of waivers and/or exemptions that may occur in FY 2008 and the fact that, in many services, the number of actual licensees or station operators fluctuates from time to time due to economic, technical, or other reasons. When we note, for example, that our estimated FY 2008 payment units are based on FY 2007 actual payment units, it does not necessarily mean that our FY 2008 projection is exactly the same number as FY 2007. We have either rounded the FY 2008 number or adjusted it slightly to account for these variables.

Fee category	Sources of payment unit estimates
Land Mobile (All), Microwave, 218–219 MHz, Marine (Ship & Coast), Aviation (Aircraft & Ground), GMRS, Amateur Vanity Call Signs, Domestic Public Fixed.	Based on Wireless Telecommunications Bureau (“WTB”) projections of new applications and renewals taking into consideration existing Commission licensee data bases. Aviation (Aircraft) and Marine (Ship) estimates have been adjusted to take into consideration the licensing of portions of these services on a voluntary basis.
CMRS Cellular/Mobile Services	Based on WTB projection reports, and FY 07 payment data.
CMRS Messaging Services	Based on WTB reports, and FY 07 payment data.
AM/FM Radio Stations	Based on CDBS data, adjusted for exemptions, and actual FY 2007 payment units.
UHF/VHF Television Stations	Based on CDBS data, adjusted for exemptions, and actual FY 2007 payment units.
AM/FM/TV Construction Permits	Based on CDBS data, adjusted for exemptions, and actual FY 2007 payment units.
LPTV, Translators and Boosters, Class A Television	Based on CDBS data, adjusted for exemptions, and actual FY 2007 payment units.
Broadcast Auxiliaries	Based on actual FY 2007 payment units.
BRS (formerly MDS/MMDS)	Based on WTB reports and actual FY 2007 payment units.
Cable Television Relay Service (“CARS”) Stations	Based on data from Media Bureau’s COALS database and actual FY 2007 payment units.
Cable Television System Subscribers	Based on publicly available data sources for estimated subscriber counts and actual FY 2007 payment units.
Interstate Telecommunication Service Providers	Based on FCC Form 499–Q data for the four quarters of calendar year 2007, the Wireline Competition Bureau projected the amount of calendar year 2007 revenue that will be reported on 2008 FCC Form 499–A worksheets in April, 2008.
Earth Stations	Based on International Bureau (“IB”) licensing data and actual FY 2007 payment units.
Space Stations (GSOs & NGSOs)	Based on IB data reports and actual FY 2007 payment units.
International Bearer Circuits	Based on IB reports and actual FY 2007 payment units.
International HF Broadcast Stations, International Public Fixed Radio Service.	Based on IB reports and actual FY 2007 payment units.

Attachment C—Calculation of FY2008 Revenue Requirements and Pro-Rata Fees

Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

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Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

Fee Category	FY 2008 Payment Units	Years	FY 2007 Revenue Estimate	Pro-Rated FY 2008 Revenue Require-ment*	Computed New FY 2008 Regulatory Fee	Rounded New FY 2008 Regula-tory Fee	Expected FY 2008 Revenue
PLMRS (Exclusive Use)	1,150	10	437,500	469,918	41	40	460,000
PLMRS (Shared use)	11,500	10	2,325,000	2,497,278	22	20	2,300,000
Microwave	4,900	10	1,740,000	1,868,931	38	40	1,960,000
218-219 MHz (Formerly IVDS)	3	10	1,650	1,772	59	60	1,800
Marine (Ship)	8,400	10	800,000	859,278	10	10	840,000
GMRS	14,000	5	400,000	429,639	6	5	350,000
Aviation (Aircraft)	7,500	10	440,000	472,603	6	5	375,000
Marine (Coast)	310	10	108,000	116,003	37	35	108,500
Aviation (Ground)	1,700	10	165,000	177,226	10	10	170,000
Amateur Vanity Call Signs	15,000	10	171,990	184,734	1.23	1.23	184,500
AM Class A	65	1	210,800	227,451	3,499	3,500	227,500
AM Class B	1,564	1	2,546,375	2,742,431	1,753	1,750	2,737,000
AM Class C	935	1	890,150	965,321	1,032	1,025	958,375
AM Class D	1,706	1	2,983,750	3,240,539	1,899	1,900	3,241,400
FM Classes A, B1 & C3	3,040	1	6,281,025	6,800,861	2,237	2,225	6,764,000
FM Classes B, C, C0, C1 & C2	3,043	1	7,655,100	8,273,911	2,719	2,725	8,292,175
AM Construction Permits	73	1	26,000	32,850	450	450	32,850
FM Construction Permits[1]	257	1	117,875	154,200	600	600	154,200
Satellite TV	127	1	137,500	147,961	1,165	1,175	149,225
Satellite TV Construction Permit	3	1	1,650	1,789	596	595	1,785
VHF Markets 1-10	43	1	2,764,900	2,983,938	69,394	69,400	2,984,200

Fee Category	FY 2008 Payment Units	Years	FY 2007 Revenue Estimate	Pro-Rated FY 2008 Revenue Require-ment*	Computed New FY 2008 Regulatory Fee	Rounded New FY 2008 Regula-tory Fee	Expected FY 2008 Revenue
VHF Markets 11-25	60	1	2,827,350	3,051,067	50,851	50,850	3,051,000
VHF Markets 26-50	74	1	2,392,775	2,581,765	34,889	34,900	2,582,600
VHF Markets 51-100	118	1	2,300,000	2,480,776	21,024	21,025	2,480,950
VHF Remaining Markets	195	1	1,014,750	1,093,312	5,607	5,600	1,092,000
VHF Construction Permits	4	1	15,375	22,400	5,600	5,600	22,400
UHF Markets 1-10	90	1	1,788,150	1,931,149	21,457	21,450	1,930,500
UHF Markets 11-25	78	1	1,478,200	1,596,290	20,465	20,475	1,597,050
UHF Markets 26-50	116	1	1,242,000	1,342,573	11,574	11,575	1,342,700
UHF Markets 51-100	167	1	1,058,400	1,141,878	6,838	6,850	1,143,950
UHF Remaining Markets	186	1	320,250	347,204	1,867	1,875	348,750
UHF Construction Permits[1]	20	1	38,500	37,500	1,875	1,875	37,500
Broadcast Auxiliaries	27,600	1	270,000	251,048	9	10	276,000
LPTV/Trans-lators/Boosters/ Class A TV	3,500	1	1,173,000	1,274,067	364	365	1,277,500
CARS Stations	750	1	144,300	155,598	207	205	153,750
Cable TV Systems	64,800,000	1	48,375,000	52,061,017	0.80341	0.80	51,840,000
Interstate Tele-communication Service Providers	$46,300,000,000	1	135,660,000	146,636,961	0.00316710	0.00317	146,771,000
CMRS Mobile Services (Cellular/Public Mobile)	255,000,000	1	41,220,000	43,917,284	0.1722	0.170	43,350,000
CMRS Messag. Services	7,000,000	1	600,000	560,000	0.080	0.080	560,000
BRS[2]	1,700	1	422,500	501,500	295	295	501,500
LMDS	335	1	133,250	98,825	295	295	98,825

Fee Category	FY 2008 Payment Units	Years	FY 2007 Revenue Estimate	Pro-Rated FY 2008 Revenue Require-ment*	Computed New FY 2008 Regulatory Fee	Rounded New FY 2008 Regula-tory Fee	Expected FY 2008 Revenue
International Bearer Circuits	7,500,000	1	7,560,000	8,149,636	1.087	1.09	8,175,000
International Public Fixed	1	1	1,875	2,014	2,014	2,025	2,025
Earth Stations	4,000	1	721,500	786,409	197	195	780,000
International HF Broadcast	5	1	3,975	4,288	858	860	4,300
Space Stations (Geostationary)	85	1	9,391,200	10,140,209	119,297	119,300	10,140,500
Space Stations (Non-Geostationary	6	1	698,850	754,556	125,759	125,750	754,500
****** Total Estimated Revenue to be Collected			291,055,465	313,567,960			312,606,810
****** Total Revenue Requirement			290,295,160	312,000,000			312,000,000
Difference			760,305	1,567,960			606,810

[1] The AM and FM Construction Permit revenues and the VHF and UHF Construction Permit revenues were adjusted to set the regulatory fee to an amount no higher than the lowest licensed fee for that class of service. The reductions in the AM and FM Construction Permit revenues are offset by increases in the revenue totals for AM and FM radio stations. Similarly, reductions in the VHF and UHF Construction Permit revenues are offset by increases in the revenue totals for VHF and UHF television stations, respectively.

[2] MDS/MMDS category was renamed Broadband Radio Service (BRS). See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report & Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14169, para. 6 (2004).

[3] Beginning in FY 2008, regulatory fees for IVoIP will be included as part of the Interstate Telecommunications Service Provider (ITSP) fee, and these fees will be collected at the same time as ITSP fees are collected.

Attachment D—Proposed FY 2008 Schedule of Regulatory Fees

Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

Fee Category	Annual Regulatory Fee (U.S. $'s)
PLMRS (per license) (Exclusive Use) (47 CFR part 90)	40
Microwave (per license) (47 CFR part 101)	40
218-219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95)	60
Marine (Ship) (per station) (47 CFR part 80)	10
Marine (Coast) (per license) (47 CFR part 80)	35
General Mobile Radio Service (per license) (47 CFR part 95)	5
Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category)	20
PLMRS (Shared Use) (per license) (47 CFR part 90)	20
Aviation (Aircraft) (per station) (47 CFR part 87)	5
Aviation (Ground) (per license) (47 CFR part 87)	10
Amateur Vanity Call Signs (per call sign) (47 CFR part 97)	1.23
CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90)	.17
CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90)	.08
Broadband Radio Service (formerly MMDS/ MDS) (per license) (47 CFR part 21)	295
Local Multipoint Distribution Service (per call sign) (47 CFR, part 101)	295
AM Radio Construction Permits	450
FM Radio Construction Permits	600
TV (47 CFR part 73) VHF Commercial	
Markets 1-10	69,400
Markets 11-25	50,850
Markets 26-50	34,900
Markets 51-100	21,025
Remaining Markets	5,600
Construction Permits	5,600

Fee Category	Annual Regulatory Fee (U.S. $'s)
TV (47 CFR part 73) UHF Commercial	
Markets 1-10	21,450
Markets 11-25	20,475
Markets 26-50	11,575
Markets 51-100	6,850
Remaining Markets	1,875
Construction Permits	1,875
Satellite Television Stations (All Markets)	1,175
Construction Permits – Satellite Television Stations	595
Low Power TV, Class A TV, TV/FM Translators & Boosters (47 CFR part 74)	365
Broadcast Auxiliaries (47 CFR part 74)	10
CARS (47 CFR part 78)	205
Cable Television Systems (per subscriber) (47 CFR part 76)	.80
Interstate Telecommunication Service Providers (per revenue dollar)	.00317
Earth Stations (47 CFR part 25)	195
Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes DBS Service (per operational station) (47 CFR part 100)	119,300
Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25)	125,750
International Bearer Circuits (per active 64KB circuit)	1.09
International Public Fixed (per call sign) (47 CFR part 23)	2,025
International (HF) Broadcast (47 CFR part 73)	860

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FY 2008 Schedule of Regulatory Fees (continued)

FY 2008 RADIO STATION REGULATORY FEES

Population served	AM class A	AM class B	AM class C	AM class D	FM classes A, B1 & C3	FM classes B, C, C0, C1 & C2
<=25,000	$650	$500	$450	$525	$600	$775
25,001–75,000	1,325	1,025	650	775	1,225	1,375
75,001–150,000	1,975	1,275	875	1,300	1,675	2,550
150,001–500,000	2,975	2,175	1,325	1,550	2,600	3,325
500,001–1,200,000	4,300	3,325	2,200	2,575	4,125	4,900
1,200,001–3,000,00	6,600	5,100	3,300	4,125	6,700	7,850
>3,000,000	7,925	6,125	4,175	5,150	8,550	10,200

Attachment E—Factors, Measurements, and Calculations that go into Determining Station Signal Contours and Associated Population Coverages

AM Stations

For stations with nondirectional daytime antennas, the theoretical radiation was used at all azimuths. For stations with directional daytime antennas, specific information on each day tower, including field ratio, phasing, spacing and orientation was retrieved, as well as the theoretical pattern root-mean-square of the radiation in all directions in the horizontal plane (''RMS'') figure milliVolt per meter (mV/m) @ 1 km) for the antenna system. The standard, or modified standard if pertinent, horizontal plane radiation pattern was calculated using techniques and methods specified in section73.150 and 73.152 of the Commission's rules.[292] Radiation values were calculated for each of 360 radials around the transmitter site. Next, estimated soil conductivity data was retrieved from a database representing the information in FCC Figure R3 [293]. Using the calculated horizontal radiation values, and the retrieved soil conductivity data, the distance to the principal community (5 mV/m) contour was predicted for each of the 360 radials. The resulting distance to principal community contours were used to form a geographical polygon. Population counting was accomplished by determining which 2000 block centroids were contained in the polygon. (A block centroid is the center point of a small area containing population as computed by the U.S. Census Bureau.) The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

FM Stations

The greater of the horizontal or vertical effective radiated power (''ERP'') (kW) and respective height above average terrain (''HAAT'') (m) combination was used. Where the antenna height above mean sea level (''HAMSL'') was available, it was used in lieu of the average HAAT figure to calculate specific HAAT figures for each of 360 radials under study. Any available directional pattern information was applied as well, to produce a radial-specific ERP figure. The HAAT and ERP figures were used in conjunction with the Field Strength (50–50) propagation curves specified in 47 CFR 73.313 of the Commission's rules to predict the distance to the principal community (70 dBu (decibel above 1 microVolt per meter) or 3.17 mV/m) contour for each of the 360 radials.[294] The resulting distance to principal community contours were used to form a geographical polygon. Population counting was accomplished by determining which 2000 block centroids were contained in the polygon. The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

Attachment F—FY 2007 Schedule of Regulatory Fees

Fee category	Annual regulatory fee (U.S. $'s)
PLMRS (per license) (Exclusive Use) (47 CFR part 90)	35
Microwave (per license) (47 CFR part 101)	40
218–219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95)	55
Marine (Ship) (per station) (47 CFR part 80)	10
Marine (Coast) (per license) (47 CFR part 80)	30
General Mobile Radio Service (per license) (47 CFR part 95)	5
Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category)	15
PLMRS (Shared Use) (per license) (47 CFR part 90)	15
Aviation (Aircraft) (per station) (47 CFR part 87)	5
Aviation (Ground) (per license) (47 CFR part 87)	10
Amateur Vanity Call Signs (per call sign) (47 CFR part 97)	1.17
CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90)	.18
CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90)	.08
Broadband Radio Service (formerly MMDS/MDS) (per license sign) (47 CFR part 21)	325
Local Multipoint Distribution Service (per call sign) (47 CFR part 101)	325
AM Radio Construction Permits	400
FM Radio Construction Permits	575
TV (47 CFR part 73) VHF Commercial.	

[292] 47 CFR 73.150 and 73.152.

[293] *See Map* of Estimated *Effective Ground Conductivity in the United States,* 47 CFR 73.190 Figure R3.

[294] 294 47 CFR 73.313.

Fee category	Annual regulatory fee (U.S. $'s)
Markets 1–10	64,300
Markets 11–25	46,350
Markets 26–50	31,075
Markets 51–100	20,000
Remaining Markets	5,125
Construction Permits	5,125
TV (47 CFR part 73) UHF Commercial.	
Markets 1–10	19,650
Markets 11–25	19,450
Markets 26–50	10,800
Markets 51–100	6,300
Remaining Markets	1,750
Construction Permits	1,750
Satellite Television Stations (All Markets)	1,100
Construction Permits—Satellite Television Stations	550
Low Power TV, TV/FM Translators & Boosters (47 CFR part 74)	345
Broadcast Auxiliary (47 CFR part 74)	10
CARS (47 CFR part 78)	185
Cable Television Systems (per subscriber) (47 CFR part 76)	.75
Interstate Telecommunication Service Providers (per revenue dollar)	.00266
Earth Stations (47 CFR part 25)	185
Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes Direct Broadcast Satellite Service (per operational station) (47 CFR part 100)	109,200
Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25)	116,475
International Bearer Circuits (per active 64KB circuit)	1.05
International Public Fixed (per call sign) (47 CFR part 23)	1,875
International (HF) Broadcast (47 CFR part 73)	795

FY 2007 Schedule of Regulatory Fees (continued)

FY 2007 RADIO STATION REGULATORY FEES

Population served	AM class A	AM class B	AM class C	AM class D	FM classes A, B1 & C3	FM classes B, C, C0, C1 & C2
<=25,000	$625	$475	$400	$475	$575	$725
25,001–75,000	1,225	925	600	725	1,150	1,250
75,001–150,000	1,825	1,150	800	1,200	1,600	2,300
150,001–500,000	2,750	1,950	1,200	1,425	2,475	3,000
500,001–1,200,000	3,950	2,975	2,000	2,375	3,900	4,400
1,200,001–3,000,00	6,075	4,575	3,000	3,800	6,350	7,025
>3,000,000	7,275	5,475	3,800	4,750	8,075	9,125

[FR Doc. E8–11891 Filed 5–27–08; 8:45 am]
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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 54

[MB Docket No. 07–148; FCC 08–119]

DTV Consumer Education Initiative

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission asks whether the eligible telecommunications carrier (ETC) obligation to provide monthly digital television (DTV) transition notices to low-income subscribers should be expanded to require the provision of such notices to all subscribers, and whether multichannel video programming distributors (MVPDs) should be required to provide on-air DTV transition education on their systems.

DATES: Comments for this proceeding are due on or before June 27, 2008; reply comments are due on or before July 14, 2008.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. You may submit comments, identified by MB Docket No. 07–148, by any of the following 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.
- People with Disabilities: Contact the FCC 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: For more information on this proceeding, please contact Lyle Elder, *Lyle.Elder@fcc.gov,* or Eloise Gore, *Eloise.Gore@fcc.gov,* of the Media

Bureau, Policy Division, (202) 418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams on (202) 418–2918, or via the Internet at *PRA@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking in MB Docket No. 07–148, FCC 08–119, adopted April 23, 2008 and released April 23, 2008. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Summary of the Notice of Proposed Rulemaking

I. Further Notice of Proposed Rulemaking

1. As discussed in the *Order on Reconsideration of the Consumer Education Initiative Order,* the revised ETC education rules require that ETCs provide monthly transition notices to their low-income (Lifeline/Link-Up) customers. This requirement is similar to the one proposed by Chairmen Dingell and Markey in their Letter to the Commission, in which they suggested that the Commission ''require, as an interim measure, that telecommunications carriers that receive funds under the Low Income Federal universal service program * * * notify each of their low income customers of the digital transition and include such a notice in their required Lifeline and Link-Up publicity efforts.'' On April 15, 2008, during Chairman Martin's testimony before the House Committee on Energy and Commerce's Subcommittee on Telecommunications and the Internet, Congressman Fred Upton suggested that the Commission explore revising these rules to require that ETCs provide monthly notices to all of their subscribers, rather than just low-income subscribers. Such a revision would ensure a wider reach for DTV transition notices as the February 17, 2009, deadline approaches, but could increase expenses for ETCs. What is the appropriate balance for the Commission's Rules in this area? We seek comment on this proposal.

2. The first Notice of Proposed Rulemaking, 72 FR 46014 August 16, 2007, in this proceeding sought comment on ''other initiatives that the Commission can and should undertake to educate the public on the DTV transition.'' In response to this request, some commenters proposed that the Commission require MVPDs to provide on-air DTV transition education on their systems. We seek comment on this proposal. As the National Cable and Telecommunications Association (NCTA) has noted, the cable industry, for instance, is already engaged in a ''$200 million digital TV transition consumer education campaign, highlighted by English and Spanish language television commercials.'' Should we require MVPDs, such as cable and direct broadcast satellite operators, to provide on-air DTV transition education on their systems as we have for TV broadcasters? We seek comment on what entities should be covered and the on-air educational efforts that should be required.

II. Procedural Matters

A. Initial Regulatory Flexibility Analysis

3. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''), the Commission has prepared this Initial Regulatory Flexibility Analysis (''IRFA'') of the possible economic impact on a substantial number of small entities by the rules proposed in this Further Notice of Proposed Rulemaking (''FNPRM''). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice as indicated on the first page of the Order. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (''SBA''). In addition, the FNPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

1. Need for, and Objectives of, the Proposals

4. This FNPRM seeks comment on a proposal to require that ETCs provide monthly notices to all of their subscribers, rather than just low-income subscribers as required by the current rules. It also seeks comment on a proposal to require MVPDs to provide on-air DTV transition education on their systems. It seeks comment on whether, as a policy matter, the Commission should impose such requirements.

2. Legal Basis

5. The authority for the action proposed in this rulemaking is contained in Sections 1, 2, 4(i), 7, 254, 303, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 157, 254, 303, and 309.

3. Description and Estimate of the Number of Small Entities to Which the Proposals Will Apply

6. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein. The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small business concern'' under Section 3 of the Small Business Act. Under the Small Business Act, a small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). The rules adopted herein will directly affect small ETCs. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

7. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

8. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.''* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size

standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are ''Other Local Service Providers.'' Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities.

9. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

10. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

11. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 67,700,000 subscribers in the United States. Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

12. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less in annual receipts. Currently, there are more than 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs. Individual PCOs often serve approximately 3,000–4,000 subscribers, but the larger operations serve as many as 15,000–55,000 subscribers. In total, PCOs currently serve approximately one million subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs qualify as small entities.

13. *Satellite Carriers.* The term ''satellite carrier'' includes entities providing services as described in 17 U.S.C. 119(d)(6) using the facilities of a satellite or satellite service licensed under part 25 of the Commission's rules to operate in Direct Broadcast Satellite (''DBS'') or Fixed-Satellite Service (''FSS'') frequencies. As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license. Since 2007, the SBA has recognized satellite television distribution services within the broad economic census category of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in this category. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of

under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

14. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with $13.5 million or less in annual receipts. Currently, only two operators—DirecTV and EchoStar Communications Corporation (''EchoStar'')—hold licenses to provide DBS service, which requires a great investment of capital for operation. Both currently offer subscription services and report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

15. *Fixed-Satellite Service (''FSS'').* The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites. The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with $13.5 million or less in annual receipts. Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Both of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

16. *Home Satellite Dish (HSD) Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with $13.5 million or less in annual receipts. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry more than 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data show that, as of June 2005, there were 206,358 households authorized to receive HSD service. The Commission has no information regarding the annual revenue of the four C-Band distributors.

17. *Open Video Systems (OVS).* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA-recognized definition of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with $13.5 million or less in annual receipts. The Commission has certified 25 OVS operators with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.5 percent of all MVPD households. Affiliates of Residential Communications Network, Inc. (''RCN''), which serves about 371,000 subscribers as of June 2005, is currently the largest BSP and 14th largest MVPD. RCN received approval to operate OVS systems in New York City, Boston, Washington, DC and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

18. *Wireless Cable Systems.* Wireless cable systems use the Broadband Radio Service (''BRS''), formerly Multipoint Distribution Service (''MDS''), and Educational Broadband Service (''EBS''), formerly Instructional Television Fixed Service (''ITFS''), frequencies in the 2 GHz band to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. Nonetheless, they appear to fall within the SBA-recognized definition of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with $13.5 million or less in annual receipts. We estimate that the number of wireless cable subscribers is

approximately 100,000, as of March 2005. Id. Local Multipoint Distribution Service (''LMDS'') is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.

19. *Wireless Cable Systems (Commission Auction Standard).* The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. In addition to the 48 small businesses that have held BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and so we will rely on the previous size standard, Cable and Other Program Distribution, which provides that a small entity is one with $13.5 million or less in annual receipts. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small MDS (or BRS) providers as defined by the SBA and the Commission's auction rules.

20. Educational institutions are included in this analysis as small entities; however, the Commission has not defined a small business size standard for ITFS (now EBS). In addition, the term ''small entity'' under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). We do not collect annual revenue data on ITFS licensees. We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

21. In the 1998 and 1999 LMDS auctions, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a ''very small business,'' which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years. These definitions of ''small business'' and ''very small business'' in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

4. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements for Small Entities

22. The FNPRM seeks comment on a rule that would impose compliance requirements on small ETCs. Small ETCs currently have an obligation to provide DTV transition notices on a monthly basis to their Lifeline and Link-up customers. These obligations would be increased by the rule contemplated in this Further Notice, but would not change in kind. Small ETCs will need to spend money printing the notices, and may either forgo advertising revenue as a result of dedicating bill space to DTV transition notices, or spend additional money mailing the notices separately. The FNPRM also seeks comment on a rule that would impose compliance requirements on small MVPDs. Small MVPDs would be required to provide on-air DTV transition education on their systems. Production costs would likely be minimal or nonexistent due to the already-produced PSAs available in the market. MVPDs may have to forgo advertising revenue as a result of dedicating available air time to DTV transition notices, or spend money reserving such time if they do not already have advertising time available.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

23. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. We seek comment on the applicability of any of these alternatives to affected small entities.

24. The requirements proposed in the FNPRM would impose costs on small ETCs and MVPDs, but would result in wider knowledge about the DTV transition, which could have an indirect positive impact on other small entities, including television broadcasters, consumer electronics manufacturers and retailers, and MVPDs themselves. We invite small entities to submit comments on how the Commission could further minimize potential burdens on small entities if the proposal in the FNPRM is ultimately adopted.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

25. None.

B. Initial Paperwork Reduction Act Analysis

26. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (''OMB'') to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

C. Ex Parte Rules

27. *Permit-But-Disclose.* This proceeding will be treated as a ''permit-but-disclose'' proceeding subject to the ''permit-but-disclose'' requirements under Section 1.1206(b) of the

Commission's rules. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation 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. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

D. Filing Requirements

28. *Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before June 27, 2008, and reply comments on or before July 14, 2008 using: (1) The Commission's Electronic Comment Filing System (''ECFS''), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.

- *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 or 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 we continue 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.

29. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

30. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov.*

E. Additional Information

31. For more information on this Order on Reconsideration and Further Notice of Proposed Rulemaking, please contact Lyle Elder, *Lyle.Elder@fcc.gov,* or Eloise Gore, *Eloise.Gore@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–2120.

III. Ordering Clauses

32. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Order on Reconsideration and Further Notice of Proposed Rulemaking, including the Supplemental Final and Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–11889 Filed 5–27–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R2–ES–2008–0065; 1111 FY07 MO–B2]

Endangered and Threatened Wildlife and Plants; Initiation of Status Review for the Northern Mexican Gartersnake (*Thamnophis eques megalops)*

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; initiation of status review and solicitation of new information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the initiation of a status review for the northern Mexican gartersnake (*Thamnophis eques megalops*). Through this action, we encourage all interested parties to provide us information regarding the status of, and any potential threat to, the northern Mexican gartersnake.

DATES: To allow us adequate time to conduct this review, we request that information be submitted on or before July 14, 2008.

ADDRESSES: You may submit information 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: FWS–R2–ES–2008–0065; 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 information on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Solicited section below for more information).

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021–4951; telephone 602–242–0210; facsimile 602–242–2513. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information concerning the status of the northern Mexican gartersnake (*Thamnophis eques megalops*). We request any additional information from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties on the status of the northern Mexican gartersnake throughout its range, including:

(1) Information from the United States and Mexico regarding the subspecies' historical and current population status, distribution, and trends; taxonomy; biology and ecology; and habitat selection;

(2) Information on the effects of potential threat factors in the United States and Mexico that are the basis for a listing determination under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of the subspecies' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

Please note that submissions merely stating support or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, because section 4(b)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.'' At the conclusion of the status review, we will determine whether listing is warranted, not warranted, or warranted but precluded.

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and materials we receive, as well as supporting documentation we used in preparing this proposed rule, 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, Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition and supporting information submitted with the petition. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**. Section 4(b)(3)(B) also requires that, for any petition to revise the Lists of Threatened and Endangered Wildlife and Plants that contains substantial scientific or commercial information that the action may be warranted, we make a finding within 12 months of the date of the receipt of the petition on whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted but precluded by other pending proposals. Such 12-month findings are to be published promptly in the **Federal Register**.

On December 19, 2003, we received a petition from the Center for Biological Diversity requesting that we list the northern Mexican gartersnake as threatened or endangered, and that we designate critical habitat concurrently with the listing. On May 17, 2005, the petitioners filed a complaint for declaratory and injunctive relief, challenging our failure to issue a 90-day finding in response to the petition as required by 16 U.S.C. 1533(b)(3)(A) and (B). In a stipulated settlement agreement, we agreed to submit a 90-day finding to the **Federal Register** by December 16, 2005, and, if the petition presented substantial scientific information indicating that listing the northern Mexican gartersnake may be warranted, submit a 12-month finding to the **Federal Register** by September 15, 2006 (*Center for Biological Diversity* v. *Norton*, CV–05–341–TUC–CKJ (D. Az)). On January 4, 2006, we published our 90-day finding that the petition presented substantial scientific information indicating that listing the northern Mexican gartersnake may be warranted and initiated a 12-month status review (71 FR 315).

On September 26, 2006, we published our 12-month finding that listing of the northern Mexican garter snake was not warranted because we determined that not enough information on the subspecies' status and threats in Mexico was known at that time (71 FR 56227).

Since the time of the 12-month finding, a formal opinion has been issued by the Solicitor of the Department of the Interior, ''The Meaning of In Danger of Extinction Throughout All or a Significant Portion of Its Range'' (U.S. DOI 2007), which provides further guidance on how to conduct a detailed analysis of whether a species is in danger of extinction throughout a significant portion of its range.

In December 2007, the Service withdrew the September 26, 2007, 12-month finding. This notice initiates a new status review for the northern Mexican gartersnake that is consistent with current policies, including any subsequent analysis relevant to the ''significant portion of its range.'' We will incorporate any new information received as requested above.

At this time, we are soliciting new information on the status of and potential threats to the northern Mexican gartersnake. We will base our new determination as to whether listing is warranted on a review of the best scientific and commercial information available, including all such information received as a result of this notice. For more information on the biology, habitat, and range of the northern Mexican gartersnake, please refer to our previous 90-day finding published in the **Federal Register** on January 4, 2006 (71 FR 315), and our previous 12-month finding published in the **Federal Register** on September 26, 2006 (71 FR 56227).

Author

The primary author of this notice is the staff of the Arizona Ecological Services Office.

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: May 9, 2008.

Kenneth Stansell,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–11756 Filed 5–27–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

RIN 0648–AR72

Fisheries of the Exclusive Economic Zone Off Alaska; Improved Retention/ Improved Utilization

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

ACTION: Notice of availability of a proposed amendment to a fishery management plan; request for comments.

SUMMARY: The North Pacific Fishery Management Council (Council) has submitted Amendment 72 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) to NMFS for review. If approved, Amendment 72 would revise the FMP to state that the Council will annually review information on the discard of shallow-water flatfish in Gulf of Alaska (GOA) groundfish fisheries. After review of this annual information, the Council may recommend revisions to retention and utilization requirements if the discard rate for shallow-water flatfish falls above or below a specified threshold. This action is necessary to support the Council's initiatives to monitor and reduce bycatch in the GOA groundfish fisheries. The intended effect of this action is to conserve and manage the groundfish resource in the GOA in accordance with the Magnuson-Stevens Fishery Conservation and Management Act.

DATES: Comments on Amendment 72 must be received on or before July 28, 2008.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–AR72'', by any one of the following methods:

• Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at *http://www.regulations.gov*.

• Mail: P. O. Box 21668, Juneau, AK 99802.

• Fax: (907) 586–7557.

• Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

FOR FURTHER INFORMATION CONTACT: Jeff Hartman, 907–586–7442.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each regional fishery management council submit any fishery management plan or fishery management plan amendment that it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce. The Council has submitted Amendment 72 to NMFS for review. If approved, Amendment 72 would revise the FMP to state that the Council will annually review the discards of shallow-water flatfish in GOA groundfish fisheries. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP amendment, publish a notice in the **Federal Register** to notify the public that the FMP amendment is available for review and comment. This notice of availability for Amendment 72 satisfies this requirement.

The Secretary of Commerce approved Amendment 49 to the FMP in 1997 (62 FR 65379) to improve the retention and utilization (IR/IU) of shallow-water flatfish. The Council recommended IR/IU measures for this species group after determining that the percentage of shallow-water flatfish catch that was discarded was greater than the percentage of most other GOA groundfish species catch that was discarded. However, implementation of IR/IU measures for shallow-water flatfish in the GOA was delayed by Amendment 49 until January 1, 2003, to provide vessels additional time to make vessel or plant modifications to meet IR/IU requirements.

Groundfish species included in the GOA shallow-water flatfish group primarily include flathead sole, rock sole, yellowfin sole, butter sole, starry flounder, English sole, sand sole, and Alaska plaice. Regulations at 50 CFR 679.27(c)(2) establish the IR/IU requirements for shallow-water flatfish implemented under Amendment 49. When shallow-water flatfish are open to directed fishing, a catcher vessel must retain all fish of that species brought onboard the vessel, and a catcher/processor must make and retain a primary product from all fish of that species brought onboard the vessel. When shallow-water flatfish are closed to directed fishing, a catcher vessel must retain all shallow-water flatfish up to the maximum retainable amount (MRA), and a catcher/processor must make and retain a primary product from all fish of that species brought onboard the vessel up to the point that the round-weight equivalent of primary products onboard equals the MRA for that species. These shallow-water flatfish IR/IU requirements currently apply to all vessels with Federal fishing permits participating in any GOA groundfish fishery, regardless of the gear type used.

In 2003, after implementation of Amendment 49 provisions for shallow-water flatfish IR/IU, the Council again reviewed discard data on shallow-water flatfish in each GOA target fishery. This review revealed that discards of shallow-water flatfish between 1995 and 2001 were less than 5 percent in all GOA groundfish target fisheries with the exception of the Western GOA flathead sole, Western GOA offshore Pacific cod, and Central GOA shallow-water flatfish fisheries. Because three target fisheries exceeded shallow-water flatfish discards of 5 percent in some years but did not exceed average shallow-water flatfish discards of 20 percent, the Council expressed interest in tracking fisheries that exceeded a 5 percent discard threshold for shallow-water flatfish. Since implementation of shallow-water flatfish IR/IU in 2003, shallow-water flatfish discards have not exceeded 5 percent of the total groundfish catch in any GOA groundfish fishery. The highest shallow-water flatfish discard rates in these years have been in the trawl fisheries for Pacific cod in the Western GOA (2.9 percent in 2003 and 2.1 percent in 2006) and shallow-water flatfish fisheries in the Central GOA (2.4 percent in 2004 and 2.9 percent in 2005).

While many groundfish vessels are able to meet a long-term goal of reducing shallow-water flatfish discards

by consistently remaining under a 5 percent discard rate, members of the GOA fishing industry reported to the Council that complete elimination of shallow-water flatfish discards is costly if some vessels do not have viable markets for small retained amounts of these species. Furthermore, the sorting and retention of small amounts of shallow-water flatfish species can involve high handling costs onboard vessels.

In recommending Amendment 72, the Council considered National Standard 9 of the Magnuson-Stevens Act, which requires that conservation and management measures minimize bycatch (discards) to the extent practicable. The Council recognized the benefits of continuing shallow-water flatfish IR/IU at 50 CFR 679.27(c)(2), and the groundfish retention that accrues from those regulations. However, the Council also recognized the benefits that would accrue from annually monitoring shallow water flatfish discards and evaluating whether IR/IU regulations continue to minimize discards and maximize catch utilization in the GOA groundfish fisheries to the extent practicable. The Council believed that this combination of regulations and annual review would provide an incentive for vessels in the GOA to maintain a high standard of retention for shallow-water flatfish.

Amendment 72 would add the following text to the FMP: ''The Council will annually review the discards of shallow-water flatfish in all GOA fisheries. The Council may recommend that NMFS initiate rulemaking to add or remove a fishery from shallow-water flatfish improved retention/improved utilization requirements if the three-year rolling average discard rate of shallow-water flatfish in any fishery falls above or below 5 percent.''

Under Amendment 72, NMFS would provide an annual report to the Council that would estimate the discard of shallow-water flatfish as a percentage of total groundfish catch by area and target fishery. This report would identify shallow-water flatfish discard rates that exceed 5 percent of total groundfish catch in a target fishery annually and over a three-year period. Based on that information, the Council could recommend a regulatory amendment to revise shallow-water flatfish IR/IU requirements.

This FMP amendment does not require any new regulations or revisions to existing regulations. Shallow-water flatfish would continue to be one of three GOA IR/IU species categories in 50 CFR part 679, along with pollock and Pacific cod. Any future revisions to shallow-water flatfish IR/IU regulations would be contingent on the Council establishing the need to modify these requirements, initiating an analysis, and proposing a regulatory amendment that could be approved by the Secretary of Commerce. Any subsequent recommendation by the Council to consider changing IR/IU requirements for shallow-water flatfish would need to clearly define the group of vessels that would be exempted from shallow-water flatfish IR/IU requirements, recognizing that IR/IU requirements are more effectively enforced if the vessels subject to these requirements can be clearly identified by vessel or gear characteristics. Enforcement of IR/IU requirements that differ by target fishery are more difficult to enforce because vessels may participate in multiple target fisheries at a time or switch between target fisheries.

Public comments are being solicited on Amendment 72. Comments received by the closing date will be considered in the approval/disapproval decision on the amendment. To be considered, written comments must be received by NMFS, not just postmarked or otherwise transmitted, by the close of business on the last day of the comment period.

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, 3631 *et seq.*; Pub. L. 108–447.

Dated: May 22, 2008.

Samuel D. Rauch III

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

[FR Doc. E8–11880 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 73, No. 103
Wednesday, May 28, 2008

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 22, 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.

Agricultural Marketing Service

Title: Laboratory Approval Programs.

OMB Control Number: 0581–NEW.

Summary of Collection: The Agricultural Marketing Act (AMA) of 1946, as amended, provides analytical testing services that facilitate marketing and allow products to obtain grade designations or meet marketing or quality standards. Pursuant to this authority, AMS develops and maintains laboratory certification and approval programs as needed by the agricultural industry, to support domestic and international marketing of U.S. products. To ensure that a laboratory is capable of accurately performing the specified analyses, it must adhere to certain good laboratory practice and show technical proficiency in the required areas.

Need and Use of the Information: Checklist and form have been developed that ask the laboratory for information concerning procedures, the physical facility, employees, and their training. The laboratory must also provide Standard Operating Procedures for the analyses and quality assurance. The laboratory certification and approval programs are voluntary, fee for service, and for admission into one of these programs a laboratory must have a client who requires the specific testing. It is necessary to collect and require a laboratory to attest to the performance elements necessary to determine the credibility of the laboratory. To do less would be a disservice to the agricultural community.

Description of Respondents: Business or other for-profit.

Number of Respondents: 82.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 5,695.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–11871 Filed 5–27–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 22, 2008.

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

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

Rural Housing Service

Title: 7 CFR 1951–E, ''Servicing of Community and Direct Business Programs Loans and Grants''.

OMB Control Number: 0575–0066.

Summary of Collection: Rural Development (Agency) is the credit

agency for agriculture and rural development for the U.S. Department of Agriculture. The Community Facilities program is authorized to make loans and grants for the development of essential community facilities primarily serving rural residents. The Direct Business and Industry Program is authorized to make loans to improve, develop, or finance business, industry, and employment, and improve the economic and environmental climate in rural communities. Section 331 and 335 of the Consolidated Farm and Rural Development Act, as amended, authorizes the Secretary of Agriculture, acting through the Agency, to establish provisions for security servicing policies for the loans and grants in question. If there is a problem which exists, a recipient of the loan, grant, or loan guarantee must furnish financial information which is used to aid in resolving the problem through reamortization, sale, transfer, debt restructuring, liquidation, or other means provided in the regulations.

Need and Use of the Information: The Agency will collect information from applicants, borrowers, consultants, lenders and attorneys. This information is used to determine applicant/borrower eligibility and project feasibility for various servicing actions. The information enables field staff to ensure that borrowers operate on a sound basis and use loan and grant funds for authorized purposes.

Description of Respondents: State, Local or Tribal Government; not-for-profit institutions.

Number of Respondents: 587.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,042.

Rural Housing Service

Title: RD 3550–28, ''Authorization Agreement for Preauthorization Payments''; RD 1951–65, ''Customer Initiated Payments (CIP)'' and RD 1951–66, ''Fedwire Worksheet''.

OMB Control Number: 0575–0184.

Summary of Collection: Rural Development (RD) uses electronic methods for receiving and processing loan payments and collections. These electronic collection methods are approved by Treasury and include Preauthorized Debits (PAD), Customer Initiated Payments (CIP), and FedWire. These electronic collection methods provide the borrower the ability to submit their loan payments the day prior to, or the day of their installment due date. To administer these electronic payment methods, RD will use approved agency forms for collecting financial institution routing information. Form RD 3550–28, Authorization Agreement for Preauthorized Payments, is prepared by the borrower to authorize RD to electronically collect regular loan payments from a borrower's account at a financial institution (FI) as preauthorized debits. Form RD 1951–65 is prepared by the borrower to enroll in CIP. CIP is an electronic collection method that enables borrowers to input payment data to a contract bank via telephone (touch tone and voice) or computer terminal. Form RD 1951–66, FedWire Worksheet, is completed by the borrower to establish an electronic FedWire format with their FI.

Need and Use of the Information: RD will request that borrowers make payments electronically via PAD, CIP, or FedWire. The information is collected only once unless the FI routing information changes. If the information were not collected, RD would be unable to collect loan payments electronically.

Description of Respondents: Not-for-profit institutions; Business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 23,520.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 11,761.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–11872 Filed 5–27–08; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Funding Opportunity Title: Crop Insurance Education in Targeted States (Targeted States Program)

Announcement Type: Modification—Competitive Cooperative Agreements

This announcement modifies the Request for Application Notice published in the **Federal Register**, January 22, 2008 (Vol. 73, No. 14, Pages 3681—3688). The Dates, Summary, and Further Information Contact portions have been modified.

CFDA Number: 10.458.

DATES: Applications are due by 5 p.m. EDT, June 12, 2008.

SUMMARY: The following paragraph has been added to the beginning of the Summary portion of the January 22, 2008, **Federal Register** Notice: The Risk Management Agency (RMA) did not receive complete and valid application packages for the State of Delaware under the original Request for Application Notice published in the **Federal Register** on January 22, 2008, for the Crop Insurance Education in Targeted States Program (Targeted States Program). RMA is re-announcing its Funding Opportunity—Request for Applications under the Targeted States Program for the State of Delaware. Applicants who previously submitted an application under the January 22, 2008, Targeted States Program Request for Applications Notice for Delaware must reapply in accordance with the original Notice published in the **Federal Register** on January 22, 2008.

All other portions and sections of the full text Notice remain unchanged.

FOR FURTHER INFORMATION CONTACT: Applicants and other interested parties are encouraged to contact: Michelle Fuller, USDA–RMA–RME, phone: 202–720–6356, fax: 202–690–3605, e-mail: *RMA.Risk-Ed@rma.usda.gov.* You may also obtain information regarding this announcement from the RMA Web site at: *http://www.rma.usda.gov/aboutrma/agreements/.*

Signed in Washington, DC, on May 21, 2008.

Eldon Gould,

Manager, Federal Crop Insurance Corporation.

[FR Doc. E8–11810 Filed 5–27–08; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Meeting; Federal Lands Recreation Enhancement Act (Title VIII, Pub. L. 108–447)

AGENCY: Rocky Mountain Region, USDA Forest Service.

ACTION: Notice of Meeting.

SUMMARY: The Colorado Recreation Resource Advisory Committee will tentatively meet in Golden, CO. The purpose of the meeting is to continue to provide the new committee members with the information they need to be effective committee members and review several fee proposals. These fee proposals will tentatively include several new cabin rentals and fee changes for: the Green Mountain Reservoir/Cataract Lake fee area and the Arapaho National Recreation Area.

DATES: The meeting will be held June 24 from 9 a.m.–4:30 p.m. This meeting will only be held if a quorum is present.

ADDRESSES: The meeting will be at the American Mountaineering Center at 710 10th Street in Golden, Colorado, in conference rooms C&D on the 1st floor. Parking is available on the north and

east sides of the building. Send written comments to Steve Sherwood, Designated Federal Official, 740 Simms Street, Golden, CO 80401 or *ssherwood@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Paul E. Cruz, Colorado Recreation Resource Advisory Committee Acting Coordinator, at 970–295–6614 or *pecruz@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service, Bureau of Land Management staff and Committee members. Persons who wish to bring recreation fee matters to the attention of the Committee may file written statements with the Committee staff. Written comments received at least a week before the meeting will be available for committee review. Written comments received less than a week before the meeting may not be available for committee referral. There will be time on the agenda for verbal comments (5 minutes per person) and the Chairperson may ask for comments from the public at any time during the meeting. All persons wishing to address the committee must sign in at the door.

Check for the status of the meeting, the final agenda and a final list of the fee proposals to be reviewed at: *http://www.fs.fed.us/r2/recreation.*

The Recreation RAC is authorized by the Federal Land Recreation Enhancement Act, which was signed into law by President Bush in December 2004.

Dated: May 19, 2008.

Steve Sherwood,

DFO, Colorado Recreation Resource Advisory Committee.

[FR Doc. E8–11621 Filed 5–27–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Hertford Renewable Energy, LLC: Notice of Intent To Hold Public Scoping Meetings and Prepare an Environmental Assessment

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of intent to hold public scoping meetings and prepare an Environmental Assessment (EA).

SUMMARY: The Rural Utilities Service (RUS), an Agency delivering the United States Department of Agriculture (USDA) Rural Development Utilities Programs, hereinafter referred to as Rural Development and/or the Agency, intends to hold public scoping meetings and prepare an Environmental Assessment (EA) in connection with potential impacts related to projects proposed by Hertford Renewable Energy, LLC (HRE), with headquarters in Winter Park, FL. The proposal consists of the construction of a 50 Megawatt (MW) biomass power plant. The proposed power plant would be located in Hertford County, North Carolina on Joe Holloman Road. HRE is requesting the Agency to provide financial assistance for the proposed action.

DATES: The Agency will conduct a Scoping Meeting in an open house format, seeking the input of the public and other interested parties. The meeting will be held from 5 p.m. until 7 p.m., on June 10, 2008. Comments regarding the proposed action may be submitted (orally or in writing) at the public scoping meetings or in writing within 30 days after the scoping meeting to Rural Development at the address provided in this notice.

ADDRESSES: The June 10, 2008, meeting will be held at the Roanoke Chowan Community College, Jernigan Auditorium, 109 Community College Road, Ahoskie, NC 27910, Phone: 252–862–1200. For further information, please contact Stephanie Strength, Environmental Protection Specialist, USDA, Rural Development Utilities Programs, Engineering and Environmental Staff, 1400 Independence Avenue, SW., Stop 1571, Washington, DC 20250–1571, telephone (202) 720–0468, or e-mail *stephanie.strength@wdc.usda.gov.*

An Electric Alternatives Evaluation and Macro Corridor Study Report, prepared by Hertford Renewable Energy, LLC, will be presented at the public scoping meetings. The Report will be available for public review at the Agency's address provided in this notice, at the Agency's Web site: *http://www.usda.gov/rus/water/ees/ea.htm,* at Hertford Renewable Energy, LLC, 152 Lincoln Avenue, Winter Park, FL 32789 and at the: Hertford County Library, 303 West Tryon Street, Winton, NC 27986, Phone: 252–358–7855; Ahoskie Public Library, 210 E. Church Street, Ahoskie, NC 27910, Phone: 252–332–5500.

SUPPLEMENTARY INFORMATION: Hertford Renewable Energy, LLC proposes to construct a 50 MW biomass power plant on approximately 93 acres on Joe Holloman Road east of Millennium, NC. A wastewater line may be required off-site. It is anticipated that all of the facilities would be in service in 2011.

Government agencies, private organizations, and the public are invited to participate in the planning and analysis of the proposed project. Representatives from the Agency and Hertford Renewable Energy, LLC will be available at the scoping meeting to discuss the Agency's environmental review process, describe the project, the need for the project, alternatives under consideration, and to discuss the scope of environmental issues to be considered, answer questions, and accept comments. Comments regarding the proposed action may be submitted (orally or in writing) at the public scoping meetings or in writing within 30 days after the June 10, 2008, scoping meeting to Rural Development at the address provided in this notice.

From information provided in the alternative evaluation and site selection study, input that may be provided by government agencies, private organizations, and the public, Hertford Renewable Energy, LLC will use to prepare an environmental analysis to be submitted to the Agency for review. The Agency will use the environmental analysis to determine the significance of the impacts of the project and if acceptable will adopt it as its environmental assessment of the project. The Agency's environmental assessment of the project would be available for review and comment for 30 days.

Should the Agency determine, based on the Environmental Assessment of the project, that the impacts of the construction and operation of the power plant would not have a significant environmental impact, it will prepare a finding of no significant impact. Public notification of a finding of no significant impact would be published in the **Federal Register** and in newspapers with a circulation in the project area.

Any final action by the Agency related to the proposed project will be subject to, and contingent upon, compliance with environmental review requirements as prescribed by the Agency's environmental policies and procedures (7 CFR part 1794).

Dated: May 20, 2008.

Mark S. Plank,

Director, Engineering and Environmental Staff, USDA/Rural Development Utilities Programs.

[FR Doc. E8–11812 Filed 5–27–08; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and

Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: The American Community Survey.

OMB Control Number: 0607–0810.

Form Number(s): ACS–1, ACS–1(SP), ACS–1PR, ACS–1PR(SP), ACS–1(GQ), ACS–1(PR)(GQ), GQFQ, ACS CATI (HU), ACS CAPI (HU), ACS Reinterview (HU), GQ Reinterview.

Type of Request: Revision of a currently approved collection.

Burden Hours: 1,994,500.

Number of Respondents: 3,220,000.

Average Hours Per Response: Household Questionnaire—38 minutes; Group Quarters Facility Questionnaire—15 minutes; Group Quarters Individual Questionnaire—25 minutes; Reinterview—10 minutes.

Needs and Uses: The U.S. Census Bureau requests authorization from the Office of Management and Budget (OMB) to continue conducting the American Community Survey (ACS). The Census Bureau has developed a methodology to collect and update every year demographic, social, economic, and housing data that are essentially the same as the ''long-form'' data that the Census Bureau traditionally has collected once a decade as part of the decennial census. Federal and state government agencies use such data to evaluate and manage federal programs and to distribute funding for various programs that include food stamp benefits, transportation dollars, and housing grants. State, county, and community governments, nonprofit organizations, businesses, and the general public use information like housing quality, income distribution, journey-to-work patterns, immigration data, and regional age distributions for decision-making and program evaluation.

In years past, the Census Bureau collected the long-form data only once every 10 years, which become out of date over the course of the decade. To provide more timely data, the Census Bureau developed the ACS. The ACS blends the strength of small area estimation with the high quality of current surveys. There is an increasing need for current data describing lower geographic detail. The ACS is now the only source of data available for small-area levels across the Nation and in Puerto Rico. In addition, there is an increased interest in obtaining data for small subpopulations such as groups within the Hispanic, Asian, and American Indian populations, the elderly, and children. The ACS provides current data throughout the decade for small areas and subpopulations.

The ACS began providing up-to-date profiles in 2006 for areas and population groups of 65,000 or more people, providing policymakers, planners, and service providers in the public and private sectors with information every year—not just every 10 years. The ACS program will provide estimates annually for all states and for all medium and large cities, counties, and metropolitan areas. For smaller areas and population groups, it will take 3 to 5 years to accumulate information to provide accurate estimates. After that period of time, the multiyear estimates will be updated annually.

Using the Master Address File (MAF) from the decennial census that is updated each year, we will select a sample of addresses, mail survey forms each month to a new group of potential households, and attempt to conduct interviews over the telephone with households that have not responded. Upon completion of the telephone follow-up, we will select a sub-sample of the remaining households, which have not responded, typically at a rate of one in three, to designate a household for a personal interview. Census will also conduct interviews with a sample of residents at a sample of group quarters (GQ) facilities. Collecting these data from a new sample of housing unit (HU) and GQ facilities every month will provide more timely data and will lessen respondent burden in the 2010 Census.

Census will release a yearly microdata file, similar to the Public Use Microdata Sample file of the Census 2000 long-form records. In addition, we will produce total population summary tabulations similar to the Census 2000 tabulations down to the block group level. The microdata files, tabulated files, and their associated documentation are available through the Internet.

The goals of the ACS are to:

- Provide federal, state, and local governments an information base for the administration and evaluation of government programs;
- Improve the 2010 Census; and
- Provide data users with timely demographic, housing, social, and economic data updated every year that can be compared across states, communities, and population groups.

For the 2009 ACS, modified data collection materials based upon results of the 2007 ACS Content Test will be used. The content of the proposed 2009 ACS questionnaire and data collection instruments for both HU and GQ operations reflect 2007 tested changes to content, instructions, and forms design.

Census plan to add a new question on field of degree (FOD) of a person's bachelor's degree beginning in 2009. We also plan to reinstate a 'duration of vacancy' question asked of contacts for vacant units during the non-response follow-up modes of data collection.

Affected Public: Individuals or households.

Frequency: Monthly.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C., Sections 141, 193 and 221.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: May 22, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11858 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the emergency provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Institute of Standards and Technology (NIST).

Title: Technology Innovation Program Application Requirements.

Form Number(s): NIST–1022.

OMB Approval Number: None.

Type of Request: Emergency submission.

Burden Hours: 11,100.

Number of Respondents: 300.

Average Hours Per Response: 37.

Needs and Uses: The Technology Innovation Program (TIP) is a competitive cost sharing program designed to assist U.S. businesses and institutions of higher education or other

organizations, such as national laboratories and nonprofit research institutions, to support, promote, and accelerate innovation in the United States through high-risk, high-reward research in areas of critical national need. High-risk, high-reward research is research that:

a. has the potential for yielding transformational results with far-ranging or wide-ranging implications;

b. addresses areas of critical national need that support, promote, and accelerate innovation in the United States and is within NIST's areas of technical competence; and is too novel or spans too diverse a range of disciplines to fare well in the traditional peer-review process.

Affected Public: U.S. businesses and institutions of higher education or other organizations, such as national laboratories and nonprofit research institutions.

Frequency: Annually.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent by June 20, 2008, to Jasmeet Seehra, OMB Desk Officer, FAX number (202) 395–5806 or via the Internet at *Jasmeet_K._Seehra@omb.eop.gov*.

Dated: May 22, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11859 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Coral Reef Valuation Study.

OMB Approval Number: None.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 990.

Number of Respondents: 1,980.

Average Hours Per Response: 30 minutes.

Needs and Uses: This is a national survey using two independently recruited Internet panels: the American National Election Study (ANES) Internet Panel and Stanford's Major Research Instrumentation Panel (MRI) Internet Panel. The survey is designed to yield information that can be used to estimate total economic values for protection and restoration of Hawaii's coral reef ecosystems. The survey addresses the public's preferences and economic values for the use of no-take areas as a management tool and the public's preferences and economic values for restoring damaged coral reefs.

NOAA is a member of the U.S. Coral Reef Task Force (CRTF), which was established in June 1998 through Executive Order (EO) 13089. As a member of the CRTF, and in support of the U.S. Coral Reef Initiative, NOAA has significant responsibilities for managing U.S. coral reef habitats and undertaking scientific studies to better manage the nation's coral reef resources. In March 2000, the task force approved the first-ever National Action Plan to Conserve Coral Reefs pursuant to the Coral Reef Conservation Act (16 U.S.C. 6401–6409). The Action Plan identifies 13 major goals, including five that the proposed research addresses: (1) Conduct strategic research, (2) understand the social and economic factors of coral reef ecosystems, (3) improve the use of marine protected areas (MPAs), (4) restore damaged reefs, and (5) improve outreach and education about coral reef ecosystems. In support of NOAA's fulfillment of these goals, this study is designed to develop a survey instrument to elicit economic values for Hawaiian coral reef ecosystems at the national level. The overall objective of this project is to develop economically valid and reliable national estimates of individuals' values for alternative Hawaiian coral reef protection and improvement options.

Affected Public: Individuals or households.

Frequency: One-time only.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: May 22, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11860 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–928, A–791–821, A–552–803

Postponement of Preliminary Determinations of Antidumping Duty Investigations; Uncovered Innerspring Units from the People's Republic of China, South Africa, and the Socialist Republic of Vietnam

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

EFFECTIVE DATE: May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Erin Begnal at (202) 482–1442 or Scot Fullerton at (202) 482–1386 (People's Republic of China), Office 9; Dmitry Vladimirov at (202) 482–0665 or Minoo Hatten at (202) 482–1690 (South Africa), Office 5; Eugene Degnan at (202) 482–0414 or Robert Bolling at (202) 482–3434 (Socialist Republic of Vietnam), Office 8, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Postponement of Preliminary Determinations

On January 28, 2008, the Department of Commerce (the Department) published in the **Federal Register** the initiation of the antidumping investigations on uncovered innerspring units from the People's Republic of China (PRC), South Africa, and the Socialist Republic of Vietnam (Vietnam). See *Uncovered Innerspring Units from the People's Republic of China, South Africa, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 73 FR 4817 (January 28, 2008) (Initiation Notice).

The notice of initiation stated that the Department would issue its preliminary

determinations for these investigations no later than 140 days after the date of issuance of the initiation, in accordance with section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act).

On May 20, 2008, the petitioner, Leggett & Platt Inc., made a request pursuant to 19 CFR 351.205(b)(2) and (e) for a 50-day postponement of the preliminary determinations.[1] The petitioner requested postponement of the preliminary determinations in order to allow the Department additional time to do a thorough investigation of the respondents in these investigations.

For the reason identified by the petitioner and because there are no compelling reasons to deny the request, the Department is postponing the deadline for the preliminary determinations under section 733(c)(1)(A) of the Act by 50 days to July 30, 2008. The deadline for the final determinations will continue to be 75 days after the date of the preliminary determinations, unless extended.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: May 21, 2008.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E8–11854 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–427–827)

Sodium Metal from France: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination

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

SUMMARY: The U.S. Department of Commerce (the Department) preliminarily determines that sodium metal from France (sodium metal) is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). The estimated margin of sales at LTFV is listed in the ''Suspension of Liquidation'' section of this notice. Interested parties are invited to comment on this preliminary determination. Pursuant to requests from interested parties, we are postponing for 60 days the final determination and extending the provisional measures from a four–month period to not more than six months. Accordingly, we will make our final determination not later than 135 days after publication of the preliminary determination.

EFFECTIVE DATE: May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Dennis McClure or Joy Zhang, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–5973 or (202) 482–1168, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 23, 2007, E.I. DuPont de Nemours & Co. Inc. (the petitioner) filed a petition on sodium metal from France. In a supplement to the petition, the petitioner provided information demonstrating reasonable grounds to believe or suspect that sales of sodium metal in the home market were made at prices below the fully absorbed cost of production (COP), within the meaning of section 773(b) of the Act, and requested that the Department conduct a sales–below-cost investigation. *See* November 8, 2007, supplement to the petition at page 10. We found that the petitioner provided a reasonable basis to believe or suspect that the French producer was selling sodium metal in France at prices below the COP. *See* section 773(b)(2)(A)(i) of the Act.

On November 13, 2007, the Department initiated the antidumping duty investigation of sodium metal from France. *See Sodium Metal from France: Notice of Initiation of Antidumping Duty Investigation*, 72 FR 65295 (November 20, 2007) (*Initiation Notice*). The Department also initiated a country–wide sales–below-cost investigation and requested that respondent, MSSA S.A.S, respond to section D of the Department's antidumping questionnaire. *See Initiation Notice*; *see also* the Department's questionnaire issued to MSSA S.A.S. on January 4, 2008.

The Department requested comments on model–matching criteria in its letter to interested parties, dated November 16, 2007. On December 6, 2007, the petitioner submitted comments on the model–matching criteria. On December 13, 2007, MSSA S.A.S., MSSA Company, and Columbia Sales International (collectively, MSSA) submitted comments on the proposed model–matching criteria. On December 14 and 17, 2007, the petitioner submitted additional comments on the proposed model–matching criteria. On December 19, 2007, MSSA responded to the petitioner's comments concerning model–matching criteria. For an explanation of the model–matching criteria used, *see Model Match* section, below.

On December 6, 2007, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that the industry in the United States is materially injured by reason of imports of sodium metal from France that are alleged to be sold in the United States at LTFV. *See Sodium Metal From France*, Investigation No. 731–TA–1135 (*Preliminary*), 73 FR 15777 (March 25, 2008). The ITC notified the Department of these findings.

On December 14, 2007, MSSA wrote to inform the Department that its home market may not be viable because most of its sales in most markets are governed by long–term contracts. In addition, MSSA also explained that the Department may need to expand the period of investigation (POI) to capture sales from one of its larger contracts in the United States. On December 19, 2007, the petitioner submitted a letter arguing against extending the POI. On December 20, 2007, MSSA submitted a response to the petitioner's comments on extending the POI. *See Date of Sale/ Market Viability* section, below.

On February 8, 2008, the Department received the Section A questionnaire response from MSSA. On February 20, 2008, the Department received a letter from MSSA explaining that it had made a small percentage of sales to affiliated parties in the United States for further manufacturing and downstream sales and asked that it be excused from reporting these sales. On February 25, 2008, the Department received the Sections B and C response from MSSA.[1] On March 6, 2008, MSSA responded to the Department's Section A supplemental questionnaire.

On March 7, 2008, the petitioner filed a sales–below-cost allegation based on sales to Germany. On March 18, 2008, the Department postponed the

[1] Although the petitioner did not file its request 25 days or more before the scheduled date of the preliminary determination, the Department has determined to accept the request pursuant to its authority under 19 CFR 351.302(b). We find that good cause exists to extend the deadline in order to allow the Department additional time to analyze the questionnaire responses in the investigation of uncovered innerspring units from the PRC. Further, for purposes of administrative efficiency, the Department concludes that the Vietnam, South Africa and PRC cases should remain on a consistent timeline.

[1] For Section B, MSSA originally reported third-country sales to Germany using invoice date as the date of sale.

preliminary determination of the instant antidumping duty investigation. *See Sodium Metal from France: Postponement of Preliminary Determination of Antidumping Duty Investigation*, 73 FR 14440 (March 18, 2008).

After reviewing the Sections B and C response from MSSA, the Department issued a supplemental questionnaire to MSSA on March 10, 2008. On March 21, 2008, the Department notified MSSA that we found that the home market was viable and were requiring it to respond to Section B and Section D of the questionnaire with regard to the French market. *See Date of Sale/Market Viability* section, below.

On April 4, 2008, we received MSSA's Section B response with regard to the French market. On April 11, 2008, we received MSSA's supplemental Sections B and C response. On April 16, 2008, we issued an additional supplemental Sections B and C questionnaire to MSSA. On April 14 and 21, 2008, we received MSSA's Section D response. On April 21, 2008, the petitioner submitted a targeted dumping allegation and comments on MSSA's Section A and C responses. On April 22, 2008, the Department issued a supplemental questionnaire with regard to Sections A and C. On April 28, 2008, MSSA responded to the Department's April 16, 2008, supplemental Sections B and C questionnaire. On April 30, 2008, MSSA responded to the Department's April 22, 2008, supplemental questionnaire with regard to Sections A and C. On April 25, 2008, the Department issued a Section D supplemental questionnaire. MSSA responded to the Section D supplemental questionnaire on May 2 and 7, 2008. On April 30, 2008, the Department requested that the petitioner respond to additional questions with regard to its targeted dumping allegation. The petitioner responded on May 6, 2008.

On May 7, 2008, MSSA requested that the Department postpone the final determination and extend the provisional measures. *See Postponement of Final Determination and Extension of Provisional Measures* section, below.

Targeted Dumping Allegation

The petitioner submitted an allegation of targeted dumping on April 21, 2008. *See* section 777A(d)(1)(B) of the Act. In its allegation, the petitioner asserts that there are patterns of constructed export prices (CEPs) for comparable merchandise that differ significantly among purchasers. We note that all of MSSA's U.S. sales are CEP sales. The Department requested additional information and clarification from the petitioner with respect to its targeted dumping allegation. *See* Letter from James Terpstra to the petitioner, dated May 1, 2008. On May 6, 2008, the petitioner provided its response. On May 16, 2008, MSSA argued that the petitioner miscalculated the gross unit price of the alleged largest targeted customer.

New Targeted Dumping Test

The statute allows the Department to employ the average–to-transaction methodology if: 1) there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time, and 2) the Department explains why such differences cannot be taken into account using the average–to-average or transaction–to-transaction methodology.[2]

In the recent post–preliminary determination memorandum in the antidumping investigation of new pneumatic off–the-road tires for the People's Republic of China, the Department applied a new targeted dumping standard and methodology for analyzing targeted dumping allegations.[3]

We conducted a customer–targeted dumping analysis for MSSA using the methodology described in the OTR Tires Targeted Dumping Memorandum. This is also the test put forward in the Department's *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 FR 26371 (May 9, 2008).

The methodology we employed involves a two–stage test: the first stage addresses the pattern requirement, and the second stage addresses the significant difference requirement. All price comparisons have been done on the basis of identical merchandise (*i.e.*, by control number or CONNUM). The test procedures are the same for customer, regional, and time period targeted dumping allegations,[4] even though the example given in the general description below applies to customer targeting.

In the first stage of the test, referred to as the ''standard deviation test,'' the Department determined, on an exporter–specific basis, the share of the alleged targeted customer's purchases of subject merchandise (by sales value) that are at prices more than one standard deviation below the weighted–average price to all customers of that exporter, targeted and non–targeted. We calculated the standard deviation on a product–specific basis (*i.e.*, CONNUM by CONNUM) using the POI–wide average prices (weighted by sales value) for each alleged targeted customer and each distinct non–targeted customer. If that share did not exceed 33 percent of the total value of the exporter's sales of subject merchandise to the alleged targeted customer, then the pattern requirement is not met and the Department did not conduct the second stage of the test.

However, if that share exceeded 33 percent of the total value of the exporter's sales of subject merchandise to the alleged targeted customer, then the pattern requirement is met and the Department proceeded to the second stage of the test. Specifically, the Department examined in the second stage all of the sales of identical merchandise (*i.e.*, by CONNUM) by that exporter to the alleged targeted customer. From those sales, we determined the total value of sales for which the difference between (i) the sales–weighted-average price to the alleged targeted customer and (ii) the next higher sales–weighted-average price to a non–targeted customer exceeded the average price gap (weighted by sales value) for the non–targeted group.[5] Each of the price gaps in the non–targeted group was weighted by the combined sales value associated with the pair of prices to non–targeted customers that make up the price gap. In doing this analysis, the alleged targeted customers were not included in the non–targeted group; each alleged targeted customer's average price was compared to only the average prices to non–targeted customers. If the share of the sales that met this test exceeded five percent of the total sales value of subject merchandise to the alleged targeted customer,[6] the significant difference

[2] Section 777A(d)(1)(B) of the Act.

[3] *See* Memorandum to David M. Spooner, ''Post-Preliminary Determination of Targeted Dumping'' (May 19, 2008), (OTR Tires Targeted Dumping Memorandum). This new test was first applied in the investigations of certain steel nails from the United Arab Emirates and the People's Republic of China.

[4] The petitioner made no targeted dumping allegations based on region or time period in this investigation.

[5] The next higher price is the sales-weighted-average price to the non-targeted group that is above the sales-weighted-average price to the alleged targeted group. For example, if the sales-weighted-average price to the alleged targeted group is $7.95 and the sales-weighted-average prices to the non-targeted group are $8.30, $8.25, and $7.50, we would calculate the difference between $7.95 and $8.25 because this is the next higher price in the non-targeted group above $7.95 (the average price to the targeted group).

[6] For example: If non-targeted A's weighted-average price is $1.00 with a total sales value of $100 and non-targeted B's weighted-average price is $0.95 with a total sales value of $120, then the

requirement was met and the Department determined that customer targeting occurred.

Once the Department determined that the customer pattern–of-price differences were significant, we applied the transaction–to-average methodology to any targeted sales and applied the average–to-average methodology to the remaining non–targeted sales.[7] When calculating the weighted–average margin, we combined the margin calculated for the targeted sales with the margin calculated for the non–targeted sales, without offsetting any margins found among the targeted sales.

We based all of our targeted dumping calculations on the U.S. net price (''NETPRIU'') determined in our margin program in our Preliminary Calculation Memorandum. *See* ''Calculation Memorandum for the Preliminary Determination – MSSA,'' dated May 21, 2008, (Preliminary Calculation Memorandum) on file in the Central Records Unit, Room 1117 of the main Department building.

Results of the Application of the New Targeted Dumping Test

For purposes of this preliminary determination on targeted dumping, we have applied the above–described test to the U.S. sales data reported by MSSA. Our observations and results are discussed in more detail in a separate memorandum placed on the record of this investigation. *See* Preliminary Calculation Memorandum.

We preliminarily determine that there is no pattern of constructed export prices for comparable merchandise that differs significantly among customers for MSSA. Therefore, we applied the average–to-average methodology to all U.S. sales by MSSA.

Comments by Interested Parties

Parties may comment on the Department's overall preliminary determination application of the new targeted dumping test in this proceeding. Consistent with 19 CFR 351.309(c)(2), all comments should be filed in the context of the case and rebuttal briefs. *See* the ''Public Comment'' section below for details regarding the briefing schedule for this investigation.

Period of Investigation

The POI is October 1, 2006 to September 30, 2007. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition.

Scope of the Investigation

The merchandise covered by this investigation includes sodium metal (Na), in any form and at any purity level. Examples of names commonly used to reference sodium metal are sodium metal, sodium, metallic sodium, and natrium. The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (HTSUS) subheading 2805.11.0000. The American Chemical Society Chemical Abstract Service (CAS) has assigned the name ''Sodium'' to sodium metal. The CAS registry number is 7440–23–5. For purposes of the investigation, the narrative description is dispositive, not the tariff heading, CAS registry number or CAS name, which are provided for convenience and customs purposes.

Model Match

We have taken into account the comments filed by MSSA and the petitioner concerning model–matching criteria. We have used the following criteria for model matching, since both parties were in substantial agreement with the product characteristics. In accordance with section 771(16) of the Act, all products produced by the respondent covered by the description in the *Scope of Investigation* section, above, and sold in France during the POI are considered to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We have relied on five criteria to match U.S. sales of subject merchandise to comparison market sales of the foreign like product: 1) calcium impurity, 2) potassium impurity, 3) chloride/bromide impurity, 4) oxygen impurity, and 5) form. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed above. On January 4, 2008, the Department issued the questionnaire containing the criteria identified above. *See* the Department's antidumping questionnaire issued to MSSA on January 4, 2008, at pages B–8 through B–10 and C–7 through C–9.

Date of Sale/Market Viability

Section 351.401(i) of the Department's regulations states that the Department normally will use the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale. Therefore, where there were no long–term contracts which were signed and effective, during the POI, we determined that the invoice date established the material terms of sale. The regulations further provide that the Department may use a date other than the date of the invoice if the Secretary is satisfied that a different date better reflects the date on which the material terms of sale are established. The Department has a long–standing practice of finding that, where shipment date precedes invoice date, shipment date better reflects the date on which the material terms of sale are established. *See* 19 CFR 351.401(i); *see also Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10; and *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2. Therefore, we used the earlier of shipment date or invoice date as the date of sale in accordance with our practice.

In MSSA's original response to Section B of the questionnaire, MSSA reported its response based upon the invoice date as the date of sale, which indicated that France was not a viable home market. Therefore, MSSA reported sales to Germany as its viable market for comparison to its U.S. sales. In our review of MSSA's sales contracts, we determined that some contracts did establish the material terms of sale because no changes to the material terms were made. Therefore, where those contracts were signed and the effective date was within the POI, we used the effective date as the date of sale for those sales made pursuant to those contracts. *See* Preliminary Calculation Memorandum.

Fair Value Comparisons

To determine whether sales of sodium metal from France were made in the

difference of $0.05 ($1.00 − $0.95) would be weighted by $220 ($100 + $120).

[7] Consistent with 19 CFR 351.414(f)(2), we have limited our application of the average-to-transaction methodology to the targeted sales under 19 CFR 351.414(f)(1)(i). As specified in the preamble to the regulations, the Department will apply the average-to-transaction methodology solely to address the practice of targeting. *See Antidumping Duties; Countervailing Duties*; 62 FR 27296, 27375 (May 19, 1997). In the preamble, the Department indicated that where the targeting is so widespread that it is administratively impractical to segregate targeted sales prices from the normal pricing behavior of the company, it may be necessary to apply the average-to-transaction methodology to all sales of a particular respondent. In this case, however, we are able to segregate the targeted sales prices, by customer, where appropriate, from the normal pricing behavior of the company and, therefore, have limited our application of the average-to-transaction methodology to the sales to the targeted group.

United States at less than normal value (NV), we compared the CEP to the NV, as described in the *Constructed Export Price* and *Normal Value* sections below. In accordance with section 777A(d)(1) of the Act, we calculated the weighted–average prices for NV and compared these to the weighted–average of CEP.

Constructed Export Price

A. Affiliation Through Agency

In accordance with section 771(33)(G) of the Act, we are treating Columbia Sales International as an affiliate of MSSA. During the POI, MSSA made sales to unaffiliated customers in the United States through three channels of distribution. The first two channels of distribution are sales by MSSA Co. with the assistance of Columbia Sales International, its exclusive U.S. sales agent. The third channel includes sales purchased by Columbia Sales International and resold to the unaffiliated U.S. customer. In MSSA's March 6, 2008, supplemental response, MSSA responded to additional questions concerning its relationship with Columbia Sales International. In Exhibit A–Supp–1, MSSA provided its ''Exclusive Agency Agreement'' with Columbia Sales International. The ''Exclusive Agency Agreement'' and other information on the record indicate that Columbia Sales International and MSSA are affiliated through a principal/agent relationship. *See*, *e.g.*, *Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 6682 (February 13, 2002), and accompanying Issues and Decision Memorandum at Comment 23, upheld in *Chia Far Industrial Factory Co. v. United States*, 343 F. Supp. 2d 1344, 1356 (CIT 2004) (''when there exists a principal who has the potential to control pricing and/or the terms of sale through the end–customer, Commerce will find agency and thus affiliation''). Furthermore, as explained in the *Notice of Final Determination of Sales at Less than Fair Value: Engineered Processed Gas Turbo–Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan*, 62 FR 24392, 24402–24403 (May 5, 1997), the Department may examine a range of criteria to determine if an agency relationship exists. For example, the Department may look at (1) the foreign producer's role in negotiating price and other terms of sale; (2) the extent of the foreign producer's interaction with the U.S. customer; (3) whether the agent/reseller maintains inventory; (4) whether the agent/reseller takes title to the merchandise and bears the risk of loss; (5) whether the agent/reseller further processes or otherwise adds value to the merchandise; (6) the means of marketing a product by the producer to the U.S. customer in the pre–sale period; and (7) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transactions. Due to the proprietary nature of MSSA's response, we have applied these factors to the facts of this case and included further analysis in our Preliminary Calculation Memorandum.

B. Calculation of U.S. Price

For the price to the United States, we used CEP in accordance with section 772(b) of the Act. We calculated CEP for those sales where a person in the United States, affiliated with the foreign exporter or acting for the account of the exporter, made the sale to the first unaffiliated purchaser in the United States of the subject merchandise. We based CEP on the packed prices charged to the first unaffiliated customer in the United States and the applicable terms of sale.

In accordance with section 772(c)(2) of the Act, we made deductions, where appropriate, for movement expenses including U.S. warehouse expense, inland freight, insurance, brokerage & handling, demurrage, international freight, and U.S. customs duties.

For CEP, in accordance with section 772(d)(1) of the Act, when appropriate, we deducted from the starting price those selling expenses that were incurred in selling the subject merchandise in the United States, including direct selling expenses (cost of credit and warranty). These expenses include certain indirect selling expenses incurred by affiliated U.S. distributors. *See* Preliminary Calculation Memorandum. We also deducted from CEP an amount for profit in accordance with sections 772(d)(3) and (f) of the Act.

Normal Value

A. Home Market Viability and Comparison Market Selection

To determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the respondents' volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise. Pursuant to section 773(a)(1)(B)(i) of the Act, because MSSA had an aggregate volume of home market sales of the foreign like product that was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market was viable. *See Date of Sale/Market Viability* section, above. *See also* March 21, 2008, Memorandum to The File, Subject: Determination of French Market as a Viable Market.

B. Arm's–Length Test

MSSA reported that its sales of the foreign like product were made to unaffiliated customers. Therefore, the arm's–length test is not applicable to MSSA's sales of the foreign like product.

C. Cost of Production Analysis

Based on our analysis of the petitioner's allegation stated in the petition, we found that there were reasonable grounds to believe or suspect that MSSA's sales of sodium metal in the home market were made at prices below its COP. Accordingly, pursuant to section 773(b) of the Act, we initiated a sales–below-cost investigation to determine whether MSSA had sales that were made at prices below its COP. *See* November 8, 2007, supplement to the petition at page 10. *See also*; *Initiation Notice* at page 65297.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated MSSA's COP based on the sum of its costs of materials and conversion for the foreign like product, plus amounts for general and administrative expenses and interest expenses (*see Test of Comparison Market Sales Prices* section, below, for the treatment of home market selling expenses).

The Department relied on the COP data submitted by MSSA in response to the Department's supplemental section D questionnaire.

2. Test of Comparison Market Sales Prices

On a product–specific basis, we compared the adjusted weighted–average COP to the home market sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. For purposes of this comparison, we used the COP exclusive of selling and packing expenses. The prices were exclusive of any applicable movement charges, direct and indirect selling expenses, and packing expenses.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of

a respondent's sales of a given product were at prices less than the COP, we did not disregard any below–cost sales of that product because we determined that the below–cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product during the POI were at prices less than the COP, we determined that such sales were made in ''substantial quantities.'' *See* section 773(b)(2)(C) of the Act. Further, the sales were made within an extended period of time, in accordance with section 773(b)(2)(B) of the Act, because we examined below–cost sales occurring during the entire POI. In such cases, because we compared prices to POI–average costs, we also determined that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

Our preliminary findings show that we did not find that more than 20 percent of MSSA's sales were at prices less than the COP and did not exclude any sales as a result of the COP test. Therefore, we used all of MSSA's home market sales as the basis for determining NV.

D. Calculation of Normal Value Based on Comparison Market Prices

We based home market prices on packed prices to unaffiliated purchasers in France. We adjusted the starting price for insurance, inland freight, and freight revenue, where appropriate, pursuant to section 773(a)(6)(B)(ii) of the Act.

When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, we also made adjustments for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like product and subject merchandise. *See* 19 CFR 351.411(b).

E. Level of Trade/Constructed Export Price Offset

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the CEP transaction. In identifying LOTs for comparison market sales (*i.e.*, NV based on home market), we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. *See Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1314 (Fed. Cir. 2001).

To determine whether NV sales are at a different LOT than EP or CEP transactions, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison market sales are at a different LOT and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. For CEP sales, if the NV LOT is more remote from the factory than the CEP LOT and there is no basis for determining whether the difference in the LOTs between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP–offset provision).

MSSA reported sales made through one LOT corresponding to one channel of distribution in the home market. In the U.S. market, MSSA reported one LOT corresponding to three channels of distribution. MSSA made sales through its U.S. affiliates (*i.e.*, CEP sales). In our analysis, we determined that there is one LOT in the home market and one LOT in the U.S. market. We have found that home market sales are at a more advanced LOT than the CEP sales made through its U.S. affiliates. Accordingly, we have made CEP offsets to NV.

For a detailed description of our LOT methodology and a summary of the LOT findings for these preliminary results, see our analysis contained in the Preliminary Calculation Memorandum.

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

All–Others Rate

Pursuant to section 735(c)(5)(A) of the Act, the all–others rate is equal to the weighted average of the estimated weighted–average dumping margins of all respondents investigated, excluding zero or *de minimis* margins. MSSA is the only respondent in this investigation and its rate is neither zero nor *de minimis*. Therefore, for purposes of determining the all–others rate and pursuant to section 735(c)(5)(A) of the Act, we are using the weighted–average dumping margin calculated for MSSA for the all–others rate, as referenced in the *Suspension of Liquidation* section, below.

Verification

As provided in section 782(i) of the Act, we intend to verify all information upon which we will rely in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of sodium metal from France that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We are also instructing CBP to require a cash deposit or the posting of a bond equal to the weighted–average dumping margin, as indicated in the chart below. These suspension–of-liquidation instructions will remain in effect until further notice.

The weighted–average dumping margin is as follows:

Manufacturer/Exporter	Weighted–Average Margin (percent)
MSSA S.A.S.	62.62
All Others	62.62

Disclosure

We will disclose the calculations used in our analysis to parties in this proceeding in accordance with 19 CFR 351.224(b).

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the Department's final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether imports of sodium metal from France are materially injuring, or threaten material injury to, the U.S. industry. Because we have postponed the deadline for our final determination to 135 days from the date of the publication of this preliminary determination, the ITC will make its final determination within 45 days of our final determination.

Public Comment

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs to the Department no later than seven days after the date of the issuance of the verification report in this proceeding. *See* 19 CFR 351.309(c)(1)(i). Rebuttal briefs, the

content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline date for the submission of case briefs. *See* 19 CFR 351.309(d)(1) and (2). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette. In accordance with section 774 of the Act, the Department will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, at a time and in a room to be determined. Parties should confirm by telephone, the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. *See* 19 CFR 351.310(c). At the hearing, oral presentations will be limited to issues raised in the briefs.

Postponement of Final Determination and Extension of Provisional Measures

Pursuant to section 735(a)(2) of the Act, on May 7, 2008, MSSA, which accounts for a significant proportion of exports of sodium metal from France, requested that in the event of an affirmative preliminary determination in this investigation, the Department fully extend the final determination (*i.e.*, postpone its final determination by 60 days). In its May 7, 2008, letter, MSSA also requested, pursuant to 733(d) of the Act, that in the event of an affirmative preliminary determination in this investigation, the Department extend the maximum duration of provisional measures from four months to six months from the date of implementation. *See* 735(a)(2) of the Act and 19 CFR 351.210(e)(2). In accordance with section 733(d) of the Act and 19 CFR 351.210(b)(2)(ii), because (1) our preliminary determination is affirmative, (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise, and (3) no compelling reason for denial exists, we are granting MSSA's request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**. Suspension of liquidation will be extended accordingly.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: May 21, 2008.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E8–11876 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XI10

Endangered Species; File No. 10037

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Dr. Douglas Peterson, Warnell School of Forest Resources (Fisheries Division), University of Georgia, Athens, Georgia 30602, has been issued a permit to take shortnose sturgeon (Acipenser brevirostrum) for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead or Kate Swails, (301)713–2289.

SUPPLEMENTARY INFORMATION: On September 11, 2007, notice was published in the **Federal Register** (72 FR 51803) that a request for a scientific research permit to take shortnose sturgeon had been submitted by the above-named individual. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Dr. Peterson is authorized to conduct research on shortnose sturgeon for five years to assess the abundance, age structure, distribution, movement, and critical habitat on the Ogeechee River, Georgia, and will also investigate the adverse effects of estrogenic compounds. Researchers may capture up to 150 shortnose sturgeon annually using gill and trammel nets and also anesthetize, measure, weigh, tissue and fin-ray sample, and PIT tag these fish. A subset of up to 10 sturgeon annually (no more than 40 during the permit life) will be laparoscoped and implanted with internal radio tags; a subset of up to 5 sturgeon annually (no more than 20 during the permit life) will be laparoscoped and fitted with external radio tags; and a subset of up to 12 sturgeon will be health evaluated using laparoscopy and venipuncture annually. The unintentional mortality of up to 2 shortnose sturgeon annually is permitted. Additionally researchers may also lethally collect up to 40 shortnose sturgeon eggs/larvae annually using buffer pads in order to document spawning.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: May 21, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–11884 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XH97

Endangered Species; File No. 1595–02

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

ACTION: Notice; issuance of permit modification.

SUMMARY: Notice is hereby given that Mr. Michael M. Hastings, University of Maine, 5717 Corbett Hall, Orono, ME 04469, has been issued a modification to scientific research Permit No. 1595–01.

ADDRESSES: The modification and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9300; fax (978)281–9394.

FOR FURTHER INFORMATION CONTACT: Brandy Belmas or Malcolm Mohead, (301)713–2289.

SUPPLEMENTARY INFORMATION: On February 7, 2008, notice was published in the **Federal Register** (73 FR 7261) that a modification of Permit No. 1595, issued April 18, 2007 (72 FR 19469), had been requested by the above-named individual. The requested modification has been granted under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

In addition to all research activities authorized under Permit No. 1595–01, this modification authorizes the: (1) increase in the amount of annual take of shortnose sturgeon (*Acipenser brevirostrum*) from 100 to 200 fish; (2) addition of D-net sampling as a method of shortnose sturgeon egg and larvae collection; (3) addition of non-lethal blood sampling; and (4) the appointment and removal of research personnel. This modification is valid through the expiration date of the original permit, March 31, 2012.

Issuance of this modification, as required by the ESA was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: May 21, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–11883 Filed 5–27–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0144]

Federal Acquisition Regulation; Information Collection; Payment by Electronic Fund Transfer

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0144).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning payment by electronic fund transfer. This OMB clearance currently expires on October 31, 2008.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before July 28, 2008.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden should be submitted to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT Ms. Meredith Murphy, Contract Policy Division, GSA (202) 208–6925.

SUPPLEMENTARY INFORMATION:

A. Purpose

The FAR requires certain information to be provided by contractors which would enable the Government to make payments under the contract by electronic fund transfer (EFT). The information necessary to make the EFT transaction is specified in clause 52.232–33, Payment by Electronic Funds Transfer—Central Contractor Registration, which the contractor is required to provide prior to award, and clause 52.232–34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration, which requires EFT information to be provided as specified by the agency to enable payment by EFT.

B. Annual Reporting Burden

Respondents: 14,000.
Responses Per Respondent: 10.
Annual Responses: 140,000.
Hours Per Response: .5.
Total Burden Hours: 70,000.

OBTAINING COPIES OF PROPOSALS: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VPR), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0144, Payment by Electronic Fund Transfer, in all correspondence.

Dated: May 15, 2008.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E8–11445 Filed 5–27–08; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0013]

Federal Acquisition Regulation; Information Collection; Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement

concerning cost or pricing data requirements and information other than cost or pricing data. A request for public comments was published in the **Federal Register** at 72 FR 696140, on November 27, 2007. No comments were received. This OMB clearance expires on August 31, 2008.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before June 27, 2008.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Edward Chambers, Contract Policy Division, GSA (202) 501–3221.

SUPPLEMENTARY INFORMATION:

A. Purpose

The Truth in Negotiations Act requires the Government to obtain certified cost or pricing data under certain circumstances. Contractors may request an exemption from this requirement under certain conditions and provide other information instead.

B. Annual Reporting Burden

Respondents: 33,332.
Responses Per Respondent: 6.
Total Responses: 199,992.
Hours Per Response: 50.51.
Total Burden Hours: 10,101,684.
OBTAINING COPIES OF PROPOSALS: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VPR), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0013, Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data, in all correspondence.

Dated: May 16, 2008.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E8–11813 Filed 5–27–08; 8:45 am]

BILLING CODE 6820–EP–S

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 28, 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 21, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.
Title: National Study on Alternate Assessments Teacher Survey.
Frequency: Annually.
Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.
Reporting and Recordkeeping Hour Burden:
Responses: 200.
Burden Hours: 445.
Abstract: The National Study on Alternate Assessments (NSAA) Teacher Survey will examine the use of alternate assessments based on alternate achievement standards by surveying a sample of teachers who use these assessments with students who have significant cognitive disabilities. The survey will study motivation and expectations, professional capacity and support, instructional resources, and opportunity to learn academic content.

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 3695. 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. E8–11870 Filed 5–27–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Filing

May 20, 2008.

Allegheny Electric Cooperative, Inc.	Docket No. EL07–56–003
Borough of Chambersburg, Pennsylvania.	
City and Towns of Hagerstown, Thurmont, and Williamsport, Maryland.	
District of Columbia Office of the People's Counsel.	
Illinois Citizens Utility Board.	
Indiana Office of Utility Consumer Counsel.	
Maryland Office of People's Counsel.	
New Jersey Division of Rate Counsel.	
Office of the Attorney General of Virginia, Division of Consumer Counsel.	
Office of the Ohio Consumers' Counsel.	
Old Dominion Electric Cooperative.	
Pennsylvania Office of Consumer Advocate.	
PJM Industrial Customer Coalition.	
Southern Maryland Electric Cooperative, Inc..	
State of Delaware, Division of the Public Advocate.	
Complainants v. PJM Interconnection L.L.C. Respondent.	
Organization of PJM States, Inc.	Docket No. EL07–58–003
District of Columbia Public Service Commission.	
Indiana Utility Regulatory Commission.	
Kentucky Public Service Commission.	
Maryland Public Service Commission.	
New Jersey Board of Public Utilities.	
North Carolina Utilities Commission.	
Pennsylvania Public Utility Commission.	
Virginia State Corporation Commission.	
Complainants v. PJM Interconnection, L.L.C. Respondent.	

Take notice that on May 12, 2008, PJM Interconnection, L.L.C., filed Rate Schedule FERC No. 46, Market Monitoring Services Agreement and Rate Schedule FERC No. 47, Service Level Agreement, in compliance with the Commission's March 21, 2008 Order, *Allegheny Elec. Coop., Inc.* v. *PJM Interconnection L.L.C.,* 122 FERC ¶ 61,257, at P 26 & Ordering Para. (C) (2008) (March 21 Order).

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

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

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

Comment Date: 5 p.m. Eastern Time on June 2, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–11833 Filed 5–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL03–230–004]

Entergy Services, Inc.; Notice of Filing

May 20, 2008.

Take notice that on May 15, 2008, Entergy Services, Inc., filed a response to the Commission's April 15, 2008, Data Request.

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

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

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

Comment Date: 5 p.m. Eastern Time on June 5, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–11834 Filed 5–27–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2007–1127, FRL–8571–8]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Requirements for Generators, Transporters, and Waste Management Facilities Under the RCRA Hazardous Waste Manifest System (Renewal); EPA ICR No. 0801.16; OMB Control No. 2050–0039

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before June 27, 2008.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–RCRA–2007–1127, to (1) EPA, either online using *www.regulations.gov* (our preferred method), or by e-mail to *rcra-docket@epa.gov*, or by mail to: RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; and (2) OMB, by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Bryan Groce, Office of Solid Waste, (mail code 5302P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–8750; fax number: 703–308–8433; e-mail address: *groce.bryan@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On February 5, 2008 (73 FR 6721), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2007–1127, which is available for online viewing at *www.regulations.gov*, or in person viewing at the Resource Conservation and Recovery Act (RCRA) Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

Use EPA's electronic docket and comment system at *www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov*.

Title: Requirements for Generators, Transporters, and Waste Management Facilities Under the RCRA Hazardous Waste Manifest System (Renewal).

ICR numbers: EPA ICR No. 0801.16, OMB Control No. 2050–0039.

ICR Status: This ICR is scheduled to expire on May 31, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The Resource Conservation and Recovery Act (RCRA), as amended, establishes a national program to assure that hazardous waste management practices are conducted in a manner that is protective of human health and the environment. EPA's authority to require compliance with the manifest system stems primarily from RCRA section 3002(a)(5). This section mandates a hazardous waste manifest ''system'' to assure that all hazardous waste generated is designated for and arrives at the appropriate treatment, storage, and disposal facility. An essential part of this manifest system is the Uniform Hazardous Waste Manifest (Form 8700–22). The manifest is a tracking document that accompanies the waste from its generation site to its final disposition. The manifest lists the wastes that are being shipped and the final destination of the waste. The manifest system is a self-enforcing mechanism that requires generators, transporters, and owner/operators of treatment, storage, and disposal facilities to participate in hazardous waste tracking. In addition, the manifest provides information to transporters and waste management facility workers on the hazardous nature of the waste, identifies wastes so that they can be managed appropriately in the event of an accident, spill, or leak, and ensures that shipments of hazardous waste are managed properly and delivered to their designated facilities.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1.8 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Businesses and Farms that generate, transport or receive hazardous waste.

Estimated Number of Respondents: 190,628.

Frequency of Response: Each shipment.

Estimated Total Annual Hour Burden: 3,743,122.

Estimated Total Annual Cost: $109,934,365, which includes

$106,862,075 annualized labor and $3,072,290 for capital or O&M costs.

Changes in the Estimates: There is an increase of 478,131 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is due to an increase in the projected number of responses from 1,762,276 previously to 2,074,900.

Dated: May 21, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8–11856 Filed 5–27–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2008–0118; FRL–8572–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Determine Percentage of High Evaporative Emissions Vehicles in On-Road Fleet, EPA ICR Number 2292.01, OMB Control Number 2060–NEW

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request for a new collection. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before June 27, 2008.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OAR–2008–0118, to (1) EPA online using *www.regulations.gov* (our preferred method), by e-mail to *a-and-r-docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mail Code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Constance Hart, Assessment and Standards Division, Office of Transportation and Air Quality, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214–4340; fax number: (734) 214–4939; e-mail address: *hart.connie@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On February 14, 2008 (73 FR 8661), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2008–0118, which is available for public viewing at the Air Docket in the EPA Docket Center (EPA/DC), EPA West, 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 Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Use EPA's electronic docket and comment system at *www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov*.

Title: Determine Percentage of High Evaporative Emissions Vehicles in On-road Fleet.

ICR Number: EPA ICR No. 2292.01, OMB Control No. 2060–NEW.

ICR Status: This ICR is for a new information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: In response to recommendations from the National Research Council of the National Academy of Sciences, EPA is initiating a systematic data collection to estimate the fraction of light-duty vehicles with high levels of evaporative emissions. Data to be collected include vehicle type, recent repair history and ''in-use'' or ''real-world'' evaporative emission rates.

The collection is a test program, to be conducted by the Office of Transportation and Air Quality (OTAQ) in the Office of Air and Radiation (OAR). This study will combine novel, newly developed test procedures with statistical survey design to estimate the number of vehicles with high evaporative emissions. The new procedures will be developed in a pilot study that will precede the actual test program. Development of new test procedures employing new technology and test methods promises to substantially reduce the cost of evaporative emissions measurement as well as improve the accuracy of these estimates.

The test program itself will be conducted in Region 6, and participation in the program shall be voluntary. The pilot program shall be conducted in EPA Region 8, and participation in it shall also be voluntary. Evaporative emissions will be measured using a variety of methods that will include Remote Sensing, an infra-red camera specifically designed to detect fugitive hydrocarbon emissions and a hydrocarbon sniffer designed for automotive applications. Remote sensing data will be collected prior to a standard I/M test as the vehicle approaches the facility. Those owners solicited that agree to participate in the program shall be provided with a rental car and their vehicle immediately subjected to the test protocol outlined below as resources permit. Following quality-assurance and analysis, the data will be stored in OTAQ's Mobile Source Observation Database.

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

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is

estimated to average 2 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Private individuals.

Estimated Number of Respondents: 2000 .

Frequency of Response: 1.

Estimated Total Annual Hour Burden: 3530.

Estimated Total Annual Cost: $91,533, includes $0 annualized capital or O&M costs.

Changes in the Estimates: This is a new collection so there is no change from a previously approved burden.

Dated: May 21, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8–11865 Filed 5–27–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2007–1116, FRL–8571–9]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Facility Ground-Water Monitoring Requirements (Renewal); EPA ICR No. 0959.13; OMB Control No. 2050–0033

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before June 27, 2008.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–RCRA–2007–1116, to (1) EPA, either online using *http://www.regulations.gov* (our preferred method), or by e-mail to *rcra-docket@epa.gov,* or by mail to: RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; and (2) OMB, by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: William Schoenborn, Office of Solid Waste, (mail code 5303P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–8483; fax number: 703–308–8617; e-mail address: *schoenborn.william@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On January 25, 2008 (73 *FR* 4554), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received one comment during the comment period, which is addressed in the ICR. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2007–1116, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Resource Conservation and Recovery Act (RCRA) Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: Facility Ground-Water Monitoring Requirements (Renewal).

ICR numbers: EPA ICR No. 0959.13, OMB Control No. 2050–0033.

ICR Status: This ICR is scheduled to expire on May 31, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This ICR examines the ground-water monitoring standards for permitted and interim status facilities at 40 CFR parts 264 and 265, as specified. The ground-water monitoring requirements for regulated units follow a tiered approach whereby releases of hazardous contaminants are first detected (detection monitoring), then confirmed (compliance monitoring), and if necessary, are required to be cleaned up (corrective action). Each of these tiers requires collection and analysis of ground-water samples. Owners or operators that conduct ground-water monitoring are required to report information to the oversight agencies on releases of contaminants and to maintain records of ground-water monitoring data at their facilities. The goal of the ground-water monitoring program is to prevent and quickly detect releases of hazardous contaminants to groundwater, and to establish a program whereby any contamination is expeditiously cleaned up as necessary to protect human health and environment. Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA) creates a comprehensive program for the safe management of hazardous waste. Section 3004 of RCRA requires owners and operators of facilities that treat, store, or dispose of hazardous waste to comply with

standards established by EPA that are to protect the environment. Section 3005 provides for implementation of these standards under permits issued to owners and operators by EPA or authorized States. Section 3005 also allows owners and operators of facilities in existence when the regulations came into effect to comply with applicable notice requirements to operate until a permit is issued or denied. This statutory authorization to operate prior to permit determination is commonly known as ''interim status.'' Owners and operators of interim status facilities also must comply with standards set under Section 3004.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 123 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Business or other for-profit; and State, local, or Tribal governments.

Estimated Number of Respondents: 989.

Frequency of Response: quarterly, semi-annually, and annually.

Estimated Total Annual Hour Burden: 121,577.

Estimated Total Annual Cost: $27,818,073, includes $4,628,246 annualized labor and $23,189,829 capital or O&M costs.

Changes in the Estimates: There is an increase of 26,380 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. The reason for the increase in hourly burden is an increase in the universe from 824 for the previous ICR to 989 for this renewal, which can be explained by improvements in the RCRAInfo database, allowing for more accurate counts.

Dated: May 21, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8–11888 Filed 5–27–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2008–0204; FRL–8572–4]

Board of Scientific Counselors, Land Research Program Mid-Cycle Review Meetings—Spring 2008

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of one meeting of the Board of Scientific Counselors (BOSC) Land Mid-Cycle Subcommittee.

DATES: The meeting (a teleconference call) will be held on Tuesday, June 24, from 12 p.m. to 2 p.m. EDT. The meetings may adjourn early if all business is finished. Requests for the draft agenda or for making oral presentations at the meeting will be accepted up to 1 business day before the meeting.

ADDRESSES: Participation in the conference call will be by teleconference only—meeting rooms will not be used. Members of the public may obtain the call-in number and access code for the call from Heather Drumm, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2008–0204, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2008–0204.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2008–0204.
- *Mail:* Send comments by mail to: Board of Scientific Counselors, Land Mid-Cycle Subcommittee Meeting—Spring 2008 Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2008–0204.
- *Hand Delivery or Courier.* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2008–0204. Note: this is not a mailing address. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2008–0204. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. 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 Board of Scientific Counselors, Land Mid-Cycle Subcommittee Meeting—Spring 2008 Docket, EPA/DC, EPA

West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Heather Drumm, Mail Drop 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1300 Pennsylvania Ave. NW., Washington, DC 20460; via phone/voice mail at: (202) 564–8239; via fax at: (202) 565–2911; or via e-mail at: *drumm.heather@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting may contact Heather Drumm, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes.

Proposed agenda items for the meeting include, but are not limited to finalizing the subcommittee's draft report and discussing the rating component for the Land research program. The meeting is open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Heather Drumm at (202) 564–8239 or *drumm.heather@epa.gov.* To request accommodation of a disability, please contact Heather Drumm, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: May 15, 2008.

Jeff Morris,

Acting Director, Office of Science Policy.

[FR Doc. E8–11874 Filed 5–27–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

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

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

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

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 20, 2008.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Blue Ridge Bank Holdings, Inc., Asheville, North Carolina; to become a bank holding company through the retention of 100 percent of the voting securities of Blue Ridge Savings Bank, Incorporated, Asheville, North Carolina.

Board of Governors of the Federal Reserve System, May 22, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–11845 Filed 5–27–08; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0027]

General Services Administration Acquisition Regulation; Information Collection; Contract Administration, Quality Assurance (GSAR Parts 542 and 546; GSA Form 1678, and GSA Form 308)

AGENCY: Office of the Chief Acquisition Officer, GSA.

ACTION: Notice of request for comments regarding a renewal to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement regarding contract administration, and quality assurance. The clearance currently expires on July 31, 2008.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: July 28, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Jeritta Parnell, Procurement Analyst, Contract Policy Division, at telephone (202) 501–4082 or via e-mail to *jeritta.parnell@gsa.gov*.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VPR), General Services Administration, Room 4035, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–0027, Contract Administration, Quality Assurance (GSAR Parts 542 and 546; GSA Form 1678, and GSA Form 308), in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

Under certain contracts, because of reliance on contractor inspection in lieu of Government inspection, GSA's Federal Supply Service (FSS) requires documentation from its contractors to effectively monitor contractor performance and ensure that it will be able to take timely action should that performance be deficient.

B. Annual Reporting Burden

Respondents: 4,604
Total Responses: 116,869
Total Burden Hours: 7,830
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4035, Washington,

DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 3090–0027, Contract Administration, Quality Assurance (GSAR Parts 542 and 546; GSA Form 1678, and GSA Form 308), in all correspondence.

Dated: May 20, 2008

Al Matera,

Director,Office of Acquisition Policy.

[FR Doc. E8–11849 Filed 5–27–08; 8:45 am]

BILLING CODE 6820–61–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Injury Prevention and Control/Initial Review Group, (NCIPC/IRG)

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 meeting for the aforementioned review group:

Times and Date:

2 p.m.–2:30 p.m., June 18, 2008 (Open).

2:30 p.m.–4 p.m., June 18, 2008 (Closed).

Place: CDC, Chamblee Campus, Building 106, 4770 Buford Highway, Atlanta, GA 30341. Toll Free: 888–793–2154, Participant Passcode: 4424802.

Status: Portions of the meetings will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5, U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Section 10(d) of Public Law 92–463.

Purpose: This group is charged with providing advice and guidance to the Secretary, Department of Health and Human Services, and the Director, CDC, concerning the scientific and technical merit of grant and cooperative agreement applications received from academic institutions and other public and private profit and nonprofit organizations, including State and local government agencies, to conduct specific injury research that focuses on prevention and control.

Matters To Be Discussed: The meeting will include the discussion and voting of the peer reviews conducted in response to Fiscal Year 2008 Requests for Applications related to the following individual research announcements: RFA–CE–08–001, Youth Violence Prevention through Community-Level Change (U49); RFA–CE–08–002, Grants for Traumatic Injury Biomechanics and their Severity (R01); RFA–CE–08–003, Research for Preventing Violence and Violence-Related Injury (R01); RFA–CE–08–004, Translation Research to prevent Motor Vehicle-related crashes and Injuries to Teen Drivers and their Passengers (R01); RFA–CE–08–005, Dissertation Grant Awards for Doctoral Candidates for Violence-Related Injury Prevention Research in Minority Communities (R36); RFA–CE–08–006, Feasibility of Acute Concussion Management in the Emergency Dept (U49); RFA–CE–08–007, Assessing the Effects of Interpersonal Violence Prevention on Suicide (U49); RFA–TS–08–001, Program of Exposure-Dose Reconstruction and Computational Methods to Quantify Exposures to Hazardous Substances (U01); and RFA–EH–08–001, Program to Assess Health Effects Associated with Exposures to Volcanic Emissions and Environmental Air Pollutants (P78).

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Jane Suen, Dr. P.H., M.S., Executive Secretary, NCIPC IRG, CDC, 4770 Buford Highway, NE., M/S F–62, Atlanta, Georgia 30341, telephone 770/488–4281.

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 CDC and the Agency for Toxic Substances and Disease Registry.

Dated: May 19, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–11720 Filed 5–27–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0280]

Potential for a Registry of Breast Cancer Treatment Using Thermal Ablation Devices; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is requesting comments on whether a registry could facilitate standardization of feasibility trials studying local treatment of small breast cancers with different thermal ablation devices and therapies (i.e. cryoablation, focused ultrasound, interstitial laser, microwave, radiofrequency ablation). FDA is specifically interested in understanding how breast cancer ablation feasibility trials can be constructed so that there exists standardized evaluation of tissue biopsy pathology, selection of tumors amenable to ablation, image guidance for ablation, post-ablation imaging and assessment, and tissue pathology of ablated specimens. The agency seeks to facilitate its understanding of local treatment for breast cancer using thermal ablation devices.

DATES: Submit written or electronic comments by November 24, 2008.

ADDRESSES: Submit written comments concerning this document 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*. To ensure timelier processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail.

FOR FURTHER INFORMATION CONTACT: Binita Ashar or Long Chen, Center for Devices and Radiological Health (HFZ–500), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 240–276–3600, e-mail: *binita.ashar@fda.hhs.gov* or *long.chen@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On July 24, 2003, FDA's General and Plastic Surgery Devices Advisory Panel discussed issues pertaining to the use of thermal ablation devices to percutaneously or non-invasively treat breast cancer by causing coagulation necrosis of the tumor. The panel discussed clinical trial issues pertaining to the local treatment of breast cancer using thermal ablation versus operative resection.

The panel addressed the following topics: (1) The level of evidence that would be required, in initial studies of treatment of primary breast cancer by minimally invasive ablation followed by immediate lumpectomy for pathologic examination of margins (i.e. ablate and resect studies), to permit initiation of studies that use minimally invasive ablation to definitively treat the cancer without followup resection (i.e., ablate and follow studies); (2) the type of pivotal study that could demonstrate the efficacy of a thermal ablation device to provide local breast cancer treatment in lieu of lumpectomy; (3) how to mitigate concerns regarding the effect of thermal ablation on surrounding breast tissue and radio/chemosensitivity; and (4) the limitations of breast imaging and its effect on patient selection and treatment followup. This panel's discussion of these issues has significantly affected FDA's regulation of these technologies.

Investigators studying the feasibility of thermal ablation devices for the treatment of breast cancers have refined their techniques. In fact, there have been small studies demonstrating nearly 100 percent ablation accuracy.

Unfortunately, the lack of uniformity among different feasibility study protocols has resulted in various study results that cannot be easily compared. Uniformity with respect to standardized evaluation of tissue biopsy pathology, selection of tumors amenable to ablation, image guidance for ablation, timing of ablation (with respect to lymph node biopsy, radiation therapy and chemotherapy), post-ablation imaging and assessment, and tissue pathology of ablated specimens would facilitate the assembly of results across both studies and ablation modalities and better allow the formulation of science-based hypotheses regarding best practices for breast cancer ablation therapy. The purpose of this critical path effort is to motivate the breast cancer ablation industry to standardize its feasibility study protocols so that data emerging are comparable in all respects except for the specific ablation modality. Such data could be used to hypothesize best practices and potentially serve as the basis for larger prospective clinical trials.

II. Registry Development and Implementation

FDA seeks comments on the possible role that a registry of breast cancer treatment using thermal ablation devices could have on advancing the development of thermal ablation devices. FDA is interested specifically on the role of such a registry on establishing standard imaging, pathological evaluation, and ablation timing protocols. In addition, FDA is interested in receiving comments on the feasibility, utility, benefits, and costs involved in the development and implementation of such standardization and on FDA's role in such a process.

A. Development of a Registry of Breast Cancer Treatment Using Thermal Ablation Devices

The agency believes that a registry for breast cancer treatments using thermal ablation devices would motivate the development and implementation of standardized protocols for pathology and imaging assessments for diagnosis and treatment of breast cancers, and followup of thermally ablated breast cancers. In addition, there would be a central place for information regarding patient selection factors, device attributes, device treatment settings and strategy, and device use integration into the multimodality treatment plan for patients with breast cancer. The patient selection, device attributes, device treatment settings and strategy, and patient treatment regimen information could include the following:

Patient Selection
- Demographics;
- Tumor imaging characteristics;
- Tumor size;
- Tumor nodal status;
- Tumor metastases;
- Tumor histology; and
- Tumor markers

Device Attributes
- Manufacturer, make, and model; and
- Unique device attributes (e.g., size, length, configuration, software version)

Device Treatment Settings and Strategy
- Thermal ablation modality;
- Tumor imaging modality for treatment localization;
- Treatment settings used to achieve ablation (relevant to modality used); and
- Treatment strategy (e.g. method for overlapping treatments, target ablation volume, method of catheter positioning)

Treatment Regimen
- Care path (i.e. timing of ablation with respect to chemotherapy, operative therapy and/or radiation therapy);
- Device application (e.g. time, target temperature, impedance, temperature achieved);
- Anesthesia;
- Chemotherapy treatment;
- Operative treatment;
- Radiation treatment; and
- Image guidance.

Patient Followup
- Duration;
- Imaging (e.g. MRI field, name of contrast agent, dose, pulse sequence used, post processing);
- Pathology assessment protocol of the ablated specimen;
- Adverse events; and
- Long term patient outcomes (i.e. overall survival, disease free survival, local recurrence).

B. Primary Benefits of Implementing a Registry of Breast Cancer Treatment Using Thermal Ablation Devices

We believe that the registry could be used to share experience. Practitioners could then refine best practices for imaging and pathologic assessment of breast cancers treated using thermal ablation. Such uniformity could identify conditions under which imaging might be a good surrogate for pathology and might serve to identify genotypes of responders versus nonresponders. This information could help our understanding of the safety and effectiveness associated with thermal ablation device use for breast cancer treatment and could better inform the decisions made by study investigators who are considering expanding their study into pivotal trials.

C. Ancillary Benefits

There may also be secondary or ancillary benefits from the use of a registry for thermal device ablation treatments for breast cancer. These benefits include improved data management across the industry of thermal ablation devices and associated healthcare cost savings. A registry could also facilitate the automatic capture of important information about the learning curve associated with thermal device use and patient factors affecting thermal ablation device use. This registry could also be used to help validate imaging findings with long term pathological assessments and patient outcomes.

III. Agency Request for Information

In light of the potential benefits highlighted previously, FDA is interested in gathering information about the feasibility, utility, benefits, and costs associated with the development and implementation of a registry of breast cancer treatment using thermal ablation devices. We are also interested in obtaining information about existing registries that may be modified to include breast cancer thermal ablation information and parties that would be interested in collaborating with the agency on this effort. Therefore, we invite comments and available data on the following questions:

Stakeholder Role and Involvement for Developing a Registry of Breast Cancer Treatment Using Thermal Ablation Devices

1. What should be the role, if any, of FDA in the development and implementation of a registry for breast cancer treatments using thermal ablation devices?
2. What are the incentives for establishing uniform, standardized imaging and pathological assessment techniques for such a registry?
3. What are the barriers for establishing a registry for breast cancer thermal ablation treatments? What suggestions would you have for overcoming these barriers?
4. Are there academic groups, industry groups, professional societies, or other organizations that would be interested in partnering with FDA and/or other entities to develop or implement a registry for breast cancer treatments using thermal ablation devices?
5. What existing databases could be feasibly modified to serve as the repository of a registry for breast cancer treatments using thermal ablation and meet the needs of all involved stakeholders?

Developing a Registry of Breast Cancer Treatments Using Thermal Ablation Devices

6. How should a registry for breast cancer treatments using thermal ablation devices be developed? What data analysis methods need to be considered when developing the registry data set?

7. Have you implemented some form of a registry for breast cancer thermal ablation treatments already? Please describe the extent of implementation, and type of data being collected.

8. Should a registry be considered for all thermal ablation device applications for cancer treatment? If yes, why? If not, what thermal ablation device uses should be considered for data capture in a registry?

9. What solutions have you developed or do you think could be developed for addressing the various technical use, pathological, imaging and other treatment assessment problems that might arise in developing and implementing a registry for breast cancer or other cancer treatments using thermal ablation devices?

Criteria for Data Inclusion from Breast Cancer Treatments Using Thermal Ablation Devices

10. What is the minimum data set that should be associated with a device use session? Would this minimum data set differ for different devices? If so, how?

11. How would the data in the minimum data set be used to improve patient safety? What other data would improve patient safety?

12. How and by whom should the registry and its associated minimum data set be obtained and maintained?

13. What information should be accessible by the public, healthcare providers, professional organizations, FDA, other Federal Agencies, the industry, and individual manufacturers? How would the information be accessible?

14. What type of proprietary information needs to be excluded?

15. Should data from all thermal ablation device investigators be included or should the data be limited to include only investigators that have received a certain level of training for device use?

Registry Benefits and Costs

16. From your perspective, how could a registry be best used among competing manufacturers of similar product lines? What obstacles do you see in using such an approach for justifying marketing claims?

17. From your perspective, should data previously collected or currently being collected be incorporated by investigators studying the effects of thermal ablation treatment for breast cancer be included in the registry? If so, why, and under what circumstances? If not, why not?

18. From your perspective, what specific public health and patient safety benefits could be gained from having a standardized registry for breast cancer treatments using thermal ablation devices? In addition, how would such a system contribute to meeting device recall and adverse event reporting requirements, and to reducing medical error? Please submit detailed data to support benefits you identify.

19. From your perspective, what are the startup costs measured in time and other resources associated with the development, implementation, and use of a registry for breast cancer treatments using thermal ablation devices? Please submit detailed data to support these cost estimates.

20. If you have already implemented a form of a registry for breast or other cancer treatments using thermal ablation devices, what investments in equipment, training, and other human and physical resources were necessary to implement the use of such a database? What factors influenced your decision to implement such a system?

21. From your perspective, what are the obstacles to implementing or using a registry for breast cancer treatments using thermal ablation devices?

IV. Comments

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

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

V. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site address, but is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.)

1. Panel transcript and questions regarding percutaneous and thermal ablation treatment of breast cancer in lieu of operative resection (see *http://www.fda.gov/OHRMS/DOCKETS/AC/03/questions/3973q1_Breast%20ca%20Questions.htm* and *http://www.fda.gov/OHRMS/DOCKETS/AC/03/transcripts/3973t1.htm*.

2. Gliklich, R.E., N.A Dreyer, eds. ''Registries for Evaluating Patient Outcomes: A User's Guide.'' (Prepared by Outcome DEcIDE Center [Outcome Sciences, Inc. dba Outcome] under Contract No. HHSA29020050035I TO1.) AHRQ Publication No. 07–EHC001–1. Rockville, MD: Agency for Healthcare Research and Quality. April 2007.

3. Goldberg, S.N., et al. ''Image Guided Tumor Ablation: Proposal for Standardization of Terms and Reporting Criteria,'' *Radiology* 2003; 228: 335–345.

4. Goldberg, S.N., et al. ''Image Guided Tumor Ablation: Standardization of Terminology and Reporting Criteria,'' *Journal of Vascular and Interventional Radiology* 2005; 16: 765–778.

Dated: May 19, 2008.

Jeffrey Shuren,

Assistant Commissioner for Policy and Planning.

[FR Doc. E8–11899 Filed 5–27–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2008–0050]

Data Privacy and Integrity Advisory Committee

AGENCY: Office of the Secretary, DHS.

ACTION: Notice of Federal Advisory Committee Meeting.

SUMMARY: The Data Privacy and Integrity Advisory Committee will meet on June 11, 2008 in Arlington, VA. This meeting will be open to the public.

DATES: The Data Privacy and Integrity Advisory Committee will meet on Wednesday, June 11, 2008 from 9 a.m. to 12 p.m. and 1:30 p.m. to 4 p.m. Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held in Galleries I and II of the Hilton Arlington Hotel, 950 North Stafford Street, Arlington, Virginia 22203. Send written materials, comments, and requests to make oral presentations to Ken Hunt, Executive Director, Data Privacy and Integrity Advisory Committee, Department of Homeland Security, Washington, DC 20528. Written

materials, comments, and requests to make oral presentations at the meeting should reach the contact person listed by June 5, 2008. Requests to have a copy of your material distributed to each member of the committee prior to the meeting should reach the persons listed under **FOR FURTHER INFORMATION CONTACT**, below, by June 5, 2008. Persons wishing to make comments or who are unable to attend or speak at the meeting may submit comments at any time. All submissions received must include the docket number: DHS–2008–0050 and may be submitted by any one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow instructions for submitting comments on the Web site.
- *E-mail: PrivacyCommittee@dhs.gov.* Include docket number in the subject line of the message.
- *Fax:* (866) 466–5370.
- *Mail:* Mr. Ken Hunt, Executive Director, Data Privacy and Integrity Advisory Committee, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the words ''Department of Homeland Security Data Privacy and Integrity Advisory Committee'' and the docket number: DHS–2008–0050. Comments received will also be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the DHS Data Privacy and Integrity Committee, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Hugo Teufel III, Chief Privacy Officer, or Ken Hunt, Executive Director, Data Privacy and Integrity Advisory Committee, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–0780 or by fax (703) 235–0442, or by e-mail *PrivacyCommittee@dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463).

During the meeting, the DHS Chief Privacy Officer will provide an update on the activities of the DHS Privacy Office. In the morning session, invited speakers will discuss the Privacy and Civil Liberties Oversight Board and the DHS Office for Civil Rights and Civil Liberties. The Subcommittees will update the Committee on their current work. In the afternoon session, speakers will discuss privacy protections and concerns within E-Verification. A tentative agenda is posted on the Privacy Advisory Committee Web site at *http://www.dhs.gov/privacy.*

At the discretion of the Chair, members of the public may make brief (i.e., no more than three minutes) oral presentations from 3:30 p.m.—4 p.m. If you would like to make an oral presentation at the meeting, please register in advance or sign up on the day of the meeting. If you would like a copy of your material(s) distributed to each member of the committee in advance, please submit 22 copies to Ken Hunt by June 5, 2008.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Ken Hunt as soon as possible.

Dated: May 20, 2008.

Hugo Teufel,

Chief Privacy Officer.

[FR Doc. E8–11875 Filed 5–27–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–300, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form N–300, Application to File Declaration of Intention; OMB Control No. 1615–0078.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 3, 2008, at 73 FR 11431 allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 27, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via email at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0078. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

(2) Evaluate the accuracy of the 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 a currently approved information collection.

(2) *Title of the Form/Collection:* Application to File Declaration of Intention.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–300. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. This form will be used by permanent residents to file a declaration of intention to become a citizen of the United States. This collection is also used to satisfy documentary requirements for those seeking to work

in certain occupations or professions, or to obtain various licenses.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 433 responses at 45 minutes (.75) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 325 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS website at: *http://www.regulations.gov/search/index.jsp.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: May 20, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–11819 Filed 5–27–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2445–08; DHS Docket No. USCIS–2008–0004]

RIN 1615–ZA68

Submission of Revised Form I–821, Application for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services (USCIS), DHS.

ACTION: Notice.

SUMMARY: This Notice announces that effective June 27, 2008 only Form I–821, Application for Temporary Protected Status with a revision date of October 17, 2007, will be accepted for filing applications for Temporary Protected Status (TPS). The Form I–821, with the October 17, 2007, revision date can be found on the USCIS Web site at *http://www.uscis.gov.* Accordingly, beginning on June 27, 2008, if you are a national of a country currently designated for Temporary Protected Status (TPS) (or an alien with no nationality who last habitually resided in a country currently designated for TPS), you must submit your application for initial registration or re-registration using the Form I–821 with the October 17, 2007, revision date. Individuals who have already filed for the most recent TPS registration or re-registration periods effective for their specific countries do not need to submit this revised Form I–821 until the next re-registration period for their country's TPS designation.

DATES: This Notice is effective June 27, 2008. After June 27, 2008, only Form I–821 with the October 17, 2007, revision date will be accepted by USCIS.

FOR FURTHER INFORMATION CONTACT: Shelly Sweeney, Status and Family Branch, Office of Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529, telephone (202) 272–1533. This is not a toll-free call.

Note: The phone number provided here is solely for questions regarding this notice and the information contained herein. It is not for individual case status inquiries. Applicants seeking information about the status of their individual case can check Case Status Online available on the USCIS Web site at *http://www.uscis.gov,* or applicants may call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).

SUPPLEMENTARY INFORMATION:

What is Form I–821?

Form I–821 is an application used by aliens to apply for TPS for the first time, as well as by aliens applying to re-register for TPS. The current version of Form I–821 can be found at *http://www.uscis.gov.*

What version of the Form I–821 will USCIS accept?

Any alien who files an initial application or re-registration application for TPS on or after June 27, 2008, must submit Form I–821 with the October 17, 2007, revision date.

Why will USCIS not accept prior versions of Form I–821?

The Form I–821 with the October 17, 2007, revision date contains additional questions regarding the applicant's eligibility for TPS that are not contained on the Form I–821 with prior revision dates. As such, previous versions of Form I–821 will no longer be accepted by USCIS.

What will happen if you file previous versions of Form I–821?

Beginning on June 27, 2008, USCIS will no longer accept any versions of Form I–821 dated prior to the October 17, 2007, revision date. TPS applications received containing previous versions of Form I–821 will be rejected and returned to the applicant, with accompanying fees for resubmission with the proper version of Form I–821.

Where should you file the revised Form I–821?

For filing instructions, refer to the most recently published **Federal Register** notice for the specific country designation under which you are applying. You may also check the USCIS Web site at *http://www.uscis.gov* or contact the USCIS National Customer Service Center at 1–800–375–5283.

Can I electronically file the revised form I–821?

If you are filing for re-registration during the re-registration period for your country and do not need to submit supporting documentation with your application, you may file your application electronically. To file your application electronically, follow the directions on the USCIS Web site at *http://www.uscis.gov.* You may not file your application electronically if you are filing for TPS for the first time.

Paperwork Reduction Act

The use of the revised Form I–821 has been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB Control Number for this collection is 1615–0043.

Dated: May 9, 2008.

Jonathan R. Scharfen,

Acting Director, U.S. Citizenship and Immigration Services.

[FR Doc. E8–11816 Filed 5–27–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2008–N0078; 30120–1113–0000–F6]

Endangered and Threatened Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of permit applications; request for comments.

SUMMARY: The following applicants have applied for permits to conduct certain activities with endangered species.

DATES: We must receive written comments on or before June 27, 2008.

ADDRESSES: Regional Director, Attn: Peter Fasbender, U.S. Fish and Wildlife Service, Ecological Services, 1 Federal Drive, Fort Snelling, MN 55111–4056; electronic mail, *permitsR3ES@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Peter Fasbender (612) 713–5343.

SUPPLEMENTARY INFORMATION:

Endangered Species

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), with some exceptions, prohibits activities affecting endangered species unless authorized by a permit from the Service. Before issuing a permit, we invite public comment on it. Accordingly, we invite public comment on the following applicants' permit applications for certain activities with endangered species authorized by section 10(a)(1)(A) of the Act and the regulations governing the taking of endangered species (50 CFR part17). Submit your written data, comments, or requests for copies of the complete applications to the address shown in **ADDRESSES**.

Permit Number TE089872

Applicant: Macalester College, St. Paul, Minnesota.

The applicant requests a permit renewal to take Higgins' eye pearlymussel (*Lampsilis higginsi*) and winged mapleleaf (*Quadrula fragosa*) in Minnesota and Wisconsin. This permit renewal is requested to continue long-term mussel and habitat monitoring in the St. Croix River aimed at enhancement of survival of the species in the wild.

Permit Number TE125333–1

Applicant: Francesca Cuthbert, University of Minnesota, St. Paul, Minnesota.

The applicant requests a permit renewal to take piping plover (*Charadrius melodus*) in Michigan and Wisconsin. The research entails capture and marking of piping plovers, erecting nesting enclosures to improve nesting success, and salvaging eggs and nestlings to enhance the survival of the species in the wild.

Permit Number TE130900

Applicant: EnviroScience, Incorporated, Stow, Ohio.

The applicant requests a permit renewal to take (collect) listed fish and mussel species throughout Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. The following species may be collected and temporarily held in the course of surveys and habitat studies to determine presence or absence of the species: Clubshell (*Pleurobema clava*), Northern riffleshell (*Epioblasma torulosa rangiana*), Orange-footed pimpleback pearlymussel (*Plethobasus cooperianus*), Pink mucket pearlymussel (*Lampsilis orbiculata*), Rough pigtoe (*Pleurobema plenum*), Purple cat's paw pearlymussel (*Epioblasma obliquata obliquata*), White cat's paw pearlymussel (*Epioblasma obliquata perobliqua*), Fanshell (*Cyprogenia stegaria*), Fat pocketbook (*Potamilus capax*), Higgins' eye pearlymussel (*Lampsilis higginsi*), Winged mapleleaf (*Quadrula fragosa*), White wartyback (Plethobathus cicatricosus), Fat three-ridge (*Amblema neislerii*), Chipola slabshell (*Elliptio chipolaensis*), Purple bankclimber (*Elliptoideus sloatianus*), Upland combshell (*Epioblasma metrastriata*), Southern acornshell (*Epioblasma othcaloogeniss*), Fine-lined pocketbook (*Lampsilis altilis*), Shiny-rayed pocketbook (*Lampsilis subangulata*), Alabama moccasinshell (*Medionidus acutissimus*), Coosa moccasinshell (*Medionidus parvulus*), Gulf moccasinshell (*Medionidus penicillatus*), Ochlockonee moccasinshell (*Medionidus simpsonianus*), Southern clubshell (*Pleurobema decisum*), Southern pigtoe (*Pleurobema georgianum*), Ovate clubshell (*Pleurobema perovatum*), Triangular kidneyshell (*Ptychobrachus greeni*), Oval pigtoe (*Pleurobema pyriforme*), Shortnose sturgeon (*Acipenser brevirostrum*), Blue shiner (*Cyprinella caerulea*), Cherokee darter (*Etheostoma scotti*), Etowah darter (*Etheostoma etowahae*), Amber darter (*Percina antesella*), Goldline darter (*Percina aurolineata*), Conasauga logperch (*Percina jenkinsi*), and Snail darter (*Percina tanasi*). Activities are proposed to identify listed species within proposed project areas and to assist in the development of methods and alternatives to minimize or avoid impacts to those listed species. Surveys are used to enhance survival of the species in the wild.

Permit Number: TE135267

Applicant: Robert Vande Kopple, Pellston, Michigan.

The applicant requests a permit renewal to take Hungerford's crawling water beetle (*Brachius hungerfordi*). The scientific research involves surveying potential habitat to document the species range and to determine dietary habits of the species. The work is aimed at enhancement of survival of the species in the wild.

Permit Number TE144832

Applicant: Detroit Zoological Society, Royal Oak, MI.

The applicant requests a permit amendment to take piping plover (*Charadrius melodus*) in Michigan. The Detroit Zoological Society currently holds a permit to take Karner blue butterfly (*Lycaeides melissa samuelis*) in Michigan for a captive rearing study and are requesting the same authority for piping plover eggs salvaged from abandoned nests in the wild. The work is a collaborative effort between the applicant and the University of Minnesota, who will salvage the eggs from abandoned nests. The applicant will incubate the eggs, hand raise the chicks, and release fledglings to the wild. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number TE179707

Applicant: Sanders Environmental Inc., Bellefonte, Pennsylvania.

The applicant requests a permit to take the Indiana bat (*Myotis sodalis*) throughout Illinois, Indiana, Iowa, Michigan, Missouri, Ohio, and Wisconsin. The activities proposed involve capture and marking individual bats to identify populations of this listed species and to develop methods to minimize or avoid project related impacts. The surveys are used to formulate project features aimed at enhancement of survival of the species in the wild.

Permit Number TE179708

Applicant: Western EcoSystems Technology, Inc., Cheyenne, Wyoming.

The applicant requests a permit to take the Indiana bat (*Myotis sodalis*) throughout its range. The activities proposed involve capture and marking individual bats to identify populations of this listed species and to develop methods to minimize or avoid project-related impacts. The surveys are used to formulate project features aimed at enhancement of survival of the species in the wild.

Permit Number TE179711

Applicant: Bernardin-Lochmueller & Associates, Evansville, Indiana.

The applicant requests a permit to take the Indiana bat (*Myotis sodalis*) throughout the range of the species. The activities proposed involve capture and marking individual bats to identify populations of this listed species and to develop methods to minimize or avoid project-related impacts. The surveys are used to formulate project features aimed at enhancement of survival of the species in the wild.

Permit Number TE182430

Applicant: Nicholas Owens, Oak Brook, IL.

The applicant requests a permit to take Fanshell (*Cyprogenia stegaria*), Pink Mucket pearlymussel (*Lampsilis abrupta*), Higgins' eye pearlymussel (*Lampsilis higginsi*), Orangefoot Pimpleback pearlymussel (*Plethobasus cooperianus*), Clubshell (*Pleurobema clava*), and Fat Pocketbook (*Potamilus capax*) throughout the States of Illinois and Indiana. This permit is requested to determine presence or absence of species in conjunction with other projects, and is aimed at enhancement of survival of the species in the wild.

Permit Number TE182436

Applicant: Illinois Natural History Survey, Champaign, IL.

The applicant requests a permit to take the Indiana bat (*Myotis sodalis*) throughout the State of Illinois. This permit is requested to determine presence or absence of the species and to determine distribution of the species. Activities are aimed at enhancement of survival of the species in the wild.

Public Comments

We solicit public review and comments on these permit applications. Please refer to the respective permit number when you submit comments. Comments and materials we receive are available for public inspection, by appointment, during normal business hours at the address shown in the **ADDRESSES** section. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment-including your personal identifying information-may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

National Environmental Policy Act (NEPA)

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the activities proposed in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: May 13, 2008.

Kyla Hastie,

Acting Assistant Regional Director, Ecological Services, Region 3, Fort Snelling, Minnesota.

[FR Doc. E8–11835 Filed 5–27–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–FHC–2008–N00133; 81331–1334–8TWG–W4]

Trinity Adaptive Management Working Group

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The Trinity Adaptive Management Working Group (TAMWG) affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River (California) restoration efforts to the Trinity Management Council (TMC). This notice announces a TAMWG meeting, which is open to the public.

DATES: TAMWG will meet from 1 p.m. to 5 p.m. on Monday, June 9, 2008 and from 8:30 to 1 on Tuesday, June 10, 2008.

ADDRESSES: The meeting will be held at the Weaverville Victorian Inn, 1709 Main St., 299 West, Weaverville, CA 96093.

FOR FURTHER INFORMATION CONTACT: Randy A. Brown of the U.S. Fish and Wildlife Service, 1655 Heindon Road, Arcata, CA 95521; telephone: (707) 822–7201. Randy A. Brown is the TAMWG Designated Federal Officer. For background information and questions regarding the Trinity River Restoration Program (TRRP), please contact Douglas Schleusner, Executive Director, Trinity River Restoration Program, P.O. Box 1300, 1313 South Main Street, Weaverville, CA 96093; telephone: (530) 623–1800; E-mail: *dschleusner@mp.usbr.gov*

SUPPLEMENTARY INFORMATION: Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), this notice announces a meeting of the (TAMWG).

Primary objectives of the meeting will include discussion of the following topics:

- Reservoir operations, minimum pool criteria, and carryover storage policies,
- Steelhead population trends and Trinity River Hatchery steelhead production,
- TRRP decision making/CDR situation assessment,
- Updates on TRRP budget, flow schedule, monitoring activities, and
- TAMWG membership appointments.

Completion of the agenda is dependent on the amount of time each item takes. The meeting could end early if the agenda has been completed.

Dated: May 13, 2008.

Joseph Polos,

Supervisory Fishery Biologist, Arcata Fish and Wildlife Office, Arcata, CA.

[FR Doc. E8–11837 Filed 5–27–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

[Docket No. MMS–2008-OMM–0026]

MMS Information Collection Activity: 1010–0057, 30 CFR Part 250, Subpart C, Pollution Prevention and Control, Correction of an Information Collection Request; Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of an information collection (1010–0057) extension.

SUMMARY: This is a correction to the May 2, 2008 (73 FR 24308), request for comments. This notice is necessary to correct the hour burden for the requirements in § 250.301(a) in the burden table. The information collection request (ICR) concerns the paperwork requirements in the regulations under 30 CFR Part 250, Subpart C, ''Pollution Prevention and Control.''

DATES: Submit written comments by July 28, 2008.

ADDRESSES: You may submit comments by any either of the following methods listed below.

- Electronically: go to *http://www.regulations.gov.* Under the tab ''More Search Options,'' click Advanced Docket Search, then select ''Minerals Management Service'' from the agency drop-down menu, then click ''submit.'' In the Docket ID column, select MMS–2008-OMM–0026 to submit public comments and to view supporting and related materials available for this rulemaking. Information on using *Regulations.gov,* including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link. The MMS will post all comments.
- Mail or hand-carry comments to the Department of the Interior; Minerals Management Service; Attention: Cheryl Blundon; 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference ''Information Collection 1010–0057'' in your subject line and mark your message for return receipt. Include

your name and return address in your message text.

FOR FURTHER INFORMATION CONTACT: Cheryl Blundon, Regulations and Standards Branch, (703) 787–1607. You may also contact Cheryl Blundon to obtain a copy, at no cost, of the regulations that require the subject collection of information.

SUPPLEMENTARY INFORMATION: *Title:* 30 CFR Part 250, Subpart C, ''Pollution Prevention and Control.''

OMB Control Number: 1010–0057.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition.

Section 1332(6) states that ''operations in the [O]uter Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.'' Section 1334(a)(8) requires that regulations prescribed by the Secretary include provisions ''for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*), to the extent that activities authorized under this Act significantly affect the air quality of any State.'' Section 1843(b) calls for ''regulations requiring all materials, equipment, tools, containers, and all other items used on the Outer Continental Shelf to be properly color coded, stamped, or labeled, wherever practicable, with the owner's identification prior to actual use.''

This information collection (IC) request for comments concerns the regulations at 30 CFR Part 250, Subpart C, Pollution Prevention and Control. It also covers the related Notices to Lessees and Operators (NTLs) that the Minerals Management Service (MMS) issues to clarify and provide additional guidance on some aspects of the regulations.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2) and under regulations at 30 CFR 250.197, ''Data and information to be made available to the public or for limited release.'' No items of a sensitive nature are collected. Responses are mandatory.

Frequency: On occasion, monthly, or annually, daily for inspection recordkeeping; varies by section.

Estimated Number and Description of Respondents: Approximately 130 Federal OCS oil and gas or sulphur lessees and 17 states.

Estimated Reporting and Recordkeeping ''Hour'' Burden: The currently approved annual reporting burden for this collection is 226,451 hours. The following chart details the individual components and respective hour burden estimates of this ICR. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Citation 30 CFR 250 subpart C and NTL(s)	Reporting and recordkeeping requirement	Hour burden
	Reporting Requirements	
300(b)(1), (2)	Obtain approval to add petroleum-based substance to drilling mud system or approval for method of disposal of drill cuttings, sand, & other well solids, including those containing NORM.	3
300(c)	Mark items that could snag or damage fishing devices	0.5
300(d)	Report items lost overboard	1
303(a) thru (d), (i), (j); 304(a), (f)	Submit, modify, or revise Exploration Plans and Development and Production Plans; submit information required under 30 CFR part 250, subpart B.	Burden covered under 1010–0151.
303(k); 304(a), (g)	Collect and report air quality emissions related data (such as facility, equipment, fuel usage, and other activity information) for input into State and regional planning organizations modeling.	3 hrs per month × 12 months = 36
303(k); 304(a), (g)	Monitor air quality emissions and submit data to MMS or to a State (new 1-year study of sites in the western/ central GOM area on ozone and regional haze air quality; data collection in 2005; report submitted in 2006).	2 hours per month × 12 months = 24
303(l); 304(h)	Collect and submit meteorological data (not routinely collected)	None planned in the next 3 years.
304(a), (f)	Affected State may submit request to MMS for basic emission data from existing facilities to update State's emission inventory.	4
304(e)(2)	Submit compliance schedule for application of best available control technology (BACT).	40
304(e)(2)	Apply for suspension of operations	Burden covered under 1010–0114.
304(f)	Submit information to demonstrate that exempt facility is not significantly affecting air quality of onshore area of a State.	15
300–304	General departure and/or alternative compliance requests not specifically covered elsewhere in subpart C regulations.	2
	Recordkeeping Requirements	
300(d)	Record items lost overboard on daily operations report	1
301(a)	Inspect drilling/production facilities daily for pollution; maintain inspection/repair records 2 years.	Manned facilities – ¼ hr/day × 365 days = 91.25

Citation 30 CFR 250 subpart C and NTL(s)	Reporting and recordkeeping requirement	Hour burden
	.....	Unmanned facilities – 1/12 hr × every 3rd day (365/3 = 122 days) = 10.17

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have identified no non-hour cost burdens for this collection.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *''. Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the ''non-hour cost'' burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this notice and address them in our submission for OMB approval. As a result of your comments, we will make any necessary adjustments to the burden in our submission to OMB.

Public Comment Procedures: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment-including your personal identifying information-may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

MMS Information Collection Clearance Officer: Arlene Bajusz (202) 208–7744.

Dated: May 20, 2008.

E.P. Danenberger,

Chief, Office of Offshore Regulatory Programs.

[FR Doc. E8–11809 Filed 5–27–08; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–352]

Andean Trade Preference Act: Impact on the U.S. Economy and on Andean Drug Crop Eradication

AGENCY: United States International Trade Commission.

ACTION: Notice of public hearing and opportunity to submit comments in connection with the 2007 report on the Andean Trade Preference Act (ATPA).

SUMMARY: Section 206 of the ATPA (19 U.S.C. 3204) requires the Commission to report biennially to the Congress by September 30 of each reporting year on the economic impact of the Act on U.S. industries and U.S. consumers, as well as on the effectiveness of the Act in promoting drug-related crop eradication and crop substitution efforts by beneficiary countries. This series of biennial reports was instituted as investigation No. 332–352, *Andean Trade Preference Act: Impact on the U.S. Economy and on Andean Drug Crop Eradication.* The Commission has scheduled a public hearing for its 2008 ATPA report, covering calendar year 2007, for July 22, 2008.

DATES: July 9, 2008: Deadline for filing requests to appear at the public hearing.

July 15, 2008: Deadline for filing pre-hearing briefs and statements.

July 22, 2008: Public hearing.

July 29, 2008: Deadline for filing post-hearing briefs and statements and all other written submissions.

September 30, 2008: Transmittal of Commission report to Committee on Ways and Means.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm.*

FOR FURTHER INFORMATION CONTACT: James Stamps (202–205–3227, or *james.stamps@usitc.gov*) or Nannette Christ (202–205–3263, or *nannette.christ@usitc.gov*), Country and Regional Analysis Division, Office of Economics, U.S. International Trade Commission, Washington, DC 20436. General information concerning the Commission may be obtained by accessing its Internet server (*http://www.usitc.gov*).

Background: Section 206 of the Andean Trade Preference Act (ATPA) (19 U.S.C. 3204) requires that the Commission submit biennial reports to the Congress regarding the economic impact of the Act on U.S. industries and consumers and, in conjunction with other agencies, the effectiveness of the Act in promoting drug-related crop eradication and crop substitution efforts of the beneficiary countries. Section 206(b) of the Act requires that each report include:

(1) The actual effect of ATPA on the U.S. economy generally as well as on specific domestic industries which produce articles that are like, or directly competitive with, articles being

imported under the Act from beneficiary countries;

(2) the probable future effect that ATPA will have on the U.S. economy generally and on such domestic industries; and

(3) the estimated effect that ATPA has had on drug-related crop eradication and crop substitution efforts of beneficiary countries.

Notice of institution of the investigation and the schedule for such reports under section 206 of ATPA was published in the **Federal Register** of March 10, 1994 (59 FR 11308). The thirteenth report, covering calendar year 2007, is to be submitted by September 30, 2008.

Public Hearing: A public hearing in connection with this investigation will be held at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC, beginning at 9:30 a.m. on July 22, 2008. Requests to appear at the public hearing should be filed with the Secretary, no later than 5:15 p.m., July 9, 2008, in accordance with the requirements in the ''Submissions'' section below. All pre-hearing briefs and statements should be filed not later than 5:15 p.m., July 15, 2008, and all post-hearing briefs and statements should be filed not later than 5:15 p.m., July 29, 2008. In the event that, as of the close of business on July 9, 2008, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant may call the Secretary to the Commission (202–205–2000) after July 9, 2008, for information concerning whether the hearing will be held.

Written Submissions: In lieu of or in addition to participating in the hearing, interested parties are invited to submit written statements concerning this investigation. All written submissions should be addressed to the Secretary, and should be received not later than 5:15 p.m., July 29, 2008. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 requires that a signed original (or a copy so designated) and fourteen (14) copies of each document be filed. In the event that confidential treatment of a document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

Committee staff has indicated that the Committee intends to make the Commission's report available to the public in its entirety, and has asked that the Commission not include any confidential business information or national security classified information in the report that the Commission sends to the Committee. Any confidential business information received by the Commission in this investigation and used in preparing this report will not be published in a manner that would reveal the operations of the firm supplying the information.

Issued: May 21, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–11842 Filed 5–27–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–649]

In the Matter of Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same (IV); 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 21, 2008, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Tessera, Inc. of San Jose, California. A supplement to the complaint was filed on May 14, 2008. 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 chips with minimized chip package size and products containing same that infringe certain claims of U.S. Patent No. 5,679,977, U.S. Patent No. 5,852,326 and U.S. Patent No. 6,433,419. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue exclusion orders 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: Kecia J. Reynolds, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2580.

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 (2007).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on May 20, 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 chips with minimized chip package size or products containing same that infringe one or more of claims 1, 2, 6, 12, 16–19, 21, 24–26, and 29 of U.S. Patent No. 5,852,326; claims 1–11, 14, 15, 19, and 22–24 of U.S. Patent No. 6,433,419; and claim 17 of U.S. Patent No. 5,679,977; 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 complainant is—Tessera, Inc., 3099 Orchard Drive, San Jose, California 95134.

(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:

ASE Inc., 26 Chin Third Road, Nantze Export Processing Zone, Nantze, Kaohsiung, Taiwan.

ASE Test Limited, 10 West Fifth Street, Nantze Export Processing Zone, Kaohsiung, Taiwan.

ASE (U.S.) Inc., 3590 Peterson Way, Santa Clara, California 95054.

ChipMOS Technologies Inc., No. 1 R&D Road 1, Science Based Industrial Park, Hsinchu, Taiwan.

ChipMOS Technologies (Bermuda) Ltd., 11F, No. 3, Lane 91, Dongmei Road, Hsinchu, Taiwan.

ChipMOS USA Inc., 2890 N 1st Street, San Jose, California 95134.

Siliconware Precision Industries, Co., Ltd., No. 123, Sec. 3, Da Fong Road, Tantzu, Taichung, Taiwan.

Siliconware USA Inc., 1735 Technology Drive, #300, San Jose, California 95110.

STATS Chippac (BVI) Limited, Craigmuir Chambers, Road Town, Tortola, British Virgin Islands.

STATS Chippac, Ltd., 10 Ang Mo Kio Street 65, #50–17/20, Techpoint, Singapore 569059.

STATS Chippac, Inc., 47400 Kato Road, Fremont, California 94538.

(c) The Commission investigative attorney, party to this investigation, is Kecia J. Reynolds, 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 Theodore Essex is designated as the presiding administrative law judge.

Any order deciding a motion for stay should be issued in the form of an initial determination (ID).

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.

Issued: May 21, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–11844 Filed 5–27–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–627]

In the Matter of Certain Short Wavelength Semiconductor Lasers and Products Containing Same; Notice of Commission Decision Not To Review an Initial Determination Granting Complainant's Motion To Amend the Complaint to Add Five Additional Respondents

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 6) issued by the presiding administrative law judge (''ALJ'') granting a motion to file an amended complaint adding five additional respondents in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Paul M. Bartkowski, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5432. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server 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.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on January 3, 2008, based on a complaint filed by Seoul Semiconductor Company, Ltd. (''SSC'') of Seoul, Korea. The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of short wavelength semiconductor lasers (''SWCLs'') and products containing the same that infringe claim 1 of U.S. Patent No. 5,321,713. The complaint initially named Nichia Corporation (''Nichia'') of Tokushima, Japan as the sole respondent.

On April 22, 2008, SSC moved to file an amended complaint naming the following five additional respondents: Hitachi, Ltd. of Tokyo, Japan; Hitachi America, Ltd. of Brisbane, CA; Panasonic Communications Co., Ltd. of Fukuoka, Japan; Matsushita Electric Industrial Co., Ltd. of Osaka, Japan; and LaCie Ltd. of Hillsboro, OR. On May 1, 2008, the Commission investigative attorney filed a response conditionally supporting the motion and Nichia filed an opposition to the motion.

On May 2, 2008, the ALJ issued the subject ID granting the motion. No petitions for review were filed. The Commission has determined not to review the subject ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.14 and 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.14, 210.42).

Issued: May 21, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–11843 Filed 5–27–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Two Amendments to Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA'')

Consistent with Section 122(d) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9622(d), and 28 CFR 50.7, notice is hereby given that on May 20, 2008, the United States lodged two amendments to the Consent Decree approved by the Court on February 23, 2001 in *United States of America* v. *Abex Aerospace Division, et al,* Civil No. 00-cv-012471 TJH(JWJx) (USDC C.D. Cal.). The original Consent Decree resolved the liability of certain defendants for the ''Phase 1a Area'' of the Site under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA''), 42 U.S.C. 9606 and 9607, as amended, and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973, as alleged in the Complaint filed in this matter.

The First Amendment primarily amends the Statement of Work under the original Consent Decree to add certain response activities necessary to address indoor air contamination observed at an indoor roller skating rink located adjacent to the Omega Chemical Corporation Superfund Site, listed on the National Priorities List on January 19, 1999, 64 FR 2950 (''Site''). The Second Amendment adds additional Settling Work Defendants, and Settling Cash Defendants to those covered by the original Consent Decree, as amended. The Second Amendment also incorporates additional volume and related payments of certain original Settling Cash Defendants, and corrects certain omissions and typographical errors in the caption. 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 Amendments. 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 20044–06529.

The Consent Decree Amendments may be examined at U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105 (contact Stephen Berninger, Esq. (415) 972–3909). During the public comment period, the Consent Decree Amendments 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, U.S. Department of Justice, P.O. Box 7611, 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 refer to *United States of America* v. *Abex Aerospace Division, et al,* Civil No. 00-cv-012471 TJH(JWJx) (USDC C.D. Cal.) (DOJ Ref. No. 90–11–3–06529), and enclose a check in the amount of $57.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–11846 Filed 5–27–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[No. 06–45]

Paul H. Volkman; Denial of Application

On February 10, 2006, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Paul H. Volkman, M.D. (Respondent), of Chillicothe, Ohio. The Order immediately suspended Respondent's DEA Certificate of Registration, AV6952837, as a practitioner, on the grounds that his continued registration during the pendency of the proceeding ''would constitute an imminent danger to public health and safety because of the substantial likelihood that [he] will continue to divert controlled substances to persons who will abuse these products.'' *Id.* at 12.

More specifically, the Show Cause Order alleged that in twelve instances, Respondent had prescribed multiple controlled substances to persons who, within days, died of overdoses of the drugs. *Id.* at 9–11. The Show Cause Order further alleged that Respondent had issued prescriptions to these persons for multiple controlled substances including opiates in schedule II (oxycodone) and/or schedule III (hydrocodone); schedule IV benzodiazepines such as diazepam and valium; and carisoprodol, a non-controlled drug which is nonetheless highly abused. *Id.; see also id.* at 3. Relatedly, the Order alleged that in July 2005, the assistant coroner for the county in which Respondent was practicing, had notified DEA ''that his staff [had] observed an increase in emergency room overdoses and believed that several recent drug-related deaths involving young [and] otherwise healthy individuals could be attributed to the consumption of large amounts of oxycodone, hydrocodone and alprazolam,'' which Respondent had dispensed. *Id.* at 8.

The Show Cause Order also alleged that DEA had received information from various distributors that Respondent was ordering excessive quantities of controlled substances. *Id.* Relatedly, the Show Cause Order alleged that during 2004, Respondent was the largest practitioner-purchaser of oxycodone in the country having purchased 438,000 dosage units, when the average amount of this drug purchased by other physicians ''was only 4,792 dosage units.'' *Id.* at 2.

The Show Cause Order further alleged that DEA investigators interviewed several of Respondent's patients who informed them that Respondent had prescribed controlled substances without performing physical examinations, that the clinic charged between $160 and $200 for an office visit, and that the clinic required that the patients pay cash and would not accept third-party payments from insurers, Medicare, Medicaid or worker's compensation. *Id.* at 4.

The Show Cause Order also alleged that on various dates, confidential sources had visited the clinic, and that Respondent had issued these persons prescriptions for controlled substances without performing physical examinations and other medical tests. *Id.* at 5. The Show Cause Order specifically alleged that on two occasions, the confidential sources had told the clinic's employees that their pain levels were ''one or two'' and ''zero'' on a scale of one-to-ten (with the latter being the most severe); that upon Respondent's asking them how they felt, the sources had told him ''fair'' and ''pretty good''; and that Respondent,

without performing a physical exam on either person, immediately issued to each of them, prescriptions for 180 tablets of hydrocodone/acetaminophen 10/650 mg., 90 tablets of diazepam 10 mg., and 60 tablets of carisoprodol. *Id.* at 5–6. Both sources then allegedly filled the prescriptions at Respondent's clinic for an additional charge. *Id.* at 6.

The Show Cause Order further alleged that in May 2005, DEA investigators received information from another confidential source who acknowledged his/her involvement in diverting controlled substances. *Id.* The source allegedly identified Respondent as a physician who would write prescriptions for Oxycontin and other controlled substances without performing a physical examination; the source allegedly stated that he and a friend had obtained from Respondent prescriptions for drugs which they then sold on the street. *Id.*

Next, the Show Cause Order alleged that in July 2005, DEA investigators conducted an accountability audit of the controlled substances which were ordered under Respondent's registration by the clinic where he worked. *Id.* at 7. The investigators allegedly found that Respondent did not maintain dispensing records in violation of Federal regulations. *Id.* Moreover, Respondent allegedly ''could not account for more than 850,000 dosage units of controlled substances that were ordered and dispensed under [his] DEA registration.'' *Id.* The Order specifically alleged that Respondent was short nearly 89,000 dosage units of alprazolam 2 mg., nearly 48,000 dosage units of diazepam 10 mg., 77,000 dosage units of hydrocodone/apap [1] (10/500 mg.), and more than 126,000 dosage units of hydrocodone/apap 10/650. *Id.* With respect to drugs containing oxycodone, the Order alleged, *inter alia,* that Respondent was short more than 49,000 dosage units of oxycodone 5 mg., 48,506 dosage units of oxycodone/apap (5/325 mg.), 165,500 dosage units of Roxicodone 15 mg., and 130,000 dosage units of Roxicodone 30 mg. *Id.* at 7–8.

Respondent requested a hearing on the allegations, and the matter was assigned to Administrative Law Judge (ALJ) Gail Randall. Following various extensions which both parties sought, as well as pre-hearing procedures,[2] a hearing was held in Columbus, Ohio on December 5–8, 2006, and January 9–10, 2007. At the hearing, both parties submitted documentary evidence and presented the testimony of witnesses.

Following the hearing, the Government submitted a brief containing its proposed findings, conclusions of law, and recommendations. Respondent chose not to submit a post-hearing brief and instead filed a petition for review with the Sixth Circuit.

On June 20, 2007, the ALJ issued her recommended decision (hereinafter cited as ALJ). In her decision, the ALJ found that ''[t]he record contains abundant evidence to demonstrate that the Respondent did not issue prescriptions 'in the usual course of his professional practice,''' and that he ''failed to limit his prescribing of controlled substances to cases where such medication would be provided for a legitimate medical purpose.'' ALJ at 39–40 (citation omitted). More specifically, the ALJ concluded that ''without adequate physical examinations and development of medical histories, the Respondent failed to adequately diagnose the patients,'' and yet ''prescribed controlled substances even when interacting with a patient for the first time.'' *Id.* at 40.

The ALJ further noted that ''Respondent prescribed the same combinations of controlled substances to a majority of his patients, again without adequate examinations or ongoing diagnoses,'' and that ''[t]his combination of drugs was common in the drug-abuse community'' and was known as ''a cocktail or the trifecta.'' *Id.* (int. quotation and citations omitted). Finally, the ALJ noted that ''Respondent treated at least sixteen patients between June of 2003 and February of 2006 who died of drug-related causes,'' and that ''Respondent's lack of adequate monitoring of these patients directly contributed to [their] deaths.'' *Id.* at 41.

The ALJ further noted that Respondent was dispensing controlled substances ''obtained through the use of [his] DEA registration,'' *id.,* and yet failed to maintain the required inventory and dispensing records and ''to adequately supervise the individuals to whom he had delegated such dispensing responsibilities.'' *Id.* at 43. Moreover, Respondent ''was unable to account for over one million tablets of controlled substances.'' *Id.* at 42. Finally, the ALJ noted that Respondent had failed to accept responsibility for his conduct. *Id.* at 44.

The ALJ thus concluded that the Government had established a prima facie case that Respondent's continued registration would be inconsistent with the public interest. *Id.* at 45. Because Respondent had failed to ''justify his past conduct'' and ''to provide adequate assurances that his future handling of controlled substances would meet the standards required of a DEA registrant,'' the ALJ recommended that I revoke his registration and deny his pending applications to renew and modify his registration. *Id.*

Respondent filed exceptions to the ALJ's decision raising numerous issues, and the Government filed a response. More specifically, Respondent contends that the Government failed to provide adequate notice and thus violated his rights under the Due Process Clause because it expanded its presentation beyond the allegations of the Show Cause Order, Exceptions at 4–10; that the proceeding violated his First Amendment rights because the ALJ failed to exclude an e-mail which the Government introduced into evidence in which Respondent portrayed the Agency, the ALJ, and the prosecuting attorney in a ''not flattering'' manner, *id.* at 10–11; that the Agency was unlawfully regulating the practice of medicine, *id.* at 11–12; that the ALJ failed to consider his evidence; and that records which he subpoenaed were not turned over to him.[3]

Having considered the record as a whole, I reject each of Respondent's exceptions. While I do not adopt all of the ALJ's factual findings, I adopt the ALJ's conclusions of law that Respondent repeatedly dispensed controlled substances outside of the usual course of professional practice and without a legitimate medical purpose. I also adopt her conclusions with respect to Respondent's failure to maintain proper records and properly supervise clinic employees, as well as his inability to account for large quantities of controlled substances. Finally, I adopt the ALJ's conclusion that the Government has established its prima *facie case* that Respondent's registration is inconsistent with the public interest and that Respondent has not demonstrated that he can be entrusted with a registration.

As explained below, Respondent did not file a timely renewal application in accordance with agency rules, and therefore, there is no existing registration to revoke or modify. Respondent did, however, apply for a registration; that application will be denied. I make the following findings.

[1] Apap is the abbreviation for acetaminophen.

[2] While Respondent requested an expedited hearing, on March 17, 2006, his first counsel withdrew. ALJ at 2. While on May 2, 2006, a new counsel entered an appearance on Respondent's behalf, on October 10, 2006, a third counsel entered a notice of appearance. *Id.*

[3] To the extent that Respondent's exceptions are based on the ALJ's weighing of the evidence or alleged failure to consider certain evidence, the ALJ's decision is only a recommendation. *See* 21 CFR 1316.65(a). As ultimate factfinder, I have carefully considered the entire record including the ALJ's report and Respondent's exceptions.

Findings

Respondent formerly held DEA Certificate of Registration, AV6952837, which authorized him to dispense controlled substances in schedules II through V, and which expired on May 31, 2006. GX 1. Between April 16, 2003, and November 18, 2003, Respondent's registered location was Tri-State Health Care (hereinafter, Tri-State), 1200 Gay Street, Portsmouth, Ohio. GX 2. Between November 19, 2003, and September 11, 2005, Respondent's registered location was 1219 Findlay St., Portsmouth, *id.,* which apparently was Tri-State's new location. GX 11, at 2 (inspection report of Ohio State Board of Pharmacy). Subsequently, Respondent left Tri-State, and on September 12, 2005, Respondent changed his registered location to 1310 Center St., Portsmouth. GX 2. On May 12, 2006, at which time his registration was suspended and which was less than forty-five days before the expiration of his registration, Respondent applied for a renewal of his registration and requested an address change to his home in Chicago, Illinois. *Id., see also* RX P at 1.

Respondent holds both an M.D. and Ph.D. from the University of Chicago and has practiced as an emergency room physician, as well as in family practice and pediatrics. *Id.* at 3. Respondent testified that in the course of his practice, he had two medical malpractice cases which his insurers settled without his consent and his admitting liability, and ''two cases [that] resulted in judgments against'' him. Tr. 1400. According to Respondent, by 2003, the awards and settlements totaled ''over a million-and-a-half dollars,'' and as a result, he was ''unable to obtain malpractice insurance.'' *Id.* As a consequence, Respondent ''could no longer work in emergency medicine, and * * * couldn't work for another clinic * * * because virtually every clinic that required hospital coverage of nighttime patients requires the doctor to have insurance.'' *Id.*

Respondent therefore needed to find a job which did not require malpractice insurance. *Id.* Searching on the internet, Respondent found a job posting for Tri-State Health Care in Portsmouth, Ohio. *Id.* at 1400–01. During discussions with Tri-State's owner, Ms. Denise Huffman, Respondent was told that he did not need malpractice insurance to work for her clinic. *Id.* at 1401. Respondent accepted the position, and in June 2003, he obtained board certification in pain management. *Id.* at 1402.

In April 2003, Respondent began working at Ms. Huffman's clinic under an ''informal handshake'' agreement which paid him $5000 a week to start; his pay was later raised to $5500. *Id.* at 1404. Ms. Huffman was not a licensed physician and was ''not any type of a health care professional'' even though she was running ''a pain clinic.'' *Id.* Respondent ''did not think'' to ask to see Ms. Huffman's licenses or verify her credentials. *Id.* at 1404. Respondent further maintained that he ''didn't know that I should have done'' that, and that he did not find out that he should have made these inquiries until being advised of this (''two years later'') by one of his attorneys. *Id.* In light of Respondent's thirty years of experience in the medical profession and his educational background, I find implausible Respondent's testimony regarding his failure to verify whether Ms. Huffman was properly licensed.

Ms. Huffman's daughter Alice was Tri-State's office manager. ALJ at 3–4 (stipulated findings). According to the report of Agent Kevin Kinneer of the Ohio State Board of Pharmacy, Alice Huffman was a ''former employee and patient of Dr. [David] Proctor,'' GX 12, at 4, a convicted drug dealer. Tr. 1014–15. Mr. Chad Ball, who was Alice Huffman's boyfriend (and subsequently became her husband), worked as a security guard at the clinic. Tr. 521, 530. Other employees included Chris Helton (who also worked as security guard) and Denise Huffman's nieces, Ms. Tara Bentley and Ms. Elizabeth Madden. *Id.* at 530. Respondent was the only licensed physician and DEA registrant at the clinic. *Id.* at 530–31.[4]

During an interview with a DEA diversion investigator (DI), Ms. Denise Huffman stated that Tri-State ''was a full cash business'' and did no ''third-party billing.'' *Id.* at 543. The DI further testified that Ms. Huffman stated that ''it would not be cost effective to have somebody file a medical insurance claim.'' *Id.* at 544.[5] Tri-State charged $200 for an office visit. *Id.* at 854–56.

Beginning in the summer of 2003, numerous pharmacies refused to fill Respondent's prescriptions. Tr. 1428–29. Accordingly, Respondent and Denise Huffman decided that they ''should institute a dispensary on-site'' so that they could provide pain medicines for their patients. *Id.* Respondent agreed that his registration could be used to order controlled substances, *id.* at 1550, and Tri-State proceeded to order large quantities of both oxycodone, a schedule II controlled substance, and combination hydrocodone/apap, a schedule III controlled substance. GX 10. For example, between August 18, 2003, and December 30, 2003, Tri-State ordered nearly 136,000 dosage units of oxycodone under Respondent's DEA registration. *Id.* at 140. During 2004, Tri-State ordered more than 457,000 dosage units of oxycodone under his registration. *Id.* at 143. Finally, between January 1, 2005, and September 2, 2005 (shortly before he left Tri-State), the clinic ordered more than 414,000 dosage units of oxycodone under his registration. *Id.* at 145. Respondent was the largest practitioner-purchaser of oxycodone in the nation during both 2004 and the first nine months of 2005. *Id.* at 5 & 28.

Moreover, Respondent's purchases of oxycodone dwarfed that of other Ohio-based practitioners. For example, during the last six months of 2003, Respondent purchased more than twenty-eight times the amount of oxycodone purchased by the second largest Ohio-based practitioner (4,800 dosage units); by contrast, the fourth through thirteenth largest purchasers bought only between 300 to 100 dosage units. *Id.* at 51.

In 2004, Respondent purchased nearly 110 times the amount of oxycodone purchased by the second largest Ohio-based practitioner (4,160 dosage units); by contrast, the third through tenth largest practitioners purchased between 3,228 and 400 dosage units. *Id.* at 29. Finally, in a little more than the first eight months of 2005, Respondent purchased approximately thirty-eight times the amount of oxycodone purchased by the second largest Ohio-based practitioner-purchaser; by contrast, the sixth through tenth largest practitioner-purchasers bought between 600 and 240 dosage units. *Id.* at 7.

With respect to hydrocodone, between July 24, 2003, and the end of that year, Respondent purchased 222,600 dosage units. *Id.* at 148. In 2004, Respondent purchased 263,500 dosage units, and in a little more than the first eight months of 2005, he purchased 168,500 dosage units of the drug. *Id.* at 150–52. Between 2003 and

[4] To clarify, the clinic did not hold a DEA registration.

[5] The record does, however, contain a document entitled ''UTILIZATION REVIEW—NOTICE OF DENIAL'' issued by Liberty Mutual Managed Care, Inc., which is addressed to Respondent at Tri-State's Findlay St. address. GX 65. This document stated that Liberty Mutual had performed a utilization review for the Kentucky Worker's Compensation program of a ''proposed treatment/service request'' for a patient named ''Paul Huffman,'' and determined that it did not meet ''nationally accepted practice protocols.'' *Id.* More specifically, the document noted that ''[t]he request for oxycodone 425 pills per month (fourteen/day) and Valium 125 pills per month (four/day) is not medically necessary or appropriate. The current narcotic situation is not beneficial in that the claimant is taking narcotics around the clock.'' *Id.*

2005, Respondent ranked between the eleventh to twenty-third largest purchaser nationwide of combination hydrocodone drugs, and was the largest Ohio-based practitioner-purchaser of combination hydrocodone drugs by a wide margin.[6] *Id.* at 72–73, 95–96, 118–20.

A DEA DI subsequently obtained a report of the prescriptions written by Respondent that were filled by Kentucky pharmacies during 2004 from the State of Kentucky's KASPER system.[7] Upon review of the data, the DI found that Respondent had prescribed three or more drugs per visit to 419 of his patients and that Respondent had issued three or more prescriptions per visit 1974 times. GX 71. The DI further found that 54 percent of Respondent's prescribing involved ''three or more prescriptions per visit,'' and that in 1065 separate instances, Respondent had prescribed four drugs including oxycodone, hydrocodone, a benzodiazepine, and carisoprodol. *Id.* at 2. The DI also found that during 2004, Kentucky pharmacies dispensed 647,440 dosage units of oxycodone and 537,691 dosage units of hydrocodone pursuant to Respondent's prescriptions. *Id.*

The Investigations of Respondent

As found above, in April 2003, Respondent commenced his employment at Tri-State. On April 17, 2003, one day after Respondent obtained his DEA registration at Tri-State's 1200 Gay Street location, Agent Kevin Kinneer of the Ohio State Board of Pharmacy received two reports from Portsmouth pharmacists regarding Respondent's prescribing practices. GX 12, at 1–2.

The first pharmacist reported that Respondent was ''writing large quantities of narcotics and benzodiazepines,'' and that his patients were presenting ''prescriptions for 180 to 300 tablets of Lorcet 10/650 mgs.,'' *id.*, a schedule III controlled substance containing hydrocodone and acetaminophen. ALJ at 5. The pharmacist further reported that some patients had ''two types of narcotic prescriptions,'' that the prescriptions were for a quantity beyond the ''manufacturer's suggested [daily] supply of Tylenol [acetaminophen] intake,'' and that ''[t]hese patients also had prescriptions [for] Xanax 2 mg. and a Soma [carisoprodol] prescription.'' *Id.* The pharmacist further reported that ''many of the patients are prior problem patients'' of a physician (Dr. Proctor),[8] who had been convicted of drug trafficking and is currently incarcerated. *Id.* at 1–2; Tr. 1015. According to the pharmacist, these persons ''had prior drug abuse problems'' including arrests on drug charges. GX 12, at 1–2. The pharmacist also told Agent Kinneer that ''he would not fill any of'' Respondent's prescriptions. *Id.* at 2.

The second pharmacist told Agent Kinneer that he had ''refused to fill prescriptions for high quantities of narcotics and Xanax 2mgs and Soma [that were] prescribed by'' Respondent. *Id.* The pharmacist further notified Agent Kinneer that Respondent was prescribing ''duplicate therapy of narcotics'' and large amounts of acetaminophen. *Id.*

Approximately two months later, another Portsmouth-area pharmacist informed Agent Kinneer of ''trouble with [Respondent's] patients.'' *Id.* More specifically, the pharmacist reported that on or about June 11, 2003, five persons came in a van to his pharmacy and that one of them ''smelled of beer and dope.'' *Id.* These persons all presented ''the same type of prescriptions'' and the pharmacist refused to fill them. *Id.*; Tr. 255–56.

One week later on June 18, 2003, Respondent telephoned Agent Kinneer and complained that local pharmacists were refusing to fill his prescriptions. Tr. 256. Respondent demanded that the Board order the pharmacists to fill his prescriptions. *Id.*; GX 12, at 3. Agent Kinneer told Respondent that he was not going to do so because the pharmacists had the right to exercise their own professional judgment in practicing pharmacy. GX 12, at 3; Tr. 256.

Throughout the summer of 2003, Agent Kinneer received further complaints from pharmacists about Respondent's prescribing practices. GX 12, at 3. These included that many of the patients were from Kentucky, West Virginia and Tennessee; that Respondent was writing prescriptions for multiple narcotics, Xanax 2 mg. and carisoprodol ''for the same patient [in] high quantities''; that the prescriptions were for drugs with ''a high abuse potential''; that ''[f]amily members within the same address [were] receiving the same type of controlled substance''; that ''many of the patients'' were known ''to be drug abusers''; and that some of the patients had ''large amounts of cash on their person.'' *Id.* Agent Kinneer also received information that Respondent had called pharmacists and demanded that they fill his prescriptions. *Id.* Moreover, between July and September 2003, pharmacists in Columbus and Cincinnati notified Agent Kinneer that persons were presenting prescriptions issued by Respondent. *Id.* at 5.

On July 22, 2003, Agent Kinneer (and another state agent) visited Tri-State to conduct an inspection pursuant to Respondent's obtaining of a clinic license, which under Ohio law, was required ''to obtain controlled substances to dispense out of [the] clinic.'' Tr. 244; *see also* GX 12, at 3. During the inspection, Alice Huffman told the agents that a bodyguard patrolled the parking area and monitored the waiting room.[9] GX 12, at 3–4. The agents observed the security arrangements, explained recordkeeping requirements, provided Respondent and Ms. Huffman with copies of the applicable federal and state laws and regulations, and gave Respondent the license. *Id.* at 4.

On December 30, 2003, Agent Kinneer and another agent went to Tri-State's new address at 1219 Findlay St. to conduct an inspection for a new license. *Id.* at 5. Agent Kinneer found numerous violations including incomplete dispensing logs for several controlled substances. GX 11, at 2. More specifically, the dispensing log for hydrocodone/apap 10/650 had not been completed since August 15, 2003. *Id.* Respondent had, however, ordered thousands of dosage units of this drug after August 15th. *See* GX 10, at 147–48. As for the other controlled substances the clinic was dispensing, Agent Kinneer found that the last entries for

[6] In the first nine months of 2005, Respondent purchased 11 times the amount of hydrocodone purchased by the second largest Ohio-based practitioner; in 2004, he purchased 11.7 times the amount purchased by the second largest Ohio-based practitioner; in the last six months of 2003, he purchased approximately 16.5 times the amount purchased by the second largest Ohio-based practitioner. *Id.* at 73–74, 96–97, 120–21.

[7] KASPER is the ''Kentucky All Scheduled Prescriptions Electronic Reporting'' program. GX 71. Under KASPER, pharmacies are required to periodically report to the State all scheduled-drug prescriptions that they dispense. Physicians are also able to access the database to determine whether their patients are obtaining controlled substances from other practitioners. GX 26, Tr. 1030.

These figures do not, however, include prescriptions issued by Respondent which were filled at pharmacies in Ohio and other States; nor do they include the prescriptions dispensed at Tri-State.

[8] The pharmacist also stated that these individuals were patients of another problem physician, Dr. Williams. GX 12, at 2. The testimony indicates that another area physician, Dr. Fortune Williams, was convicted of drug trafficking, but his conviction was overturned on appeal. Tr. 1016. It is unclear whether the pharmacist's reference to Dr. Williams was to this individual.

[9] It is unclear whether there were multiple bodyguards on the premises. During an inspection conducted on December 30, 2003, Agent Kinneer noted that there were two bodyguards at the clinic.

both Xanax 1 mg., and diazepam 10 mg., had been made on August 15, 2003.[10] GX 11, at 2. He also found that while the log for hydrocodone/apap 10/325 mg. had been started on August 11, 2003, the last entry was dated the following day. *Id.*

Agent Kinneer further found that numerous DEA 222 forms, which are required to order schedule II controlled substances, were not properly completed. *Id.* He observed that Alice Huffman, who was not a registered pharmacist, was dispensing drugs without obtaining Respondent's final approval. *Id.* at 3–5. He also found ''four vials of unmarked pills with unknown medications [in] the dispensing area.'' *Id.* at 6.

In his report, Agency Kinneer further stated that he ''found this clinic not to be your normal Doctor's Office.'' *Id.* In support of his conclusion, Agent Kinneer noted that there was a Glock handgun in the dispensing area, that there were two night sticks and a four-foot long club with leather straps, and that these were ''things that [he] normally would not see in a physician's office or a dispensing area.'' Tr. 259–60; GX 12, at 7. Agent Kinneer also noted that Respondent was treating both Denise and Alice Huffman, that he had prescribed narcotics for them, and that both appeared to be ''over medicated.'' GX 12, at 6. In his testimony, Agent Kinneer also related that he had received reports that ''there would be 20 to 30 cars lined up outside of [Respondent's] practice,'' and that people would be lined up waiting to enter the clinic. Tr. 260–61; *see also* Tr. 455–56 (testimony of Detective John Koch, Scioto County Sheriff's Office that he observed a ''large group of people outside the office,'' and that he had ''never seen that outside of a doctor's office, where groups of people would hang out'').

Agent Kinneer thus concluded that Respondent was running a ''prescription mill.'' *Id.* at 260. Nonetheless, on February 4, 2004, following receipt of a letter from Respondent which stated that Tri-State was ''now currently in compliance with all issues'' found at the inspection and that ''[a]ll log books are current and up to date and are being kept current,'' GX 11,[11] Agent Kinneer delivered a new license to Tri-State and obtained Respondent's dispensing records. GX 12, at 6. The same day, Agent Kinneer contacted three distributors (Cardinal, McKesson, and Moore Medical) to obtain copies of Respondent's purchases from them. GX 12, at 6–7.

The purchase records showed, *inter alia,* that between October 13, 2003, and January 12, 2004, Respondent had purchased 277,500 tablets of Roxicodone 30 mg., a schedule II controlled substance. GX 12, at 7. Moreover, between August 18, 2003, and January 6, 2004, Respondent purchased 65,700 tablets of oxycodone hcl 5 mg., and 59,000 tables of oxycodone/apap (5/325 mg.). *Id.*

The records also showed that between July 24, 2003, and October 21, 2003, Respondent purchased more than 57,000 dosage units of combination hydrocodone/apap drugs in 10/325 mg., 10/500 mg., and 10/650 mg. strengths.[12] *Id.* Furthermore, between various dates, he had purchased more than 32,600 dosage units of benzodiazepines including alprazolam in 1 mg. and .5 mg. strengths, and both diazepam and lorazepam in 10 mg. strength.[13] *Id.* at 7.

In late June 2003, a Diversion Investigator (DI) with DEA's Columbus, Ohio office received a phone call from a pharmacist in Kenova, Ohio. Tr. 472, 508, GX 6. The pharmacist inquired as to whether Respondent had an active DEA registration; he also told the DI that he was ''receiving numerous prescriptions for OxyContin and Percocet,'' as well as Lorcet, Xanax and Soma (carisoprodol), which Respondent had written. Tr. 472–73, 508. The pharmacist also stated that between June 1, 2003, and July 15, 2003, Respondent's ''prescriptions had tripled'' and that the prescriptions were for ''very large'' quantities. *Id.* at 473. The pharmacist further told the DI that the persons who were presenting prescriptions from Respondent ''were lining up outside'' of his pharmacy to get them filled. *Id.* at 507–08.

The DI further testified that she had received phone calls from numerous other pharmacies regarding Respondent's prescribing practices including pharmacies that were located in Northern Kentucky and Columbus, Ohio. *Id.* 476. The pharmacists reported that Respondent was prescribing ''very high quantities'' of OxyContin, Percocet, Lortab, Xanax, and Somas, and that the patients were paying cash for their drugs.[14]

The DI also received a phone call from a DI in Forth Worth, Texas, regarding a report from McKesson, a distributor, that Respondent had ordered large quantities of combination hydrocodone/apap. Tr. 482. More specifically, McKesson had reported that on August 7, 2003, Respondent ordered thirty 100-count bottles of combination hydrocodone/apap, and on August 15, 2003, he ordered forty 100-count bottles of the drug. *Id.* Moreover, on August 22, 2003, Respondent ordered twenty 100-count bottles of combination hydrocodone/apap, as well as twenty 100-count bottles of alprazolam. *Id.*; see also GX 15, at 3–5. Thereafter, the DI obtained copies of invoices documenting Respondent's purchases of controlled substances from McKesson and other distributors. GX 14–16.

In November 2003, the Columbus-based DI was contacted by another Portsmouth-based physician who informed her that ''there were numerous patients that were coming from [Respondent's] office'' who were seeking detoxification treatment. Tr. 483. The physician related that Respondent had put the patients on excessive amounts of opiates such as OxyContin, Percocet, and hydrocodone. *Id.* The physician also told the DI that Respondent was telling the patients to go to particular pharmacies to get their prescriptions filled.[15] *Id.* at 484.

[10] Both logs were started on July 30, 2003. GX 11, at 2.

[11] While the letter is dated January 19, 2003, it references the December 30, 2003 inspection report. *See* GX 11. I thus find that the letter was actually sent on January 19, 2004. As discussed below, during a search warrant which was executed on June 7, 2005, Tri-State did not have any logbooks for 2004. *See* Tr. 612.

[12] Respondent was also purchasing large quantities of combination hydrocodone/apap drugs from PD–RX Pharmaceuticals, Inc., during this period *See* GX 10, at 147–48.

[13] According to the testimony of a detective with the narcotics unit of the Scioto County Sheriff's Office, the illegal trafficking of prescriptions drugs is ''[t]he number one [drug] problem'' in the County. Tr. 444. The Detective further testified that oxycodone, which is the ''most abused'' drugs sells ''for between 30 and 40 dollars per pill'' of thirty milligram strength, that Xanax sells for ''between $5 and $12'' per pill depending upon its strength, and that combination hydrocodone drugs sell for ''between $7 to $15'' per pill. Id. at 450.

[14] The DI also received information from an FBI task force officer. Tr. 475. The officer told the DI that an informant had obtained a prescription from Respondent without the latter having performed an evaluation on him, and that Denise Huffman had filled the prescription for ''approximately $200.'' *Id.* The DI did not, however, testify as to what drug was involved. *See id.*

[15] The DI also testified that she had been informed that one of Respondent's ''patients'' had contacted DEA regarding her visit with Respondent. *Id.* The patient related that she had taken a friend with her to the clinic and had been ''scolded'' for doing so by Denise Huffman, the clinic owner, because ''she didn't like anybody coming with patients,'' *id.* at 486, and ''law enforcement was watching the building.'' *Id.* at 488. The patient further stated that Respondent had prescribed Soma and an analgesic even though he ''only saw her for a couple of minutes'' and had little interest in reviewing her x-ray. *Id.* at 485. Because of what was going on at the clinic, the patient decided to see another physician. *Id.* at 486. Respondent's office repeatedly refused to send her records to her new physician and the patient had to retain an attorney to obtain them. *Id.* at 486–87.

Thereafter, DEA investigators obtained records from various pharmacies pertaining to Respondent's prescriptions. *Id.* 489; see also GX 18–20, 22–25. A DI also obtained from the State of Kentucky the previously mentioned KASPER report. *See* GX 26. Moreover, in April-May 2005, the Agency also obtained records pertaining to Respondent's purchases from four distributors (PD–RX Pharmaceuticals, Cardinal, McKesson, and Moore Medical). *See* GX 29.

On June 7, 2005, DEA investigators executed a search warrant at the Tri-State facility and seized the controlled substances that were on the premises, patient records, invoices, DEA Form 222s, and financial records.[16] Tr. 541, 696–97. One of the DIs interviewed Denise Huffman, Tri-State's owner. Denise Huffman told the DI that based on what Respondent ''told her to order,'' she would order the controlled substances from the distributors. *Id.* at 543. Ms. Huffman also stated that the clinic did not do third-party billing and was a ''full cash business.'' *Id.* Ms. Huffman further related that her daughter Alice and Respondent ''were in complete control of the dispensing center.'' *Id.* at 545.

The DI also interviewed Alice Huffman, who confirmed that Tri-State ''was a cash only business'' with ''no third-party billing.'' *Id.* at 544. Alice Huffman admitted that she filled ''all the prescriptions and was supposed to keep the records,'' including the dispensing records, but did not. *Id.* Alice Huffman further stated that ''she wasn't sure'' if there were any inventories and ''didn't know if they'' would be accurate if there were any. *Id.* at 545. When asked by the DI whether she was aware of whether any of Tri-State's patients had overdosed, Huffman gave the names of two persons ''that she believed had overdosed on prescriptions that were written from the clinic.''[17] *Id.*

The same day, DEA investigators attempted to interview Respondent at his residence, but he declined. *Id.* at 691. Later that day, Respondent arrived at the clinic and he eventually agreed to an interview. *Id.* at 692. Regarding the interview, the DI testified that Respondent ''declined to talk'' when asked about the deaths of Tri-State's patients. *Id.* at 694. Respondent further maintained that he was an independent contractor and serving as a ''loc[um] ten[ens]'' practitioner[18] who had found his position on the internet. *Id.* at 695. Respondent could not, however, ''recall what company * * * he was a loc[um] ten[ens] for,'' *id.,* and, of course, had been working at Tri-State for more than two years at that point.

Moving on to other subjects, Respondent stated that the clinic did not have a physical therapist on its staff and he was not sure whether the clinic even had a nurse. *Id.* at 695. Respondent also told the DI that he ''rarely recommend[ed] people to other physicians'' and that ''for the most part,'' he did not associate with other area physicians. *Id.* at 695–96.

On the same day that the warrant was executed, DEA investigators attempted to conduct an accountability audit. *Id.* at 546. The investigators inventoried all of the controlled substances that were being seized. *Id.* at 613–14. Consistent with Alice Huffman's testimony, the DIs did not find either any initial or biannual inventories as required by Federal regulations. *Id.* at 615. Nor were there any dispensing logs for the year 2004. *Id.* at 612.

Using records subsequently obtained from various distributors, the DI was able to determine the amounts of the various controlled substances Respondent purchased during the audit period and concluded that there were substantial shortages of the drugs. *Id.* at 615. These records also showed that Respondent had ordered large quantities of alprazolam (2 mg.) and diazepam (10 mg.), hydromorphone (4 mg.), and both oxycodone and combination hydrocodone in various strengths. GX 30.

I find it unnecessary to make findings regarding the actual amounts of the shortages.[19] Instead, I find that Respondent authorized the ordering of large quantities of numerous controlled substances, and that the disposition of these drugs cannot be adequately accounted for because Respondent failed to maintain accurate records.

On September 9, 2005, Respondent's relationship with Tri-State ended. *Id.* at 1433–34. Respondent initially saw patients at his apartment in Portsmouth. *Id.* at 1434–35. Regarding his activities at this location, a DEA Investigator testified that he had interviewed the friend (DC) of one of Respondent's deceased patients (M.R.). Tr. 761. DC told the investigator that he and M.R. ''knew that [Respondent] was writing prescriptions without any type of medical examination.'' *Id.* Accordingly, they decided to see Respondent (at his Center St., Portsmouth) address to obtain drugs that they could sell on the street. *Id.*

DC related that upon his arrival at Respondent's office, he encountered a former girlfriend who was now working for Respondent. *Id.* at 762. After filling out various forms, the ex-girlfriend asked DC what he was taking. *Id.* DC asked her: ''what is he writing?'' *Id.* She then wrote out ''prescriptions for oxycodone, a hydrocodone product, and Xanax.'' *Id.*

DC further related that Respondent did not physically examine him. Respondent signed the prescriptions and engaged in small talk with DC before Respondent left the exam room. *Id.* at 763–64.

On October 4, 2005, the Portsmouth Police Department executed a warrant at Respondent's apartment and seized various items including patient files.[20] *Id.* at 1436–37. The Chief of Police also issued a condemnation notice, which in Respondent's words, ordered him ''to immediately vacate the premises.'' *Id.* at 1437.

Approximately a week later, Respondent relocated to Chillicothe, Ohio. *Id.* at 1437–38. On February 6, 2006, DEA investigators obtained a warrant to search Respondent's Chillicothe office. GX 78. On February 10, 2006, the warrant was executed and additional patient files were seized. GX 73.

A DI subsequently reviewed the 1258 patient files that were seized during both the June 2005 search of Tri-State and the February 2006 search of Respondent's Chillicothe office. *Id.* Most significantly, the DI determined

[16] ''To accommodate'' Respondent, the investigators made copies of the medical records and provided them to the clinic before ''the summer ended.'' Tr. 697.

[17] The circumstances surrounding the overdose of one of these persons (K.R.) is discussed below.

[18] As commonly understood, the term ''locum tenens'' means ''one filling an office for a time or temporarily taking the place of another.'' *Webster's Collegiate Dictionary* 684 (10th ed. 1998).

[19] Because Tri-State had no inventories, the DI used the starting figure of ''0'' for each drug. Under the heading for the closing inventory, the audit chart stated ''as of 12–31–04.'' GX 30. The DI testified, however, that the actual inventory was taken on June 7, 2005. Tr. 613. The record does not establish how the DI arrived at the inventory figures for December 31, 2004.

There was also testimony that during the search, Denise Huffman stated that the dispensing logs ''were probably at her house.'' Tr. 669. Eventually, Ms. Huffman produced logbooks for 2005; Ms. Huffman admitted, however, that there were no records for 2004. *Id.* at 670. The DI further testified that the logbooks were provided only after the Government provided copies of the patient files subsequent to the search. *Id.* at 674–75. The logbooks ''were brand new,'' and appeared to have been newly created based on the copies of the medical records. *Id.*

[20] Respondent testified that the seizure occurred because the police ''were bigger than I was, and they decided that they were going to come in and do that.'' Tr. 1436. He also maintained that the ''search warrant * * * contained a lot of frankly irrelevant materials.'' *Id.* Respondent did not, however, produce any evidence that a court had quashed the warrant.

that 900 of the patient files lacked documentation that Respondent had performed a physical examination on the patient. *Id.*

During the course of the investigation, DEA investigators received information from various sources including family members, friends, emergency room physicians, and various coroners indicating that sixteen persons had died of drug overdoses shortly after seeing Respondent. Tr. 617–20; *see also* GXs 32–60. For example, the widow of J.R. testified that her husband had obtained prescriptions from Respondent for Oxycontin, oxycodone, hydrocodone, valium, and Soma, and was receiving as many as 622 pills per month. Tr. 40, 42–43. At one point J.R. attempted to commit suicide and was hospitalized; J.R., however, was released. *Id.* at 81–82. On November 18, 2003, J.R. visited Respondent. Id. at 53; GX 61.

On the morning of November 20, 2003, J.R. was found dead in the bathroom. Tr. 52. According to the Deputy Coroner's report, there were four pill bottles on the bathroom sink: two bottles were labeled as containing oxycodone (Rx'd on 10/3/03 and 10/20/03) although both were found empty; one contained 12 tablets of diazepam out of the original 90 count which was prescribed on 11/18/03; and one bottle contained three methadone tablets. See GX 60, at 4. Respondent was listed as the prescriber on the two oxycodone and the diazepam bottles. *Id.* No prescriber was listed on the bottle which contained methadone. Id.

The coroner found that the immediate cause of J.R.'s death was an ''overdose'' due to multiple drug intoxication. GX 60, at 1. *See* also GX 59. According to J.R.'s widow, her husband was addicted to drugs. Tr. 33, 45. She also testified that her husband was selling some of his drugs to pay for his visits with Respondent. *Id.* at 64. According to her testimony, her husband had told her that Respondent ''was trying to give him [S]omas also and to take them, and that [Respondent] said if he didn't take them to sell them.'' *Id.* at 42.

J.R.'s step-daughter corroborated this testimony. More specifically, she testified that her step-father had ''said that I could get more if I wanted. [Respondent] offered me [S]omas, and I told him that I was allergic to them, and he [Respondent] said sell them, trade them, whatever you need to do.'' [21] *Id.* at 104.

During the June 2005 search of Tri-State, DEA investigators ''could not find [J.R.'s] medical chart.'' *Id.* at 706; see also id. at 709. The investigators did, however, find a ''sign-in sheet'' which indicated that J.R. had visited Respondent on November 18, 2003, two days before his death. *Id.*; see also GX 61.

DEA did, however, obtain the medical charts of six ''patients'' who died while under Respondent's care and provided these to L. Douglas Kennedy, M.D., for his review. GX 74. Dr. Kennedy holds medical licenses in Kentucky, Ohio, and Florida, and board certifications in anesthesiology and pain medicine. GX 63, at 9. He has been a fellow in pain medicine at the Cleveland Clinic Foundation, served as an assistant professor of anesthesiology and director of the chronic pain management program at the University of Kentucky Medical Center, and has approximately fifteen years experience as the medical director of a pain management practice. GX 63, at 1–2. Dr. Kennedy has also lectured on pain management at numerous symposia and conferences. *Id.* at 3–7. Dr. Kennedy was qualified as an expert witness in the standard of care in pain management and the prescribing of controlled substances for the treatment of chronic pain. Tr. at 1021–22.

Dr. Kennedy specifically reviewed records including Respondent's patient files for six individuals (M.C., S.H., S.J., C.J., D.P, and K.R.). GX 74, at 1–5; *see also* Tr. 1084–89. He also ''reviewed past or concurrent medical records present on [Respondent's] 'patient' charts from other physicians [and]/or medical facilities,'' police reports, as well as death certificates, autopsy, coroner's, and post-mortem toxicology reports. GX 74, at 1. In his report, Dr. Kennedy further stated that he had reviewed, and was ''generally familiar with, regulations including Ohio Administrative Code, Chapter 4731–21 on Intractable Pain,'' the Federation of State Medical Board's Model Policy for the Use of Controlled Substances for the Treatment of Pain, and ''other applicable standards and guidelines with respect to pain management and the prescription of controlled substances for same.'' *Id.* at 2.[22]

Dr. Kennedy specifically noted that the drugs Respondent prescribed ''were present in the Toxicology Testing post-mortem and were the primary (in some cases the only) cause of death.'' [23] *Id.* at

[21] While Soma (carisoprodol) is a prescription drug, it is not a controlled substance. It is, however, a highly abused drug which metabolizes into meprobamate, a schedule IV depressant. *See* 21 CFR 1308.14(c); ALJ Ex. 11, at 4; Tr. 934 (testimony of Dr. Wheeler). Respondent's statements to J.R. to sell or trade the drug are nonetheless relevant to show his knowledge and intent.

[22] While much of the cross-examination of Dr. Kennedy focused on his reliance on the Kentucky guidelines, in both his report and testimony, Dr. Kennedy made clear that he had also reviewed the Ohio Administrative Code. *See* Tr. 1198–1203. When Dr. Kennedy offered to explain why Respondent also violated the Ohio regulations, Respondent's counsel declined to pursue this line of questioning. *Id.* at 1202–03.

[23] With respect to patient M.C., the record establishes that she saw Respondent on January 8, 2004, and died on January 10, 2004, at the age of 32. GX 84, at 6–7; GX 44. During the January 8 visit, Respondent issued her three prescriptions: one for 300 tablets of Norco (hydrocodone/apap 10/325); one for 60 tablets of oxycodone 30 mg.; and one for 120 tablets of Xanax 2 mg. GX 84, at 6–7. The coroner concluded that M.C. died from ''intoxication'' caused ''by the combined effects of oxycodone and hydrocodone.'' GX 42 & 44.

With respect to patient S.H., the record establishes that he saw Respondent on April 19, 2005, and died the next morning at the age of 33. GX 84, at 12–14; GX 38, at 3. During the April 19 visit, Respondent issued him prescriptions for 360 tablets of oxycodone (15 mg.) with an instruction to take 12 per day; 120 tablets of Valium (10 mg.); 30 tablets of Xanax (2 mg.), and another drug Carafate, which is not controlled. GX 84, at 12–13. Respondent also issued an RX for an MRI during this visit. The coroner concluded that S.H. overdosed and died of the ''acute combined effects of oxycodone, diazepam, and alprazolam.'' GX 38, at 1.

With respect to S.J., the record establishes that she saw Respondent on both September 16 and September 29, 2005. On September 16, Respondent prescribed to her 270 tablets of oxycodone 30 mg.; 270 tablets of Percocet 5/325 (oxycodone/apap); 60 tables of Xanax (2 mg.), and 120 tablets of Soma (350) even though her pain was indicated as being ''2/10.'' GX 84, at 21–24. On September 26, 2005, Respondent prescribed to S.J. an additional 135 tablets of both Percocet 5/325 and oxycodone 30. *Id.* at 25–26. The form documenting the 9/26/05 visit does not contain any indication of a medical complaint and the entry for ''Pain: Location, Description, Duration'' is blank. *Id.* at 26. S.J. died September 30, 2005; the coroner concluded that the cause of death was ''[m]ultiple drug intoxication, with acute bronchopneumonia contributing.'' GX 55, at 2. The coroner further noted that S.J., who was 30 years old, had ingested oxycodone, alprazolam, cocaine and diphenhydramine. *Id.* at 2–3.

With respect to K.R., the record establishes that on March 8, 2004, Respondent gave her two separate prescriptions for 90 tablets of oxycodone 30 mg., a prescription for 180 tablets of Lorcet 10/650 (hydrocodone/apap), and a prescription for 120 Xanax (2 mg.). GX 84, at 10. The progress note for the visit suggests that Respondent also gave her a prescription for Soma 350. *Id.* at 11. K.R, who was 39 years old, died the following day of a drug overdose. GX 51, at 2. The toxicology report indicates that oxycodone, benzodiazepines, and carisoprodol /meprobamate were present. *Id.* at 3.

Dr. Kennedy specifically noted that Respondent had ''essentially doubled'' K.R.'s medication ''the day before she died,'' and that he saw ''no indication for her being on the medicines in the first place, let alone [Respondent's] doubling them.'' Tr. 1090.

With respect to C.J., the record establishes that on October 16, 2003, Respondent gave him prescriptions for 120 tablets of oxycodone 30 mg., 180 tablets of Percocet 10/650 (oxycodone/apap); 180 Xanax 2 mg., and 90 Soma 350 mg. GX 84, at 3–5. The progress note indicated that C.J.'s pain level was 5–6/10, and his spasms were 0/10. *Id.* at 5. C.J. died five days later; the coroner determined that the cause of his death was ''acute opioid (oxycodone) toxicity.''

With respect to D.P., the record establishes that on August 11, 2004, Respondent issued to him prescriptions for 300 tablets of oxycodone 30 mg.,

4. He further found that Respondent ''practiced 'polypharmacy[,]' prescribing multiple controlled substances at the same time.'' *Id.* at 5. Relatedly, Dr. Kennedy observed that Respondent ''averaged 3.8 controlled substance prescriptions for each 'patient' visit,'' and that ''[t]his increased the likelihood of sedation, respiratory depression and death.'' *Id.* He also noted that ''[d]eath occurred on average * * * [three] days after the last visit with [Respondent] [with] some [occurring] the next day.'' *Id.*

Dr. Kennedy further described Respondent's practices as ''prescrib[ing] drug 'cocktails' * * * often including an opioid[] (often 2–3 types), a benzodiazepine, and Soma.'' *Id.* at 3. According to Dr. Kennedy, Respondent's prescribing practices ''greatly increased the chance for drug abuse, diversion, [and]/or addiction.'' *Id.*

Moreover, based upon his review of the ''patient charts'' (which is more fully set forth in GX 82), Dr. Kennedy found that Respondent ''did not establish a doctor-patient relationship on initial visits, and did not establish or maintain such a relationship on followup visits.'' GX 74, at 3. Relatedly, Dr. Kennedy noted that ''[t]here was inadequate or no history [and] physical examination,'' that ''[t]here was seldom any diagnostic testing or past medical record present,'' and that ''[w]here there was, [Respondent] did not rely upon it for medical decision making.'' *Id.* at 4.

Dr. Kennedy also observed ''[t]here existed no plan to diagnose or treat the person's problem(s),'' and that ''[t]he 'plan of care' was essentially the same for every person: drugs (predominately controlled substances), for which no medical necessity was established.'' *Id.* Moreover, once Respondent began his '' 'plan of care' * * * [he] continued [it] with no reassessment as to effect, success, or ill effects.'' *Id.* Relatedly, Dr. Kennedy found that Respondent ''did not regularly and consistently address pain complaints with other methods, for example, nonprescription drugs, non-controlled substance prescription drugs, physical therapy or behavioral medicine consultation, before resorting to controlled substance prescriptions.'' *Id.* at 3.

Dr. Kennedy also concluded that Respondent ''ignored and failed to obtain necessary testing and consultations (with Behavioral Medicine, Psychiatry, or Addiction Medicine) that would have identified and then allowed treatment for abuse and addiction as well as identifying those persons who may have been diverting the drugs.'' *Id.* at 5. More specifically, Dr. Kennedy found that Respondent ''rarely tested, checked for, or heeded signs of addiction (he rarely performed in office urinary drug screens). When he did perform in office urinary drug screens, the tests were inadequate.'' [24] *Id.* at 3. As Dr. Kennedy explained, if a test does not pick up a drug that a physician has prescribed, it raises the possibility that the ''person could have been selling those drugs.'' Tr. 1091. Dr. Kennedy further noted that Respondent ''prescribed and continued to prescribe controlled substances to persons who exhibited behavior consistent with possible drug abuse, addiction [and]/or diversion.'' *Id.* at 3.

Dr. Kennedy thus concluded that Respondent ''did not establish'' a bona-fide doctor patient relationship or ''any relationship adequate for prescribing controlled substances on the [patient's] initial visit'' or ''on subsequent visits.'' *Id.* at 4. Most significantly, he concluded that Respondent ''knowingly and intentionally distribute[d] prescriptions for oxycodone and other controlled substances not for a legitimate medical purpose and beyond the bounds of medical practice.'' *Id.* Finally, Dr. Kennedy concluded that Respondent's ''distribution of multiple and regular controlled substances resulted in the death'' of ''all [six]'' patients whose records he examined, and that ''each one of these [six] deaths was preventable.'' *Id.* at 4–5.[25]

360 tablets of hydrocodone/apap (10/325), 120 tablets of alprazolam 2 mg., and 180 tablets of carisoprodol 350 mg. GX 26, at 385. D.P. filled the first two prescriptions the same day, and filled the latter two the next day. *Id.* According to the chart, D.P. reported that his pain level was ''O–1/10,'' and his spasms were ''0/10.'' GX 84, at 17. There is a notation ''See Cleve. Clinic Report,'' but the note does not say what the referral was for. *Id.* There is also a notation that Rx Express Pharmacy had been called and D.P. had not filled either the Soma or Xanax prescriptions, *Id.*; he did, however, fill them the next day. *Id.*

While the record does not contain D.P.'s death certificate, the testimony establishes that he died on August 12, 2004. Tr. 736. Moreover, the toxicology report confirmed the presence of oxycodone in D.P.'s blood. GX 34, at 2. According to the spreadsheet compiled by Dr. Kennedy, there is a handwritten note on a preliminary toxicology sheet which states that D.P.'s death was caused by ''acute oxycodone toxicity.'' GX 82.

[24] According to Dr. Kennedy's spreadsheet, Respondent did not perform a single urinary drug screen on M.C., even though she made five visits to him over a four month period. GX 82. Notably, M.C.'s toxicology report was positive for cannabinoids. *Id.* Dr. Kennedy thus concluded that M.C.'s use of marijuana ''most likely would have been picked up by [Respondent] if he had checked, triggering an addiction medicine [and]/or law enforcement evaluation.'' *Id.* According to Dr. Wayne Wheeler, who also testified as an expert witness for the Government, M.C.'s emergency room records indicate that on August 5, 2003, she had been in a car accident; a drug test done at the hospital indicated that she was positive for marijuana and ''the police report indicated she had taken Soma and Percocet and lost control of her vehicle.'' Tr. 946.

Dr. Kennedy noted that S.J. ''had been dismissed in 2003 for falsifying symptoms and cancer records.'' GX 82. Respondent did not, however, perform a drug screen on S.J. *Id.* Dr. Wheeler noted that S.J. had made ''multiple visits to the emergency room'' for conditions (falls, headaches, dental pain) that are the ''hallmarks of * * * pill-seeking behavior'' because it is ''very hard to find objective evidence'' that the patient is not telling the truth. Tr. 948.

Dr. Kennedy also noted that Respondent did not perform a single drug screen on D.P., even though he had visited Respondent seventeen times over the course of sixteen months and had received a total of 74 controlled-substance prescriptions from him. GX 82.

Respondent performed only a single drug screen on S.H., even though he was a patient for more than two years and saw Respondent thirteen times. *Id.* He also noted that S.H. had previously been treated at Tri-State (albeit at a different location) and that records of an earlier visit indicated an abnormal drug screen in that S.H. indicated that he was currently taken Lortab 10/500 and the screen was negative. *Id.* Moreover, S.H. had previously been hospitalized for mental illness; these records indicated that S.H. had stated that ''he has smoked pot [and], taken Cocaine.'' *Id.* Moreover, S.H. had a Xanax bottle which had been filled ten days earlier but was then empty. S.H. had also stated that he was out of medications and that prior to his admission, he was taking Xanax, Oxycontin, and oxycodone. *Id.* The note also stated that S.H. had a history of ''significant alcohol abuse'' and ''[s]uicidal ideation with family member stating that the patient does have the potential for self-destructive behavior.'' *Id.* Moreover, the patient had tested positive for benzodiazepines and cocaine but negative for opiates. *Id.* As Dr. Kennedy noted in the spreadsheet, ''[t]here are numerous 'red flags' for significant mental illness * * * with medication non-compliance, drug abuse & addiction (polysubstance abuse), and general non-compliance with treatment recommendations.'' *Id.*

Respondent performed a single drug screen on C.J., who was his patient for more than six months and saw him seven times. *Id.* During the screen, only cocaine and THC were checked for. *Id.*

Finally, with respect to K.R., who was a patient for nearly eleven months and made 14 office visits during this period, Dr. Kennedy noted in his spreadsheet that Respondent had obtained two in-office drug screens. GX 82. On cross-examination, it appeared that both screens were ordered by a different physician, who was practicing in Tri-State's South Shore, KY office, and not Respondent. *Id.*; *see also* Tr. 1182–83, 1186. The first of these occurred on December 1, 2003, nearly eight months after K.R.'s first visit; the second drug screen was obtained on January 23, 2004. GX 82. Dr. Kennedy noted that the first screen did not test for oxycodone and that the second test did not check for specific opiates or benzodiazepines. *Id.* Dr. Wheeler noted that while Respondent had referred K.R. to a yoga class, she went only one time and decided not to go back. Tr. 949. According to Dr. Wheeler, allowing the patient to quit after one class does not give that treatment ''modality a reasonable chance to produce any positive results.'' *Id.*

[25] The Government also called to testify Dr. Wayne Wheeler, who is licensed in Ohio and other states, and holds board certifications in both emergency and occupational medicine, as well as quality assurance and utilization review. Tr. 907–08. Dr. Wheeler also has extensive experience in emergency medicine and has served as a deputy coroner of Scioto County, Ohio, since 1990. GX 69, at 2. Dr. Wheeler is a member of the Ohio Medical

Continued

On cross-examination, Dr. Kennedy acknowledged that K.R's medical records indicated that Respondent had performed a physical exam on her on April 17, 2003, which was the date of K.R.'s first visit to him.[26] Tr. 1174–78. However, during his lengthy cross-examination of Dr. Kennedy, Respondent's counsel did not establish that Respondent had ever performed a followup physical examination or that he properly monitored K.R.

Moreover, Dr. Kennedy noted that during K.R.'s first visit with Respondent, the latter proceeded to prescribe what Dr. Kennedy termed the ''cocktail'' or ''trifecta'' of Soma, Xanax, and Lorcet 10, which is ''one of the highest doses of hydrocodone.'' *Id.* at 1178.[27] While Respondent testified as to the general rationale for his prescribing practices,[28] *id.* at 1416–18, he did not testify regarding his prescribing to the six deceased patients and presented no expert testimony refuting Dr. Kennedy's opinion that there was no legitimate medical purpose for prescribing these drugs in combination. GX 64, at 2; GX 74, at 5 (noting that prescribing this combination of drugs ''increased the likelihood of sedation, respiratory depression and death''); Tr. 1047 (noting that the ''cocktail * * * is very popular amongst those individuals who go to doctors' offices to take drugs to abuse them, [and] not [use them] for legitimate medical purposes''); *see also id.* at 1036–37; 1189. Moreover, Respondent did nothing to impeach Dr. Kennedy's findings with respect to the remaining five deceased patients (M.C., S.H., S.J., C.J. and D.P.).

In his defense, Respondent testified that when he ''started seeing these patients, they were all new to me, and so I had to evaluate all of them pretty much from scratch.'' *Id.* at 1407. Respondent maintained that he ''did a physical exam on all of them, and evaluated their complaints, evaluated the medical records that were in the charts, as far as prior treatments, prior x-rays, prior MRIs, prior lab tests, prior consultations with other physicians.'' [29] *Id.* Relatedly, he asserted that ''[v]irtually all the patients that I found had previous consultations with neurosurgeons or neurologists,'' and ''[m]ost of them had surgery one or more times,'' and ''extensive injections given by neurosurgeons, which they reported to me had done very little to treat their pain.'' *Id.* at 1409.

Respondent further testified that ''[m]ost of'' his patients ''had run the gamut of treatment from specialists, and were still in severe chronic pain,'' and ''fit the diagnosis and the category of chronic intractable pain patients'' who ''would need medicine on a continuing basis for the rest of their lives [as] there was no other treatment available to them which would in any way alleviate their pain.'' *Id.* He also maintained that ''I at all times attempted to verify that all the patients were in fact genuine patients who had a legitimate need and requirement for pain medication.'' *Id.* at 1407. He also testified that if he did see a patient who would be helped by surgery, he would refer them to the Cleveland Clinic. *Id.* at 1410.[30]

Respondent further testified that ''each and every one of'' his patients ''signed narcotic contracts'' which set forth that his patients were ''to take their medicine'' as he prescribed it and how the patients were to secure the drugs. *Id.* 1420. Relatedly, Respondent testified that he directed that the Tri-State staff call in his patients for random pill counts and that his patients were subject to ''random drug screens.'' *Id.* at 1421. He further asserted that he sent his patient to two hospitals ''for more extensive blood and urine tests,'' *id.* at 1424, and that he dismissed those patients who were non-compliant and referred them to addiction treatment programs. *Id.* at 1444.

Respondent further testified that ''at all times,'' he documented his diagnosis, *id.* at 1471, and that he ''always wrote my justification and my thinking as to why I put patients on certain medicines, and I believe that would be apparent in any reading of my charts.'' *Id.* at 1472. Moreover, he maintained that he would document the patients' ''response to the medication,'' and any ''adverse [drug] effect'' and changes in medication. *Id.* at 1473. He also contended that ''[a]t all times [he] would look for signs of diversion'' such as abnormal drug tests and physical signs of ''intravenous drug abuse or perhaps intranasal drug abuse.'' *Id.* at 1474.

Regarding the six deceased patients whose files Dr. Kennedy reviewed, Respondent's testimony was limited to

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Malpractice Commission, a board member of the Ohio Patient Safety Institute, and Chairman of the Ethics Committee at the Southern Ohio Medical Center of Portsmouth. *Id.* Dr. Wheeler was accepted as an expert in occupational medicine. Tr. 915.

Dr. Wheeler testified that prescription drug abuse is ''a particular problem in Scioto County.'' *Id.* at 917. Dr. Wheeler explained that in treating a chronic pain patient, a physician must determine the patient's complaint, the history of the problem including ''what therapies have been tried'' and ''who has been taking care of the problem,'' and how the condition has ''developed.'' *Id.* at 922. Dr. Wheeler also testified that the treating physician ''need[s] to get a past medical history, which included other injuries, other illnesses,'' including ''psychiatric histories'' and ''social backgrounds.'' *Id.* Next, the physician should do ''a top-to-bottom physical exam.'' *Id.* Finally, if other practitioners have been ''caring for [the] patient, it become * * * fairly important that you get their records and find out what they have done and what their impressions have been.'' *Id.* at 923. Dr. Wheeler explained that patients sometimes ''don't really understand what has been told them about their condition or they cover up material or just intentionally leave it out.'' *Id.*

Dr. Wheeler further testified that in evaluating a patient, it is ''essential'' to determine if there is ''a history of overdosing on drugs'' or of psychiatric problems. *Id.* at 927. He also explained that he would have his patients sign releases so that he could obtain the patients' records from the other physicians who had previously treated them, as well as emergency room and hospital records. *Id.* at 928. According to Dr. Wheeler, obtaining emergency room records is ''not a terribly laborious or complicated process.'' *Id.* at 951. On cross-examination, Dr. Wheeler further explained that while it was not his experience that a hospital would fail to provide the records to a physician, a patient is entitled to her medical record. *Id.* at 988.

While Dr. Wheeler acknowledged that ''pain is very subjective,'' he added that some patients exaggerate their pain level. *Id.* Moreover, he would not prescribe a narcotic unless he ''truly believed'' the patient was ''experiencing pain somewhere in the 5 to 6 level.'' *Id.* Dr. Wheeler particularly noted that drug abusers ''have long track records of pain-medicine seeking behavior'' with multiple visits to emergency rooms. *Id.* at 929.

[26] Dr. Kennedy noted that Respondent's diagnosis of ''left sciatica'' was ''odd, because the left straight leg raise had a greater range of motion than did the right.'' *Id.* at 1177.

[27] Respondent's counsel also cross-examined Dr. Kennedy about two referrals that K.R. was given, one for a neurosurgeon, the other for a neurologist. Tr. at 1183–84; 1186–87. Neither document was admitted into the record, and the testimony suggests that both referrals were issued by a doctor who was working at a Tri-State Clinic in South Shore, Kentucky, and not Respondent. *Id.* Moreover, Respondent's counsel did not establish that K.R. ever went to either specialist, and Respondent did not testify that he had reviewed a report from either specialist.

[28] In his testimony, Respondent described at length the role of opiates in the treatment of pain; he testified that he used both oxycodone and hydrocodone because ''it was perfectly appropriate, as well as usually necessary, to treat chronic severe intractable pain with two opiates, usually a stronger or long acting one [oxycodone], as well as a shorter acting one,'' hydrocodone, which he used ''for [his] breakthrough medicine.'' 1418. As support for his testimony, Respondent cited various guidelines, Ohio's regulations, and a document of frequently asked questions published by this Agency and two other entities. Tr. 1412–15. He also justified his prescribing of carisoprodol on the grounds that ''I learned that almost [all] of my patients complained of severe muscle spasms * * * usually radiating down one or both legs.'' *Id.* at 1415. Finally, he justified his prescribing of either Valium (diazepam) or Xanax (alprazolam) on the ground that ''virtually all of these patients needed medicine to help them sleep.'' 1417–18. He also justified his prescribing of benzodiazepines as medically necessary to relieve muscle spasms. *Id.*

[29] Respondent maintained that he ''would always'' do a physical exam during his first visit with a patient. *Id.* at 1469. He further testified that he would not necessarily do a new physical exam at a subsequent visit because in ''many instances,'' there was ''no new factor to evaluate.'' *Id.*

[30] He also testified that he arranged for a yoga instructor to come to Portsmouth, and that the instructor did so ''two days a week'' for about ''the better part of a year,'' when Ms. ''Huffman decided that she did not want to subsidize the * * * instructor any longer.'' Tr. 1411–12.

a discussion of their autopsies and toxicology results, with in some instances, Respondent disputing the findings that the patients had taken drugs in amounts that could be definitively shown to be the cause of their deaths. *See* 1475–86.; *id.* at 1481 (testifying that ''post mortem values of opiates are irrelevant to any determination of cause of death,'' because the values only show ''the patient having ingested those compounds, but could not speak to whether they were involved in the cause of death.''); *id.* at 1482–83 (testifying regarding toxic levels of meprobamate).

However, with respect to several patients, the coroners found that these individuals had ingested not only opiates, but opiates in combination with benzodiazepines (S.H.), opiates in combination with a benzodiazepine and illicit drugs (S.J.), or opiates in combination with benzodiazepines and carisoprodol (K.R.). Moreover, even with respect to those patients who were found to have ingested only opiates, I reject Respondent's testimony either because there were other findings consistent with the Coroner's finding (M.C., GX 42; noting presence of extreme pulmonary edema, which according to Dr. Wheeler, ''typically occurs when someone has overdosed on a narcotic drug [or] narcotic drugs,'' Tr. 945), or because I presume that the officials performing the autopsies are competent and reviewed other information (including the clinical history, EMS run sheet, and emergency room report) that is relevant in determining the cause of death. Tr. 1196–97.

The ALJ did not make a credibility finding pertaining to this portion of Respondent's testimony. She did, however, find that she ''doubt[ed] Respondent's credibility'' with respect to his testimony regarding his treatment practices such as whether he took medical histories and performed physical exams, had his patients sign narcotic contracts, called patients in for pill counts, and performed drug screens. ALJ at 34–35. As the ALJ explained, ''[n]either Dr. Wheeler nor Dr. Kennedy testified about finding such safeguards in the patient charts they reviewed for this proceeding.'' *Id.* at 35.

I adopt the ALJ's credibility finding. While I acknowledge that there is evidence that Respondent performed a physical exam during K.R's initial visit, he did not introduce any evidence to corroborate that he performed a physical exam on any of the five other patients whose records were reviewed by Dr. Kennedy. Notably, Respondent was provided with the patients files for these six patients and testified that he always documented his findings. Tr. 1471. Moreover, there was other evidence suggesting that Respondent frequently failed to perform physical exams including testimony regarding an interview with DC, Tr. 762–64, and a DI's analysis that in 900 of the 1258 patient files she reviewed, there was no documentation that Respondent had performed a physical exam. GX 73.

Furthermore, Dr. Kennedy's review of the six patient files establishes that Respondent rarely performed drug screens on those patients. *See* n.22. For example, Respondent did not perform a single drug screen on D.P., even though he issued 74 controlled-substances prescriptions to him during some seventeen visits over a sixteen-month period. GX 82. He performed but a single drug screen on S.H., even though he saw S.H. thirteen times over a period of two years. *Id.* This evidence, which is unrebutted by any documentary evidence, gives ample reason to reject Respondent's testimony.[31]

Moreover, none of Respondent's other evidence (including the various exhibits he submitted on pain management and the testimony of his witnesses) rebuts Dr. Kennedy's ultimate findings that Respondent did not establish and maintain valid doctor-patient relationships with the six deceased patients and that his prescribing lacked a legitimate medical purpose and was outside of the usual course of professional practice. Only one of Respondent's three witnesses (I.A.) testified that she knew one of the deceased patients (D.P.), and she did not even know that D.P. had died of a drug overdose. Tr. 1286–87. Ms. I.A., who worked at Tri-State, and apparently did so only ''a few hours now and then,'' *id.* at 1284, testified that she ''opened the doors,'' ''basically answered the phones,'' ''pulled charts, and once in a while . . . would write a few patients up if somebody was gone'' based on what the patient told her. *Id.* at 1287–88. Ms. I.A. had no personal knowledge of Respondent's treatment of any of the six patients whose files were reviewed by Dr. Kennedy.[32]

S.S. (who was I.A.'s sister) also testified. S.S. did not work at Tri-State and started working for Respondent only after his falling out with the Huffmans; her employment was thus limited to the time he worked out of his Portsmouth apartment and in Chillicothe. *Id.* at 1328–29. S.S. testified that she ''would set up the charts'' and obtain information from both the patients and the hospitals to corroborate their stories. *Id.* at 1331. S.S. further testified that Respondent ''usually required his patients to have at least a year of therapy.'' *Id.* at 1332. S.S. further maintained that ''we obtained histories. We did physicals. We did the drug exams'' and monitored the patients' ''drug levels.'' *Id.* S.S. did not, however, have any knowledge regarding Respondent's treatment of patients (other than her sister) at Tri-State and offered no testimony regarding his treatment of the six deceased patients.

Respondent's remaining witness (E.S.M.) likewise worked for him for only two months at his Chillicothe office. *Id.* at 1363. While E.S.M. testified that Respondent made ''a lot of referrals,'' and that ''[h]e was very strict with'' monitoring patient compliance, *id.* at 1368, she did not work under him during the period in which he treated the six patients whose files were reviewed by Dr. Kennedy. Furthermore, at the time she was employed by him, Respondent clearly had reason to know that he was the subject of criminal investigations because various law enforcement authorities had twice searched his offices. Under these circumstances, even if true, evidence that Respondent was making referrals, was closely monitoring his patients and attempting to corroborate their stories,

[31] In his exceptions, Respondent notes that he attempted to subpoena records from a hospital that would have showed that he ''routinely and consistently ordered urine drug screens on his patients.'' Exceptions at 13. Respondent states: ''[o]f course, such records were simply 'not available,' '' implying that there is a conspiracy to deny him access to records that would vindicate him. According to Respondent: ''[t]he non-production of the forgoing documents, records, and evidence fits synergistically with the course of conduct of the hearing before the ALJ and stands as a poignant indictment of the legality of the process utilized by the agency.'' *Id.* at 14.

The letter from King's Daughters Medical Center merely stated that the hospital was ''unable to retrieve the information * * * from our system without patient specific information.'' RX T. My review of the subpoena indicates that it sought ''records of all urine drug screens ordered by [Respondent] from April 2003, through February 2006.'' RX O, at 5. Respondent offered no evidence that the records could, in fact, be retrieved based solely on his name, and there is no evidence that he subsequently provided patient names to the hospital.

[32] While Ms. I.A. testified that Respondent had sent her to several specialists, Tr. 1268, this testimony is not probative of Respondent's treatment of the six deceased patients whose files were reviewed by Dr. Kennedy. It should also be noted that I.A. was related to Denise Huffman, *id.* at 1288–89, and had testified before a grand jury on matters related to her employment at Tri-State. *Id.* Ms. I.A. also testified that Respondent ordered that blood be drawn on any patient he prescribed to, *id.* at 1318, yet there was no evidence of blood tests being performed on any of the six patients with the possible exception of a test done on S.H. at King's Daughters Hospital on March 2, 2005 (although it is unclear whether the test was a urine screen or blood test). GX 82. Based on the weight of the evidence, I reject this testimony.

and performing physical exams, is not probative of Respondent's practices while he was employed at Tri-State.

Finally, as for his exhibits, most of them are only marginally relevant to the issues in this case. While one of Respondent's Exhibits (an FAQ supported by DEA, the Last Acts Partnership, and the Univ. of Wisconsin) indicates that it may be appropriate ''on a case by case basis'' to prescribe more than one opiate including a short-acting one to address ''breakthrough pain,'' RX I, at 25; nothing in this document refutes the testimony of the Government's experts regarding the medical propriety of Respondent's prescribing of the trifecta and quadfecta cocktails.

Moreover, this document notes the importance of ''tak[ing] a detailed history and perform[ing] an appropriate physical examination,'' ''[s]creen[ing] for addictive behaviors of other family members,'' and ''[i]dentify[ing] concurrent psychiatric illness.'' *Id.* at 31. The document further notes that the physician should ''[c]onsider multiple approaches to the treatment of chronic pain'' including ''[n]onpharmacological and nonopioid analgesic approaches.'' *Id.* The document also explains that the physician should ''[r]ecognize that opioid therapy is as much a 'therapeutic trial' as any other treatment[,]'' and that ''[i]f the benefits are not clear, or the risks of adverse effects are not easily managed, the therapy can be modified or stopped.'' *Id.*

Relatedly, the document suggests that the physician ''[s]tructure the treatment in a manner that maintains the safety of the patient, and increases both the patient's ability to maintain control and the clinician's ability to identify medication misuse.'' *Id.* at 37. Among the measures which the document recommends that a physician employ are: ''the prescribing of small quantities,'' ''the use of a single drug (typically a long-acting opioid''), ''pill counts,'' and ''regular screening of urine toxicology (to provide evidence of therapeutic adherence and non-use of other drugs).'' *Id.* As found above, the credible evidence establishes that Respondent rarely followed these recommendations.

Most significantly, as found above, there is abundant evidence that Respondent did not regularly perform physical exams, rarely conducted drug screenings, rarely used methods other than prescribing controlled substances to treat the six deceased patients, and continued to prescribe controlled substances to persons whose behavior was consistent with either diversion or self-abuse. Moreover, as found above, Respondent's testimony that he complied with these standards is not credible. Contrary to Respondent's contention, this document does not support Respondent.

Discussion

Respondent's Exceptions

Two of Respondent's remaining exceptions raise constitutional claims which are not intertwined with the merits. Accordingly, they will be discussed before addressing the application of the public interest standard.[33]

The first of these is Respondent's contention that the Government was allowed to introduce over his objection an e-mail in which ''Respondent expresse[d] some opinions about the DEA, the ALJ, and the prosecuting DEA attorney,'' which ''are not flattering.'' Exceptions at 10. Respondent notes that he ''objected based upon relevance, prejudice, and intentional inflammation of the factfinder,'' that the evidence was not relevant ''to the factual issues in dispute,'' and the admission of the evidence punished him ''for merely expressing his Constitutionally protected opinions.'' *Id.*

Respondent is correct that the e-mail was not relevant to any issue in the case. The e-mail does not contain any evidence that is probative of either the allegations that he failed to maintain proper records and could not account for large quantities of controlled substances, or the allegations that his prescribing of controlled substances to various patients violated Federal law. GX 83. The Government's contention at the hearing that the e-mail was relevant because Respondent made ''disparaging remarks'' about the proceeding, DEA counsel and the ALJ, and that this ''raise[s] questions about judgment, and [is] therefore relevant to the public interest consideration,'' Tr. 1506, finds no support in the decisions of this Agency.

While a registrant's judgment may be relevant in determining the public interest, what makes it relevant is the nexus between the registrant's judgment and the performance of his obligations under the CSA and DEA regulations. As one example, entrusting one's registration to someone without doing a background check and failing to adequately supervise that person reflects poor judgment that is relevant in the public interest determination. *See, e.g., Rose Mary Jacinta Lewis,* 72 FR 4035, 4040 (2007). In contrast to his conduct, the opinions expressed by Respondent in his e-mail do not establish whether he committed any violations in the past or whether he is likely to do so in the future. The e-mail should not have been admitted into evidence and Respondent should not have been questioned about it.

That being said, the Administrative Procedure Act recognizes a rule of prejudicial error. *See* 5 U.S.C. 706. The ALJ did not rely on the e-mail in her recommended decision. Most significantly, having concluded that it is irrelevant, as ultimate factfinder, I have not considered it. Respondent's exception is therefore rejected.

Respondent's second constitutionally based exception is that the Agency violated his right to Due Process because it failed to provide him with ''fair notice'' of its ''theory of the case'' because the Government was repeatedly allowed to introduce ''evidence which grossly exceeded the scope of the February 2006 show cause order.'' Exceptions at 5 (citation omitted). While acknowledging that each of the unnamed patients listed in the Show Cause Order (most of whom were alleged to have died shortly after obtaining prescriptions from Respondent, see Show Cause Order at 9–11), were identified by the Government in its March 2006 pre-hearing statement, Respondent contends that the Government was allowed to introduce evidence ''about more than *twenty-five* specific patients,'' and that this ''effectively expanded'' the scope of the hearing ''without proper notice or any realistic chance to defend.'' Exceptions at 6. Respondent also notes that the Government was allowed to ask him ''about many more patients by reading names from a spreadsheet.'' *Id.*

Respondent did not, however, identify who the twenty-five patients were by citation of either the transcript or exhibits. *See* 21 CFR 1316.66(a) (''[t]he party shall include a statement of supporting reasons for such exceptions together with evidence of record (including specific and complete citations of the pages of the transcript and exhibits)''). Respondent has therefore failed to properly preserve this exception.[34]

Respondent also argues that he was denied a meaningful opportunity to

[33] Respondent's exception that DEA is engaged in the unlawful regulation of the practice of medicine will be discussed in the public interest analysis.

[34] It appears that the twenty-five patients included those patients who were listed on the KASPER report as having obtained controlled substances from Respondent (*see* GX 26, Exceptions at 8 n.6); the Government merely asked Respondent whether he recalled each of these patients. Tr. 1521–29. Respondent has made no showing that the Government failed to timely provide this document to him. In any event, I do not rely on this portion of his testimony.

respond to the Government's case because it used ''patient charts to prepare its own expert witnesses,'' but denied him ''timely access to these charts.'' Exceptions at 7. Respondent contends that ''it was essential to a meaningful hearing that [he] receive copies of the very same charts the [G]overnment used in order to procure expert opinion testimony from their own witnesses.'' *Id.* Respondent further argues that he ''asked for the charts,'' but the Government would not provide them because it had decided not to enter them into the record. *Id.*

Respondent acknowledges, however, that the Government provided him with nine patient charts, including five of the charts which were reviewed by Dr. Kennedy. Exceptions at 8 n.6. Moreover, the record establishes that Respondent received all six of the patient files which Dr. Kennedy reviewed in creating his report on Respondent's prescribing to the six deceased patients. Tr. 1126–27. While Respondent contends that he did not have enough time to review the charts and consult an expert witness because the Government turned over the charts only four days before the hearing convened, Exceptions at 8 n.6, Respondent ignores that the hearing was adjourned for approximately one month and that the ALJ allowed him to defer his cross-examination of Dr. Kennedy until the hearing reconvened. Tr. 1094–95.

Respondent thus had a meaningful opportunity to prepare for his cross-examination of Dr. Kennedy, as well as to retain an expert witness to review the patient files which Dr. Kennedy reviewed. Accordingly, there is no merit to his contention that the proceeding violated his rights under the Due Process Clause.[35]

The Public Interest Analysis

Respondent's Registration Status

At the outset, the scope of this proceeding must be determined. As found above, Respondent's registration expired on May 31, 2006, and he did not submit a renewal application (and his request for a modification) until May 12, 2006. While one of the Government's exhibits states that because Respondent filed a renewal application, his registration has ''remained in effect on a day-to-day basis pending the resolution of administrative proceedings,'' the document cited no authority for this statement which is contrary to Agency regulations. GX 2.

Under the Administrative Procedure Act, ''[w]hen [a] licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.'' 5 U.S.C. 558(c). When, however, a Show Cause Order has been issued to a registrant, DEA's regulation provides that:

> [i]n the event that an applicant for reregistration (who is doing business under a registration previously granted and not revoked or suspended) has applied for reregistration at *least 45 days before the date on which the existing registration is due to expire,* and the Administrator has issued no order on the application on the date on which the existing registration is due to expire, the existing registration shall automatically be extended and continue in effect until the date on which the Administrator so issues his/her order. The Administrator may extend any other existing registration under the circumstances contemplated in this section even though the registrant failed to apply for reregistration at least 45 days before expiration of the existing registration, if the Administrator finds that such extension is not inconsistent with public health and safety.

21 CFR 1301.36(i) (emphasis added).

Notwithstanding that he had previously been served with a Show Cause Order, Respondent did not file his renewal application until nineteen days before his registration expired. Accordingly, Respondent did not make a timely renewal application in accordance with agency rules; his registration has not remained in effect pending the resolution of this proceeding. *See* 5 U.S.C. 558(c). Moreover, in light of the allegations of the Show Cause Order (and the facts found above), the extension of his registration pending this Final Order would be manifestly ''inconsistent with public health and safety.'' 21 CFR 1301.36(i). I therefore conclude that Respondent's registration has expired.[36]

Respondent did, however, submit a renewal application and a request for modification, which under Agency regulation, is ''handled in the same manner as an application for registration.'' 21 CFR 1301.51. Accordingly, Respondent does have an application pending before the Agency.

The Public Interest Factors

Section 303(f) of the Controlled Substances Act (CSA) provides that an application for a practitioner's registration may be denied upon a determination ''that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination, the CSA requires the consideration of the following factors:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (2) The applicant's experience in dispensing * * * controlled substances.
>
> (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
>
> (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
>
> (5) Such other conduct which may threaten the public health and safety.

Id.

''These factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether * * * an application for registration [should be] denied.'' *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA*, 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA*, 412 F.3d 165, 173–74 (DC Cir. 2005).

Having considered all of the factors, I conclude that factors two, four, and five amply demonstrate that issuing a registration to Respondent ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In this matter, there is abundant evidence that Respondent repeatedly violated Federal law by prescribing controlled substances without a legitimate medical purpose and outside of the course of professional practice. Moreover, the evidence also establishes that Respondent authorized Tri-State personnel to use his registration to order huge quantities of

[35] While it is true that DEA's regulations and the Administrative Procedure Act require that an Order to Show Cause contain ''a summary of the matters of fact and law asserted,'' 21 CFR 1301.37(c), an agency is not required ''to give every [Respondent] a complete bill of particulars as to every allegation that [he] will confront.'' *Boston Carrier, Inc.,* v. *ICC,* 746 F.2d 1555, 1560 (*DC* Cir. 1984). As the ALJ explained at the hearing, the Show Cause Order only sets forth the parameters of the proceedings. *See Medicine Shoppe-Jonesborough,* 73 FR 364, 368 (2008). The actual conduct of the proceeding is controlled by the pre-hearing statements.

Respondent also raises an exception based on the ALJ's denial of his request for a subpoena requiring Dr. Kennedy to produce ''[c]opies of all opinion reports evaluating medical care by physicians written for the DEA from December 2001 through December 2006.'' RX O, at 1. The ALJ denied Respondent's ''request absent any further justification.'' *Id.* at 2. Respondent did not, however, provide any further justification. Accordingly, this exception is without merit. *See* 5 U.S.C. 555(d); 21 U.S.C. 875 & 876.

At Respondent's request, the ALJ issued a subpoena which directed DEA to provide patient release forms it had obtained from Dr. Joseph Delzotto. *Id.* at 1–3. Upon receipt of the subpoena, DEA searched its case files and found no such documents. *Id.* at 10. Respondent has made no showing that this was not the case.

[36] No footnote.

controlled substances and that he failed to ensure the accountability of these drugs by maintaining lawfully required records. Accordingly, Respondent's application will be denied.

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Record of Compliance With Applicable Laws

Respondent's Prescribing Practices

One of the principal issues in this case is whether the prescriptions Respondent issued complied with Federal law. While Respondent maintains that his prescribing practices were compliant with the State of Ohio's regulations of the practice of medicine, the evidence conclusively establishes that Respondent used his prescribing authority to act as a drug pusher.

Under a longstanding DEA regulation, a prescription for a controlled substance is not ''effective'' unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). This regulation further provides that ''an order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances.'' *Id.*

In *Gonzalez* v. *Oregon*, the Supreme Court explained that ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135 & 143 (1975)).

It is fundamental that a practitioner must establish and maintain a bona-fide doctor-patient relationship in order to be acting ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *See Moore*, 423 U.S. at 142–43 (noting that the evidence established that physician ''exceeded the bounds of 'professional practice,' '' when ''he gave inadequate physical examinations or none at all,'' ''ignored the results of the tests he did make,'' and ''took no precautions against * * * misuse and diversion''). Moreover, as I have explained, ''the CSA looks to state law in determining whether a physician has established [and is maintaining] a valid doctor-patient relationship.'' *United Prescription Services, Inc.*, 72 FR 50397, 50407 (2007) (citing DEA, *Dispensing and Purchasing Controlled Substances over the Internet*, 66 FR 21181, 21182–83 (2001)). *See also Kamir Garces-Mejias*, 72 FR 54931, 54935 (2007) (citing numerous state practice standards violated by physician).

Respondent argues that under *Gonzales*, DEA ''cannot lawfully determine and enforce a national medical standard of care.'' Exceptions at 11. Respondent further contends that because ''*Gonzales* directs that the states retain the power to set parameters on the practice of medicine, [and he] produced evidence that his prescribing practices conformed with Ohio law,'' DEA cannot act against his federal registration. *Id.* Relatedly, Respondent argues that whether he ''did or did not conform his conduct to the mandates of Ohio law is a question for the State Medical Board of Ohio—not DEA.'' *Id.* at 12. Respondent's argument that he was in compliance with the Ohio regulations is not factually correct; his contention that the Agency is exceeding its authority and usurping the State's role in regulating the practice of medicine is also mistaken.

As found above, Respondent's testimony that he complied with Ohio law was not credible. Under Ohio law, ''when utilizing any prescription drug for the treatment of intractable pain on a protracted basis or when managing intractable pain with prescription drugs in amounts that may not be appropriate when treating other medical conditions, a practitioner shall'' perform:

> [a]n initial evaluation of the patient * * * and documented in the patient's record that includes a relevant history, including complete medical, pain, alcohol and substance abuse histories; an assessment of the impact of pain on the patient's physical and psychological functions; a review of previous diagnostic studies and previously utilized therapies; an assessment of coexisting illnesses, diseases or conditions; and *an appropriate physical examination.*

Ohio Admin. Code R. 4731–21–02(A) (emphasis added).

There is ample evidence that Respondent failed to obtain adequate histories and perform adequate physical exams including the testimony of Dr. Kennedy and the DI's review of Respondent's patient files which found that there was no documentation of a physical exam in 900 of the files as required by Ohio law. This conclusion is also supported by the testimony regarding the interview of DC, who obtained three controlled-substance prescriptions from Respondent without the latter having performed a physical exam.

Moreover, the Ohio regulations require that ''[t]he practitioner's diagnosis of intractable pain shall be made after having the patient evaluated by one or more other practitioners who specialize in the treatment of the anatomic area, system, or organ of the body perceived as the source of the pain.'' Ohio Admin. Code R. 4731–21–02(A)(4)(a). Furthermore, ''[t]he practitioner shall maintain a copy of any report made by any practitioner to whom referral for evaluation was made under this'' provision.[37] *Id.* With respect to the six deceased patients, there is no credible evidence that Respondent had them evaluated by specialists [38] or relied on reports that a specialist had prepared ''within a reasonable period of time'' before diagnosing them as having intractable pain. *Id.* R. 4731–21–02(4)(b).

Respondent argues that while Dr. Kennedy ''claim[ed] to be aware of the Ohio guidelines,'' he was ''painfully unfamiliar with the controlling state standards.'' Exceptions at 12 (citing Tr. 1202–03). While it is true that much of Dr. Kennedy's testimony focused on the Kentucky guidelines, he also testified that ''there is no significant variation between the'' Ohio standards and the Kentucky guidelines. Tr. 1203. Moreover, when Dr. Kennedy offered to display the Ohio provisions to the court and explain how Respondent ''violated the Ohio Code,'' Respondent's counsel declined to pursue this line of questioning. *See Id.* Furthermore, in his report, Dr. Kennedy made clear that he had reviewed and was generally familiar with the Ohio standards for treating intractable pain (as well as other professional standards such as those issued by the Federation of State Medical Boards). GX 74, at 2; *see also* Tr. 1075 (expressing opinion that Respondent knew better because of ''the guidelines that were published by the

[37] The practitioner is not ''required to obtain such an evaluation, if the practitioner obtains a copy of medical records or a detailed written summary thereof showing that the patient has been evaluated and treated within a reasonable period of time by a specialist.'' Ohio Admin. Code R. 4731–21–02(A)(4)(b). The practitioner must, however ''obtain and review all available medical records or detailed written summaries thereof of prior treatment of the intractable pain or the condition underlying the intractable pain.'' *Id.* Moreover, under this regulation, the practitioner is required to ''maintain a copy of any record or report * * * on which [he] relied.'' *Id.*

[38] While there is evidence in a progress note dated 8/11/04 that D.P. had been referred to the Cleveland Clinic, the note does not indicate what the referral was for and when it occurred. At the time, D.P. had been seeing Respondent since April 2003.

State Medical Board of Ohio [and] the Kentucky Board of Medical Licensure that were well circulated'').

Respondent further argues that I should reject Dr. Kennedy's testimony because ''it was clear that he had not studied the chart * * * and was unable to harmonize his criticism of [Respondent's] care with the actual patient record then in front of him.'' Exceptions at 11. Respondent then argues that Dr. Kennedy ''admittedly worked from summaries, print-outs, and other documents created by the government or himself, based on pharmacy records—without any meaningful review and reliance on the patient record itself.'' *Id.*

Respondent does not, however, support these contentions with any citations to the record. *See* 21 CFR 1316.66. Moreover, in both his report and testimony, Dr. Kennedy made clear that for each of the patients, he had ''reviewed records obtained from [Respondent's] office'' including his ''clinical records.'' *See also* GX 74, at 1–2; *see also* Tr. 1068. While it is true that Respondent showed that he had performed a physical exam on K.R. at apparently her first visit (which also coincided with when he started working for Tri-State), he made no such showing with respect to the other five patients. Moreover, even with respect to K.R., Respondent did not establish that he complied with the Ohio standards and maintained a valid doctor-patient relationship with her.

Indeed, Respondent offered no testimony specific to his treatment of the six deceased patients and did not submit their patient files into the record. Accordingly, I adopt Dr. Kennedy's opinion that Respondent ''distributed prescriptions for oxycodone and other controlled substances not for a legitimate medical purpose and beyond the usual course of professional practice.'' GX 74, at 3.

Respondent further argues that the Agency is acting ''in direct contravention to *Gonzales*'' because it ''sought to pass judgment upon the medical care [he] rendered.'' Exceptions at 11. Relatedly, Respondent contends that whether he complied with Ohio law ''is a question for the State Medical Board of Ohio [and] not DEA.'' *Id.* at 12.

It is true that in enacting the CSA, Congress did not adopt a federal standard for determining whether a valid doctor-patient relationship exists. Rather, on this issue, the CSA recognizes the traditional role of the States in regulating the practice of medicine. *See Gonzales*, 546 U.S. at 270. The CSA therefore looks to state law in determining whether there is a valid doctor-patient relationship. *United Prescription Services*, 72 FR at 50407; *Dispensing and Purchasing Controlled-Substances over the Internet, 66 FR at 21182–83.*

Determining whether Respondent established and maintained a valid doctor-patient relationship with the six deceased patients under Ohio law is thus a necessary and permissible incident of determining whether Respondent complied with the prescription requirement of Federal law. *Cf.* 21 U.S.C. 823(f)(4) (directing consideration of applicant's ''[c]ompliance with applicable State * * * or local laws relating to controlled substances''). Whether Respondent complied with Ohio law in prescribing controlled substances is thus not only a question for the Ohio Medical Board, but also a question for the Attorney General, who has been entrusted with the authority under Federal law to determine whether the granting of a registration to dispense controlled substances is consistent with the public interest. *See Id.* section 823(f); *Id.* § 824(a) (granting Attorney General authority to revoke a registration where a registrant has committed acts inconsistent with the public interest). DEA's reliance on Ohio's medical practice standards thus does not exceed this Agency's authority as set forth in Gonzales.[39]

Accordingly, Respondent's arguments are without merit. Because the evidence establishes that Respondent lacked a ''legitimate medical purpose'' and acted outside of ''the usual course of his professional practice'' in distributing numerous controlled-substance prescriptions to the six deceased patients (and others), he violated Federal law. This conclusion provides reason alone to conclude that granting his application ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f).

The Record Keeping Violations

The record also contains extensive evidence that Respondent violated Federal law by failing to keep proper records for the controlled substances that were ordered and dispensed under his registration at Tri-State. Respondent agreed that his registration could be used to order and dispense controlled substances for Tri-State's customers. Tr. 1550. As the record establishes, Respondent agreed to this because numerous pharmacists were questioning his prescriptions and refusing to fill them. Tr. 1428–29. Moreover, Respondent told Denise Huffman what drugs to order. *Id.* at 543.

Respondent rapidly became the largest practitioner-purchaser in the nation of oxycodone, a schedule II controlled substance which is highly sought after by drug-abusers, and which commands top dollar in the illicit market. As found above, his purchases dwarfed that of other Ohio-based practitioners who purchased the drug. Moreover, Respondent also became—by a wide margin—the largest Ohio-based practitioner-purchaser of combination hydrocodone/apap drugs.[40]

Respondent proceeded to order hundreds of thousands of dosage units of these drugs (136,000 dosage units of oxycodone between 8/18/03 and 12/30/03; 222,600 dosage units of hydrocodone between 7/24/03 and 12/30/03)[41] which he distributed, and was required to maintain purchasing, inventory and dispensing records. *See* 21 U.S.C. 827(a); 21 CFR 1304.03(b) (requiring dispenser to keep records); *see also* 21 CFR 1304.11 (requiring initial and biennial inventories), *id.* 1304.22(c) (requiring maintenance of receiving and dispensing records). When, however, on December 30, 2003, Agent Kinneer of the Ohio State Board of Pharmacy inspected Tri-State, he found that the clinic had not made any entries in several controlled-substance dispensing logs in more than four months. *See* GX 11, at 2; GX 12, at 5. Respondent was thus already repeatedly violating Federal law.

[39] By contrast, *Gonzales* did not involve reliance on a State's medical practice standards but the issuance of an interpretive rule, unsupported by a grant of Congressional authority, which would have barred conducted permitted by state law. *See* 546 U.S. at 274–75. Moreover, as Gonzales recognized, prior to 1984, ''the Attorney General was required to register any physician who was authorized by his State [and] could only deregister a physician who falsified his application, was convicted of a felony relating to controlled substances, or had his state license or registration revoked.'' *Id.* at 261. In 1984, however, the CSA was amended to grant ''the Attorney General the authority to deny a registration to an applicant 'if he determines that the issuance of such registration would be inconsistent with the public interest.'' '*Id.* (quoting 21 U.S.C. 823(f)). Respondent's prescribing practices are therefore properly considered in this proceeding.

[40] The record further establishes that Respondent also ordered large quantities of hydromorphone, another schedule II controlled substance, 21 CFR 1308.12(b)(1), and several benzodiazepines, which are schedule IV controlled substances. *Id.* 1308.14(c). During the 2005 search, there were also no records documenting the handling of these drugs.

[41] As found above, in 2004, Respondent ordered 457,000 dosage units of oxycodone and 263,500 dosage units of hydrocodone/apap. Moreover, during the little more than eight months of 2005 when he worked at Tri-State, Respondent ordered 414,000 dosage units of oxycodone and 168,500 dosage units of hydrocodone.

Thereafter, in January 2004, Respondent represented to the Ohio Board that ''[a]ll log books are current and up to date and are being kept current.'' GX 11. He also stated that ''[a]ll controlled medication being dispensed * * * is being logged as it is filled.'' GX 11.

Notwithstanding Respondent's representations to the state board, on June 7, 2005, DEA investigators could not find any dispensing logs for the year 2004, and Denise Huffman admitted that there were no such logs. Tr. 670. Under Federal regulations, however, Respondent was required to maintain these records for a period of two years. *See* 21 U.S.C. 827(b). Moreover, given the circumstances in which the 2005 logs were not at the clinic but were later provided to the Government only after copies of the patient files were given to the clinic (following the search), and that the logs appeared to be brand new, it is most unlikely that these were accurate records. In any event, the various dispensing logs were required to be maintained at the clinic. *See* 21 CFR 1304.04(1). Respondent thus repeatedly violated Federal law by failing to maintain the required records and did so over a sustained period of time. It is no defense that Respondent delegated this responsibility to Ms. Huffman.[42] Tr. 1511.

Aggravating these violations is the fact that he ordered extraordinary quantities of various highly abused controlled substances and that there is no way—given the wholly deficient recordkeeping—to determine where these drugs have gone. Recordkeeping is one of the CSA's central features; a registrant's accurate and diligent adherence to this obligation is absolutely essential to protect against the diversion of controlled substances. Given the extraordinary quantities of controlled substances which Respondent ordered and his complete lack of accountability for them, it is likely that most of these drugs were diverted. Respondent's failure to maintain accurate records (assuming that they were ever accurately maintained beyond August 2003,[43] *see* GX 11, at 2), provides a further reason—which is sufficient by itself—to conclude that granting him a registration would ''be inconsistent with the public interest.'' 21 U.S.C. 823(f).

At the hearing, Respondent testified that ''as far as I was concerned, as far as my knowledge of Ohio law, Federal law, standards of care of pain management, and anything else I could find, I had done nothing wrong, and was following absolutely prescribed procedures that I should in every respect.'' Tr. 1439. I beg to differ. As the record shows, Respondent is an egregious violator of the CSA's requirements with respect to both his prescribing practices and compliance with the Act's recordkeeping requirements.[44] And even assuming—given the remedial purpose of proceedings under section 303—that there could be circumstances in which an egregious violator of the Act might convincingly establish that he has reformed, Respondent has offered no credible evidence to demonstrate that he can be entrusted with a new registration. Accordingly, I conclude that granting Respondent's application for a new registration would be ''inconsistent with the public interest.''[45] 21 U.S.C. 823(f).

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) & 0.104, I order that the application of Paul H. Volkman, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This order is effective June 27, 2008.

Dated: May 16, 2008.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E8–11851 Filed 5–27–08; 8:45 am]

BILLING CODE 4410–09–P

[42] As I have previously explained, when a registrant authorizes another person to perform acts under his registration, he is responsible for that individual's misuse of the registration and failure to perform required acts. *See Rose Mary Jacinta Lewis*, 72 FR 4035, 4040 (2007); *see also Summer Grove Pharmacy*, 54 FR 28522, 28523 (1989).

[43] While Agent Kinneer stated in his report that during his February 2004 visit, Respondent and Alice Huffman gave him dispensing logs, no such logs were found during the June 2005 search.

[44] There is also evidence in the record that Respondent told a patient (J.R.) to sell a drug (Soma) if he did not take it. Tr. 42 & 104. While Soma is not controlled under Federal law, the evidence is nonetheless probative of Respondent's intent.

[45] In light of the extensive evidence of Respondent's misconduct, I conclude that it is unnecessary to make findings regarding the remaining factors.

MERIT SYSTEMS PROTECTION BOARD

Agency Information Collection Activities; Proposed Collection

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), the U.S. Merit Systems Protection Board (MSPB) announces that it is planning to submit a request for a three-year extension of an Information Collection Request (ICR) to the Office of Management and Budget (OMB). Before submitting this ICR to OMB for review and approval, MSPB is soliciting comments on specific aspects of its information collection activities as described below.

DATES: Written comments must be received on or before June 27, 2008.

ADDRESSES: Submit written comments on the collection of information to Dr. Dee Ann Batten, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Dr. Dee Ann Batten at (202) 653–6772, ext. 1411.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. The MSPB intends to ask for a three-year renewal of its Generic Clearance Request for Voluntary Customer Surveys, OMB Control No. 3124–0012. Executive Order 12862, ''Setting Customer Service Standards,'' mandates that agencies identify their customers and survey them to determine the kind and quality of services they want and their level of satisfaction with existing services.

In this regard, we are soliciting comments on the public reporting burden. The reporting burden for the collection of information on this request is estimated to vary from 5 minutes to 30 minutes, with an average of 15 minutes, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. In the estimated annual reporting burden listed below, the reason that the annual number of respondents differs from the number of total annual responses is that the latter figure assumes a 60% response rate. Our experience has been that fewer than 60% of those invited to participate in our voluntary customer surveys avail themselves of that opportunity.

In addition, the MSPB invites comments on (1) Whether the proposed collection of information is necessary for the proper performance of MSPB's functions, including whether the information will have practical utility; (2) the accuracy of MSPB's estimate of burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

ESTIMATED ANNUAL REPORTING BURDEN

5 CFR parts	Annual number of respondents	Frequency per response	Total annual responses	Hours per response (average)	Total hours
1201, 1208, and 1209	2,500	1	1,500	0.25	375

William D. Spencer,

Clerk of the Board.

[FR Doc. E8–11877 Filed 5–27–08; 8:45 am]

BILLING CODE 7401–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–048)]

NASA Advisory Council; Science Committee; Planetary Science Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: The National Aeronautics and Space Administration (NASA) announces a meeting of the Planetary Science Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Monday, June 23, 2008, 8:30 a.m. to 6:30 p.m., and Tuesday, June 24, 2008, 8:30 a.m. to 4:30 p.m.

ADDRESSES: NASA Goddard Space Flight Center, Building 1, Room E100E, 8800 Greenbelt Road, Greenbelt, Maryland 20771.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Planetary Science Division Update;

—Analysis Group and Management Operations Working Group Reports;

—Update on International Mars Architecture for Returning Samples;

—Evaluation of the Government Performance and Results Act Outcomes;

—Discussion with the New Associate Administrator for Science Mission Directorate.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide the following information no less than 15 working days prior to the meeting: Full name; gender; date/place of birth; citizenship; social security number; green card information (resident alien number, expiration date); visa information (number, type, expiration date); passport information (number, country of issue, expiration date); employer/affiliation information (name of institution, title/position, address, country of employer, telephone, email address); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 4 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: May 20, 2008.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E8–11805 Filed 5–27–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency has submitted to OMB for approval the information collection described in this notice. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted to OMB at the address below on or before June 27, 2008 to be assured of consideration.

ADDRESSES: Send comments to Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5167.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. NARA published a notice of proposed collection for this information collection on March 11, 2008 (73 FR 13019 and 13020). No comments were received. NARA has submitted the described information collection to OMB for approval.

In response to this notice, comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Authorization for Release of Military Medical Patient Records, Request for Information Needed to Locate Medical Records, Request for Information Needed to Reconstruct Medical Data, and Questionnaire about Military Service.

OMB number: 3095–0039.

Agency form number: NA Forms 13036, 13042, 13055, and 13075.

Type of review: Regular.

Affected public: Veterans, their authorized representatives, state and local governments, and businesses.

Estimated number of respondents: 79,800.

Estimated time per response: 5 minutes.

Frequency of response: On occasion (when respondent wishes to request information from a military personnel, military medical, and dependent medical record).

Estimated total annual burden hours: 6,650 hours.

Abstract: The information collection is prescribed by 36 CFR 1228.162. In accordance with rules issued by the Department of Defense (DOD) and the Department of Transportation (DOT, U.S. Coast Guard), the National Personnel Records Center (NPRC) of the National Archives and Records Administration (NARA) administers military personnel and medical records of veterans after discharge, retirement, and death. In addition, NRPC administers the medical records of dependents of service personnel. When veterans, dependents, and other authorized individuals request information from or copies of documents in military personnel, military medical, and dependent medical records, they must provide on forms or in letters certain information about the veteran and the nature of the request. A major fire at the NPRC on July 12, 1973, destroyed numerous military records. If individuals' requests involve records or information from records that may have been lost in the fire, requesters may be asked to complete NA Form 13075, Questionnaire about Military Service, or NA Form 13055, Request for Information Needed to Reconstruct Medical Data, so that NPRC staff can search alternative sources to reconstruct the requested information. Requesters who ask for medical records of dependents of service personnel and hospitalization records of military personnel are asked to complete NA Form 13042, Request for Information Needed to Locate Medical Records, so that NPRC staff can locate the desired records. Certain types of information contained in military personnel and medical records are restricted from disclosure unless the veteran provides a more specific release authorization than is normally required. Veterans are asked to complete NA Form 13036, Authorization for Release of Military Medical Patient Records, to authorize release to a third party of a restricted type of information found in the desired record.

Dated: May 21, 2008.

Martha Morphy,

Assistant Archivist for Information Services.

[FR Doc. E8–11922 Filed 5–27–08; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No.: 40–8027]

Notice of Availability of the Environmental Impact Statement for the Reclamation of Sequoyah Fuels Corporation Site in Gore, Oklahoma, NUREG–1888

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of availability of Final Environmental Impact Statement.

FOR FURTHER INFORMATION CONTACT: Allen Fetter, Project Manager, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 415–8556; e-mail: *allen.fetter@nrc.gov.*

SUMMARY: Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC) is issuing a Final Environmental Impact Statement (EIS) for the Sequoyah Fuels Corporation (SFC) license amendment application, dated January 28, 2003, and subsequently revised by letters dated February 27, 2004, and July 30, 2004, for the surface reclamation of SFC's former uranium conversion site near Gore, Oklahoma. The Final EIS also addresses the SFC license amendment application dated June 12, 2003, for groundwater corrective actions at the SFC site.

The Final EIS discusses the purpose and need for SFC's proposed surface reclamation activities and groundwater corrective actions and reasonable alternatives to the proposed action, including the no-action alternative. The Final EIS also discusses the environment potentially affected by the SFC proposal, presents and compares the potential environmental impacts resulting from the proposed action and its alternatives, and identifies mitigation measures that could eliminate or lessen the potential environmental impacts.

Based on the final evaluation in the Final EIS, the NRC environmental review staff has concluded that the proposed action would have small effects on the physical environment and human communities with the exception of land use, for which the impact would be moderate. This Final EIS reflects the final analysis of environmental impacts of the proposed actions and its alternatives, including the consideration of public comments received by the NRC.

ADDRESSES: The NRC maintains an Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The Final EIS and its appendices may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html,* using the Agencywide Documents Access and Management System (ADAMS) accession number ML081300103 for the Final EIS. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

The Final EIS is also available for inspection at the Commission's Public Document Room, U.S. NRC's Headquarters Building, 11555 Rockville Pike (first floor), Rockville, Maryland. Upon written request and to the extent supplies are available, a single copy of the Final EIS can be obtained for a fee by writing to the Office of the Chief Information Officer, Reproduction and Distribution Services Section, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; by electronic mail at *Distribution.Resource@nrc.gov;* or by fax at (301) 415–2289.

SUPPLEMENTARY INFORMATION: The NRC staff has prepared this Final EIS in response to two license amendment requests submitted by SFC for the surface reclamation and groundwater restoration at SFC's former uranium conversion site near Gore, Oklahoma. The Final EIS was prepared by the staff of the NRC and its contractor, Ecology & Environment, Inc., in compliance with the National Environmental Policy Act (NEPA) and the NRC's regulations for implementing NEPA (10 CFR Part 51).

The NRC staff published a Notice of Intent to prepare an EIS for the Sequoyah Fuels Corporation Site and to conduct a scoping process, in the

Federal Register on October 20, 1995 (60 FR 54260). The public scoping meeting was held in Gore, Oklahoma on November 15, 1995. Following the NRC's 2002 reclassification of waste at the SFC site as 11e.(2) byproduct material and transfer of the NRC regulatory oversight to Appendix A of Part 40, NRC held a rescoping meeting on May 13, 2003 (68 FR 20033). The Rescoping Summary Report was issued in November 2003 (ADAMS Accession No.: ML033170349). The NRC staff prepared and issued a Draft EIS in September 2007; notice of the availability of the Draft EIS appeared in the **Federal Register** on September 21, 2007 (72 FR 54080). Public comments on the Draft EIS were accepted by the NRC staff until November 5, 2007. The NRC staff's responses to these comments and copies of the submitted comments are provided in appendices to the Final EIS.

The Final EIS describes the proposed action and reasonable alternatives to the proposed action, including the no-action alternative, and describes the proposed mitigation measures. The NRC staff assesses the impacts of the proposed action and it's alternative on public and occupational health, air quality, water resources, waste management, geology and soils, noise, ecology resources, land use, transportation, historical and cultural resources, visual and scenic resources, socioeconomics, accidents and environmental justice. Additionally, the Final EIS analyzes and compares the costs and benefits of the proposed action.

After weighing the impacts, costs, and benefits of the proposed action and comparing alternatives, the NRC staff, in accordance with 10 CFR 51.91(d), sets forth its final NEPA recommendation regarding the proposed action. The NRC staff recommends that the proposed action be approved, unless safety issues mandate otherwise.

Dated at Rockville, Maryland, this 21st day of May, 2008.

For the U.S. Nuclear Regulatory Commission.

Scott C. Flanders,

Deputy Director, Environmental Protection and Performance Assessment Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. E8–11869 Filed 5–27–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

DATE: Weeks of May 26, June 2, 9, 16, 23, 30, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of May 26, 2008

Tuesday, May 27, 2008

1:30 p.m.

NRC All Hands Meeting (Public Meetings), Marriott Bethesda North Hotel, 5701 Marinelli Road, Rockville, MD 20852.

Wednesday, May 28, 2008

9:25 a.m. Affirmation Session (Public Meeting) (Tentative):

a. AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station), Docket No. 50–219–LR, Citizens' Petition for Review of LBP–07–17 and Other Interlocutory Decisions in the Oyster Creek Proceeding (Tentative).

b. Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee License Renewals, Docket Nos. 50–219–LR, 50–247–LR, 50–286–LR, 50–293–LR, 50–271–LR, Petition to Suspend Proceedings (Tentative).

c. U.S. Department of Energy (High Level Waste Repository: Pre-Application Matters), Docket No. PAPO–00—The State of Nevada's Notice of Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders and The State of Nevada's Motion to File a Limited Reply (Tentative).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

9:30 a.m.

Briefing on Equal Employment Opportunity (EEO) and Workforce Planning (Public Meeting) (*Contact:* Kristin Davis, (301) 492–2266).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Week of June 2, 2008—Tentative

Wednesday, June 4, 2008

9 a.m.

Briefing on Results of the Agency Action Review Meeting (AARM) (Public Meeting) (*Contact:* Shaun Anderson, (301) 415–2039).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Thursday, June 5, 2008

1:30 p.m.

Meeting with Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting) (*Contact:* Tanny Santos, (301) 415–7270).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Week of June 9, 2008—Tentative

There are no meetings scheduled for the Week of June 9, 2008.

Week of June 16, 2008—Tentative

There are no meetings scheduled for the Week of June 16, 2008.

Week of June 23, 2008—Tentative

Friday, June 27, 2008

9:30 a.m.

Periodic Briefing on New Reactor Issues (Public Meeting) (*Contact:* Donna Williams, (301) 415–1322).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Week of June 30, 2008—Tentative

Tuesday, July 1, 2008

9 a.m.

Hearing: Diablo Canyon, 10 CFR Part 2, Subpart K Proceeding, Oral Arguments (Public Meeting) (*Contact:* John Cordes, (301) 415–1600).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, *TDD:* 301–415–2100, or by e-mail at *REB3@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is

available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: May 22, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 08–1303 Filed 5–23–08; 10:44 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Issuance of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance, Availability of Regulatory Guide 1.45, Revision 1.

FOR FURTHER INFORMATION CONTACT: John Ridgely, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6555 or e-mail to *John.Ridgely@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to an existing guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 1 of Regulatory Guide 1.45, ''Guidance on Monitoring and Responding to Reactor Coolant System Leakage,'' was issued with a temporary identification as Draft Regulatory Guide DG–1173. General Design Criterion (GDC) 14, ''Reactor Coolant Pressure Boundary,'' as set forth in Appendix A, ''General Design Criteria for Nuclear Power Plants,'' to Title 10, Part 50, of the *Code of Federal Regulations* (10 CFR part 50), ''Domestic Licensing of Production and Utilization Facilities,'' requires that the reactor coolant pressure boundary (RCPB) shall be designed, fabricated, erected, and tested so as to have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture. As a result, these nuclear components are normally designed to the criteria established in Section III of the Boiler and Pressure Vessel Code promulgated by the American Society of Mechanical Engineers.

During the design phase, degradation-resistant materials are normally specified for reactor coolant system (RCS) components. However, materials can degrade as a result of the complex interaction of the materials, the stresses they encounter, and the normal and upset operating environments in which they are used. Such material degradation could lead to the leakage of the reactor coolant. Consequently, GDC 30, ''Quality of Reactor Coolant Pressure Boundary,'' of Appendix A to 10 CFR Part 50 requires that means shall be provided for detecting and, to the extent practical, identifying the location of the source of reactor coolant leakage. Additionally, 10 CFR 50.55a, ''Codes and Standards,'' requires the performance of inservice inspection and testing of nuclear power plant components. Thus, the concept of defense-in-depth is used to provide assurance that structural integrity of the RCPB is maintained. This guide describes methods that the staff of the NRC considers acceptable for implementing these requirements, with regard to selecting reactor coolant leakage detection systems, monitoring for leakage, and responding to leakage. This guide applies to light-water cooled reactors.

II. Further Information

In June 2007, DG–1173 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on August 28, 2007. The staff's responses to the public comments are located in the NRC's Agencywide Documents Access and Management System (ADAMS), Accession Number ML073200289.

Electronic copies of Regulatory Guide 1.45, Revision 1 are available through the NRC's public Web site under ''Regulatory Guides'' at *http://www.nrc.gov/reading-rm/doc-collections/.*

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4209, by fax at (301) 415–3548, and by e-mail to pdr@nrc.gov.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 21st day of May, 2008.

For the Nuclear Regulatory Commission.

Andrea D. Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–11847 Filed 5–27–08; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for OMB Review; Comment Request for Extension, Without Change, of a Currently Approved Information Collection: RI 20–64, RI 20–64A and RI 20–64B

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) has submitted to the Office of Management and Budget (OMB) a request for extension, without change, of a currently approved information collection. RI 20–64, Letter Reply to Request for Information, is used by the Civil Service Retirement System to provide information about the amount of annuity payable after a survivor reduction, to explain the annuity reductions required to pay for the survivor benefit, and to give the beginning rate of survivor annuity. RI 20–64A, Former Spouse Survivor Annuity Election, is used by the Civil Service Retirement System to obtain a survivor benefits election from annuitants who are eligible to elect to provide survivor benefits for a former spouse. RI 20–64B, Information on Electing a Survivor Annuity for Your Former Spouse, is a pamphlet that provides important information to retirees under the Civil Service Retirement System who want to provide a survivor annuity for a former spouse.

We estimate that 30 survivor elections on RI 20–64A will be processed per year and that of these eight will use RI 20–64 to ask for information about electing a smaller survivor benefit. Form RI 20–64A requires 45 minutes to complete for a burden of 23 hours. Form RI 20–64 requires 8 minutes to complete for a burden of 1 hour. The total burden is 24 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, FAX (202) 418–3251 or via E-mail to *MaryBeth.Smith-Toomey@opm.gov.*

Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 30 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—Ronald W. Melton, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500; and Brenda Aguilar, OPM Desk Officer, Office of Information & Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 10235, Washington, DC 20503.

For Information Regarding Administrative Coordination—Contact: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, (202) 606–0623.

U.S. Office of Personnel Management.

Howard Weizmann,

Deputy Director.

[FR Doc. E8–11840 Filed 5–27–08; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57838; File No. SR–NYSEArca–2008–09]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Relating to the Listing and Trading of Shares of the AirShares™ EU Carbon Allowances Fund

May 20, 2008.

I. Introduction

On March 14, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to: (1) Adopt new NYSE Arca Equities Rule 8.204 relating to the listing and trading of Commodity Futures Trust Shares; (2) incorporate cross-references to Commodity Futures Trust Shares and proposed NYSE Arca Equities Rule 8.204 in certain Exchange rules; and (3) permit the listing and trading, or trading pursuant to unlisted trading privileges (''UTP''), of shares (''Shares'') of the AirShares™ EU Carbon Allowances Fund (''Fund'') under the proposed rule. On April 4, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended by Amendment No. 1 thereto, was published for comment in the **Federal Register** on April 15, 2008.[3] On May 14, 2008, the Exchange filed Amendment No. 2 to the proposed rule change.[4] The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto.

II. Description of the Proposed Rule Change

A. Proposed Listing Rules for Commodity Futures Trust Shares

The Exchange proposes to adopt new NYSE Arca Equities Rule 8.204 to permit the listing and trading, or trading pursuant to UTP, of Commodity Futures Trust Shares. Proposed NYSE Arca Equities Rule 8.204(c) defines a Commodity Futures Trust Share as a security that: (1) Is issued by a trust that (a) is a commodity pool, as defined in the Commodity Exchange Act (''CEA'') and regulations thereunder, managed by a commodity pool operator registered with the Commodity Futures Trading Commission (''CFTC''), and (b) holds positions in futures contracts[5] that track the performance of a specified commodity, or interests in a commodity pool which, in turn, holds such positions; and (2) is issued and redeemed daily in specified aggregate amounts at net asset value (''NAV'').

Proposed NYSE Arca Equities Rule 8.204(d) provides that the Exchange may trade, either by listing or pursuant to UTP, Commodity Futures Trust Shares that are based on an underlying commodity futures contract. Each issue of Commodity Futures Trust Shares would be designated as a separate series and would be identified by a unique symbol.

The criteria for listing and trading Commodity Futures Trust Shares are set forth in proposed NYSE Arca Equities Rule 8.204(e). Proposed NYSE Arca Equities Rule 8.204(e)(1) provides that the Exchange will establish a minimum number of Commodity Futures Trust Shares that will be required to be outstanding at the time of commencement of trading. The continued listing criteria in proposed NYSE Arca Equities Rule 8.204(e)(2) provide for the suspension of trading in, or removal from listing of, the Commodity Futures Trust Shares under any of the following circumstances:

- If, following the initial 12-month period beginning upon the commencement of trading of the Shares: (1) The trust has fewer than 50,000 Shares issued and outstanding; (2) the market value of all Shares is less than $1,000,000; or (3) there are fewer than 50 record and/or beneficial holders of Commodity Futures Trust Shares for 30 consecutive trading days;
- If the value of the underlying futures contract is no longer calculated or available on at least a 15-second delayed basis during the Exchange's Core Trading Session, as defined in NYSE Arca Equities Rule 7.34(a), from a source unaffiliated with the sponsor, the trust, or the trustee;
- If the NAV for the trust is no longer disseminated to all market participants at the same time;
- If the Indicative Trust Value is no longer disseminated on at least a 15-second delayed basis during the Exchange's ''Core Trading Session,'' as defined in NYSE Arca Equities Rule 7.34(a);[6] or
- If such other event shall occur or condition exists that, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57636 (April 8, 2008), 73 FR 20344 (''Notice'').

[4] In Amendment No. 2, the Exchange made minor, non-substantive changes to incorporate cross-references to Trust Units under NYSE Arca Equities Rule 8.500: (1) in the list of securities for which the Core Trading Session (as defined herein) on the Exchange concludes at 4:15 p.m. Eastern Time (''ET''), as provided in NYSE Arca Equities Rule 7.34(a)(3); (2) in the definition of ''Derivative Securities Product'' as set forth in NYSE Arca Equities Rule 7.34(a)(4); and (3) in the list of securities included under the term ''Derivative Securities Products'' set forth in note 3 of the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services. *See* Securities Exchange Act Release No. 57059 (December 28, 2007), 73 FR 909 (January 4, 2008) (SR–NYSEArca–2006–76) (approving, among other things, the adoption of NYSE Arca Equities Rule 8.500 relating to the listing and trading of Trust Units). In addition, the Exchange made clarifying changes to NYSE Arca Equities Rule 7.34(a) and the NYSE Arca Equities Schedule of Fees and Charges for Exchange Service to reflect the incorporation of cross-references to Managed Fund Shares under NYSE Arca Equities Rule 8.600 that was approved by the Commission subsequent to the date of the Notice. *See* Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25) (approving, among other things, the adoption of NYSE Arca Equities Rule 8.600 relating to the listing and trading of Managed Fund Shares). Amendment No. 2 is technical in nature, and therefore is not subject to notice and comment.

[5] For purposes of the proposed rule: (1) The term ''futures contract'' is a ''contract of sale of a commodity for future delivery'' set forth in Section 2(a) of the CEA; and (2) the term ''commodity'' is defined in Section 1(a)(4) of the CEA.

[6] The Core Trading Session on the Exchange is from 9:30 a.m. to 4 or 4:15 p.m. ET. *See* NYSE Arca Equities Rule 7.34(a).

In addition, the Exchange will remove the Commodity Futures Trust Shares from listing upon termination of the trust.

Proposed NYSE Arca Equities Rule 8.204(e)(3) provides that the term of a trust is as stated in the trust's prospectus, and that the trust may be terminated ''earlier'' as may be specified in the prospectus. Proposed NYSE Arca Equities Rule 8.204(e)(4) sets forth proposed requirements for the trustee of a trust: (1) The trustee of a trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business; in cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee; and (2) no change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange. Proposed NYSE Arca Equities Rule 8.204(e)(5) provides that voting rights will be as set forth in the applicable trust prospectus.

Proposed NYSE Arca Equities Rule 8.204(f) sets forth certain restrictions on ETP Holders acting as registered Market Makers [7] in Commodity Futures Trust Shares to facilitate surveillance. Proposed NYSE Arca Equities Rules 8.204(f)(2)–(3) require that the ETP Holder acting as a registered Market Maker in the Commodity Futures Trust Shares provide the Exchange with necessary information relating to its trading in the underlying commodity, related futures or options on futures, or any other related derivatives. Proposed NYSE Arca Equities Rule 8.204(f)(4) prohibits the ETP Holder acting as a registered Market Maker in the Commodity Futures Trust Shares from using any material non-public information received from any person associated with an ETP Holder or employee of such person regarding trading by such person or employee in the underlying commodity, related futures or options on futures, or any other related derivative (including the Commodity Futures Trust Shares). In addition, proposed NYSE Arca Equities Rule 8.204(f)(1) prohibits the ETP Holder acting as a registered Market Maker in the Commodity Futures Trust Shares from being affiliated with a market maker in the underlying commodity, related futures or options on futures, or any other related derivative, unless adequate information barriers are in place, as provided in NYSE Arca Equities Rule 7.26.

Proposed NYSE Arca Equities Rule 8.204(g) relates to the Exchange's limitation of liability. Proposed NYSE Arca Equities Rule 8.204(h) specifically provides that the Exchange will file separate proposals under Section 19(b) of the Act [8] before listing and trading separate and distinct series of Commodity Futures Trust Shares.

Commentary .01 to proposed NYSE Arca Equities Rule 8.204 requires ETP Holders to provide all purchasers of newly issued Commodity Futures Trust Shares with a prospectus. Commentary .02 to proposed NYSE Arca Equities Rule 8.204 provides that trading in the Commodity Futures Trust Shares will occur during the trading hours specified in NYSE Arca Equities Rule 7.34. Commentary .03 to proposed NYSE Arca Equities Rule 8.204 requires that if the Indicative Trust Value or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Indicative Trust Value or the value of the underlying futures contract occurs. If the interruption to the dissemination of the Indicative Trust Value or the value of the underlying futures contract persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to a series of Commodity Futures Trust Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV or the Disclosed Portfolio is available to all market participants. Commentary .04 to proposed NYSE Arca Equities Rule 8.204 provides that the Exchange's rules governing the trading of equity securities apply to Commodity Futures Trust Shares. Commentary .05 to proposed NYSE Arca Equities Rule 8.204 provides that the Exchange will implement written surveillance procedures for Commodity Futures Trust Shares.

B. Other Proposed Amendments [9]

The Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(3) to add references to Commodity Futures Trust Shares and proposed NYSE Arca Equities Rule 8.204 to the list of securities for which the Core Trading Session on the Exchange concludes at 4:15 p.m. ET. In addition, the Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(4) to include Commodity Futures Trust Shares under the definition of ''Derivative Securities Product'' with respect to trading halts of certain derivative securities products trading pursuant to UTP on the Exchange. The Exchange also proposes to add Commodity Futures Trust Shares to the securities included under the term ''Derivative Securities Products'' in note 3 of the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services.

Proposal To List and Trade the Shares of the Fund

Pursuant to proposed NYSE Arca Equities Rule 8.204, the Exchange proposes to list and trade the Shares of the Fund.[10] The Exchange states that the Shares, which represent ownership of a fractional undivided beneficial interest in the net assets of the Fund, will conform to the initial and continued listing criteria under proposed NYSE Arca Equities Rule 8.204.

The investment objective of the Fund is to provide investors with investment results that correspond generally, before payment of the Fund's expenses and liabilities, to the performance of a basket of exchange-traded futures contracts for carbon equivalent emissions allowances (''EUAs'') issued under the European Union Emissions Trading Scheme (''EU ETS'').[11] The EU ETS is a ''cap and trade'' emissions trading program instituted by the European Union (''EU''), in furtherance of the joint commitment of its member states under the Kyoto Protocol to achieve certain reductions in their emissions of greenhouse gases from 2008 to 2012. The Fund will not be actively managed in that it will not engage in activities designed to obtain a profit from, or to ameliorate losses caused by, changes in the value of its portfolio of EUAs.

The net assets of the Fund will consist of long positions in ICE Futures ECX Carbon Financial Instrument Futures Contracts (''ECX CFI Futures

[7] Section 1.1(u) defines ''Market Maker'' as ''an ETP Holder that acts as a Market Maker pursuant to Rule 7.''

[8] 15 U.S.C. 78s(b).

[9] *See supra* note 4.

[10] The Exchange states that the Fund is not an investment company registered under the Investment Company Act of 1940, according to the Registration Statement on Form S–1 for the Fund, which was filed with the Commission on December 14, 2007 (File No. 333–145448) (''Registration Statement'').

[11] According to the Registration Statement, while the investment objective of the Fund is to track generally the value of the underlying futures contracts, the Fund's portfolio of fixed income securities, as well as other factors such as the Fund's expenses and its hedging activities, may cause a lack of correlation between the NAV of the Shares and the value of the Fund's portfolio of futures contracts.

Contracts'').[12] The ECX CFI Futures Contracts are standardized contractual instruments for futures on deliverable EUAs issued under the EU ETS and developed by the European Climate Exchange (''ECX''). ECX CFI Futures Contracts are listed and admitted to trading on ICE Futures on the London-based electronic platform, owned and operated by Intercontinental Exchange, Inc. (also known as the ICE Platform).[13] Each ECX CFI Futures Contract provides for delivery of 1,000 EUAs on a specified date at a specified price, with each EUA being an entitlement to emit one ton of carbon dioxide equivalent gas.[14] The Exchange states that, if the Fund invests in EUAs other than ECX CFI Futures Contracts, it will file a Form 19b–4 under the Act[15] to obtain Commission approval for the continued listing and trading of the Shares.[16]

More information about the structure of the Fund, the Kyoto Protocol, the EU ETS, the ECX CFI Futures Contracts, and the Fund's investment objective and strategy, as well as further descriptions of the Shares, risks, NAV, and procedures for creations and redemptions of Shares, can be found in the Notice[17] and the Registration Statement,[18] as applicable.

Availability of Information Regarding the Fund and the Shares

The daily settlement prices for the EUAs are publicly available on the ICE Futures Web site at *http://www.icefutures.com.* In addition, various market data vendors and news publications publish futures prices and related data. Quote and last-sale information for the EUAs are widely disseminated through a variety of market data vendors worldwide. ICE Futures also provides delayed futures information on current and past trading sessions and market news free of charge on its Web site. The specific contract specifications for the EUAs are also available on the ICE Futures Web site.

The Web site for the Fund at *http://www.airsharesfund.com,* which is publicly accessible at no charge, will contain the following information: (1) The prior business day's NAV per Share[19] and the reported closing price; (2) the mid-point of the bid-ask price in relation to the NAV per Share as of the time the NAV is calculated (''Bid-Ask Price''); [20] (3) calculation of the premium or discount of such price against such NAV per Share; (4) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters; (5) the prospectus and the most recent periodic reports filed with the Commission or required by the CFTC; [21] and (6) other applicable quantitative information.

The Fund's total portfolio composition, consisting primarily of long positions in ECX CFI Futures Contracts and cash, will be disclosed each business day that the Exchange is open for trading on the Fund's Web site. The Fund has informed the Exchange that Web site disclosure of portfolio holdings will be made daily and will include, as applicable, the name and value of each EUA and amount of cash held in the portfolio of the Fund.

As noted above, the Fund's NAV will be calculated and disseminated daily.[22] The Exchange will disseminate for the Fund on a daily basis by means of Consolidated Tape Association CQ High Speed Lines information with respect to the Indicative Fund Value (as discussed below), recent Fund NAV, Shares outstanding, and the Basket amount. The Exchange will also make available on its Web site daily trading volume, closing prices, and the Fund's NAV per Share. The closing price and settlement prices of the EUAs held by the Fund are also readily available from ICE Futures, automated quotation systems, published or other public sources, or on-line information services.

Information regarding market price and volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last-sale information for the Shares will be available via the facilities of the Consolidated Tape Association.

All pricing information will be quoted in U.S. dollars, other than the current trading value of the Euro-denominated EUAs, which will be quoted in Euro. The current trading price per Share will be published continuously as trades occur throughout each trading day on the consolidated tape, Reuters, and/or Bloomberg. The most recent trading value of each EUA is published on the Web site of the ECX at *http://www.ecxeurope.com,* under the heading ''Market Data,'' and each vintage futures contract in the Fund's portfolio will be published on the Fund's Web site at *http://www.airsharesfund.com,* or any successor thereto.

To provide updated information relating to the Fund for use by investors, professionals and persons wishing to create or redeem the Shares, the Exchange or a major market data vendor will disseminate through the facilities of the Consolidated Tape Association an updated Indicative Fund Value (''Indicative Fund Value'').[23] The Indicative Fund Value, which is also known as intraday indicative value (IIV) or intraday optimized portfolio value (IOPV), is an estimate, updated on a real-time basis at least every 15 seconds, of the NAV, which is disclosed only once per day. The Indicative Fund Value for the Fund will be disseminated on a per-Share basis at least every 15 seconds during the Exchange's Core Trading Session. The Indicative Fund Value will be calculated based on the previously-disclosed portfolio composition of the Fund, *i.e.*, the futures contracts in the Fund's portfolio, and will be adjusted to reflect the price changes of the relevant EUAs.

The value of a Share may be influenced by the non-concurrent

[12] The Fund represents that the ECX CFI Futures Contracts meets the definition of ''futures contract'' as set forth in Section 2(a) of the CEA. The Exchange further represents that carbon equivalent emissions allowances meet the definition of ''commodity'' as defined in Section 1(a)(4) of the CEA.

[13] The ECX CFI Futures Contracts trade on the London-based ICE Platform from 7:00 a.m. to 5:00 p.m. Greenwich Mean Time.

[14] The Exchange states that the ECX CFI Futures Contract had average daily trading volume of $135,717,089 (USD), or approximately 87,587,602 Euro, representing 3,551 contracts traded daily from January 1, 2008 through March 11, 2008.

[15] 15 U.S.C. 78a.

[16] The Exchange also states that it will file a proposed change seeking approval to continue listing or trading the Shares if the Fund invests in EUAs that constitute more than 10% of the weight of the Fund and where the principal trading market for such component is not a member or affiliate member of the Intermarket Surveillance Group (''ISG'') or where the Exchange does not have a comprehensive surveillance sharing agreement with such market.

[17] *See* Notice, *supra* note 3.

[18] *See supra* note 9.

[19] The most recent end-of-day NAV of the Fund and NAV per Share will be published by the Fund sponsor as of 4 p.m. ET on Reuters and/or Bloomberg and on the Fund's Web site at *http://www.airsharesfund.com.* The end-of-day NAV per Share will also be published the following morning on the consolidated tape.

[20] The Bid-Ask Price of Shares is determined using the highest bid and lowest offer as of the time of calculation of the NAV per Share.

[21] Monthly account statements conforming to CFTC and National Futures Association requirements are posted on the Fund's Web site at *http://www.airsharesfund.com.* Additional reports may be posted on the Fund's Web site in the discretion of the Fund sponsor or as required by regulatory authorities.

[22] The Exchange will obtain a representation from the Fund that the Fund's NAV per Share will be calculated daily and made available to all market participants at the same time. *See* Notice at 20347, n.16.

[23] The Indicative Fund Value is referred to as the Indicative Trust Value in proposed new NYSE Arca Equities Rule 8.204(e)(2)(iv).

trading hours between the Exchange and the exchanges on which the EUAs trade. While the Shares will trade from 4 a.m. to 8 p.m. ET, the ECX CFI Futures Contracts, for example, trade on the London-based ICE Platform from 7 a.m. to 5 p.m. local time in London, England. When the ICE Platform and the Exchange are both open for trading, the Indicative Fund Value can be expected to closely approximate the NAV per Share. When the ICE Platform is closed and the Exchange is open, trading spreads and the resulting premium or discount on the Shares may widen and, therefore, increase the difference between the public trading price of the Shares and the NAV per Share. The Indicative Fund Value on a per-Share basis disseminated during the Exchange's Core Trading Session should not be viewed as a real-time update of the Fund's NAV, which is calculated only once a day.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares.[24] Trading in the Shares will be halted if the circuit breaker parameters under NYSE Arca Equities Rule 7.12 are reached. Trading may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying EUA futures contracts; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Commentary .03 to proposed NYSE Arca Equities Rule 8.204, which sets forth circumstances under which trading in the Shares may be halted.

Trading Rules

Under proposed NYSE Arca Equities Rule 8.204(b), Commodity Futures Trust Shares are included within the Exchange's definition of ''securities.'' The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Commentary .02 to proposed NYSE Arca Equities Rule 8.204 provides that transactions in Commodity Futures Trust Shares will occur during the trading hours specified in Rule 7.34. Therefore, in accordance with such rule, the Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. ET. The Exchange states that it has appropriate rules to facilitate transactions in the Shares during all three trading sessions.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which will include Commodity Futures Trust Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the ISG from other exchanges who are members or affiliate members of the ISG. In addition, the Exchange has an information sharing agreement in place with ICE Futures for the purpose of providing information in connection with trading in, or related to, futures contracts traded on ICE Futures. The Exchange states that it will file a proposed change pursuant to Rule 19b–4 under the Act[25] seeking approval to continue trading the Shares if the Fund invests in EUAs (or pricing information is used for a new or existing component) that constitute more than 10% of the weight of the Fund where the principal trading market for such component is not a member or affiliate member of ISG or where the Exchange does not have a comprehensive surveillance sharing agreement with such market. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders[26] in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The risks involved in trading the Shares during the Opening and Late Trading Sessions[27] when an updated Indicative Fund Value will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares (and that Shares are not individually redeemable); (3) NYSE Arca Equities Rule 9.2(a),[28] which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (4) the risk involved in trading the Shares during the Core and Late Trading Sessions when the ECX CFI Futures Contracts are not trading on the ICE Platform; (5) how information regarding the Indicative Fund Value is disseminated; (6) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (7) trading information.

In addition, the Bulletin will reference that: (1) The Fund is subject to various fees and expenses described in the relevant registration statement; (2) that there is no regulated source of last-sale information regarding physical commodities; (3) the Commission has no jurisdiction over the trading of EUAs; and (4) the Financial Services Authority in the United Kingdom has regulatory jurisdiction over the trading of EUAs and related options. The Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act and disclose that the NAV for the Shares will be calculated after 4: p.m. ET each trading day.

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act[29] and the rules and regulations thereunder applicable to a national securities exchange.[30] In particular, the

[24] *See* Commentary .04 to NYSE Arca Equities Rule 7.12.

[25] 17 CFR 240.19b–4.

[26] *See* NYSE Arca Equities Rule 1.1(n) (defining ETP Holder).

[27] The Opening Trading Session is from 4 a.m. to 9:30 a.m. ET and the Late Trading Session is from 4:15 p.m. to 8 p.m. ET. *See* NYSE Arca Equities Rule 7.34.

[28] NYSE Arca Equities Rule 9.2(a) provides that ETP Holders, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder shall make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that the ETP Holder believes would be useful to make a recommendation.

[29] 15 U.S.C. 78f.

[30] In approving this proposed rule change, the Commission has considered the proposed rule's

Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[31] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that it has approved similar NYSE Arca Equities rules to list and trade products based on or related to commodities.[32]

A. Proposed Amendments to NYSE Arca Equities Rules

The Commission finds that NYSE Arca's proposal contains adequate rules and procedures to govern the listing and trading of Commodity Futures Trust Shares on the Exchange. Prior to listing and/or trading on the Exchange, NYSE Arca must file a separate proposed rule change pursuant to Section 19(b) of the Act for each series of Commodity Futures Trust Shares.[33] All such securities listed and/or traded under proposed NYSE Arca Equities Rule 8.204 will be subject to the full panoply of NYSE Arca rules and procedures that currently govern the trading of equity securities on the Exchange.[34] For the initial listing of each series of Commodity Futures Trust Shares under proposed NYSE Arca Equities Rule 8.204, the Exchange must establish a minimum number of Commodity Futures Trust Shares required to be outstanding at the commencement of trading on the Exchange.[35]

The Commission believes that the proposed continued listing and trading standards under proposed NYSE Arca Equities Rule 8.204 are adequate to ensure transparency of key values and information regarding the securities. The Exchange may consider suspending trading in, or removing from listing, a series of Commodity Futures Trust Shares if: (1) Following the initial twelve-month period beginning upon the commencement of trading of the Commodity Futures Trust Shares, (a) The Trust has fewer than 50,000 Commodity Futures Trust Shares issued and outstanding; (b) the market value of all Commodity Futures Trust Shares issued and outstanding is less than $1,000,000, or (c) there are fewer than 50 record and/or beneficial holders of Commodity Futures Trust Shares for 30 consecutive trading days; (2) the value of the underlying futures contracts is no longer calculated or available on at least a 15-second delayed basis during the Exchange's Core Trading Session, as defined in NYSE Arca Equities Rule 7.34(a), from a source unaffiliated with the sponsor, the trust or the trustee of the trust; (3) the NAV for the trust is no longer disseminated to all market participants at the same time; (4) the Indicative Trust Value is no longer disseminated on at least a 15-second delayed basis during the Corporation's Core Trading Session, as defined in NYSE Arca Equities Rule 7.34(a); or (5) such other event shall occur or condition exists which in the opinion of the Corporation makes further dealings on the Corporation inadvisable.[36]

The Commission finds that the Exchange's rules with respect to trading halts under proposed NYSE Arca Equities Rule 8.204 should help ensure the availability of key values and information relating to Commodity Futures Trust Shares. If the Indicative Trust Value or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Indicative Trust Value or the value of the underlying futures contract occurs; if the interruption to the dissemination of the Indicative Trust Value or the value of the underlying futures contract persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.[37] In addition, if the Exchange becomes aware that the NAV with respect to a series of Commodity Futures Trust Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV is available to all market participants.[38] Lastly, the Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(4) to include Commodity Futures Trust Shares under ''Derivative Securities Products'' with respect to trading halts of certain derivative securities products trading pursuant to UTP on the Exchange. The Commission believes that the foregoing requirements of the Exchange's proposed rules should help to prevent trading when a reasonable degree of transparency cannot be assured and to maintain a fair and orderly market for Commodity Futures Trust Shares.

The Commission also believes that the proposed listing and trading rules for Commodity Futures Trust Shares are reasonably designed to promote a fair and orderly market for such securities by, among other things, requiring ETP Holders acting as registered Market Makers in Commodity Futures Trust Shares to be subject to certain restrictions in dealings and trading activities, to maintain and present, upon request, appropriate books and records, and to be subject to restrictions governing the use of any material, non-pubic information in connection with the trading of Commodity Futures Trust Shares and any underlying components.[39] The proposed rule also requires the implementation of written surveillance procedures[40] and prescribes prospectus delivery requirements for purchasers of each newly issued series of Commodity Futures Trust Shares.[41]

As proposed, the Exchange's listing fees will be applicable to a series of Commodity Futures Trust Shares under the Schedule of Fees and Charges for Exchange Services. In connection with proposed NYSE Arca Equities Rule 8.204, the Exchange also proposes to make certain technical revisions so that Commodity Futures Trust Shares are also included among the types of securities referenced in NYSE Arca Equities Rule 7.34 relating to trading hours and trading halts. The

impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[31] 15 U.S.C. 78f(b)(5).

[32] *See* Securities Exchange Act Release Nos. 54025 (June 21, 2006), 71 FR 36856 (June 28, 2006) (SR–NYSEArca–2006–12) (approving new NYSE Arca Equities Rule 8.203 ''Commodity-Indexed Trust Shares'' for trading pursuant to UTP the iShares GSCI Commodity-Indexed Trust); 51067 (January 21, 2005), 70 FR 3952 (January 27, 2005) (SR–PCX–2004–132) (approving new NYSE Arca Equities Rule 8.201 ''Commodity-Based Trust Shares'' for trading pursuant to UTP the iShares COMEX Gold Trust); 56041 (July 11, 2007), 72 FR 39114 (July 17, 2007) (SR–NYSEArca–2007–43) (approving listing of shares of iShares COMEX Gold Trust pursuant to NYSE Arca Equities Rule 8.201); 53875 (May 25, 2006), 71 FR 32164 (June 2, 2006) (SR–NYSEArca–2006–11) (approving new NYSE Arca Equities Rule 8.300 ''Partnership Shares'' for trading pursuant to UTP the United States Oil Fund, LP); and 53736 (April 27, 2006), 71 FR 26582 (May 5, 2006) (SR–PCX–2006–22) (approving new Commentary .02 to NYSE Arca Equities Rule 8.200 ''Investment Shares'' for trading pursuant to UTP the DB Commodity Index Tracking Fund).

[33] *See* proposed NYSE Arca Equities Rule 8.204(h).

[34] Commentary .04 to proposed NYSE Arca Equities Rule 8.204 provides that the Exchange's rules governing the trading of equity securities apply to Commodity Futures Trust Shares.

[35] *See* proposed NYSE Arca Equities Rule 8.204(e)(1).

[36] *See* proposed NYSE Arca Equities Rule 8.204(e)(2)(i)–(v).

[37] *See* Commentary .03 to proposed NYSE Arca Equities Rule 8.204.

[38] *See id.*

[39] *See* proposed NYSE Arca Equities Rule 8.204(f)(1)–(4).

[40] *See* Commentary .05 to proposed NYSE Arca Equities Rule 8.204.

[41] *See* Commentary .01 to proposed NYSE Arca Equities Rule 8.204.

Commission finds that the changes made to the Exchange's listing fees and the technical revisions to NYSE Arca Equities Rule 7.34 are reasonable and promote transparency and consistent application of certain rules imposed with respect to a series of Commodity Futures Trust Shares.

B. Proposal To List and Trade the Shares of the Fund

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[42] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotations and last-sale information for EUAs are widely disseminated through a variety of market data vendors worldwide, and the daily settlement prices for the EUAs are publicly available on the ICE Futures Web site. In addition, quotations and last-sale information for the Shares will be available via the facilities of the Consolidated Tape Association. The daily NAV for the Fund will be calculated and disseminated publicly to all market participants at the same time, and the Exchange or a major market data vendor will disseminate through the facilities of the Consolidated Tape Association an updated Indicative Fund Value on a real-time basis at least every 15 seconds during the Exchange's Core Trading Session. The Fund's Web site will provide information relating to NAV, the Fund's daily total portfolio composition, the Fund's prospectus and other reports filed with the Commission, and other applicable quantitative information. Additionally, the Exchange will make available on its Web site daily trading volume of the Shares, closing prices of the Shares, and the Fund's NAV per Share.

Furthermore, the Commission believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the Fund that the NAV per Share for the Fund will be calculated daily and made available to all market participants at the same time.[43] The Exchange may consider the suspension of trading in, or removal from listing of, the Shares if the value of the underlying futures contracts, the NAV, or the Indicative Fund Value is no longer calculated or available as required under proposed NYSE Arca Equities Rule 8.204(e)(2). In addition, proposed NYSE Arca Equities Rule 8.204(f) restricts ETP Holders from engaging in certain trading activities with respect to dealings in Commodity Futures Trust Shares and prescribes certain other restrictions regarding the use of material, non-public information.

For the reasons discussed above, the Commission believes that the Exchange's trading halt rules are reasonably designed to prevent trading in the Shares when transparency is impaired. Commentary .03 to proposed NYSE Arca Equities Rule 8.204 provides that, if the Indicative Fund Value or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Indicative Fund Value or the value of the underlying futures contract occurs; if the interruption to the dissemination of the Indicative Fund Value or the value of the underlying futures contract persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.[44] In addition, if the Exchange becomes aware that the NAV with respect to a series of Commodity Futures Trust Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV is available to all market participants.[45] Trading in the Shares also will be halted if the circuit breaker parameters under NYSE Arca Equities Rule 7.12 are reached. Trading may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying EUA futures contracts; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The Commission further believes that the trading rules and procedures to which the Shares will be subject pursuant to this proposal are consistent with the Act. The Exchange has represented that the Shares are equity securities subject to the Exchange's rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following representations:

(1) The Shares will conform to the initial and continued listing criteria under proposed NYSE Arca Equities Rule 8.204(e).

(2) The Exchange's surveillance procedures applicable to derivative products (which will include Commodity Futures Trust Shares) are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in the Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss, among other things, the following: (a) The risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Indicative Fund Value will not be calculated or publicly disseminated; (b) the procedures for purchases and redemptions of Shares (and that Shares are not individually redeemable); (c) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (d) the risk involved in trading the Shares during the Core and Late Trading Sessions when the ECX CFI Futures Contracts are not trading on the ICE Platform; (e) how information regarding the Indicative Fund Value is disseminated; (f) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (g) trading information.

This approval order is based on the Exchange's representations.

The Commission believes that the proposal should help to facilitate the listing and trading of additional types of exchange-traded products that should enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the Commission believes that the listing and trading criteria for Commodity Futures Trust Shares set forth in proposed NYSE Arca Equities Rule 8.204 are reasonably designed to protect investors and the public interest, as discussed herein. For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules

[42] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[43] *See supra* note 22.

[44] *See* Commentary .03 to proposed NYSE Arca Equities Rule 8.204.

[45] *See id.*

and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.[46]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[47] that the proposed rule change (SR–NYSEArca–2008–09), as modified by Amendment Nos. 1 and 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[48]

Nancy M. Morris,

Secretary.

[FR Doc. E8–11832 Filed 5–27–08; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11256 and #11257]

Arkansas Disaster # AR–00020

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Arkansas (FEMA–1758–DR), dated 05/20/2008.

Incident: Severe Storms, Flooding, and Tornadoes.

Incident Period: 05/02/2008 and continuing.

DATES: *Effective Date:* 05/20/2008.

Physical Loan Application Deadline Date: 07/21/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 02/20/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/20/2008, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans):

Benton, Cleburne, Conway, Crittenden, Grant, Lonoke, Mississippi, Pulaski, Saline, Van Buren.

Contiguous Counties (Economic Injury Loans Only):

Arkansas: Arkansas, Carroll, Cleveland, Craighead, Cross, Dallas, Faulkner, Garland, Hot Spring Independence, Jefferson, Lee, Madison, Perry, Poinsett, Pope, Prairie, Saint Francis, Searcy, Stone, Washington, White, Yell.

Missouri: Barry, Dunklin, Mcdonald, Pemiscot.

Mississippi: Desoto, Tunica.

Oklahoma: Adair, Delaware.

Tennessee: Dyer, Lauderdale, Shelby, Tipton.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.375
Homeowners Without Credit Available Elsewhere	2.687
Businesses With Credit Available Elsewhere	8.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11256B and for economic injury is 112570.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E8–11886 Filed 5–27–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11254]

Maine Disaster Number ME–00012

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Maine (FEMA–1755–DR), dated 05/14/2008.

Incident: Severe Storms and Flooding.

Incident Period: 04/28/2008 through 05/14/2008.

DATES: *Effective Date:* 05/14/2008.

Physical Loan Application Deadline Date: 07/14/2008.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for private non-profit organizations in the State of Maine, dated 05/14/2008, is hereby amended to establish the incident period for this disaster as beginning 04/28/2008 and continuing through 05/14/2008.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E8–11885 Filed 5–27–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11242 and #11243]

Maine Disaster Number ME–00011

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major

[46] 15 U.S.C. 78f(b)(5).

[47] 15 U.S.C. 78s(b)(2).

[48] 17 CFR 200.30–3(a)(12).

disaster for the State of Maine (FEMA–1755–DR), dated 05/09/2008.

Incident: Severe Storms and Flooding.

Incident Period: 04/28/2008 and continuing through 05/14/2008.

DATES: *Effective Date:* 05/14/2008.

Physical Loan Application Deadline Date: 07/08/2008.

EIDL Loan Application Deadline Date: 02/09/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Maine, dated 05/09/2008 is hereby amended to establish the incident period for this disaster as beginning 04/28/2008 and continuing through 05/14/2008.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E8–11887 Filed 5–27–08; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes new information collections, revisions to OMB-approved information collections and extensions (no change) of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the Agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and how to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and the SSA Reports Clearance Officer to the addresses or fax numbers listed below.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov*.

SSA has submitted the information collections listed below. Your comments on the information collections will be most useful if OMB and SSA receive them within 30 days from the date of this publication. You can request a copy of the information collections by e-mail, *OPLM.RCO@ssa.gov*, fax 410–965–6400, or by calling the SSA Reports Clearance Officer at 410–965–0454.

1. Report to United States Social Security Administration by Person Receiving Benefits for a Child or for an Adult Unable to Handle Funds/Report to the United States Social Security Administration—0960–0049. SSA needs the information on Forms SSA–7161–OCR–SM and SSA–7162–OCR–SM to: (1) Determine continuing entitlement to Social Security benefits: (2) correct benefit amounts for beneficiaries outside the United States: and (3) monitor the performance of representative payees outside the United States. The respondents are individuals living outside the United States who are receiving benefits on their own (or for someone else) under Title II of the Social Security Act.

Type of Request: Extension of an OMB-approved information collection.

Form number	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
SSA–7161–OCR–SM	28,461	1	15	7,115
SSA–7162–OCR–SM	247,136	1	5	20,595
Totals	275,597			27,710

2. Questionnaire About Employment or Self-Employment Outside the United States—20 CFR 404.401(b)(1), 404.415 & 404.417—0960–0050. SSA uses Form SSA–7163 to determine: (1) Whether work performed by beneficiaries outside the United States is cause for deductions from their monthly benefits: (2) which of two work tests (foreign or regular test) is applicable; and (3) the number of months, if any, for SSA-imposed deductions. Respondents are beneficiaries living and working outside the United States.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 20,000.

Frequency of Response: 1.

Average Burden Per Response: 12 minutes.

Estimated Annual Burden: 4,000 hours.

3. Petition to Obtain Approval of a Fee for Representing a Claimant before the Social Security Administration—20 CFR 404.1720, 404.1725, 416.1520 & 416.1525—0960–0104. Representatives use Form SSA–1560 to charge a fee for representing a claimant in proceedings before SSA. A representative must file either a fee petition or fee agreement with SSA. If the representative files a fee petition (Form SSA–1560) to obtain approval of a fee, SSA reviews the information to determine a reasonable fee for the representative's services. Respondents are attorneys and non-attorneys who represent claimants for Social Security benefits.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 34,624.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 17,312 hours.

4. Annual Earnings Test Direct Mail Follow-Up Program Notices—20 CFR 404.452–404.455—0960–0369. The Mid-Year Mailer ensures Social Security payments are correct. Beneficiaries under full retirement age (FRA) use Forms SSA–L9778, SSA–L9779, and SSA–L9781 to update their current year estimate and their estimate for the

following year. Beneficiaries use Mid-Year Mailer Forms SSA–L9784 and SSA–L9785 to request earnings estimates in the year of FRA for the period prior to the month of FRA. Beneficiaries will use new Form SSA–L9790 to report earnings information at the end of the year. The respondents are working Retirement Survivors Insurance beneficiaries with earnings over the exempt amount.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 460,000.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 76,667 hours.

5. Electronic Benefit Verification Information (BEVE)—20 CFR 401.40—0960–0595. The electronic proof of income (POI) verification Internet service, BEVE, provides beneficiaries the convenience of requesting a proof of income statement through the Internet. Beneficiaries often require a POI to obtain housing, food stamps, or other public services. SSA uses the information BEVE collects to provide the POI to the beneficiary, after verifying the requestor's identity. The respondents are Social Security Title II, Title XVI, and Medicare beneficiaries.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 314,974.

Frequency of Response: 1.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 26,248 hours.

6. Application for Survivors Benefits—20 CFR 404.611(a) and (c)—0960–0062. Surviving family members of armed services personnel can file for Social Security and Veterans' benefits at SSA or the Veterans Administration (VA). If applicants go to the VA first, they complete Form SSA–24, the Application for Survivor's Benefits. The VA then forwards Form SSA–24 to SSA for processing. If applicants previously filed for benefits at SSA, the Agency disregards this form. The respondents are survivors of deceased armed services personnel who are applying for benefits at the VA.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 3,200.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 800 hours.

7. Quarterly Statistical Report on Recipients and Payments under State-Administered Assistance Programs for Aged, Blind and Disabled (Individuals and Couples) Recipients—20 CFR 416.2010, 20 CFR 416.2098—0960–0130. States with agreements with SSA under the State supplementation provisions of the Social Security Act must provide statistical data to SSA. State Disability Determination Services (DDS) inform SSA of expenditures and caseloads of State-administered supplements under the Supplemental Security Income program. SSA needs the data from this report to: (1) Supplement the information it already has about federally-administered programs; (2) more fully explain the effect of the public income support programs on the needy, aged, blind, and disabled; and (3) monitor State compliance with the mandatory pass-along provision. States and other Federal agencies use data from this report as well for various purposes. The respondents are State DDSs.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 31.

Frequency of Response: 4.

Average Burden Per Response: 60 minutes.

Estimated Annual Burden: 124 hours.

8. Employee Work Activity Questionnaire—20 CFR 404.1574, 404.1592—0960–0483. Social Security disability claimants qualify for benefits when a verified physical or mental impairment prevents them from working. If disability claimants attempt to return to work after receiving disability benefits but are unable to continue working, they submit Form SSA–3033, the Employee Work Activity Questionnaire, so SSA can evaluate the work attempt. SSA also uses this form to evaluate unsuccessful subsidy work. Ultimately, SSA uses the form to determine applicants' continuing eligibility for disability benefits. The respondents are employers of Social Security disability beneficiaries who unsuccessfully attempted to return to work.

Type of Request: Extension of an OMB approved information collection.

Number of Respondents: 15,000.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 3,750 hours.

9. Medical Permit Parking Application—41 CFR 101–20.104–2—0960–0624. SSA employees and contractors with a qualifying medical condition who park at SSA-owned and -leased facilities may receive a medical parking permit. SSA uses three forms as part of this program: SSA–3192, the Physician's Report (which the applicant's physician completes to verify the medical condition); Form SSA–3193, the Application and Statement (which the person seeking the permit completes when first applying for the medical parking space); and Form SSA–3194, the Renewal Certification (which medical parking permit holders complete to verify their continued need for the permit). The respondents are SSA employees and contractors seeking medical parking permits and their physicians. **Note**: Because SSA employees are federal workers and are PRA-exempt, the burden below is only for SSA contractors and physicians (of both SSA employees and contractors).

Type of Request: Revision to an OMB-approved information collection.

	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
SSA–3192	75	1	90	113
SSA–3193	75	1	30	38
SSA–3194	10	1	5	1
Totals	160			152

10. Authorization to Obtain Earnings Data from the Social Security Administration—0960–0602. A wage earner or an organization may request detailed earnings information from SSA. SSA collects the information on the SSA–581 to identify the earnings record, verify authorized access to the earnings record, and produce an itemized statement for release to the proper party. The respondents are various private/

public organizations/agencies needing detailed earnings information.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 33,000.

Frequency of Response: 1.

Average Burden Per Response: 2 minutes.

Estimated Annual Burden: 1,100 hours.

11. Statement Regarding the Inferred Death of an Individual by Reason of Continued and Unexplained Absence—20 CFR 404.720 & 404.721—0960–0002. Section 202(d)–(i) of the Social Security Act provides for the payment of various monthly survivor benefits and a lump sum death payment to certain survivors upon the death of an individual who dies fully or currently insured. If a person has been absent from his or her residence and has not been heard from for at least 7 years, SSA will presume he or she is deceased. SSA collects information on Form SSA–723–F4 to determine if SSA may presume a missing wage earner is deceased and, if so, to establish a date of presumed death. The respondents are persons having knowledge about the disappearance of a wage earner.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 3,000.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 1,500 hours.

12. Railroad Employment Questionnaire—20 CFR 404.1401, 404.1406–404.1408—0960–0078. SSA uses the data on the SSA–671 to secure sufficient information to effect the required coordination with the Railroad Retirement Board for Social Security claims processing. SSA obtains data whenever claimants give indications of employment in the railroad industry. The respondents are applicants for Social Security benefits employed by a railroad or dependents of railroad workers.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 125,000.

Frequency of Response: 1.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 10,417 hours.

13. Government Pension Questionnaire—20 CFR 404.408a—0960–0160. The Social Security Act and regulations provide an individual receiving spousal benefits and concurrently receiving a Government pension based on his or her own earnings not covered by Social Security may have the amount of the Social Security benefit reduced by two-thirds the amount of the Government pension. SSA uses the information on the SSA–3885 to determine whether the individual's Social Security benefit is subject to reduction, the amount of the reduction, the effective date of the reduction, and whether one of the exceptions in 20 CFR 404.408a applies. The respondents are individuals receiving spousal benefits and a Government pension.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 30,000.

Frequency of Response: 1.

Average Burden Per Response: 12.5 minutes.

Estimated Annual Burden: 6,250 hours.

14. Teacher Questionnaire and Request for Administrative Information—20 CFR 416.1103(f)—0960–0646. SSA must consider all relevant evidence when determining a child's disability under Title XVI of the Social Security Act. When determining the effects of a child's (or other individual's) impairment(s), SSA must obtain information about the child's functioning. Using Forms SSA–5665 and SSA–5666, SSA obtains formal testing results, teacher reports, therapy progress notes, individualized education program information and other records of a child's educational aptitude and achievement. The respondents are parents, teachers and other education personnel.

Type of Request: Extension of an OMB-approved information collection.

Form number	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
SSA–5665–BK	618,000	1	20	206,000
SSA–5666	615,000	1	15	153,750
Totals	1,233,000	.....	.....	359,750

SSA has made a correction to this Notice. Previously we inadvertently published the burden information for only one of the forms. We are now including a chart to show the information for both forms.

15. Statement of Income and Resources—20 CFR 416.207, 146.301—416.310, 416.704, and 416.708—0960–0124. SSA collects information about income and resources on form SSA–8010–BK in Supplemental Security Income (SSI) claims and redeterminations. SSA uses the information to make initial or continuing eligibility determinations for SSI claimants/recipients who are subject to deeming. The respondents are persons whose income and resources may be deemed (considered available) to applicants or beneficiaries of SSI benefits.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 341,000.

Frequency of Response: 1.

Average Burden Per Response: 26 minutes.

Estimated Annual Burden: 147,767 hours.

16. Medicare Part D Subsidies Regulations—20 CFR Part 418—0960–0702. The Medicare Prescription Drug Improvement, and Modernization Act of 2003 (MMA) established the Medicare Part D program for voluntary prescription drug coverage of premium, deductible, and co-payment costs for certain low-income individuals. The MMA also mandated the provision of subsidies for those individuals who qualify for the program and who meet eligibility criteria for help with premium, deductible, and/or co-payment costs.

This law requires SSA to make eligibility determinations and to provide a process for appealing SSA's determinations. Regulation sections 418.3625(c), 418.3645, 418.3665(a), and 418.3670 contain public reporting requirements, listed below. Respondents are applicants for the Medicare Part D subsidies who request an administrative review hearing.

Type of Request: Revision to an existing OMB-approved information collection.

Section	Annual number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
§ 418.3625(c) One may request in writing a change in date/time for an administrative review hearing	2,500	1	5	208
§ 418.3645 One may request in writing a different person to conduct the administrative hearing if they suspect bias	10	1	20	3
§ 418.3665(a) One may withdraw their request in writing for an administrative review hearing	1,000	1	5	83
§ 418.3670 Applicants may ask SSA to vacate their previous request to dismiss an administrative review hearing	5	1	10	1
Total	3,515	.....	.....	295

Dated: May 22, 2008.

Elizabeth A. Davidson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. E8–11898 Filed 5–27–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 6237]

Determination on Provision of Assistance for Sudan

Pursuant to section 451 of the Foreign Assistance Act of 1961, as amended (the ''Act'')(22 U.S.C. 2261), and Section 1–100(a)(1) of Executive Order 12163, as amended, I hereby authorize, notwithstanding any other provision of law, the use of up to $3 million in Fiscal Year 2008 Peacekeeping Operations (PKO) funds available under Chapter 6 of Part II of the Act, in order to provide, for any unanticipated contingencies, assistance authorized by Part I of the Act (which is deemed to include references to Chapter 6 of Part II) for Sudan.

This determination shall be reported to Congress promptly and published in the **Federal Register**.

Dated: April 25, 2008.

John D. Negroponte,

Deputy Secretary of State, Department of State.

[FR Doc. E8–11894 Filed 5–27–08; 8:45 am]

BILLING CODE 4710–26–P

DEPARTMENT OF STATE

[Public Notice 6238]

Notice of Public Meeting on FY 2009 Refugee Admissions Program

There will be a meeting on the President's FY 2009 Refugee Admissions Program on Wednesday, June 11, 2008 from 3 p.m. to 5 p.m. The meeting will be held at the Refugee Processing Center, 1401 Wilson Boulevard, Suite 700, Arlington, Virginia. The meeting's purpose is to hear the views of attendees on the appropriate size and scope of the FY 2009 Refugee Admissions Program.

Seating is limited. Persons wishing to attend this meeting must notify the Bureau of Population, Refugees, and Migration at telephone (202) 663–1006 by 5 p.m. on Friday, May 30, 2008, to reserve a seat. Persons planning to present oral comments must notify us by 5 p.m. on Wednesday, June 4, 2008. Persons planning to submit written comments for consideration should provide those comments by 5 on Wednesday, June 4, 2008. All written comments should either be e-mailed to *spruellda@state.gov* or faxed to (202) 663–1364.

If you have questions about the public meeting, please contact Delicia Spruell, PRM/Admissions Program Officer at (202) 663–1006. Information about the Refugee Admissions Program may be found at *http://www.state.gov/g/prm/.*

Dated: May 16, 2008.

Samuel Witten,

Acting Assistant Secretary, Department of State.

[FR Doc. E8–11857 Filed 5–27–08; 8:45 am]

BILLING CODE 4710–33–P

DEPARTMENT OF STATE

[Public Notice 6226]

Shipping Coordinating Committee; Notice of Subcommittee Meeting

The Subcommittee on the Safety of Navigation of the Shipping Coordinating Committee (SHC) will be holding an open meeting at 9:30 a.m. on Wednesday, June 11, 2008, in room 6215, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC. The purpose of the meeting is to prepare for the 54th session of the Subcommittee on Safety of Navigation (NAV) of the International Maritime Organization (IMO) which is scheduled for June 30–July 4, 2008, to be held at IMO Headquarters, 4 Albert Embankment, London SE1 7SR, United Kingdom. Items of principal interest on the agenda are:

—Routing of ships, ship reporting and related matters;

—Development of guidelines for integrated bridge systems (IBS), including performance standards for bridge alert management;

—Amendments to the General Provisions on Ships' Routing;

—Carriage requirements for a bridge navigational watch alarm system;

—Review of the International Regulations for Preventing Collisions at Sea (COLREGs) regarding the right of way of vessels over pleasure craft;

— Amendments to COLREG Annex I related to color specification of lights;

— International Telecommunication Union (ITU) matters, including Radiocommunication ITU–R Study Group 8;

—Code of conduct during demonstrations/campaigns against ships on high seas;

—Measures to minimize incorrect data transmissions by automatic identification system (AIS) equipment;

—Worldwide radio navigation system (WWRNS);

—Development of an e-navigation strategy;

—Development of carriage requirements for electronic chart display and information system (ECDIS);

—Guidelines for uniform operating limitations of high-speed craft;

—Guidelines on the layout and ergonomic design of safety centers on passenger Ships;

—Review of vague expressions in the International Convention for the Safety of Life at Sea (SOLAS) regulation V/22;

—Revision of the Guidance on the application of AIS binary messages;

—Improved safety of pilot transfer arrangements;

—Casualty analysis; and

—Consideration of International Association of Classification Societies (IACS) unified interpretations.

Members of the public may attend these meetings up to the seating capacity of the room. Interested persons may seek information by writing: Mr. Edward J. LaRue, Jr., U.S. Coast Guard (CG–5413), Room 1407, 2100 Second Street, SW., Washington, DC 20593–0001 or by calling: (202) 372–1564.

Dated: May 21, 2008.

Mark Skolnicki,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. E8–11895 Filed 5–27–08; 8:45 am]

BILLING CODE 4710–09–P

TENNESSEE VALLEY AUTHORITY

Paperwork Reduction Act of 1995, as Amended by Public Law 104–13; Submission for OMB Review; Comment Request

AGENCY: Tennessee Valley Authority.

ACTION: Proposed collection; comment request.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C Chapter 35, as amended). The Tennessee Valley Authority is soliciting public comments on this proposed collection as provided by 5 CFR 1320.8(d)(1). Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer: Mark R. Winter, Tennessee Valley Authority, 1101 Market Street (MP 3C), Chattanooga, Tennessee 37402–2801; (423) 751–6004.

DATES: Comments should be sent to the Agency Clearance Officer no later than July 28, 2008.

SUPPLEMENTARY INFORMATION:

Type of Request: Regular Submission; extension without change, of a currently approved collection.

Title of Information Collection: Reservoir Operations Study (ROS)—Recreation User Data.

Frequency of Use: Annually.

Type of Affected Public: Individual recreation users at public and commercial recreation areas and recreation users from private waterfront homes.

Small Business or Organizations Affected: No.

Estimated Number of Annual Responses: 3000.

Estimated Total Annual Burden Hours: 990.

Estimated Average Burden Hours Per Response: .33 hour.

Need For and Use of Information: As part of system wide re-evaluation of TVA reservoirs and tailwaters, TVA conducted a survey of recreation use on 13 representative reservoirs and 6 representative tailwaters during calendar year 2002. Recreation use estimates were made for public use areas, commercial marinas, river outfitters, and private home owners. In each case, information was collected on the amount of recreation use, length of stay, facility preference, trip origin, expenditures and economic impact.

These data now form the foundation for a TVA reservoir and tailwater recreation database. TVA recognizes the value of this database and proposes to keep it up-to-date and improving its utility by refining the survey design and conducting additional surveys of recreational use on representative reservoirs and tailwaters.

Janice W. McAllister,

Senior Manager, Enterprise IT Security, Information Services.

[FR Doc. E8–11830 Filed 5–27–08; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2008–0101]

Agency Information Collection Activities; Revision of a Currently-Approved Information Collection: Licensing Applications for Motor Carrier Operating Authority

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for information.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval. The FMCSA seeks approval to revise an ICR entitled, ''Licensing Applications for Motor Carrier Operating Authority,'' that is used by for-hire motor carriers of regulated commodities, motor passenger carriers, freight forwarders, property brokers, and certain Mexico-domiciled motor carriers to register their operations with the FMCSA. The agency invites public comment on the ICR.

DATES: We must receive your comments on or before *July 28, 2008.*

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket Number FMCSA–2008–0101 using any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Group Floor, Room W12–140, Washington, DC 20590–0001.
- Hand Delivery: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington DC, 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal Holidays.
- Fax: 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Please note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The DMS is available 24 hours each day, 365 days each year. If you want acknowledgement that we received your comments, please include a self-addressed, stamped envelope or post card or print the acknowledgement page that appears after submitting your comment on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** on April 11, 2000 (65 FR 19477). This information is also available at *http://docketsinfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Denise Ryan, Transportation Specialist, Office of Information Technology, Operations Division, Department of Transportation, Federal Motor Carrier Safety Administration, 6th Floor, West Building, 1200 New Jersey Ave., SE., Washington DC 20590. Telephone Number (202) 493–0242; E-mail Address *denise.ryan@dot.gov.* Office hours are from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal Holidays.

SUPPLEMENTARY INFORMATION:

Background: The FMCSA is authorized to register for-hire motor carriers of regulated commodities and motor passenger carriers under the provisions of 49 U.S.C. 13902; freight forwarders under the provisions of 49 U.S.C. 13903; property brokers under the provisions of 49 U.S.C. 13904; and certain Mexico-domiciled motor carriers under the provisions of 49 U.S.C. 13902(c) and the North American Free Trade Agreement (NAFTA) motor carrier access provision. The forms used to apply for registration authority with the FMCSA are: Form OP–1 for motor property carriers and brokers; Form OP–1(P) for motor passenger carriers; Form OP–1(FF) for freight forwarders; and Form OP–1(MX) for certain Mexico-domiciled motor carriers. These forms request information on the applicant's identity, location, familiarity with safety requirements, and type of proposed operations. There are some differences on the forms due to specific statutory standards for registration of the different types of transportation entities.

Title: Application for Certificate of Registration for Foreign Motor Carriers and Foreign Motor Private Carriers.

OMB Control Number: 2126–0016.

Type of Request: Revision of a currently-approved information collection.

Respondents: Motor carriers, motor passenger carriers, freight forwarders, brokers, and certain Mexico-domiciled motor carriers.

Estimated Number of Respondents: 43,810.

Estimated Time per Response: 4 hours to complete Form OP–1(MX); and 2 hours to complete Forms OP–1, OP–1(FF), OP–1(P).

Expiration Date: August 31, 2008.

Frequency of Response: Other (as needed).

Estimated Total Annual Burden: 71,218 hours [63 hours for Form OP–1(MX) + 68,010 hours for Form OP–1 + 1,085 hours for Form OP–1(FF) + 2,060 hours for Form OP–1(P) = 71,218].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the agency to perform its mission; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: May 19, 2008.

Michael S. Griffith,

Acting Associate Administrator, Research and Information Technology.

[FR Doc. E8–11890 Filed 5–27–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–1999–6439, Notice No. 19]

Adjustment of Nationwide Significant Risk Threshold

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

ACTION: Notice of Adjustment of the Nationwide Significant Risk Threshold.

SUMMARY: In accordance with Title 49 Code of Federal Regulations Part 222, Appendix D, FRA is updating the Nationwide Significant Risk Threshold (NSRT). This action is needed to ensure that the public has the proper threshold of permissible risk for calculating quiet zones established in relationship to the NSRT. This is the second update to the NSRT since the final rule, titled ''Use of Locomotive Horns at Highway-Rail Grade Crossings,'' was amended in response to petitions for reconsideration on August 17, 2006 (71 FR 47614). This notice announces that the NSRT has fallen from 19,047 to 17,610.

DATES: The effective date is May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Ronald Ries, Office of Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: (202) 493–6299 or e-mail: *Ronald.Ries@dot.gov*); or Kathryn Shelton, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: (202) 493–6038 or e-mail: *Kathryn.Shelton@dot.gov*).

SUPPLEMENTARY INFORMATION:

Background

The NSRT is simply an average of the risk indexes for gated public crossings nationwide where train horns are routinely sounded. FRA developed this risk index to serve as one threshold of permissible risk for quiet zones established under this rule across the Nation. Thus, a community that is trying to establish and/or maintain its quiet zone pursuant to 49 CFR Part 222 can compare the Quiet Zone Risk Index calculated for its specific crossing corridor to the NSRT to determine whether sufficient measures have been taken to compensate for the excess risk that results from prohibiting routine sounding of the locomotive horn. (In the alternative, a community can establish its quiet zone in comparison to the Risk Index With Horns, which is a corridor-specific measure of risk to the motoring public when locomotive horns are routinely sounded at every public highway-rail grade crossing within the quiet zone.)

In 2006, when the final rule, titled ''Use of Locomotive Horns at Highway-Rail Grade Crossings'' was amended, the NSRT was 17,030 (71 FR 47614, August 17, 2006). In 2007, FRA recalculated the NSRT to be 19,047 (72 FR 14850, March 29, 2007.)

New NSRT

Using collision data from 2002 to 2006, FRA has recalculated the NSRT based on formulas identified in 49 CFR Part 222, Appendix D. In making this recalculation, FRA noted that the total number of gated, nonwhistle ban crossings was 38,420.

$$\text{Fatality Rate} = \frac{\text{Fatalities}}{\text{Fatal Incidents}} = \frac{351}{302} = 1.1622$$

$$\text{Injury Rate} = \frac{\text{Injuries in Injury Only Incidents}}{\text{Injury Only Incidents}} = \frac{821}{614} = 1.3371$$

Applying the fatality rate and injury rate to the probable number of fatalities and casualties predicted to occur at each of the 38,420 identified crossings and the predicted cost of the associated injuries and fatalities, FRA calculates the NSRT to be 17,610.

Issued in Washington, DC on May 21, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–11848 Filed 5–27–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 670 (Sub-No. 1)]

Notice of Rail Energy Transportation Advisory Committee Meeting

AGENCY: Surface Transportation Board.

ACTION: Notice of Rail Energy Transportation Advisory Committee meeting.

SUMMARY: Notice is hereby given of a meeting of the Rail Energy Transportation Advisory Committee (RETAC), pursuant to section 10(a)(2) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C., App. 2).

DATES: The meeting will be held on June 12, 2008, beginning at 9 a.m.

ADDRESSES: The meeting will be held in the Surface Transportation Board's hearing room on the 1st floor of the agency's headquarters at Patriot's Plaza, 395 E Street, SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman at 202–245–0202. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877–8339.]

SUPPLEMENTARY INFORMATION: RETAC arose from a proceeding instituted by the Board, in *Establishment of a Rail Energy Transportation Advisory Committee,* STB Ex Parte No. 670. RETAC was formed to provide advice and guidance to the Board, and to serve as a forum for discussion of emerging issues regarding the transportation by rail of energy resources, particularly, but not necessarily limited to, coal, ethanol, and other biofuels. The purpose of this meeting is to continue discussions regarding issues such as rail performance, capacity constraints, infrastructure planning and development, and effective coordination among suppliers, carriers, and users of energy resources.

The meeting, which is open to the public, will be conducted pursuant to RETAC's charter and Board procedures. Further communications about this meeting may be announced through the Board's Web site at *http://www.stb.dot.gov.*

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. 721, 49 U.S.C. 11101; 49 U.S.C. 11121.

Decided: May 22, 2008.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–11878 Filed 5–27–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

May 20, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW. Washington, DC 20220.

DATES: Written comments should be received on or before June 27, 2008 to be assured of consideration.

United States Mint

OMB Number: 1525–0012.

Type of Review: Revision.

Title: Generic Clearance for Voluntary Surveys to Implement E.O. 12882. Implemented by Sales and Marketing Division.

Description: This is a revised Generic Clearance for an undefined number of customer satisfaction and opinion surveys or focus group interviews to be conducted over the next three years. The information collected from these surveys will be used to improve U.S. Mint products and services.

Respondents: Individuals or households.

Estimated Total Reporting Burden: 60,813 hours.

Clearance Officer: Yvonne Pollard (202) 354–6784, United States Mint, 799 9th Street, NW., 4th Floor, Washington, DC 20220.

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

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E8–11818 Filed 5–27–08; 8:45 am]

BILLING CODE 4810–37–P

Federal Register

Wednesday,
May 28, 2008

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 423

Medicare Program; Medicare Part D Claims Data; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 423

[CMS–4119–F]

RIN 0938–AO58

Medicare Program; Medicare Part D Claims Data

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule allows the Secretary to collect claims data that are presently being collected for Part D payment purposes for other research, analysis, reporting, and public health functions. The Secretary needs to use these data because other publicly available data are not, in and of themselves, sufficient for the studies and operations that the Secretary needs to undertake as part of the Department of Health and Human Service's obligation to oversee the Medicare program, protect the public's health, and respond to Congressional mandates. These data will also be used to better identify, evaluate and measure the effects of the Medicare Modernization Act of 2003, (MMA).

DATES: *Effective Date:* This regulation is effective June 27, 2008. *Date of Applicability:* This regulation applies to Part D claims data collected on or after January 1, 2006. Following the effective date of this final rule, we will recollect under section 1860D–12(b)(3)(D) of the Act any data that were first submitted prior to the effective date of this final rule by extracting them from the Part D claims data already collected for payment purposes.

FOR FURTHER INFORMATION CONTACT: Alissa DeBoy, (410) 786–6041; Nancy DeLew, (202) 690–7351.

SUPPLEMENTARY INFORMATION: Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 (or toll free at 1–888–293–6498) or by faxing to (202) 512–2250. The cost for each copy is $10. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**. This **Federal Register** document is also available from the **Federal Register** online database through GPO Access, a service of the U.S. Government Printing Office. The Web site address is: *http://www.access.gpo.gov/fr/index.html.*

I. Background

A. Requirements for Issuance of Regulations

Section 902 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) amended section 1871(a)(3) of the Social Security Act (the Act) and requires the Secretary, in consultation with the Director of the Office of Management and Budget (OMB), to establish and publish timelines for the publication of Medicare final regulations based on the previous publication of a Medicare proposed or interim final regulation. Section 1871(a)(3)(B) of the Act also states that the timelines for these regulations may vary, but shall not exceed 3 years after publication of the preceding proposed or interim final regulation, except under exceptional circumstances. This final rule finalizes provisions set forth in our October 18, 2006 proposed rule. In addition, this final rule is being published within the 3-year time limit imposed by section 1871(a)(3)(B) of the Act. Therefore, we believe that the final rule is in accordance with the Congress's intent to ensure timely publication of final regulations.

B. General Overview

As stated in the October 18, 2006 proposed rule, under the Act, the Secretary has the authority to include in Part D sponsor contracts any terms or conditions the Secretary deems necessary and appropriate, including requiring the organization to provide the Secretary with such information as the Secretary may find necessary and appropriate. (See section 1857(e)(1) of the Act as incorporated into Part D through section 1860D–12(b)(3)(D) of the Act.)

We proposed to implement section 1860D–12(b)(3)(D) of the Act to allow the Secretary to collect the same claims information now collected under the authority of section 1860D–15 of the Act for purposes including reporting to the Congress and the public, conducting evaluations of the overall Medicare program, making legislative proposals to Congress, and conducting demonstration projects. While the purposes underlying such collection are discussed in more detail in this final rule, they include, but are not limited to, evaluating the effectiveness of the new prescription drug benefit and its impact on health outcomes, performing Congressionally mandated or other demonstration and pilot projects and studies, reporting to Congress and the public regarding expenditures and other statistics involving the new Medicare prescription drug benefit, studying and reporting on the Medicare program as a whole, and creating a research resource for the evaluation of utilization and outcomes associated with the use of prescription drugs.

We note that because this final rule applies to all Part D sponsors, it applies to any entity offering a Part D plan, including both prescription drug plan sponsors and Medicare Advantage organizations offering qualified prescription drug coverage. We further note that the Part D prescription drug event data (hereinafter also referred to as ''Part D claims data'') collected in accordance with section 1860D–12(b)(3)(D) of the Act will include 37 drug claim elements submitted by drug plan sponsors to the Secretary, which in accordance with § 423.100, include not only data from claims for drugs, but also data from claims for insulin, biological products, certain medical supplies, and vaccines.

II. Provisions of the Proposed Rule With an Analysis of and Response to Public Comments

We received approximately 118 items of timely correspondence containing comments on the October 18, 2006 proposed rule. Commenters included health policy organizations, pharmacies and pharmacy-related organizations, members of the Congress, researchers, insurance industry representatives, physicians and other health care professionals, beneficiary advocacy groups, representatives of hospitals, Part D beneficiaries, a pharmacy benefit managers' trade association and others.

In this final rule, we address all comments and concerns on the policies included in the proposed rule. The following lists the provisions of the proposed rule that received the most comments:

- External access to the data
- Uses for the data
- Privacy protections for the data

Generally, the vast majority of commenters expressed strong support for the proposed rule, declaring it essential for the success and accurate evaluation of the Medicare Part D program. There was also a significant

amount of agreement among the commenters that external entities be allowed access to Part D claims data. Commenters pointed out that CMS could not possibly fund all the research needed, and because of that, allowing external entities access to these data is necessary in order to evaluate the many health care issues arising from the new prescription drug benefit. Commenters also noted that research by external entities is likely to result in lower government expenditures and better delivery of health care to beneficiaries. Many of the commenters supporting the rule cited multiple examples of the potential benefits to the public health that could result with the access to Part D claims data by qualified organizations and individuals, including assessing the impact prescription drugs have on the health outcomes of the elderly, cost efficiencies, quality of care measures, and the efficacy of prescription drugs.

A number of comments addressed privacy protections, which impact the collection and release of claims data, and other commenters expressed concern about sensitive financial information being released. The majority of commenters acknowledged that a risk to protected information exists; however, they believed that the risk is no greater than the risk involved when allowing access to currently available Medicare data.

Several commenters raised concerns about the inherent limitations associated with the use of claims data for research purposes and requested that we acknowledge these limitations. In the following sections, we address all of these comments.

A. General Provisions

1. Statutory Basis

On December 8, 2003, the Congress enacted the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173). Title I of the MMA amended the Act to establish a new voluntary prescription drug benefit program, Medicare Part D. As we stated in the preamble to the January 28, 2005 final rule (70 FR 4197) implementing the new prescription drug benefit, we believe that the addition of outpatient prescription drug coverage to the Medicare program is the most significant change to the Medicare program since its inception in 1965.

Unlike Parts A and B of the Medicare program, where Medicare acts as the payer and insurer and generally pays for items and services on a fee-for-service basis, the prescription drug benefit is based on a private market model. Under this model, CMS contracts with private entities—prescription drug plan (PDP) sponsors, Medicare Advantage (MA) organizations, as well as other types of Medicare health organizations—who then act as the payers and insurers for prescription drug benefits. These private entities are generally referred to as ''Part D sponsors'' in our rules. Section 1860D–12 of the Act contains the majority of provisions governing the contracts CMS enters into with the Part D sponsors. That section, entitled, ''Requirements for and contracts with prescription drug plan (PDP) sponsors,'' incorporates by reference many of the contract requirements that previously were applicable to Medicare Advantage organizations.

One of the incorporated provisions at section 1860D–12(b)(3)(D) of the Act, is section 1857(e)(1) of the Act, which provides broad authority for the Secretary to add terms to the contracts with Part D sponsors, including terms that require the sponsor to provide the Secretary ''with such information * * * as the Secretary may find necessary and appropriate.'' We believe that the broad authority of section 1860D–12(b)(3)(D) of the Act authorizes us to collect most of the information we currently collect to properly pay sponsors under the statute. However, section 1860D–15 of the Act contains provisions that might be viewed as limiting such collection. Therefore, we engaged in this rulemaking in order to resolve the statutory ambiguity, as well as to implement the broad authority of section 1860D–12(b)(3)(D) of the Act.

Most of the payment provisions with respect to Part D sponsors are found in section 1860D–15 of the Act.[1] Subsections (d) and (f) of section 1860D–15 of the Act authorize the Secretary to collect any information he needs to carry out that section. However, those subsections also state that ''information disclosed or obtained under [section 1860D–15 of the Act] may be used by officers, employees, and contractors of the Department of Health and Human Services only for the purposes of, and to the extent necessary in, carrying out [section 1860D–15 of the Act].'' (Sections 1860D–15(d)(2)(B) and (f)(2) of the Act).

In the January 28, 2005 Medicare prescription drug benefit final rule (70 FR 4399), we stated that the section 1860D–15 of the Act restriction applies only in cases where section 1860D–15 of the Act is the authority for collecting the information. When information is collected under an independent authority (even if the collected information duplicates the data collected under section 1860D–15 of the Act) the restrictions under 1860D–15 of the Act would not apply. In the January 28, 2005 final rule (70 FR 4399), we noted that because quality improvement organizations (QIOs) have independent authority to collect Part D claims data in order to evaluate the quality of services provided by Part D sponsors, QIOs would not be barred from collecting such data despite the restrictions of section 1860D–15 of the Act. We refer readers to the October 18, 2006 proposed rule for the exact citation to the discussion in the January 28, 2005 final rule (71 FR 61447). Similar to the statutory provisions authorizing QIOs to collect the information they need to perform their statutory duties, section 1860D–12(b)(3)(D) of the Act recognizes that the Secretary will need to collect a broad array of data in order to properly carry out his responsibilities as head of the Department of Health and Human Services (DHHS). Thus, if the Secretary determines it is necessary and appropriate under section 1860D–12 of the Act for him to collect Part D claims data in order to carry out responsibilities outside section 1860D–15 of the Act, then section 1860D–15 of the Act would not serve as an impediment to such collections.

As stated in the October 18, 2006 proposed rule, we also believe that language in sections 1860D–12(b)(3)(D) and 1857(e)(1) of the Act indicating that the authority to collect information exists only ''except as otherwise provided,'' and in a manner that is ''not inconsistent with this Part,'' would not serve as a hindrance to the independent collection of Part D claims data, since on its face, section 1860D–15 of the Act restricts use of information only when collected under that authority.

As we stated in the proposed rule, the Congress most likely included the broad grant of authority in section 1860D–15 of the Act in order to ensure that the Secretary, without engaging in any rulemaking, would have the legislative authority to collect any necessary data in order to pay Part D sponsors correctly. However, we do not believe that the Congress intended to restrict the Secretary when the Secretary otherwise has independent authority to collect identical information to that collected under section 1860D–15 of the Act. Rather, we noted that the Secretary will need to evaluate Part D claims information in order to determine how access to Part D drug benefits affects beneficiary utilization of services under Parts A and B of the Medicare program.

[1] We note that there are other provisions outside of section 1860D–15 of the Act that also contain payment provisions. For example, section 1860D–14 of the Act discusses how CMS pays the low-income subsidy.

Specifically, when Congress enacted the MMA, one of the stated reasons was to ensure that ''by lowering the cost of critical prescription drugs, seniors will better be able to manage their health care, and ultimately live longer, healthier lives.'' (Press Release, House Ways and Means Committee, Seniors Wait for Affordable Rx Drugs Comes to an End. President Bush Signs Historic Medicare Bill into Law (December 8, 2003) (available at *http://waysandmeans.house.gov/news.asp*)). In order to determine whether lowering the costs of prescription drugs actually reduces health expenditures or improves health outcomes for beneficiaries, the Secretary will need to match individual level Parts A and B data with Part D claims data. In this way, the Secretary will be able to evaluate the effectiveness and efficiency of the Part D benefit and report to the Congress and others on the progress of the program.

We are required to report to the Congress regarding whether mandated disease management demonstrations are budget neutral and whether beneficiaries in these demonstrations are on the appropriate medications. As we stated in the preamble of the proposed rule we may also need to make reports under the Part D program, for example, the publication of statistics detailing aggregate Medicare and beneficiary spending by class of drug, average number of drugs used by beneficiaries, total Medicare program spending, and other similar statistics. In order to derive such statistics, we would need to use Part D claims data. In the proposed rule, as well as in this final rule, we outlined a wide variety of situations in which it will be ''necessary and appropriate'' for CMS to evaluate the same information collected under section 1860D–15 of the Act, even though such information would not be used to implement section 1860D–15 of the Act. In these situations, we believe the clear language of section 1860D–12(b)(3)(D) of the Act provides the authority to collect the necessary information, and nothing about such collection will be inconsistent or in conflict with any other part of the statute.

In addition, as discussed in this preamble, we are adding section 1106 of the Act as a statutory basis for this final rule, as that section authorizes release of data by the agency through regulation.

Comment: Some commenters stated that the proposed rule was inconsistent with the statute. Commenters also asserted that the collection is neither necessary nor appropriate, and some contended that the rule would improperly allow the release of proprietary data.

Response: We refer readers to our discussion of the statutory basis in both the proposed rule (71 FR 61446) and in section II.A.1. of this final rule. As noted in the proposed rule, section 1860D–12(b)(3)(D) of the Act (and its incorporation of section 1857(e)(1)) of the Act provide broad authority to the Secretary to require Part D sponsors to provide the Secretary with ''such information as the Secretary may find necessary and appropriate.'' In addition, sections 1860D–15(d)(2)(B) and (f)(2) of the Act, by their own terms, restrict information only when ''disclosed or obtained under the provisions of [section 1860D–15 of the Act].'' Thus, we continue to believe that when information is collected through a statutory authority independent of section 1860D–15 (such as in the case of QIOs, who have independent authority to collect data) the restrictions of section 1860D–15 of the Act would not apply, and nothing about the collection or use of the claims data would create an inconsistency or conflict in the statute.

We also believe the collection of claims data under section 1860D–12 of the Act is both necessary and appropriate for the reasons discussed in the proposed rule and in this final rule. For example, the collection of such claims data will permit the Secretary to conduct high level, internal analyses of the Part D benefit, such as which drugs are commonly used by the Medicare population, the utilization of generic drugs in the Part D benefit, the effect of benefit design on catastrophic costs (costs for which reinsurance is available), the number of individuals who entered the catastrophic phase of the benefit, and many more types of analysis. Similarly, the Secretary will have the opportunity to crosswalk Part D claims data to Parts A and B data in order to analyze the effect of access to prescription drugs on utilization under hospital and supplementary medical insurance.

We know that one of the stated reasons for the drug benefit was to modernize Medicare and ensure that beneficiaries were not enduring unnecessary hospitalizations due to failure to access preventive prescription drug regimens. At the time the prescription drug benefit was being enacted into law, then-chairman of the Senate Finance Committee, Senator Charles Grassley, stated:

> [T]his bill is about enhancing quality of life * * *. Today, the practice of medicine—and a lot of the thanks can go to prescription drugs—is to keep people out of hospitals and out of operating rooms. So people who cannot afford drugs, who go to the doctor very sick, are going to not only end up in a place they do not want to go, because people would rather not go to hospitals, rather not go to operating rooms. It is going to save our programs a lot of money, both private and public payment programs, for doctors and hospitals, when we can have people go into programs where they can get prescription drugs and keep their health up so they do not go to the hospital.
>
> (Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Conference Report, 149 Cong. Rec. S15882–03, *S15883 and S15884 (November, 25, 2003)).

Access to Parts A, B, and D claims data will allow the Secretary to analyze the prescription drug utilization of chronically ill patients over time, and determine whether increases in prescription drug utilization do, in fact, result in fewer hospitalizations. This is the type of analysis we believe the Congress expected the Secretary to engage in, and such analysis is both necessary and appropriate under the law.

Finally, in response to concerns about releasing proprietary data to external entities as a result of this rulemaking, we note that data which could affect Medicare program spending, such as rebates, bids, reinsurance, and risk-sharing data, are not part of this rulemaking. In addition, as discussed later in this preamble, this rulemaking places certain limitations on data when released outside of CMS. We believe that it is in the interest of public health to share information collected under the regulations promulgated by this rule with entities outside of CMS for legitimate research, or in cases of other governmental agencies, for purposes consistent with their mission. Through the application of our ''minimum data necessary policy'', with some additional restrictions to protect beneficiary confidentiality and commercially sensitive data of Part D sponsors, and our data sharing procedures (which ensure the agency's compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Privacy Act of 1974, and other applicable laws), we will limit the use and disclosure of Part D claims data to ensure that the data are only used or disclosed as permitted or required by applicable law, and not inappropriately disclosed in a manner which could undermine the competitive nature of the Part D program.

Comment: One commenter requested that CMS postpone implementation of this regulation until the Congress clarifies CMS's statutory authority and that CMS answer certain questions in a second posting for comment.

Response: We believe we have the authority to collect Part D claims data under sections 1860D–12 and 1860D–15 of the Act, and to disclose Part D claims data collected under section 1860D–12 of the Act, in accordance with section 1106 of the Act. This final rule is sufficiently related to the proposals in the proposed rule, which were the subject of vigorous review and comment by the public, and we are not posting the proposal for a second round of comments.

Comment: One commenter questioned why we were equating collecting data with accessing data.

Response: As stated in both the proposed rule and this final rule, in order to ensure that Part D sponsors are not required to submit a second set of the same data already collected under section 1860D–15, we would collect the data that are the subject of this final rule by extracting them from Part D claims data already collected for payment purposes. This is the same approach we used when we discussed QIO access to data in the January 28, 2005 Part D final rule (70 FR 4399), where we stated that ''to the extent QIOs need access to data from the transactions between pharmacies and Part D sponsors, these data could be extracted from the claims data submitted to us''. Thus, in the preamble to this final rule, as in the preamble to the proposed rule (71 FR 61447), we may refer to ''accessing'' rather than ''collecting'' Part D data.

2. Information To Be Collected

In the proposed rule, we proposed to independently collect the same claims information collected under section 1860D–15 of the Act under the authority of section 1860D–12(b)(3)(D) of the Act. The Part D claims data for 2006 and 2007 includes 37 data elements. We referred readers to the Prescription Drug Event data instructions which can be accessed at *http://www.cms.hhs.gov/DrugCoverageClaimsData/01_PDEGuidance.asp#TopOfPage* for a full description of this information.

These instructions define each data element and its specific potential use for CMS's payment process. Generally stated, these data elements include the following:

- Identification of the Part D sponsor and Part D plan through contract number and plan benefit package identification number.
- Health insurance claim number, which identifies the particular beneficiary receiving the prescription.
- Patient date of birth and gender.
- Date of service.
- Date paid by the plan.
- Identification of pharmacy where the prescription was filled.
- Identification of prescribing health care professional.
- Identification of dispensed product using national drug code (NDC) number.
- Indication of whether drug was compounded or mixed.
- Indication of prescriber's instruction regarding substitution of generic equivalents or order to ''dispense as written.''
- Quantity dispensed (for example, number of tablets, grams, milliliters, or other unit).
- Days supply.
- Fill number.
- Dispensing status and whether the full quantity is dispensed at one time, or the quantity is partially filled.
- Identification of coverage status, such as whether the product dispensed is covered under the plan benefit package or under Part D or both. This code also identifies whether the drug is being covered as part of a Part D supplemental benefit.
- Indication of whether unique pricing rules apply, for example because of an out-of-network or Medicare as Secondary Payer services.
- Indication of whether beneficiary has reached the annual out-of-pocket threshold, which triggers reduced beneficiary cost-sharing and reinsurance subsidy.
- Ingredient cost of the product dispensed.
- Dispensing fee paid to pharmacy.
- Sales tax.
- For covered Part D drugs, the amount of gross drug costs that are both below and above the annual out-of-pocket threshold.
- Amount paid by patient and not reimbursed by a third party (such as copayments, coinsurance, or deductibles).
- Amount of third party payment that would count toward a beneficiary's true out-of-pocket (TrOOP) costs in meeting the annual out-of-pocket threshold, such as payments on behalf of a beneficiary by a qualifying State Pharmaceutical Assistance Program (SPAP).
- Low income cost sharing subsidy amount (if any).
- Reduction in patient liability due to non-TrOOP-eligible payers paying on behalf of the beneficiary. This would exclude payers whose payments count toward a beneficiary's true out of pocket costs, such as SPAPs.
- Amounts paid by the plan for basic prescription drug coverage and amounts paid by plan for benefits beyond basic prescription drug coverage.

In 2008, the number of elements collected in the Part D claims data was expanded from 37 to 39. Specifically, we added additional elements to reflect the estimated rebate amount applied to the point-of-sale price and the vaccine administration fee. Because these elements were added for 2008, they were not addressed in the October 18, 2006 proposed rule. Furthermore, in the October 2006 proposed rule (71 FR 61447), we did not explicitly discuss how we would respond to future changes in the elements collected as part of the claim. Rather, the proposed rule included only a discussion of the 37 elements that then comprised the Part D claim and proposed that we would collect these 37 elements under section 1860D–12(b)(3)(D) of the Act. As a result, interested parties had an opportunity to comment only upon our proposal to collect the original 37 elements of the Part D claim under section 1860D–12(b)(3)(D) of the Act, and there has not been any similar opportunity for interested parties to submit comments on whether the two new elements should also be collected under section 1860D–12(b)(3)(D) of the Act, such that they may also be used for non-payment-related purposes. Accordingly, we will not be collecting these two data elements under section 1860–12(b)(3)(D) of the Act at this time. We are finalizing a regulation establishing our authority to collect under section 1860D–12(b)(3)(D) of the Act only those 37 data elements that were part of the prescription drug event (PDE) record in 2006. Data regarding these 37 elements may be used for both payment-related and nonpayment-related purposes. As discussed later in this preamble, such use will be subject to our minimum necessary data policy, our data sharing procedures, and the encryption of certain identifiers and aggregation of cost data to protect beneficiary confidentiality and commercially sensitive data of Part D sponsors. Because data regarding the 38th and 39th elements will continue to be collected only under section 1860D–15(d)(2) and (f)(1) of the Act, consistent with § 423.322(b), these data may be used only for payment-related purposes.

We note that this final rule does not extend to rebate or other price concession data, otherwise known as ''direct or indirect remuneration'' or ''DIR'', with the exception of DIR that may be reflected in the negotiated price paid for a drug at the point of sale. Again, the collection of Part D data under the authority of section 1860D–12 of the Act in accordance with this final rule, is limited to the original 37 data elements collected as part of the Part D claims data. We have clarified this in

response to comments and in the regulatory text.

Comment: Commenters were generally supportive of CMS's proposal to access Part D claims data for research and non-research purposes, and agreed that the data will provide valuable information and be essential in the evaluation of the Part D benefit. Several commenters requested additional elements be added to the original 37 PDE elements outlined in the proposed rule.

Response: We agree that the PDE data elements we now collect will provide a valuable tool for evaluating the Part D program, and appreciate the suggestions to add other elements for collection. This final rule is first and foremost a clarification of the statutory authority that allows us to collect the original 37 PDE elements outlined in the proposed rule and this final rule and to access them for purposes other than payment. Since these data are already being collected under the Part D program, we would access the already-collected data and make them available for research and non-research purposes, without undue burden to Part D sponsors or beneficiaries.

As discussed above, in 2008, the number of PDE data elements was expanded to 39. In future years, we may revise our guidance on PDE Reporting to include additional elements on the claim beyond the elements presently collected. Through separate rulemaking, we will address whether we intend to collect any of these additional elements under our authority in section 1860D–12(b)(3)(D) of the Act.

Comment: Several commenters noted that the proposed rule relates to drug claims and related information and asked for clarification as to what is meant by this phrase. A few commenters noted that the presence of this phrase in the proposed regulatory text suggests that CMS may be contemplating using and sharing rebate and other discount and pricing concession data.

Response: Rebate and other price concession data are not the subject of this final rule. This rulemaking applies to Part D claims data only, and is limited to the original 37 elements reported on the PDE. To further clarify this point we are amending proposed § 423.505(f)(3) to delete the applicable reference to ''related information.''

Comment: Several commenters expressed concern about access to cost and pricing data. Several commenters noted that pricing data contained on the Part D claim are not an accurate reflection of the actual costs to plans. These commenters also requested clarification that the information we are proposing to collect and disclose relate only to Part D claims data, and not to competitively sensitive financial data regarding rebates, discounts or other negotiated price concessions. The commenters expressed a concern that release of competitively sensitive data could undermine the competitive bid process. They assert that plans will be able to adjust their bids on the basis of knowledge of each others' data, resulting in higher drug costs for all.

Response: We share the commenters concerns about the need to protect the sensitive data under the Part D program. Because the Medicare drug benefit is based on a competitive business model, to release commercially or financially sensitive data to the public could negatively impact Part D sponsors' ability to negotiate for better prices, and ultimately affect the ability of sponsors to hold down prices for beneficiaries and taxpayers. Therefore, we have adopted a number of protections to mitigate these concerns.

First, we have clarified that this final rule applies only to the 37 original elements of Part D claims data and not to rebate and other price concessions data. As discussed above, to the extent that the PDE record was amended in 2008 to include data on estimated rebates applied at the point of sale, we have clarified it in the regulation that we will not be collecting this information under that authority. In addition, we note that plan-specific bid information is not included on the claim, and therefore, would not be the subject of this rulemaking.

Second, with respect to our disclosures of information collected under this rulemaking to external entities, we have developed an approach to minimize the risk of unauthorized disclosure of beneficiary identifiable information, as well as the use of commercially sensitive data of Part D sponsors. Similar to the process used under Parts A and B program:

- We will require research using beneficiary identifiable data to be conducted by an experienced entity at a reputable organization, with an appropriate research design, and with assurances to protect beneficiary confidentiality. Research is to be made available to the public and identifiable data is not released for commercial purposes.
- We will only release beneficiary identifiable data for research purposes if the CMS privacy board approves the data release and then, will only release the minimum data necessary for the study.
- Requesters who receive identifiers to link to another dataset will be required to re-encrypt beneficiary identifiers, after data linkage, to minimize the risk of accidental disclosure.
- Requesters will sign a data use agreement which carries penalties for misuse or intentional release of beneficiary identifiable information.

In addition to these protections of beneficiary identifiable information, we plan to impose additional restrictions to further protect beneficiary confidentiality and plan commercially sensitive information. When releasing data to external entities, we will restrict releases according to the following principles:

- Only the minimum necessary elements from the PDE will be released for a project. In accordance with this principle, cost data will not be released unless necessary for the project.
- Drug cost elements (that is, ingredient cost, dispensing fee, and sales tax) will be aggregated.
- Beneficiary identifiers, pharmacy identifiers and prescriber identifiers will be encrypted where not needed to link to other datasets. Additionally, an element representing the internal prescription service reference number assigned by pharmacies will not be released so as to not indirectly reveal pharmacy identifiers.
- Plan identifiers will always be encrypted for external entities. We note that the internal plan identification numbers on the claim would also not be available to external entities as these represent reference numbers assigned by the plan at the time a drug is dispensed and release of such numbers could lead to a de facto identification of the plan. We also note that when we state in this preamble that an identifier will be encrypted, this means that it will be replaced with a non-identifiable number or code such that there is a low probability of assigning any meaning to the replacement number or code. Unless otherwise noted, encryption will occur without any decryption, and we would not provide a key that allows for an encrypted identifier to be converted back into its original form. We believe these restrictions will protect both the commercially sensitive data of Part D plans, such as the plan identifiers, pharmacy identifiers, prescriber identifiers and cost elements, as well as the beneficiary identifiable data included on the claim. Similar protections for both beneficiary identifiable information as well as commercially sensitive data of Part D sponsors will be in place for releases to governmental entities as well including

States, Congress and other executive branch agencies. For both States and non-HHS executive branch agencies, the drug cost elements on the claim (ingredient cost, dispensing fee, and sales tax) will be aggregated together, and will not be available in a disaggregated format, except that, upon request, CMS will exclude sales tax from the aggregation at the individual claim level if necessary for the project. We believe this aggregation will serve to ensure that some of the most confidential data on the claim—the separate costs paid by Part D sponsors for ingredient cost or dispensing fee—will not be vulnerable to any unauthorized release. However, because these government agencies may need other data on the claim in order to coordinate treatment of beneficiaries or further study care received by individual beneficiaries, we will make the beneficiary, plan, pharmacy, and prescriber identifiers available to these entities where needed. For example, as discussed later in this preamble, States have specifically requested claims data for beneficiaries dually eligible for Medicaid and Medicare. By understanding the care received by these beneficiaries, the State Medicaid agencies may be able to better coordinate the medical costs they reimburse under Medicaid with the drug regimens being reimbursed under the Medicare Part D program. In coordinating care, these State agencies may need to understand which plan a beneficiary is enrolled in. Releases to Congressional oversight agencies are discussed in response to comment later in this preamble. We have included these restrictions in our amended regulations at § 423.505(m).

The appendix to this rule also contains a CMS chart, explaining in more specific detail the restrictions relative to the available PDE elements for various parties. We will evaluate all requests for these data to ensure that any release is consistent with the restrictions contained in our regulations, and we will release only the minimum data that are necessary for the specific project. Additionally, as part of our data sharing procedures, we will ensure that any disclosure is for an appropriate purpose and does not undermine the competitive nature of the Part D program, such as a disclosure that would result in Part D sponsors being able to adjust their plan bids on the basis of knowledge of each others' data.

Finally, while we agree with commenters that cost data on the Part D claim may not reflect the actual costs to plans, such data does reflect costs incurred at point-of-sale, and may be of use to CMS, other governmental entities, and other external entities for projects unrelated to a plan's total costs.

Comment: One commenter asked that CMS appropriately use and differentiate between the terms ''sex'' and ''gender'' in its data collection process.

Response: The Patient Gender Code field in the Part D claim is defined by the National Council of Prescription Drug Programs (NCPDP). We have found it helpful in working with the industry and other stakeholders to rely on the NCPDP industry standard whenever possible. The NCPDP data dictionary defines ''Gender Code'' under definition of field, ''For eligibility, and identifying the gender of the member.'' Values are: M=Male, F=Female, and U=Unknown.

B. Purpose of CMS Collecting Information

In the proposed rule, we outlined our intended use of Part D claims data for a wide variety of statutory and other purposes including—

- Reporting to the Congress and the public on the overall statistics associated with the operation of the Medicare prescription drug benefit;
- Conducting evaluations of the Medicare program;
- Making legislative proposals with respect to the programs we administer, including the Medicare, Medicaid, and the State Children's Health Insurance Program; and
- Conducting demonstration projects and making recommendations for improving the economy, efficiency, or effectiveness of the Medicare program.

In the final rule, we continue to believe such uses are necessary and appropriate. In addition, as discussed below and later in this preamble, we also intend to use these data for ''other studies addressing public health questions,'' ''pilot projects,'' ''supporting quality improvement and performance measurement activities,'' and ''populating personal health records,'' and have added these purposes to the list in § 423.505(f)(3).

Comment: Many commenters believe analyses of Part D claims data are necessary for CMS to administer the Medicare program, and for planning, evaluation, and policy development. Examples of program research and evaluation uses suggested by commenters include—

- Assuring that Part D has not promoted adverse selection into certain health plans with less generous medication coverage;
- Examining the effects of drug coverage and cost containment on Medicare spending and the health of vulnerable elderly and disabled persons;
- Measuring the success of prescription drug plans in encouraging the use of generic medicines;
- Examining the transition effects of moving dual eligibles from Medicaid programs to Part D;
- Analyzing the effects of a coverage gap on drug utilization and spending;
- Determining the impact of Part D coverage on non-pharmaceutical treatments and services use;
- Evaluating the effect of changing copayments, copay structures, and coverage limits on beneficiary drug choices and compliance with drug regimens;
- Assessing the extent to which risk adjustment methodology influences enrollment dynamics;
- Assessing the impact of adding a prescription drug benefit on health outcomes of beneficiaries;
- Researching the extent to which disparities in care (based on race, socioeconomic status, rural residence, etc.) might be affected by Part D; and
- Understanding the impact of Part D on related public programs, such as the State Children's Health Insurance Program (SCHIP), SPAPs, Medicaid, and the VA.

Commenters also noted that being able to explore how Part D functions on its own and in relation to other parts of the Medicare program is essential to guiding future policy decisions. They further assert that use of Part D claims data is critical to CMS's credibility and should be considered as part of the Secretary's value-based health care purchasing initiative. Without access to Part D claims data for research and other purposes, CMS will limit its ability to monitor expenditures for the new program, to study the impact of the program on public health, and to respond to Congressional requests for information.

Response: We agree with the many comments that Part D claims data will be essential to us for reporting, conducting program evaluations and demonstrations, research analyses, and other public health functions. We also agree that research uses of these data should help promote and protect the health and well-being of Medicare beneficiaries. While we believe these uses were implied in the regulatory text set forth in the proposed rule, we are expanding the list of necessary and appropriate purposes for which data will be collected in this final rule to address public health functions specifically.

Comment: Commenters expressed widespread support for using Part D

claims data to improve our knowledge base on medication adherence and other aspects of pharmacotherapy among the elderly and disabled. Some specific suggested uses of Part D claims data for this purpose include the following:

- Describing current medication use among the elderly and disabled and examining trends, specifically enhancing our awareness of poly-pharmacy, off-label uses, avoidance of contraindicated drugs and dangerous drug-drug interactions.
- Examining the extent to which Medicare beneficiaries receive medicines according to evidence based guidelines.
- Assessing whether beneficiaries are adhering to prescribed therapy, and if not, the clinical and economic impact of nonadherence.
- Testing new interventions to improve medication prescribing and adherence.
- Evaluating the impact of medication therapy management programs mandated under the new Medicare prescription drug benefit.

Response: We consider examining medication use, inappropriate use, and factors influencing medication adherence in the Medicare population to be crucial aspects of Part D program monitoring and evaluation, and public health. As noted by commenters, the Congress mandated that we examine best practices of medication therapy management, and Part D claims data are critical for our being able to complete that study.

Comment: A few commenters noted that sharing of research results is critical to CMS credibility and should be considered part of the transparency initiative.

Response: We recognize Part D claims data research, and any subsequent results, are critical to evaluating multiple aspects of the Medicare Prescription Drug program. Many quality measures developed by the American Medical Association Physician Consortium and National Committee for Quality Assurance, and subsequently adopted by Ambulatory Care Quality Alliance, and the Hospital Quality Alliance require Part D claims data to run the measures. All of the following quality measures involve Part D claims data: Drug Therapy for Lowering Cholesterol, Beta-Blocker Therapy within 7 days post myocardial infarction, and Beta-Blocker therapy at 6 months post myocardial infarction. These measures will be used by many of the Better Quality Information to Improve Care for Medicare Beneficiaries Project pilots, including the new local collaboratives being chartered under the Secretary's value-based health care initiative to foster public reporting. All of this makes Part D claims data an integral part of our transparency efforts. Thus, in this final rule, we are clarifying our intent to use Part D data for these necessary and appropriate purposes by adding ''supporting quality improvement and performance measurement activities'' as an explicit use of these data under § 423.505(f)(3).

Comment: A commenter asserts that we did not adequately justify the use of Part D claims data by the Secretary for public reporting purposes, apart from its use to develop reports to the Congress, which may become publicly available records.

Response: As we stated in the proposed rule, we believe it is appropriate and necessary for the Secretary to use Part D claims data for the purposes of reporting to the Congress on the effectiveness and performance of the prescription drug benefit—including reporting that is not related to payment. In addition, we may need Part D claims data to report to the public on aggregate statistics associated with the Part D program. Finally, the Secretary has determined that it is necessary and appropriate, under section 1860D–12 of the Act, that the public should have access to certain data, so that the public may monitor the progress of the Part D program and, in fact, perform research that will improve the health of, not only Medicare beneficiaries, but all Americans. This is why we have created Part D-related public use files relating to plan benefits and formularies (for example, files such as geographic locator files, plan information files, formulary files, beneficiary cost files, pharmacy network files, and record layout files as described at *http://www.cms.hhs.gov/NonIdentifiableDataFiles/09_PrescriptionDrugPlanFormularyandPharmacyNetworkFiles.asp*.). We may also create additional public use files subsequent to the publication of this final rule.

Comment: Several commenters suggested that the reporting of overall statistics and development of evaluations and/or legislative proposals can be achieved without CMS having to use or disclose the Part D sponsors' Part D claims data. The commenter suggested that CMS use information that is separately collected from the claim to develop statistics, noting however, that this information will not necessarily allow CMS to do every type of analysis described in the proposed rule. Additionally, CMS could partner with one or more sponsors to use their data, alone, or in combination, to do additional statistics and analysis.

Response: Although we are willing to partner with plan sponsors as needed, we do not believe that voluntary cooperation by Part D sponsors would provide the kind of comprehensive data sets we need to perform the research, evaluations, reporting and other functions that are described this final rule. Voluntary agreements with plan sponsors would lead to an incomplete file of data. In addition, because we possess the authority under section 1860D–12(b)(3)(D) of the Act to collect Part D claims data, we do not believe an exclusive reliance on such voluntary agreements is necessary.

Comment: A commenter noted that a recent Report to Congress recommended that the Secretary should have a process in place for the timely delivery of Part D data to congressional support agencies to enable them to report to the Congress on the drug benefit's impact on cost, quality, and access.

Response: We agree that congressional support agencies should have timely access to appropriate Part D data. This final rule allows congressional oversight agencies access to all elements on the Part D claim in order to carry out their functions. Like other agencies outside of CMS, such congressional agencies would be subject to our minimum necessary policies and data sharing policies. Thus, we would release only the minimum amount of Part D claims information necessary to support given projects. In addition, as discussed later in this preamble, the Congressional Research Service has the authority to require data releases only when acting on behalf of a committee. Thus, that agency would be treated the same as a congressional oversight agency when acting on behalf of committee. Otherwise, it would be subject to the same restrictions that apply to external entities in our regulation.

Comment: Several commenters requested that we establish specific, explicit procedures to ensure that if comparative effectiveness or safety research informs coverage or payment decisions for specific items and services (whether decisions are made by CMS or its agents under Parts A and B or by private plans under Part D), stakeholders have an opportunity to evaluate the evidentiary basis of proposed decisions and provide input.

Response: Since our proposed rule did not address the development of national coverage or payment decisions, but rather our access to Part D claims data, we believe that our development of coverage or payment decisions is beyond the scope of this rulemaking.

We do note that section 1860D–4(b)(3) of the Act requires pharmacy and therapeutic committees to base clinical formulary decisions on the strength of the scientific evidence and standards of practice. We have issued further formulary guidance available at *http://www.cms.hhs.gov/Pharmacy/07_Formulary%20Guidance.asp#TopOfPage*.

Comment: Some commenters noted potential uses for Part D claims data, linked with Parts A and B data, which extend beyond research into the actual provision of care, including disease management.

Response: We believe the implementation of disease management programs and the evaluation of these programs could potentially be strengthened by the use of Part D claims data. However, we believe these data must be used with caution for these purposes since we collect Part D claims data only for Medicare Part D enrollees. We do not collect drug claims data for those beneficiaries who receive their drug insurance solely from other sources, such as employer or retiree sponsored health plans, the Veterans Health Administration, or TRICARE.

Comment: Some commenters noted that Part D claims data can help improve Medicare's current basis of risk adjustment for plan payments.

Response: Section 1860D–15(d)(2)(B) of the Act provides us authority to use Part D claims data for determining Medicare payments to prescription drug plan sponsors. This includes their use for refining our drug plan payment system. Thus, when claims data are used for risk adjustment they are collected under section 1860D–15 of the Act, and not under section 1860D–12 of the Act.

Comment: A commenter recommended adding the phrase ''and pilot'' into the text of the § 423.505(f)(3)(iv), so that the regulation would read ''The Part D plan sponsor agrees to submit to CMS * * * [d]ata included in drug claims submitted by Part D plan sponsors, as the Secretary deems necessary and appropriate for purposes including but not limited to * * * [(f)(3)(iv) c]onducting demonstration *and pilot* projects and making recommendations for improving the economy, efficiency, or effectiveness of the Medicare program.'' The commenter wants to ensure that Medicare Health Support Organizations are able to access Part D claims utilization data.

Response: We agree that pilot projects, as appropriate, should have access to these data, as appropriate, and have added the phrase ''and pilot'' to § 423.505(f)(3)(iv).

Comment: Several commenters requested that the list of purposes for which the data would be used be expanded to include program integrity.

Response: We agree that it is important that our program integrity components have access to necessary data in order to protect the program. The existing regulation at § 423.322(b) already allows information collected under section 1860D–15 of the Act to be used in determinations of payments and payment-related oversight and program integrity activities. To the extent that program integrity activities may include investigations of issues that are not directly payment-related, this rule will provide access to Part D claims data for these purposes.

Comment: One commenter requested we clarify in the final rule that Part D claims data can be used by CMS to oversee and protect the program. Other commenters stated that we should clarify that Medicare Drug Integrity Contractors (MEDICs) can obtain Part D claims data where necessary to fully investigate complaints and fraudulent claims.

Response: Our regulations already address use of payment data for payment-related oversight. We are constantly working with our MEDICs to determine the types of data to which they will have access. However, we believe our interactions with our contractors involve internal agency procedures, and are not the subject of this final rule.

C. Sharing Data With Entities Outside of CMS (Final § 423.505(f)(3) and (l) Through (o))

As stated in the October 18, 2006 proposed rule, in addition to collecting Part D claims data for use in administering the Medicare Part D program under the authority of section 1860D–12(b)(3)(D) of the Act, we also believe that it is in the interest of public health to share the information collected under that authority with entities outside of CMS. When information is collected under the authority of section 1860D–12(b)(3)(D) of the Act, we do not believe that the statutory language in section 1860D–15(d) and (f) of the Act (requiring the information collected under the authority of that section to be used only in implementing such section) would apply, since any collection would be effectuated outside of section 1860D–15 of the Act. Therefore, as we stated in the October 18, 2006 proposed rule, we proposed to add a new § 423.505(f)(5) to the regulations (now § 423.505(l) and (m)) that would specify that we could use and share the Part D claims information we collect under § 423.505(f)(3), without regard to any restriction included in § 423.322(b). In response to comments, we clarify in this final rule that our regulation permitting release of Part D claims data to other government agencies and outside entities is authorized by section 1106 of the Act.

1. Other Government Agencies

We stated in the proposed rule that the Department of Health and Human Services' (DHHS') public health agencies such as the National Institutes of Health (NIH), the Food and Drug Administration (FDA), and the Agency for Healthcare Research and Quality (AHRQ) have, or support, researchers that would need to use Medicare Part D prescription drug event data for studies, and other projects, to improve public health consistent with the missions of these agencies. We also stated that oversight agencies may need access to both aggregated and non-aggregated claims data in order to conduct evaluations of the Part D program that are unrelated to payment and therefore not authorized under section 1860D–15 of the Act. In addition, agencies in the legislative branch, such as the GAO, MedPAC, and CBO, may need access to data in order to evaluate the program. We continue to believe this.

We also continue to believe that other agencies within DHHS, such as the Centers for Disease Control and Prevention, the Health Resources and Services Administration, or the Office of the Assistant Secretary for Planning and Evaluation, may also need Part D claims data to perform evaluations or assess policies. However, we note specifically that OIG has independent authority to collect Part D claims data from Part D sponsors to perform its statutory duties in accordance with the Inspector General Act of 1978, as amended, 5 U.S.C. App. This final rule provides OIG an additional avenue for access to these data for both payment and nonpayment purposes.

Given these necessities, we proposed to allow broad access for other Federal government executive branch agencies to our Part D claims data, linked to our other claims data files. As stated in the preamble of the proposed rule, other agencies generally would enter into a data sharing agreement, similar to what is used today. This would allow the sharing of event level cost data, protect the confidentiality of beneficiary information, and ensure that the use of Part D claims data serves a legitimate purpose. We also stated in the proposed rule that we would also ensure that any

system of records with respect to Part D claims data is updated to reflect the most current uses of such data.

In the proposed rule, we requested comments that would help us in our efforts to improve knowledge relevant to the public health. Specifically, we requested guidance on how we can best serve the needs of other agencies through the sharing of information we collect under section 1860D–12(b)(3)(D) of the Act, while at the same time addressing the legitimate concerns of the public and of Part D plan sponsors that we appropriately guard against the potential misuse of data in ways that would undermine protections put in place to ensure confidentiality of beneficiary information, and the nondisclosure of proprietary data submitted by Part D plans.

After considering the comments received, we will make Part D claims data available under a process that builds upon the practice that is currently in place today with respect to the release of Medicare Parts A and B data. Thus, we specify in this final rule that, of the data we collect under the authority of section 1860D–12 of the Act, only the minimum information necessary, subject, in certain cases, to encryption and aggregation of certain elements, will be shared with other Federal executive branch agencies, which would include contractors acting on their behalf, in accordance with section 1106 of the Act, based on data sharing procedures established by CMS and agreed to by the Federal executive branch agency requesting the data. The attached appendix, as well as our amended rules at § 423.505(m), explain how in this final rule we would group the governmental entities outside of CMS that request access to the data collected under 1860D–12 of the Act. Agencies within HHS, as well as the Congressional oversight agencies (including CRS when acting on behalf of a committee) would receive only the elements of the PDEs on the claim that are minimally necessary for the applicable project. Plan, pharmacy, and prescriber identifiers would be encrypted unless necessary for the project. In addition, for States and non-HHS executive branches, the dispensing fee, ingredient cost and sales tax elements on the claim would be aggregated together prior to any release, except that, upon request, we will exclude sales tax from the aggregation at the individual claim level if necessary.

Comment: One commenter objected to the use of the word ''necessities,'' stating that it is not necessary to allow broad access to Part D claims data.

Response: We continue to believe that it is both necessary and appropriate for the Secretary to collect the Part D claims data under section 1860D–12(b)(3)(D) of the Act in order to carry out his broad range of duties under the Act, including the duties that are listed at § 423.505(f)(3). Once the Secretary collects the information for his own necessary and appropriate purposes, we do not believe that the external release of such information must be categorized as necessary in order for it to occur, as section 1860D–12(b)(3)(D) of the Act refers to the collection of, not the release of, data. Release of data will be authorized under section 1106 of the Act. In addition, any release will be intended for the benefit of the public health and welfare.

Comment: Several commenters requested that the FDA play a central role in any use of Part D claims data for safety evaluations. Others requested that CMS issue a separate proposal to present CMS and FDA combined views on sharing of data for public comment. One commenter also contended that the FDA may not want to use Part D claims data because of alleged reliability problems and the fact that the FDA may have problems integrating the Part D claims data with its own databases. Finally, commenters requested that both agencies allow manufacturers to review the data and methods used for post-marketing surveillance.

Response: We do not believe that the FDA's use of Part D claims data or how the claims data are used in safety evaluations is the subject of this proposed rule. However, we note that we plan to exchange Part D claims data with the FDA in accordance with applicable laws and our data sharing procedures, by entering into appropriate interagency agreements and data use agreements. Thus, our procedures for sharing data with the FDA will be the same as those developed for other government agencies.

Comment: A commenter requested that the Congressional Research Service (CRS) be able to access the same level of data as oversight agencies, such as the Office of the Inspector General (OIG), the Government Accountability Office (GAO), the Congressional Budget Office (CBO), and the Medicare Payment Advisory Commission (MedPAC).

Response: In the proposed rule we stated that the Congressional oversight agencies (GAO, MedPAC, and CBO) may require access to data in order to evaluate the Part D program (71 FR 61452). Although we did not define CRS as a Congressional Oversight entity, like GAO, it does have statutory authority to request data (see 2 U.S.C. 166(d)(1)), but only when it is doing so on behalf of a committee. Accordingly, we are specifying that CRS will be considered a congressional oversight agency when the CRS is acting on behalf of committee under 2 U.S.C. 166(d)(1). Our regulations at § 423.505(m), as well as the attached appendix outline the data policies that would apply to congressional oversight agencies, including being subject to our minimum data necessary policy, our data sharing procedures, and applicable laws. For individually identifiable information or certain commercially or financially sensitive information, such as plan identifiers and cost information, these Congressional oversight agencies will be required to sign a Data Use Agreement (or provide assurances acceptable to CMS) to protect against disclosure of such data. When CRS is not acting as the agent of a committee, however, it does not have the same authority to request data from departments or agencies of the United States. Thus, we have specified that in these cases, CRS would be treated as an external entity, because the agency would essentially be performing research or analysis on behalf of an individual member of the congress. In addition, unlike States or other executive branch departments, the CRS should not need access to plan identifiers or other data on the claim in order to coordinate care on behalf of beneficiaries. Thus, we have specified that CRS will be restricted in the same manner as external researchers, and will not be treated similar to other executive branch agencies or States.

Comment: A commenter asked CMS to allow for a process that permits access to Part D claims data in a highly organized way and enables external entities to replicate any results Federal agencies obtain using the data.

Response: We believe that our approach to providing access to Part D claims data, which would follow a review of each request under our minimum necessary data policy with some additional encryption and aggregation restrictions based on type of requestor, balances the need for Part D data in order to conduct legitimate research with the needs to protect patient information and to preserve the competitive nature of the Part D program. Therefore, we will review legitimate research requests and decide whether to release Part D claims information, consistent with our regulation at § 423.505(m), as well as the guidance provided in the appendix to this final rule. We expect that external entities may be able to replicate the results of Federal analyses for many research questions, such as those

relating to the utilization of specific drugs or classes of medications, comparative effectiveness or safety research.

Comment: A few commenters asked that all applicable government agencies have broad access to the data in a timely fashion without having to enter into numerous data use agreements (DUA).

Response: As illustrated in our regulation § 423.505(m), as well as in the appendix to this final rule, non DHHS entities will have access to the minimum Part D claims data necessary for a given project, except that certain elements may be encrypted or aggregated. In the event of a backlog of requests for Part D data under these rules, we plan to give government agencies first preference in the review process, and to require such agencies to abide by our data sharing policies, which generally require a data use agreement. We have modified or streamlined the data sharing process in the case of certain Federal law enforcement or oversight entities. For example, we have streamlined the DUA process for the Department of Justice (DOJ). DOJ provides a letter for each request for data, which CMS tracks and monitors.

2. External Entities

As stated in the preamble of the proposed rule, external entities, such as researchers based in universities, regularly request and analyze Medicare data for their research studies, many of which are designed to address questions of clinical importance and policy relevance. We continue to believe researchers studying a broad range of topics need access to Part D claims linked to Parts A and B claims data. As stated in the preamble of the proposed rule, analyses of Parts A and B claims have contributed to significant improvements in the public health, have been critical in assessing the quality and costs of care for patients in the Medicare program, and have, in many cases, spurred other types of research. As such, we continue to believe that a data source that includes Parts A and B claims as well as their attendant Part D claims could be used in a similarly constructive manner, such that greater knowledge on a range of topics, both clinical and economic, would be generated. This knowledge is expected to contribute positively to the evaluation and functioning of the Medicare program, and to improve the clinical care of beneficiaries.

Also, as stated in the preamble of the proposed rule, we will specifically address the needs of a segment of external entities as part of our implementation of section 723 of the MMA, which requires the Secretary to develop a plan to ''improve the quality of care and reduce the cost of care for chronically ill Medicare beneficiaries.'' The Congress specifically stated that the plan should provide for the collection of data in a data warehouse (under section 723(b)(3) of the MMA). Within the parameters of this regulation, we will implement section 723 of the MMA by populating a chronic care condition data warehouse (CCW) which will be accessible by private researchers in order for such researchers to conduct studies related to improving quality and reducing costs of care for chronically ill Medicare beneficiaries.

In addition to the section 723 of the MMA data warehouse, we stated in the proposed rule that we are planning to make Medicare Part D claims data linked to other Medicare claims files available to external entities on the same terms as other Medicare Parts A and B data are released today, with appropriate protections for beneficiary confidentiality. We requested comments on the proposed use of the data for research purposes that would help us in our efforts to improve knowledge relevant to the public's health, as well as comments on whether we should consider additional regulatory limitations for external entities beyond our existing data use agreement protocols in order to further guard against the potential misuse of data for non-research purposes, commercial purposes, or to ensure that proprietary plan data or confidential beneficiary data are not released.

As explained in response to comments, we continue to maintain the discretion to release the 37 collected PDE elements for legitimate research purposes, subject to encryption of certain identifiers and aggregation of cost data to protect beneficiary confidentiality and commercially sensitive data of Part D sponsors. (These restrictions are outlined in our regulations at § 423.505(m) as well as in the appendix attached to this rule.) Furthermore, we also believe Part D claims data are necessary for use in personal health records and to ensure the public will be able to access the results of quality measurement and performance initiatives as discussed in the ''Purpose of CMS Collecting Information'' section of this preamble. We will release only the minimum information necessary for a given project. In addition, data will be disseminated in accordance with applicable laws via our established data sharing procedures. Thus, the requestor of data must agree to abide by the restrictions established by our data sharing procedures in order to receive access to Part D claims data. We will ensure that our system of records for Part D claims data would permit the uses of the data described in this final rule.

Comment: In general, the importance of Part D claims data for improving aspects of public health was a recurring theme among many of the comments we received. Commenters noted the lack of a comprehensive source of prescription medication data as one of the greatest challenges to conducting meaningful research in the elderly. They noted that Part D claims data will be vital for enhancing disease surveillance, identifying rare complications of drug therapy, and improving knowledge about the effectiveness and safety of drugs. Several commenters underscored that knowledge based on selected aspects of pharmacotherapy in the elderly or disabled population is limited. They point out that the very old, patients with multiple chronic conditions, and those taking multiple medications are routinely excluded from clinical trials, and assert that research based on Part D claims data would provide a valuable supplement to the FDA's current post-marketing surveillance system.

Other themes raised by commenters centered on the current fragmentation of our health care information and the lack of information on drug treatment in the elderly. These commenters suggested that analyses of Part D claims data linked with Parts A and B data could provide a comprehensive picture of disease treatment, help guard against siloed policy analyses, and support a broad, disease-centered research agenda that would advance the essential quality improvement goals highlighted by the Institute of Medicine in its report, Crossing the Quality Chasm: A New Health System for the 20th Century. Commenters also said analyses of Part D claims data would be beneficial for developing comprehensive estimates of the costs of care, revealing the most cost effective disease therapies, and understanding beneficiaries' sensitivity to changes in cost sharing for drugs.

Response: We agree with the many comments that Part D claims data will be essential for research analyses involving the elderly and disabled, and for other public health functions.

Comment: Two commenters suggested that CMS implement a tiered system of access to Part D claims data. Specifically, they suggested we establish separate tiers for accessing the data, taking into account the need for data and the opportunity for abuse, which

would correlate to the following groups: (1) Government agencies; (2) contractors and researchers under contract with CMS or another government agency; and (3) outside researchers. They suggest that Part D claims data be available to the above-listed entities within appropriate parameters, but not be available to entities, such as pharmaceutical manufacturers and others with strong proprietary interests.

Response: We considered several alternatives to the Medicare A/B data release process including restricting:

- Access to HHS agencies only,
- Access to Federal Government agencies only,
- Access to financial elements for outside researchers.

We rejected these alternatives as too restrictive in light of the significant benefits to the Medicare program and the public's health in making Medicare Parts A, B, and D linked data available, with protections, to Federal and State government agencies, and external entities. We believe that our approach, which incorporates the Medicare A/B minimum necessary data policy with additional restrictions to protect privacy and plan commercially sensitive information, strikes an appropriate balance between these significant health benefits and the concerns regarding the release of proprietary data and preserving beneficiary confidentiality. Moreover, we believe this process has sufficient protections to ensure compliance with the applicable laws and guard against the potential misuse of data. External entities requesting access to Part D claims data will have to enter into an agreement with us that includes provisions protecting the data from improper release.

Our regulation at § 423.505(m), as well as the attached appendix provides additional guidance on the additional limitations that would apply to external entities (which would include CRS when not acting on behalf of a committee as an agent, but would not include States or other executive-branch Federal agencies) requesting Part D data. Cost data (consisting of ingredient cost, dispensing fee, and sales tax) could be released only in aggregated form. In addition, plan and other identifiers generally would be encrypted.

We also intend to only release the minimum data necessary for a given project. Additionally, we also note that if an entity involved in a data release of electronic protected health information (EPHI) is a HIPAA-covered entity, the covered entity will have to comply with our HIPAA privacy and security standards. In addition, the covered entity should also follow the security guidance which was released in December 2006. The guidance reinforces our existing security standards to specifically address remote access and use of EPHI. This reinforcement of the HIPAA security standards, particularly related to data in transit, will further protect Part D claims data from inappropriate release, and therefore inappropriate use. For more information on this guidance, please log on to *http://www.cms.hhs.gov/SecurityStandard/.*

Comment: We requested comments on whether we should consider additional regulatory limitations for external researchers beyond our existing data use agreement protocols in order to further guard against the potential misuse of data for non-research purposes, commercial purposes, or to ensure that proprietary plan data or confidential beneficiary data are not released. In response, a number of commenters requested that CMS define the term ''commercial purposes'' clearly and narrowly so that a broader range of entities would have access to the data, including pharmaceutical manufacturers, insurance companies, and pharmacy benefit managers. These commenters argue that instead of precluding certain types of entities from accessing Part D claims data, it would be better to focus on assuring researcher quality and integrity, and on ensuring that researchers adopt sound methodologies in conducting analyses. Therefore, the commenters request that the ''clear bias'' against pharmaceutical company supported research be removed from the CMS review criteria.

As noted previously, other commenters suggested that the final regulation should deny access to data to organizations with strong proprietary interests, such as drug plan sponsors, pharmaceutical manufacturers, and other industry data collection entities that sell market research and sales data.

Response: Under our current policies for Parts A and B data, we do not provide protected health information (PHI), as defined for purposes of HIPAA at 45 CFR 160.103, for commercial purposes, as we believe PHI should only be provided to entities conducting research that will result in generalizable knowledge in the public domain. We are concerned about the potential for conflicts of interest where commercial entities, whose primary purpose is not the creation of generalizable knowledge, might not publish results contrary to the firm's financial interest. However, we do allow external researchers to be funded by commercial firms, including pharmaceutical manufacturers, insurance companies, and pharmacy benefit managers when the research will contribute to general knowledge in the public domain and the researchers are free to publish the results of the research regardless of the findings. We continue to believe that any findings based on beneficiary identifiable data released by us should be unbiased by commercial incentives and should be in the public domain. The criteria governing releases of protected health information (PHI) for research are designed to ensure that the HIPAA Privacy Rule's requirements, as defined at 45 CFR 164.512(i), as well as our own policies are met. In this final rule, we use the definition of research contained in the HIPAA Privacy Rule, which defines the term as ''a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge'' (45 CFR 164.501). Thus, we do not release PHI to external entities when their research is not designed to develop or contribute to the generalizable knowledge. Nor do we release PHI to external entities for their commercial purposes or if they fail to demonstrate that they have a sound research methodology and that their research will produce findings relevant to the Medicare program and its beneficiaries.

Therefore, we will continue to apply the same criteria in distinguishing between who may have access to data (researchers versus commercial interests), as we have been using for Parts A and B data. Because we intend to examine whether each proposed use of data meets the definition of research used under the HIPAA Privacy Rule, we will not be defining the term ''commercial purposes'' in this regulation.

Comment: We received several comments relating to the Freedom of Information Act (FOIA), noting that releases under FOIA should not include information that would be considered proprietary in nature.

Response: If a FOIA request is received, we will follow our ordinary FOIA procedures and not release under FOIA data the agency determines are trade secrets, or commercial or financial information protected by FOIA Exemption 4 (5 U.S.C. 552(b)(4)). These procedures were explained more fully in the preamble to the Part D final rule, where, in response to a question about protecting bid information under FOIA we stated:

> [B]idders can always seek to protect their information under the Freedom of Information Act and label truly proprietary information ''confidential'' or ''proprietary''. When information is so labeled, the bidder is required to explain the applicability of the

FOIA exemption they are claiming. When there is a request for information that is designated by the submitter as confidential or that could reasonably be considered exempt under Exemption 4, the Department is required by its FOIA regulation at 45 CFR § 5.65(d) and by Executive Order 12,600 to give the submitter notice before the information is disclosed. To determine whether the submitter's information is protected by Exemption 4, the submitter must show that (1) disclosure of the information is likely to impair the government's ability to obtain necessary information in the future; (2) disclosure of the information is likely to cause substantial harm to the competitive position of the submitter; or (3) the records are considered valuable commodities in the marketplace which, once released through the FOIA, would result in a substantial loss of their market value. Consistent with our approach under the Part C program, we would not release information under the Part D program that would be considered proprietary in nature or that would tend to stifle the availability of discounts or rebates from pharmaceutical manufacturers negotiated by Part D plans.

Bidders may identify trade secrets and confidential business information (CBI) with their submission. However, if they have not we will give them another chance when a FOIA request has been made on their records. In this case we will notify the business submitters that we are in receipt of FOIA requests for their records. We will then provide the business submitters with instructions and ask them to identify any trade secret or CBI in order to justify our application of Exemption 4. We will then review their justifications and highlighted information against FOIA case law to see if we can support their requested redactions. Under Executive Order 12600, if the business submitters disagree with our Exemption 4 analysis (which includes their justification) of their identified trade secret or CBI, they are provided the opportunity to seek a restraining order or injunction in Federal court prohibiting us from releasing their records under FOIA. (70 FR 4294 through 4295)

Thus, for example, we do not expect that any pricing data included on the claim that fits within FOIA Exemption 4 would be required to be released under FOIA.

We also note that we do not view data releases made under the authority of the new § 423.505(m) as FOIA releases. Unlike FOIA releases, these releases are not required by law. Section 423.505(m) permits the release of data, but does not require it.

Comment: A number of commenters underscored the importance of CMS making patient identifiers available in order to achieve the full potential of Part D data. One commenter stated prescription drug claims files by themselves lack the diagnostic, outcomes and other information to support the needed studies. However, when merged with other data, they can become a powerful tool for improving the public health. Reflecting the views of several other commenters, the commenter noted that Part D claims data could be linked to several other data sets such as: death and birth certificate files; nursing homes Minimum Data Set; home health care Outcome and Assessment Information Set files; disease registries such as the Surveillance, Epidemiology, and End Results-Medicare dataset developed by the National Cancer Institute to study outcomes of cancer therapies; geographical data on characteristics and health care resources of communities; information on characteristics of providers (for example, use of primary medical care versus specialty care); and Medicaid data on health care encounters and services not covered by Medicare. The commenter emphasized that linking Part D data to the above information is essential in order to provide accurate accounting for outcomes and to best address the many scientific pitfalls and potential threats to validity that emerge when one moves from experimental to observational studies, such as unobserved variable bias and confounding by indication or counter-indication.

Another commenter stated that linkage of the Part D data to population-based surveys would provide invaluable sources for epidemiologic, health services and policy analyses and enable investigations into prevalence of diseases, their risk factors, progression, and trends in treatment and drug use.

Response: We agree these data are more powerful when linked with other data sets. Linkage to Medicare Parts A and B data is essential for understanding the impact of the Part D benefit on use of other Medicare services. There are a host of other types of research studies that could not be completed without linked data. These include: studies examining the impact of changes in benefit structure on patient outcomes, research into the relative effectiveness of pharmacologic therapies or medication therapy management interventions, and pharmacovigilence studies. In many cases, Part A/B linked data provided through our chronic condition warehouse with encrypted identifiers will be sufficient to accomplish the research. In cases where beneficiary identifiers are essential for linkage with non-Medicare data bases, such as the National Center for Health Statistics Surveys, beneficiary-identifiable data may be released, but will be subject to the Privacy Act and HIPAA data security and privacy requirements consistent with those we require in our data release policies for identifiable Part A/B data. These requirements include a CMS Privacy Board review/approval, submission of a Data Use Agreement, and the justification of minimum data necessary to carry out the project. If the data is going to be linked to data collected under another federally funded study, the requestor must also secure the Federal project officer's concurrence and an Institutional Review Board (IRB) approval.

Comment: A few commenters were concerned that CMS had not adequately addressed the implications of expanding access to physician and patient information. They recommended that we specify more clearly the conditions under which physician data can be collected and used in performance programs, research studies, and demonstration projects, noting that revealing physician identification information will enable pharmaceutical companies and others to influence physicians' prescribing patterns and interfere with a physician's professional judgment.

Response: We believe that an encrypted version of the physician identifier, which will allow for the linkage of all of a physician's claims without divulging the physician's identity, will meet the needs of most researchers. Accordingly, we will evaluate research requests for physician identifiers (for example, that could be used to link Medicare data at the physician level to other datasets) on a case-by-case basis and will only consider providing them if necessary for the study under our minimum data necessary policy and permitted under applicable law. In addition, we will continue our current practice of not providing identifiable data for commercial purposes. This limitation should address the concern regarding pharmaceutical company interference with medical practice.

In addition to releasing physician identifiers in response to certain research requests, we anticipate releasing physician identifiers to States, and pilot and demonstration projects, as the ability to link all of a physician's claims may be necessary for care coordination and disease management purposes. Physician identifiers may also be used by or released to other government agencies or contractors, as part of populating personal health records, so that beneficiaries will have a record of who prescribed their drugs. Finally, we anticipate that they may be used in connection with or released to support the Secretary's Value-driven Health Care initiative which seeks to

improve the quality and efficiency of health care delivery by making performance measurement information available to better support provider and consumer health care decision-making.

One of the goals of the Secretary's Value-driven Health Care Initiative is to promote public reporting of performance measurement results at the provider and physician level that may be based on public sector claims, private sector claims, and other data in order to enable providers, including physicians, and consumers to make informed health care decisions. We envision using the claims data to develop provider and physician-level performance measurement results.

Comment: A commenter supported CMS's use of Part D data to manage cost and clinical quality and argued that providing external parties access to linked physician identifiable claims in order to pool them with employer data would allow analysis to reduce the cost of care delivery and improve the quality of care. The commenter stated that increasing transparency of care in the outpatient sector is critical and that protecting physicians from oversight cannot continue.

Response: We are undertaking a variety of pay for performance and value-based health care initiatives in an effort to encourage health care providers to furnish high quality health care and in order to provide cost and quality information to consumers. We intend to use the Part D claims data in these activities. Similarly, other Federal executive branch agencies (and their contractors) will have access to physician identifiers, if appropriate. We are working with external stakeholders, including multi-stakeholder coalitions that represent providers, consumers, employers, and health plans, regarding how to pool Medicare data with private data for analysis and how to make the results available to the public. As these plans mature, more information will be shared with the public.

Comment: While many commenters supported the use of Part D claims data for detecting and analyzing unintended risks and benefits of medications, they also noted the limitations of claims-based research for answering questions about the comparative efficacy and safety of drugs. The commenters asserted that claims-based outcomes research, such as with Part D claims data, can reveal correlations between variables or events, but is often not sufficient to establish causation. They offered specific suggestions such as holding researchers to high methodological and ethical standards, creating study panels of qualified external stakeholder experts to review research protocols, and encouraging CMS to conduct an open and transparent process that will allow for external verification and replication of CMS's sponsored analyses.

Response: We are well aware of the limitations involving retrospective, claims-based research. Our current data release policies for Parts A and B data for externally-funded research require that a requestor submit a detailed proposed research protocol. We review these proposals for the legitimacy and feasibility of the research, the strength of the proposed methods for guarding the privacy of the data, and the appropriateness of the research methods. Research requests for Part D claims data would be subject to the same type of review.

Comment: Some commenters suggest that CMS make available the number of external requests it receives for claims data, the manner in which the agency responds to those requests, the timeliness of the approval process, and any fees charged for various types of data. They also believe that CMS should describe the Federal priorities for government-sponsored research using Medicare Part D claims data, and provide for public notice and comment on proposals based on processes already established by Agency for Health Research and Quality (AHRQ).

Response: We already maintain data on the number of external research requests for our claims data, whether the request was approved, the timeliness of the approval process, and any fees charged for various types of data. We can make this information available to the public, upon request, and will explore posting it on our Web site.

We do not believe we should establish Federal priorities for research using Part D claims data, just as we do not establish priorities for research using Medicare Parts A and B data. Much of our research agenda is determined by directives from the Congress for research studies, demonstrations and their evaluation. Accordingly, a public comment process on CMS-sponsored research is not necessarily feasible. However, other Federal government executive branch agencies that are likely to sponsor comparative effectiveness or safety research using Part D claims data, such as AHRQ, do have such priority-setting processes in place. We believe these processes are adequate to address the commenters' concerns.

Comment: A few commenters suggested that we make available Part D claims data to State Medicaid directors for the purpose of monitoring and researching the dual eligible population. The commenters suggested we provide States with access to the drug utilization and spending data collected by the Medicare Part D prescription drug plans, as well as other data necessary for states to effectively coordinate the care of dual eligibles.

Response: We believe that States may improve their disease management and other care coordination programs by examining utilization data of dual eligibles extracted from Part D claims. In this final rule, we have clarified that we will be permitted to use collected Part D claims data for care coordination and disease management purposes. Under § 423.505(m), we may release collected Part D claims data to States, consistent with our minimum data necessary policy, our data sharing procedures, applicable laws, and subject to encryption of certain identifiers and aggregation of cost data. We plan to explore the operational issues associated with such an exchange. As a result, we believe States will have appropriate access to Part D claims data for purposes of coordinating the care of dual eligible beneficiaries. Please see § 423.505(m), as well as the appendix to this final rule for additional explanation of how we would determine the data that would be released to States.

Comment: Commenters requested further discussion on the types of entities to which collected Part D claims data will be released. A commenter also contends that the recipients of data could share the data with third parties of their choice.

Response: Identifiable data are not released to all external requesters. Currently, for Parts A and B data, external researchers must request the identifiable data from us. Our privacy board reviews the request for beneficiary identifiable data to determine if the request is for an appropriate research purpose, whether the Privacy Rule's criteria are met, and that the request is consistent with our data release policies. Our data release policies do not allow us to release identifiable data for marketing or commercial purposes. Further, we do not approve requests from for-profit organizations or organizations that could profit from a study, although we do produce databases with identifiers stripped, as well as public use files, for any organization to use. We also have requirements for release of Parts A and B data to other Federal governmental entities and contractors for purposes not related to research. Generally, we use DUAs to track the disclosure of personally identifiable data to such entities. Under our data sharing

policies, we generally require the requester not to disclose the data to third parties without specific written authorization from us. The release of data must also be permissible under the Privacy Act, the HIPAA Privacy Rule, the Trade Secrets Act, and any other applicable laws.

Comment: A commenter recommended that CMS include a requirement that the recipient obtain a certification of confidentiality for all identifiable CMS data covered by the agreement or other data within the scope of the research project to protect researchers when compelled to release protected data.

Response: Under section 301(d) of the Public Health Service Act (42 U.S.C. 241(d)) the Secretary of Health and Human Services may authorize persons engaged in biomedical, behavioral, clinical, or other research to protect the privacy of individuals who are the subjects of that research. This authority has been delegated to the National Institutes of Health (NIH). Certificates of confidentiality are issued to protect identifiable research information from forced disclosure. Certificates of confidentiality may be appropriate for research that combines the direct study of human subjects with the use of identifiable Part D data. They allow the investigator and others who have access to research records to refuse to disclose identifying information on research participants in any civil, criminal, administrative, legislative, or other proceeding, whether at the Federal, State, or local level. Certificates of confidentiality may be granted for studies collecting information that, if disclosed, could have adverse consequences for subjects or damage their financial standing, employability, insurability, or reputation. By protecting researchers and institutions from being compelled to disclose information that would identify research subjects, certificates of confidentiality help achieve the research objectives and promote participation in studies by assuring confidentiality and privacy to participants. The Department would encourage researchers to explore with their institutional review boards or other knowledgeable experts the use of certificates of confidentiality where appropriate. If a researcher has obtained a certificate of confidentiality for a human subjects study, its protection would extend to all individually identifiable data on the research subjects in that study (including Part D data.) maintained in the research records. Additional information about certificates of confidentiality is available on our Web site at *http://grants2.nih.gov/grants/policy/coc/*.

Comment: Several commenters stated their concern that the proposal would run afoul of Federal confidentiality protections for substance abuse laws such as 42 CFR Part 2.

Response: As the commenter notes, regulations at 42 CFR Part 2 ''Confidentiality of Alcohol and Drug Abuse Patient Records,'' establish restrictions on the disclosure and use of alcohol and drug abuse patient records that are maintained in connection with the performance of any Federally-assisted alcohol and drug abuse program. These regulations limit disclosures of any patient-identifying information acquired by a Federally-assisted facility that provides alcohol or drug abuse diagnosis, treatment, or referral for treatment. We will work with Part D sponsors to ensure that these specifically protected claims are not redisclosed for purposes other than payment. One option that we plan to explore to comply with these regulations is to identify a set of drugs which are used for the treatment of alcohol and substance abuse (that is, Anatabuse and Vivtrol) and exclude associated PDEs for these drugs from any sample of PDEs used for purposes other than carrying out section 1860D–15 of the Act (that is, for nonpayment purposes).

Comment: We received a number of comments on how the rule will be implemented. Commenters requested that CMS ensure that: Part D claims data file formats are consistent with other CMS data files; limited data sets (LDS) be available linking Medicare Parts A, B and D data; and files be in a clean format that is sufficiently detailed and secure. Other commenters requested that Part D claims data be made available in a linkable format that includes details of prescriptions by patient, time, and location, in order to address the shortcomings in the current management of chronic diseases.

Response: We do not believe that the detailed formatting standards requested by the commenters are an appropriate subject of this final rule. However, we recognize the need to ensure appropriate security of data, and will apply the processes and procedures regarding the transmission and storage of data currently in place to protect Parts A and B data to Part D claims data. We also note that linked data files will contain both a patient's chronic conditions and detailed information regarding prescriptions.

Comment: Several commenters recommended that CMS consider developing and releasing a summary file that parallels the current Physician Supplier Procedure Summary Master file along with a 5 percent sample standard analytical file. One commenter asked that both LDS files and Research Identifiable files be available and asked for clarification of the file types available from the CCW.

Response: As stated, we do not believe that detailed formatting standards are the subject of this final rule. We also note that both LDS files and research identifiable files are available from the CCW. We anticipate filling most research requests for Part D claims data using LDS files available from the CCW or from other places.

Comment: One commenter questioned how plan sponsors are to comply with applicable State privacy laws that may preclude disclosure of medical information for one or more of the purposes listed in the proposed regulatory text. The commenter requested that CMS explain whether any such conflicting state law prohibitions would be preempted by the proposed regulation, notwithstanding that § 423.136 of the regulations states that state confidentiality and disclosure laws are not preempted.

Response: Part D sponsors should comply with all applicable Federal and state confidentiality and disclosure laws when not directly conflicting. Part D regulations specifically require prescription drug plans to comply with these laws. If there is a belief that a particular State law is in direct conflict with our Federal requirements, plan sponsors should bring those specific cases to our attention for individual review.

Comment: One commenter contended that CMS can share Part D claims data freely with its contractors, who may also be researchers, under section 1860D–15 of the Act.

Response: Section 1860D–15 of the Act only relates to disclosures necessary to carry out that section, which would permit sharing of Part D data with contractors only for payment purposes. This regulation, which is established under the authority of section 1860D–12 of the Act, would permit us to collect the original 37 PDE elements comprising the Part D claims data for nonpayment-related purposes, and allow the agency and its contractors to use them for nonpayment-related purposes (section 1874 of the Act permits the Secretary to perform his functions by contract).

Comment: A commenter contends that it is impossible to assess the intent of CMS without the ability to review the system of record notice for data collected under Part D. The commenter

wants CMS to republish the proposed rule along with the applicable system of records notice.

Response: We believe the proposed rule contained enough information for interested parties to assess our intent. We plan to publish a revised system of records notice shortly to ensure that the regulation and its system of records are effective as close to the same time as possible.

Comment: One commenter stated CMS should complete a Privacy Impact Assessment (''PIA'').

Response: We annually update all appropriate PIAs. Accordingly, we will be updating the Drug Data Processing System PIA every year.

Comment: A commenter recommended that the subjects of any data disclosed to a third party be parties to CMS's data use agreement, so that they may seek relief for a breach of the agreement.

Response: The format and procedures for our data sharing agreements are not strictly within the scope of this final rule. Moreover, we do not believe the commenter's recommendation would be advisable because it may significantly hamper the ability of researchers to perform the activities that benefit the public's health under this rule. Researchers may ultimately expend an enormous amount of resources responding to third party claims. However, we do note that signatories of our data use agreements can be sanctioned if they violate the agreement or Federal law.

Comment: We received several comments suggesting that we establish a process for reviewing research requests based on a 'first in, first reviewed' process.

Response: The internal procedures we use in reviewing requests for data are not strictly within the scope of this final rule, as the proposed rule did not make recommendations related to our data-sharing process. However, we do plan to continue the practice of giving government agencies first preference in the review process, and to require that such agencies abide by our data sharing procedures, which generally require a data sharing agreement.

External research requests are usually reviewed in the month they are received with the exception of time sensitive research requests, which may be considered in an expedited manner, at our discretion. Because we expect a large volume of requests, there may be a delay between when a request is received, reviewed, and approved or denied. As we do currently with Parts A and B data requests, we will continue to carefully consider each research request with a review process that emphasizes compliance with applicable laws, including those governing the protection of privacy, first, followed by legitimacy of the requested study, and the requestor's expertise.

D. Beneficiary Access to Part D Claims Data

The proposed rule stated that we were considering the use of Part D claims data for projects involving the development or population of personalized health records, which include beneficiary medication history, which would be accessible by Medicare beneficiaries or their providers after the beneficiary consents to such a release. We requested comments on this proposed use of Part D claims data collected under the authority of section 1860D–12(b)(3)(D) of the Act.

In this final rule, after considering the comments received, we are expanding the use of the collected Part D claims data so that we may authorize the use and release of these data to government contractors or external entities for the population of personal health records.

Comment: Generally, commenters encouraged CMS to pursue projects of this nature, with one commenter in particular noting that the personalized medication history record could be linked to the *MyMedicare.gov* Web site and could include links to a beneficiary's Part D plan, its formulary, and the plan's instructions for prior authorization requests.

A few commenters requested more detail regarding the development of PHRs, the protection of beneficiary health information, and the Web-based standards (that is, record security, record retrieval, browser compatibility, etc.) underlying the display of PHRs. They suggested that we use a transparent, public process for developing these ideas and allowing for public comments. One commenter referenced the URAC (the organization formerly known as the Utilization Review Accreditation Commission) standards for Web-based clinical content and another, the Medicare pilot demonstration project conducted by the United Mine Workers Health and Retirement Fund as a model of a project.

Response: Currently, we are conducting pilot projects and studies on personal health records that include the disclosure of hospital and provider claims data (Part A and Part B) to populate beneficiaries' PHRs. However, until this rule is effective, we cannot include Part D claims data in these projects. When we have authority to disclose Part D claims data, we will provide the Part D claims data to populate PHRs only upon the authorization of the beneficiary. We require our partners in PHR pilots and studies to agree to strict privacy and security safeguards whenever receiving, using or disclosing beneficiary data. The pilots and studies are intended, in part, to help inform us in developing privacy rules and security arrangements that would be appropriate for a program of ongoing disclosures to populate and update the PHRs, as authorized by beneficiaries.

In the area of health information technology, the Department has a history of developing policy in a collaborative, open, and transparent manner. In addition to obtaining public comment through notice in the **Federal Register**, such as this, the Department relies on its public advisory committees, relationships with industry, and participation in professional associations in developing policies and procedures with respect to the emerging health information environment. With regard to PHRs, the information we gather through this process will also help us determine future steps.

Comment: Several commenters stated that beneficiary participation in such projects should not be mandatory, but voluntary.

Response: We expect that any program we plan to undertake to make collected Part D claims data available to beneficiaries would be voluntary on the part of beneficiaries.

Comment: A commenter noted that beneficiaries already have the right to request access to, inspect, and copy their medication histories and other PHI.

Response: We appreciate the commenter's statements that beneficiaries already have access to their medical records, but believe that a centralized PHR that is easily accessible from a Web site, and that includes a more comprehensive set of data from multiple providers and prescribers, would be of use to beneficiaries.

Comment: A commenter urged CMS to establish procedures where the data will be automatically available to other health care practitioners and institutions. The commenter stated that a beneficiary may be unable to release the record due to being unconscious or confused. Finally, the commenter noted reasons why, under Parts A and B, the personalized EHR is necessary, including the value of having a complete record in an emergency room situation and in instances when a physician administers medications incident to a physician visit.

Response: Any PHI that CMS releases to providers or institutions would be

authorized by the beneficiary or the beneficiary's authorized representative or would be otherwise permitted or required under the applicable laws and our policies. Moreover, we note that health care providers are not necessarily the intended users of PHR; rather, they are intended for use by the patient. We believe it more likely that emergency room and other health care providers would have access to patient's medication history from another source.

Comment: One commenter noted that Part D claims data may be of limited value in creating a PHR.

Response: We believe that access to medication history information, even of limited scope, is deemed one of the top priorities by emergency responders, emergency room personnel and physicians, in discussions regarding electronic PHRs.

Comment: A commenter noted that PHR information shared with entities other than the beneficiary should only be released in an aggregated format without any physician identifiers.

Response: We requested comments on the usefulness of creating a personalized beneficiary medication history record from the Part D claims data. We are uncertain as to why the commenter believes it would only be appropriate for physician information to be released at the aggregate level since the purpose of PHRs is to allow individuals and their providers to have access to information to improve the quality and delivery of care to the individual. Any sharing of this data with organizations that assist beneficiaries in developing their own PHR would need to be authorized by the individual to whom the record pertains, just as the individual would provide authorization for release of any other of his or her personal data held by Medicare.

E. Applicability

We stated in the proposed rule that the proposed revision does not affect the applicability of HIPAA to the DHHS or any other appropriate parties, nor does it affect the applicability of the Privacy Act (5 U.S.C. 552a) or the Trade Secrets Act (18 U.S.C. 1905). Thus, Part D claims data, like any personally identifiable information or PHI collected by the agency, are subject to protection under the HIPAA Privacy Rule, the Privacy Act and the Trade Secrets Act, and other laws, as applicable. In this final rule, we continue to take this position.

Comment: One commenter stated that the proposed rule does not explain why HIPAA does not apply to Part D activities when HIPAA does apply to CMS activities for Parts A and B of Medicare.

Response: The HIPAA Privacy Rule applies to covered entities and defines the term ''covered entity'' as (1) a health plan, (2) a health care clearinghouse, or (3) a health care provider who transmits any health information in electronic form in connection with a covered transaction. (See 45 CFR 160.103.) HIPAA defines ''health plan'' as an individual or group plan that provides, or pays the cost of medical care, and specifically includes Part A and Part B of the Medicare program under title XVIII. (See section 1171(5) of the Act and 45 CFR 160.103 (definition of health plan).) With respect to Part D, because Part D sponsors meet the definition of health plan, they are covered entities subject to HIPAA. HIPAA does not apply to the component of CMS that administers the Part D program because it is does not pay claims directly. However, although Part D claims information held by this component is not directly subject to HIPAA, the Part D data are protected under the Privacy Act of 1974, which applies to all federal agencies' data collections of individually identifiable information in systems of records. The Privacy Act requires that CMS maintain Part D data in a protected system of records and may only use or disclose the data in accordance with the specific purposes which have been published in the **Federal Register** and with other uses and disclosures allowed by the Privacy Act, itself. See 5 U.S.C. 552a(b) and (e)(4).

This rule will allow the Secretary to use the original 37 PDE elements that are being collected for Part D payment purposes for reporting to the Congress and the public, conducting evaluations of the overall Medicare program, making legislative proposals to Congress, and conducting demonstration projects. To the extent that such information becomes part of our administration of the Medicare Part A and Part B programs, HIPAA will apply to such information. Moreover, although Part D claims information held by the component of CMS that administers the Part D program are not directly subject to HIPAA, we are choosing to comply with HIPAA's limitations on the use and disclosure of PHI to ensure that beneficiaries' privacy interests are fully protected. In addition, we are choosing to impose standards similar to those applied when we release beneficiary identifiable information with respect to non-beneficiary identifiable Part D data, on the PDE, such as plan, prescriber, and pharmacy identifiable data.

Comment: One commenter noted that many plan sponsors already share data with agencies such as the FDA, NIH, and AHRQ, and external entities subject to HIPAA, therefore there is no need for this rulemaking.

Response: While plan sponsors may already share data with agencies such as FDA, NIH, and AHRQ, only CMS can share Part D claims data linked to Medicare Parts A and B data. Therefore, we maintain that this rulemaking is necessary.

Comment: Some commenters expressed concern with CMS' use of data use agreements. They asked that CMS explain the steps we will undertake to ensure the confidentiality of individually identifiable beneficiary data.

Response: In response to the commenter's concerns about CMS' reliance on data use agreements (DUAs), we administer DUAs for any data disclosures to external entities, including limited data sets that exclude certain personal identifiers. The DUA is a way to ensure that the data provided are only used for the purposes for which the data were disclosed. All external requests for personally identifiable data for research are subject to CMS' Privacy Board review and approval.

Currently, for Parts A and B data, CMS restricts data releases to the minimum amount of information necessary for the requestor's specific research project. We intend to operate on the same basis, with some additional restrictions to protect privacy and commercially sensitive information as described our regulations at § 423.505(m) as well as in the appendix to this final rule, with respect to the release of collected Part D claims data. We anticipate that we will be able to satisfy many requests for Part D claims data using limited data sets, which exclude certain personal identifiers.

Comment: A commenter was concerned with the release of prescriber identifiers, believing that the release of such data could be used to target marketing efforts and otherwise improperly affect a prescriber's judgment.

Response: As explained previously in section II.B. of this final rule, we expect that the results of the Secretary's quality improvement and performance measurement initiatives may be made public in an effort to financially reward health care providers who provide high quality health care and to provide cost and quality information to consumers. Beyond that, we will encrypt prescriber identifiers as a general matter with limited exceptions (see 42 CFR 423.505(m), as well as the appendix to

this final rule). Additionally, we will not release Part D claims information for commercial purposes.

Comment: A commenter contended that for a HIPAA-covered entity the proposed rule will impose a substantial compliance burden and monetary costs to transform each prescription drug claim that a plan sponsor submits for payment purposes into an accountable disclosure that the plan sponsor would need to track in order to fulfill its accounting of disclosures obligations under the HIPAA Privacy Rule. The commenter also stated that the proposal may burden plan sponsors by possibly requiring many to distribute revised notices of privacy practices, which may cause beneficiary confusion. The commenter states that CMS should be precluded from implementing the proposed rule except at the beginning of a calendar year.

Response: Regularly, laws and regulations intersect or overlap, and individuals and entities are required to dissect the application of such laws and regulations, as appropriate. This rule does not regulate how covered entities, subject to HIPAA compliance, must comply with the HIPAA Privacy Rule, nor was it intended to do so. As a general matter, Part D plan sponsors are subject to a wide range of Federal laws and regulations, including HIPAA, and in this instance there may be an intersection between such laws and regulations that requires analysis and consideration. As we noted in the preamble to the proposed rule, nothing in this final rule affects the applicability of HIPAA (or the Privacy Act) to the DHHS or any other appropriate parties.

Since the proposed rule did state that it did not affect the applicability of HIPAA, we believe a brief discussion of the intersection between this rule and existing HIPAA rules is warranted. However, it is important to note that the Office for Civil Rights (OCR) is the only agency within DHHS that can provide advice on and enforce the HIPAA Privacy Rule. Affected entities can obtain comprehensive information regarding the HIPAA Privacy Rule, including answers to frequently asked questions and information on the enforcement program, at *http://www.hhs.gov/ocr/hipaa/*.

With this in mind, we believe that private plans are permitted by the HIPAA Privacy Rule to make the disclosures provided for in this Rule. The HIPAA Privacy rule permits disclosures for health oversight and as required by law. See 45 CFR 164.512(a) and 164.512(d). We are not suggesting that the HIPAA definition of ''required by law'' at 45 CFR 164.103 encompasses contractual requirements. Rather, we believe those disclosures required by contract, which are also mandated by statute or regulation or both, would be ''required by law'' under the HIPAA Privacy Rule.

As noted previously above, plans disclosing data under this rule may face HIPAA compliance issues regarding accounting and Notice of Privacy Practices. We believe that most Part D plans very likely have a statement in their existing Notices of Privacy Practices that notifies enrollees of permitted disclosures for purposes of health oversight and as required by law, and therefore, are unlikely to have to modify their notices of privacy practices.

An individual also has the right under the HIPAA Privacy Rule to receive an accounting of certain disclosures, including disclosures for health oversight purposes or disclosures required by law. It is each plan's responsibility to comply with the HIPAA Privacy Rule as it deems appropriate.

Finally, we do not believe that any further delay in the effective date for this regulation is required. We believe the commenters are referencing the prohibition on mid-year significant regulatory requirements at 42 CFR 423.516. However, that regulation does not apply to already-existing regulations, such as HIPAA regulations, or the impact already-existing regulations will have on a new Part D regulation. Because we already collect Part D claims data, this regulation does not impose additional Part D requirements on Part D sponsors, and therefore, we do not view this regulation as constituting a significant midyear change for Part D sponsors.

Comment: The commenter also questioned how CMS would notify beneficiaries that their data may be released for research purposes.

Response: As a general matter, how we comply with our own HIPAA obligations is outside the scope of the proposed rule. To the extent HIPAA requires us to take any additional steps (including additional notification responsibilities) to ensure full compliance with HIPAA, we intend to do so. For instance, a covered entity is required to include in its notice of privacy practices a statement that PHI may be used for research purposes. CMS, as a covered entity for Medicare Parts A and B, currently provides such notice to beneficiaries annually.

Comment: Several commenters requested that CMS discuss the regulation in light of the Trade Secrets Act, specifically with respect to pricing data.

Response: Because our regulations at 42 CFR 423.505(f), (l), and (m) are issued under the authority of section 1106 of the Act, any release of potentially proprietary data under these regulations would also be authorized by law under the Trade Secrets Act. As we have stated elsewhere in this preamble, we believe that our minimum data necessary policy with some additional restrictions to protect privacy and plan commercially sensitive information and our data sharing procedures will guard against any potential misuse or inappropriate disclosure of Part D claims data.

F. Limitations

This final rule in no way affects or limits our existing ability to collect non-payment data such as enrollment, formulary, price comparison, quality assurance and utilization review data. In such cases, even where the data collection is not specifically mandated by statute, we do not believe it is necessary to resolve any statutory ambiguity, because section 1860D–15 of the Act would not apply.

In addition, it is important to note that this rule applies when collections of data occur under section 1860D–12 of the Act. The rule does not address collections that occur under other provisions of law. Thus, this rule also does not address uses or disclosures already permitted under section 1860D–15 of the Act, to carry out audits and evaluations necessary to ensure accurate and correct payment and to otherwise oversee Medicare reimbursement under Part D. These uses are already contemplated under both the statute and the regulations at § 423.322(b). Furthermore, section 1860D–15 of the Act and § 423.322(b) of our regulations do not limit the ability of OIG to access, use, or disclose Part D claims data as part of the Inspector General's statutory responsibilities to oversee the Medicare program.

III. Provisions of the Final Regulations

This final rule finalizes most of the provisions of the proposed rule. Those provisions of this final rule that differ from the proposed rule are as follows:

- In part 423, adding section 1106 of the Act to the authority citation.
- In § 423.1, adding section 1106 of the Act.
- In § 423.505, making the following changes:

++ Revising paragraph (f)(3) to clarify that the regulatory provision is only applicable to Part D claims data and is limited to the original 37 elements

reported on the PDE record; to add a reference to pilot projects, and to add care coordination and disease management activities, quality improvement and performance measurement activities, and the populating of personal health records to the list of necessary and appropriate purposes for the collection of this information. This list is not intended to be exclusive, and Part D claims data may be collected for other purposes that the Secretary deems necessary and appropriate.

++ Removing paragraph (f)(5) and incorporating the provisions of this paragraph in paragraphs (l) and (m).

++ Adding a new paragraph (l) to specify that CMS may use the data collected under § 423.505(f)(3).

++ Adding a new paragraph (m) to specify that CMS may release the minimum data collected under § 423.505(f)(3) in accordance with applicable Federal laws, our established data sharing procedures, and subject to encryption of certain identifiers and aggregation of cost data to protect beneficiary confidentiality and commercially sensitive data of Part D sponsors.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

This document does not impose new information collection requirements on Medicare Part D plans. Medicare Part D plan sponsors already submit the information required to conduct the studies discussed earlier in the preamble of this document. Medicare Advantage prescription drug plan (MA–PD) sponsors, prescription drug plan (PDP) sponsors, and Fallback plan sponsors, as required by the MMA, are required to submit payment-related data to CMS that include, but are not limited to, Part D claims data. The information collection requirements associated with the collection of prescription drug data from MA–PD, PDP and Fallback plan sponsors for Medicare Part D payments are currently approved under the Office of Management and Budget (OMB) Control No. 0938–0982, with an expiration date of November 30, 2009. Additionally, we have included a discussion of the currently approved information collection requirements associated with the Medicare Part D reporting requirements and the plan benefit package (PBP) and formulary submission for Medicare Advantage prescription drug plans (MA–PD) and prescription drug plans (PDPs). The information collection requirements (ICRs) for the Part D reporting requirements and the plan benefit package are approved under OMB Control Nos. 0938–0992 and 0938–0763, respectively.

A. ICRs Regarding Contract Provisions (§ 423.505)

Section 423.505 discusses provisions that must be contained in contracts between Part D plan sponsors and CMS. Specifically, § 423.505(b)(8) requires that a Part D plan sponsor comply with the disclosure and reporting requirements in § 423.505(f), § 423.514, and § 423.329(b), respectively. Section 423.505(f) lists the information that Part D plan sponsors are required to disclose to CMS. This information includes but is not limited to the disclosure of certified financial information, the disclosure of all information necessary for us to administer and evaluate the program and to simultaneously establish and facilitate a process for current and prospective beneficiaries to exercise choice in obtaining prescription drug coverage, and the disclosure to its enrollees of all informational requirements under § 423.128 and, upon an enrollee's request, the financial disclosure information required under § 423.128(c)(4).

B. ICRs Regarding Reporting Requirements (§ 423.514)

Section 423.514 outlines the reporting requirements for Part D plan sponsors. Section 423.514(a) requires each Part D plan sponsor to have an effective procedure to develop, compile, evaluate, and report to CMS, to its enrollees, and to the general public, at the times and in the manner that CMS requires. Section 423.514(b) requires Part D plan sponsors to report to CMS annually, within 120 days of the end of its fiscal year, significant business transactions. In addition, § 423.514(c) sets forth the requirements for submitting combined financial statements. For any employees' health benefits plan that includes a Part D plan sponsor in its offerings, § 423.514(d) addresses the reporting and disclosure obligations under the Employee Retirement Income Security Act of 1974 (ERISA). Section 423.514(e) states that each Part D plan sponsor must notify CMS of any loans or other special financial arrangements it makes with contractors, subcontractors and related entities. Section 423.514(f) requires each Part D plan sponsor to make the information reported to CMS under this section available to its enrollees upon reasonable request.

C. ICRs Regarding Determination of Payments (§ 423.329)

Section 423.329(b) contains the reporting requirements for PDPs and MA–PDs for the purposes of determining health status risk adjustment. As stated in § 423.329(b)(3)(i), PDPs are required to submit data regarding drug claims that can be linked at the individual level to Part A and Part B data in a form and manner similar to the process provided under § 422.310 of this chapter and other information as we determine necessary. In addition, § 423.329(b)(3)(ii) requires MA organizations that offer MA–PD plans to submit data regarding drug claims that can be linked at the individual level to other data that the organizations are required to submit to CMS in a form and manner similar to the process provided under § 422.310 and other information as we determine necessary.

D. ICRs Regarding Contract Provisions (§ 423.505(b)(8))

The burden associated with the requirements in § 423.505(b)(8) of this regulation is the time and effort associated with meeting the aforementioned requirements in § 423.505(f), § 423.514, and § 423.329(b). As stated earlier, these requirements are subject to the PRA; however, they are approved under existing OMB control numbers. The requirements in § 423.505(f) and § 423.514 are currently approved under OMB control number 0938–0992 with an expiration date of June 30, 2008. The information collection requirements contained in § 423.329(b) are currently approved under OMB control number 0938–0763, with an expiration date of November 30, 2009.

TABLE 1.—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Regulation section	OMB Control number	Number of respondents	Number of responses	Burden per response (hours)	Total annual burden (hours)
§ 423.505 ** and § 423.514 **	0938–0992	3,203	179,368	.69	123,764
§ 423.329 **	0938–0763	430	4,515	2.29	**10,319
Total					138,469

** As specified by § 426.505(b)(8)

As required by section 3504(h) of the Paperwork Reduction Act of 1995, we have submitted a copy of this document to the Office of Management and Budget (OMB) for its review of these information collection requirements.

V. Regulatory Impact Statement

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism and the Congressional Review Act (5 U.S.C. 804 (2)).

Executive Order 12866, as amended, directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This final rule does not have economically significant effects of $100 million or more in any one year and therefore is not a major rule.

We assessed alternatives, including, not releasing data to any entity meeting the applicable criteria. We determined that the approach that maximizes public health benefits is the approach taken in the final regulation, which would use a case-by-case evaluation approach similar to the process in use today for Medicare Parts A and B data, with some additional restrictions to protect privacy and commercially sensitive data of Part D sponsors. Weighing all factors, this approach limits the risk that sensitive Part D claims data will be released to inappropriate entities leading to the inappropriate use of this sensitive data, but maximizes the benefit that this data can provide in supporting research studies and other actions that will benefit the public.

We do not believe that new costs associated with compliance under this regulation, if any, will be significant. As stated in section II. E. of this final rule, we expect risk and compliance burdens to be limited; therefore any costs associated with compliance or inappropriate use of data are expected to be limited, and because the use of these data according to applicable laws and CMS data release policies is expected to improve the public's health, this rule does not reach the economic threshold and thus is not considered a major rule requiring a RIA.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. Individuals and states are not included in the definition of a small entity. While a number of Part D plan sponsors are small entities due to their nonprofit status, few, if any, of the Part D plan sponsors meet the size standard for a small insurance firm by having revenues of $6 million or less in any 1 year. Therefore, an analysis for the RFA will not be prepared because the Secretary has determined that this final rule will not have a significant economic impact on a substantial number of small entities. Furthermore, we believe, the rule does not create a significant economic impact on Part D plan sponsors.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. An analysis for section 1102(b) of the Act will not be prepared because the Secretary has determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals. In fact, we do not expect that it will have any impact on small rural hospitals because the rule relates to Part D plan sponsors, not small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $130 million. This final rule will not contain mandates having a negative effect on state, local, or tribal governments in the aggregate, or by the private sector, of $130 million.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on state and local governments, preempts State law, or otherwise has Federalism implications. Even though states may incur costs associated with exchanging data, this regulation does not require states to request Part D claims data, but makes it an option, provided we can resolve any operational issues. In fact, even if States do request data, they may already have systems in place to receive data from CMS. Furthermore, we are not aware of any conflict between this final regulation and State privacy laws (with which Part D sponsors must comply per our regulations). Therefore, we do not believe this final regulation will implicate a Federalism issue through an impact on State privacy laws. Since this regulation does not impose any costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

We received the following comments regarding the impact analysis of the proposal rule:

Comment: One commenter stated that because of the monetary cost and other compliance burdens associated with the implementation of this regulation due to HIPAA, this rule, if implemented, must be implemented at the beginning of a calendar year per § 423.516.

Response: We address this comment in section II. E. of this final rule.

Comment: A commenter stated that in determining whether the rulemaking

met the $100 million threshold the value of the information to beneficiaries should have been considered. The commenter states that the value would surpass $100 million, since brokers rent lists potentially for $5 million per rental, often several times a year.

Response: Under our data release policies, we would not allow the release of Part D claims data for commercial purposes. Thus, we do not believe the $100 million threshold would be met based on the example cited by the commenter. It is unlikely that list brokers will receive any nonpublic data from CMS.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 423

Administrative practice and procedure, Medicare, Prescription Drugs, Reporting and recordkeeping.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 423—VOLUNTARY MEDICARE PRESCRIPTION DRUG BENEFIT

■ 1. The authority citation for part 423 is amended to read as follows:

Authority: Sections 1102, 1106, 1860D–1 through 1860D–42, and 1871 of the Social Security Act (42 U.S.C. 1302, 1306, 1395w–101 through 1395w–152, and 1395hh).

Subpart A—General Provisions

■ 2. Section 423.1 is amended by adding a new reference to paragraph (a)(1) in numerical order to read as follows:

§ 423.1 Basis and scope

(a) * * *.

(1) * * *.

1106. Disclosure of Information in Possession of Agency.

* * * * *

Subpart K—Application Procedures and Contracts With Part D Plan Sponsors

■ 3. Section 423.505 is amended by—

■ A. Revising paragraph (b)(8).

■ B. Redesignating paragraph (f)(3) as (f)(4).

■ C. Adding new paragraph (f)(3).

■ D. Adding new paragraphs (l) and (m).

The revisions and additions read as follows:

§ 423.505 Contract provisions.

* * * * *

(b) * * *

(8) Comply with the disclosure and reporting requirements in § 423.505(f), § 423.514, and the requirements in § 423.329(b) of this part for submitting current and prior drug claims and related information to CMS for its use in risk adjustment calculations and for the purposes of implementing § 423.505(f), (l), and (m) and § 423.329(b) of this part.

* * * * *

(f) * * *

(3) The 37 original data elements included in all of its drug claims for purposes deemed necessary and appropriate by the Secretary, including, but not limited to, the following:

(i) Reporting to Congress and the public on overall statistics associated with the operation of the Medicare prescription drug program.

(ii) Conducting evaluations of the overall Medicare program, including the interaction between prescription drug coverage under Part D of Title XVIII of the Social Security Act and the services and utilization under Parts A, B, and C of title XVIII of the Act and under titles XIX and XXI of the Act, as well as other studies addressing public health questions.

(iii) Making legislative proposals to the Congress regarding Federal health care programs and related programs.

(iv) Conducting demonstration and pilot projects and making recommendations for improving the economy, efficiency, or effectiveness of the Medicare program.

(v) Supporting care coordination and disease management programs,

(vi) Supporting quality improvement and performance measurement activities, and;

(vii) Populating personal health care records.

* * * * *

(l) CMS may use the information collected under paragraph (f)(3) of this section. Any restriction set forth by § 423.322(b) of this part must not be construed to limit the Secretary's authority to use the information collected under paragraph (f)(3).

(m)(1) CMS may release the minimum data necessary for a given purpose from the data collected under paragraph (f)(3) of this section to Federal executive branch agencies, congressional oversight agencies, States, and external entities in accordance with the following:

(i) Applicable Federal laws.

(ii) CMS data sharing procedures.

(iii) Subject, in certain cases, to encryption of certain identifiers and aggregation of cost data to protect beneficiary confidentiality and commercially sensitive data of Part D sponsors, in accordance with all of the following principles:

(A) Subject to the restrictions in this paragraph, all elements on the claim are available to congressional oversight agencies (as defined in paragraph (m)(1)(iv) of this section) and HHS.

(B) Cost data elements on the claim generally are aggregated for releases to other executive branch agencies, States, and external entities.

(C) Plan identifier elements on the claim are encrypted or unavailable for releases to external entities.

(D) Beneficiary, pharmacy, and prescriber identifier elements on the claim generally are encrypted for releases to external entities, except in limited circumstances, such as to link to another data set.

(iv) For purposes of paragraph (m)(1)(iii) of this section, congressional oversight agencies (the Congressional Budget Office, the Government Accountability Office, the Medicare Payment Advisory Commission, and the Congressional Research Service when acting on behalf of a congressional committee in accordance with 2 U.S.C. 166(d)(1)), States, and executive-branch Federal agencies are not considered to be external entities.

(2) Any restriction set forth by § 423.322(b) of this part must not be construed to limit the Secretary's authority to release the information collected under paragraph (f)(3) of this section.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: February 25, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: March 17, 2008.

Michael O. Leavitt,

Secretary.

The following appendix will not appear in the Code of Federal Regulations.

Appendix—Data Element Availability Under Section 1860D–12 of the Social Security Act by Type of Requestor

CMS and its contractors have access to all PDE elements. This chart shows the data elements that are available for release to other federal and state agencies and external entities in the final rule under our minimum necessary data policy subject, in certain cases, to encryption of certain identifiers and aggregation of cost data to protect beneficiary confidentiality and commercially sensitive data of Part D sponsors. Thus, a requestor would not automatically receive all of the available elements, but would only receive those necessary for their study. (Note: As

stated in the preamble to the final rule, this chart applies only when data is collected under section 1860D–12 of the Act, and does not apply to any uses or disclosures already permitted under section 1860D–15 of the Act, including to carry out audits and evaluations necessary to ensure accurate and correct payment and to otherwise oversee Medicare reimbursement under Part D. These uses are already contemplated under both the statute and the regulations at § 423.322(b) and are not the subjects of this final rule.)

Data elements	Other (i.e., non-CMS) DHHS entities, and Congressional Oversight Agencies* See Note 1	Non-HHS Executive Branch Agencies and States	External entities
Identifiers			
Encryption permits analysis on a beneficiary, plan, prescriber, or pharmacy level without disclosure of the actual identifying information. CMS will link our data to other data files, to the extent feasible, to minimize the extent to which other parties need identifiers for data linkage purposes. CMS has the sole authority to determine whether a particular data element is needed for a request.			
Beneficiary ID (HIC Number, Cardholder ID, Patient date of birth) See Note 2.	Encrypted, but available if needed.	Encrypted, but available if needed.	Encrypted, but available if needed to link to another dataset.
Plan ID (PBP identifier, Contract identifier) See Note 3	Encrypted, but available if needed. Additionally, nonencrypted data will be available for purposes of performance measures.	Encrypted, but available if needed.	Encrypted.
Prescriber ID (Prescriber Identifier) See Note 4	Encrypted, but available if needed. Additionally, nonencrypted data will be available for purposes of performance measures.	Encrypted, but available if needed.	Encrypted, but available if needed to link to another dataset.
Pharmacy ID (Service provider identifier) See Note 5	Encrypted, but available if needed.	Encrypted, but available if needed.	Encrypted, but available if needed to link to another dataset.
Qualifying Identifiers (Service & Prescriber Identifier Qualifiers—codes that denote whether NPI, NCPDP, UPIN, state license number, DEA, or non-standard code is used).	Available	Available	Available.
Internal plan/pharmacy prescription identification numbers (Claim Control Number—a code intended for the plan to identify unique events & Prescription Service Reference Number—a code assigned by the pharmacy at the time the prescription is filled).	Available	Unavailable	Unavailable.
Drug Utilization Information			
Date of Service	Available	Available	Available.
Drug information (Product/Service Identifier, Quantity Dispensed, Days Supply, Compound Code, Fill Number, Dispensing Status.).	Available	Available	Available.
Other utilization information (Dispense as Written/Product Selection Code, Drug Coverage Status Code).	Available	Available	Available.
Drug Cost Information			
Total Drug Costs (Ingredient Cost, Dispensing Fee, Total Amount Attributable to Sales Tax) See Note 6.	Available, Disaggregated ..	Available, Aggregated	Available, Aggregated.
Coverage Information			
Date Paid	Available	Available	Available.
Plan Paid Amounts (Covered D Plan Paid Amount, Non-covered Plan Paid Amounts).	Available	Available	Available.
Beneficiary cost sharing (Patient Pay Amount,)	Available	Available	Available.
Other Payer Amounts (Other True Out of Pocket Amount, Patient Liability due to Other Payer Amount).	Available	Available	Available.
Low-Income Subsidy Amount	Available	Available	Available.
Other Financial Information (Gross Drug Cost below Out-of-pocket Threshold, Gross Drug Cost above Out-of-pocket Threshold).	Available	Available	Available.
Other Descriptive Data			
Patient gender	Available	Available	Available.

Data elements	Other (i.e., non-CMS) DHHS entities, and Congressional Oversight Agencies* See Note 1	Non-HHS Executive Branch Agencies and States	External entities
Catastrophic Coverage Indicator (Catastrophic Coverage Code).	Available	Available	Available.
In-network versus OON or MSP claim (Pricing Exception code).	Available	Available	Available.
Electronic versus Paper Claim (Non-Standard format Code).	Available	Available	Available.
Original versus Adjusted PDE (Adjustment/Deletion code).	Available	Final Action claims would be provided, so this element should not be needed.	Final Action claims would be provided, so this element should not be needed.

Generally, the notes apply to all columns across the row.

Note 1—Congressional oversight agencies include GAO, MedPAC, and CBO. CRS is considered a Congressional oversight agency, but only when acting on behalf of a committee pursuant to its authority in 2 U.S.C. § 166(d)(1). Otherwise, CRS is considered to be an external entity. Note also that OIG has authority independent of both sections 1860D–12 and 1860D–15 of the Social Security Act to collect data.

Note 2—CMS will encrypt all beneficiary identifiers unless they are needed. An example of where they might be needed is linkage to another dataset. When CMS sends real identifiers in order to permit the requestor to link files, CMS will encrypt identifiers during transmission, provide a link key to unencrypt the files, allow the linkage, and then require the requestor to re-encrypt identifiers. Public disclosure of research results will not include beneficiary identifying information.

Note 3—In general, CMS will link the Part D claims to plan level benefits and formulary data if needed by the requestor, and then encrypt the plan ID. However, CMS will not link certain information if it will lead to a de facto identification of the plan. CMS may develop plan specific performance measures which are publicly reported.

Note 4—CMS will link to physician characteristics from CMS files if needed by the requestor. Generally, when CMS sends real identifiers in order to permit the requestor to link files, CMS will encrypt identifiers during transmission, provide a link key to unencrypt the files, allow the linkage, and then require the requestor to re-encrypt identifiers.

Note 5—To the extent available, CMS will provide pharmacy characteristics from CMS files. However, CMS will not release pharmacy ID, together with drug cost information, in order to guard against the disclosure of negotiated price information.

Note 6—Generally, CMS will aggregate ingredient cost, dispensing fee, and sales tax at the individual claim level. Upon request, CMS will exclude sales tax from the aggregation at the individual claim level if necessary for the project.

[FR Doc. 08–1298 Filed 5–22–08; 1:30 pm]

BILLING CODE 4120–01–P

Federal Register

Wednesday,
May 28, 2008

Part III

Department of Education

Compliance Agreement; Notice

DEPARTMENT OF EDUCATION

Compliance Agreement

AGENCY: Department of Education.

ACTION: Notice of written findings and compliance agreement with the Commonwealth of Puerto Rico and the Puerto Rico Department of Education.

SUMMARY: This notice is being published in the **Federal Register** consistent with section 457(b)(2) of the General Education Provisions Act (GEPA). Section 457 of GEPA authorizes the U.S. Department of Education (the Department) to enter into a compliance agreement with a recipient that is failing to comply substantially with Federal program requirements, and for whom the Department determines that full compliance is not feasible until a future date. Section 457(b)(2) requires the Department to publish written findings leading to a compliance agreement, with a copy of the compliance agreement, in the **Federal Register**. If a recipient fails to comply with the terms and conditions of a compliance agreement, the Secretary may take any action authorized by law with respect to the recipient.

On December 17, 2007, the Department entered into a three-year compliance agreement (the Agreement) with the Commonwealth of Puerto Rico (Puerto Rico) and the Puerto Rico Department of Education (PRDE) because PRDE was failing to comply substantially with numerous Federal education program requirements, and it was clear to the Department from all available information that PRDE would not be able to come into full compliance with applicable Federal requirements for the administration of Department programs until a future date.

PRDE receives grant funds under a number of programs administered by the Department, including programs authorized under Titles I, II, and IV of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (ESEA), Title IV of the Higher Education Act of 1965, as amended (HEA), and the Individuals with Disabilities Education Act (IDEA). As a result of program monitoring and audits, the Department has identified numerous program areas requiring corrective action by PRDE. Specifically, the Agreement applies to grant funds awarded to Puerto Rico and PRDE by the Department under Titles I, II, and IV of ESEA, Title IV of HEA, and IDEA. The purpose of the Agreement is to improve education for the students of Puerto Rico by bringing Puerto Rico and PRDE into full compliance with the Department's program requirements.

FOR FURTHER INFORMATION CONTACT: Mr. Phil Maestri, U.S. Department of Education, Office of the Secretary, 400 Maryland Avenue, SW., room 7E206, Washington, DC 20202–6132. Telephone: (202) 205–3511.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: In recent years, PRDE has been putting forth efforts and working, with technical assistance provided by the Department, to make important changes to improve education services to Puerto Rico's students in accordance with special conditions the Department has imposed on PRDE's grants. These efforts were part of an initiative undertaken in 2003 between PRDE and the Department, under the Department's Cooperative Audit Resolution and Oversight Initiative (CAROI), and under a compliance agreement entered into by the Department and PRDE in October 2004 (October 2004 Compliance Agreement) (see 72 FR 60186–99).

The October 2004 Compliance Agreement primarily addressed systemic problems in PRDE's program administration and management of Federal education funds in areas such as grants management, payroll, financial management, property management and procurement. The Department identified these systemic problems through numerous audits of PRDE that it conducted beginning in 1994. Subsequently, in the process of monitoring PRDE's implementation of various Department programs, the Department identified significant programmatic issues under a number of PRDE's education programs, including programs authorized under Titles I, II, and IV of ESEA, Title IV of HEA, and IDEA. The Department determined that these significant programmatic issues rose to the level of programmatic non-compliance by PRDE.

In accordance with the requirements of section 457(b) of GEPA, 20 U.S.C 1234f(b), on October 26, 2007, Department officials conducted a public hearing in Puerto Rico to assess whether a compliance agreement with Puerto Rico and PRDE addressing the numerous areas of programmatic non-compliance might be appropriate. Witnesses representing PRDE and other concerned individuals testified at this hearing. The Department considered the testimony provided at the October 2007 public hearing and all other relevant information and materials and concluded that PRDE would not be able to correct the areas of programmatic non-compliance immediately and would need more than one year to correct the identified programmatic deficiencies.

Therefore, the Department, Puerto Rico and PRDE entered into a comprehensive compliance agreement with a three-year term. The Agreement, which incorporates and reflects the Department's written findings based on the hearing testimony and other relevant information and materials, gives PRDE three years to develop effective, long-term solutions to problems in the performance and administration of its Department programs. Under the terms of the Agreement, by the end of the three-year term of the Agreement, PRDE must be in full compliance with the requirements of all programs funded by the Department.

As required by section 457(b)(2) of GEPA, 20 U.S.C. 1234f(b)(2), the Agreement (which incorporates the Department's written findings in the section entitled ''Overview of Issues Addressed by this Compliance Agreement'') is set forth as Appendix A of this notice.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

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(Authority: 20 U.S.C. 1234c, 1234f)

Dated: May 16, 2008.

David Dunn,

Chief of Staff for the Office of the Secretary.

Appendix A—Compliance Agreement Among the Commonwealth of Puerto Rico, the Puerto Rico Department of Education, and the United States Department of Education, December 17, 2007

I. Overview

Purpose of and Issues Addressed By This Compliance Agreement

The purpose of this Agreement is to improve education for the students of Puerto Rico by bringing the Commonwealth of Puerto Rico (Puerto Rico) and the Puerto Rico Department of Education (PRDE) into full compliance with program requirements of the U.S. Department of Education (the Department) (Puerto Rico, PRDE, and the Department shall hereafter collectively be referred to as ''the Parties''). The Department awards grants to PRDE under a number of Federal education programs. As a result of program monitoring and audits, the Department has identified several program areas requiring corrective action by PRDE. The programs under which PRDE receives funds from the Department and in which corrective action is necessary, include Titles I, II, and IV of the Elementary and Secondary Education Act (ESEA), Title IV of the Higher Education Act of 1965, and the Individuals with Disabilities Education Act (IDEA) (hereafter ''covered Federal programs'').

In recent years, PRDE has been putting forth efforts to make important changes to improve education services to Puerto Rico's students in accordance with special conditions imposed by the Department on PRDE's grants, with technical assistance provided by the Department. These efforts were part of an initiative undertaken in 2003 between PRDE and the Department, under the Department's Cooperative Audit Resolution and Oversight Initiative (CAROI), and under a Compliance Agreement entered into by the Department and PRDE in October 2004. The October 2004 Compliance Agreement primarily addressed systemic problems in PRDE's program administration and management of Federal education funds. Those problems were uncovered and identified by numerous audits of PRDE beginning in 1994.

With regard to the more recent program compliance issues uncovered by the Department's monitoring of PRDE's Federal programs, it appears that it will take more than one year for PRDE to completely address those programmatic issues. It will also take more than one year to establish the continued cooperation of other parts of the Puerto Rico government in this effort, such as the Puerto Rico Department of the Treasury (Hacienda) and PRDE's Office of Management and Budget. Therefore, under the authority of section 457 of the General Education Provisions Act (GEPA), the Department is entering into this comprehensive, three-year Compliance Agreement (Agreement) with Puerto Rico and PRDE.

Through this Agreement, Puerto Rico and PRDE, with technical assistance from the Department, agree to develop and implement solutions to PRDE's program performance and program implementation problems. These programmatic issues are being carefully examined and addressed from the perspective of PRDE and other Puerto Rico agencies with management responsibility for resources or programs that have an impact on education in Puerto Rico and on PRDE's administration of Federal education funds. Whatever the solutions Puerto Rico and PRDE have chosen to implement, as reflected in this Agreement, Puerto Rico and PRDE must ensure that their goal is to achieve the best educational systems possible for the students of Puerto Rico.

This Agreement is also intended to ensure an effective planning and evaluation process throughout PRDE's programs and initiatives. Planning and evaluation processes are the basis for determining program goals, current status, improvement needs, budgets, resources, effectiveness of results, and other important aspects of effective program management. Through this Agreement, Puerto Rico and PRDE will improve program planning and evaluation for education programs and use the plans and evaluation results to drive management and resource decisions.

This Agreement will allow PRDE time to develop and implement significant changes and improvements necessary to address the deficiencies that the Department has identified in PRDE's implementation of the covered Federal programs and to come into full compliance with identified Federal program requirements. At the end of this three-year period, PRDE must be in full compliance with all applicable program requirements in order to continue to receive Federal education funds under these programs.

Incorporation By Reference of Corrective Action Plans

This Agreement lists specific tasks, goals, completion dates, and persons and offices responsible for carrying out specific tasks for each program area. Corrective Action Plans for each program area will contain action steps and sub-steps, measurable objectives, and detailed corresponding timelines. Under the terms of the Corrective Action Plans, PRDE and identified persons and offices will be responsible for addressing the underlying problems to be resolved by Puerto Rico's compliance with each task, goal, and action step. PRDE will submit a draft of each Corrective Action Plan to the Department by February 1, 2008. The Department will respond to PRDE's drafts by February 20, 2008. Following consultations and discussions, the plans will be completed by the Parties by March 15, 2008 and are incorporated into this Agreement by reference. The Corrective Action Plan for ESEA, Title I, Standards and Assessments, is complete and is incorporated by reference into this Agreement at its signing as Attachment A. Hereinafter, each reference in this Agreement to the ''Agreement,'' is intended to include the Corrective Action Plans. Failure by PRDE to come to agreement with the Department on specific Corrective Action Plans for each of the program areas covered in this Agreement will render each such section of this Agreement null and void.

Review of Progress

The Department will review Puerto Rico's and PRDE's progress in meeting the terms of this Agreement by assessing how well Puerto Rico and PRDE design and implement solutions to the programmatic compliance issues in the covered Federal programs that are addressed below, by the demonstrated communication, cooperation, and organizational changes undertaken by Puerto Rico, PRDE, and other Puerto Rico agencies with management responsibility for Federal education funds, and by assessing Puerto Rico's and PRDE's completion of specific agreed-upon corrective action steps. The approaches adopted by Puerto Rico and PRDE should include effective planning and evaluation of resource and management decisions that are designed to result in compliance with all programmatic requirements by the end of the period covered by this Agreement, and to produce better educational results for Puerto Rico students.

In making the changes required to meet the terms of this Agreement, it is important to understand that the Agreement is not only designed to bring about compliance with Federal programmatic requirements but to improve education for the students of Puerto Rico. The Department, Puerto Rico, and PRDE will judge the success of this Agreement by: determining whether PRDE has met all the terms of this Agreement, assessing whether PRDE is in compliance with all Federal programmatic requirements identified below, and determining how successful Puerto Rico has been overall in improving its educational programs.

II. Consequences of Not Meeting the Terms and Conditions of This Agreement

There will be consequences should PRDE and Puerto Rico fail to meet the terms of this Agreement. Among possible consequences are:

A. Designation of PRDE as a ''High-Risk'' Grantee Under 34 CFR 80.12

If, during the period covered by this Agreement, PRDE and Puerto Rico fail to demonstrate that they are making reasonable progress toward meeting the terms of this Agreement, or fail to demonstrate an active, good faith commitment to meeting the terms of this Agreement, the Department may exercise its authority to designate PRDE a ''high-risk'' grantee. In addition, if, at the termination of this Agreement, PRDE has failed to come into compliance with the education program requirements addressed in this Agreement, the Department may exercise its authority to designate PRDE a ''high-risk'' grantee.

As is addressed more fully below, if the Department chooses to designate PRDE as a ''high-risk'' grantee, additional special conditions or restrictions may include, but will not necessarily be limited to: (1) Payment of Federal funds on a reimbursement basis; (2) withholding the authority to proceed to the next phase of a program until receipt of evidence of acceptable performance within a given funding period; (3) requiring PRDE to submit to the Department additional, more detailed financial reports than those already being submitted in one or more programs; (4) requiring additional project monitoring; (5) requiring PRDE to obtain technical or management assistance, including the designation of a third-party fiduciary to administer all or part of PRDE's grants from the Department; or (6) establishing additional prior approvals. The use of a condition for one covered Federal program does not require or preclude its use for a different covered Federal program.

In the event that the Department decides to designate PRDE as a ''high-risk'' grantee, it would notify PRDE as early as possible, in writing, of the: (1) Nature of additional special conditions and restrictions; (2) reason(s) for imposing them; (3) corrective actions that must be taken before special conditions will be removed and time allowed for completing any additional corrective actions; and (4) method of requesting reconsideration of conditions and restrictions imposed.

B. Reimbursement Grant Payments

For one or more covered Federal programs, the Department may decide to place PRDE on a cost reimbursement method of payment rather than on an advance payment method of payment. Cost reimbursement would require PRDE to submit to the Department receipts and other documentation necessary to support all PRDE program expenditures and the Department would release Federal program funds to PRDE only after approving each of PRDE's expenditures as allowable costs.

C. Requiring PRDE To Contract With a Third-Party Fiduciary To Oversee PRDE's Education Program Administration

If, during the period covered by this Agreement, PRDE and Puerto Rico fail to demonstrate reasonable progress toward meeting the terms of this Agreement, fail to demonstrate an active, good faith commitment to meeting the terms of this Agreement, or fail to meet a significant term in this Agreement, the Department may place an appropriate amount of Puerto Rico's or PRDE's grant funds into an interest bearing escrow account to fund the duties of a third-party fiduciary agent and require PRDE and Puerto Rico to enter into a contract with a third-party fiduciary agent to assist PRDE and Puerto Rico with the administration of its Federal education grant programs.

D. Requiring PRDE To Operate One or More Programs Under the Terms of a Cooperative Agreement With the Department

If, during the period covered by this Agreement, PRDE and Puerto Rico fail to demonstrate reasonable progress toward meeting the terms of this Agreement, fail to demonstrate an active, good faith commitment to meeting the terms of this Agreement, or fail to meet a significant term in this Agreement, under authority of the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301–6308), the Department may determine that substantial involvement by the Department in PRDE's program grant administration is necessary in one or more covered Federal programs and award one or more education grants to PRDE under the terms of corresponding Cooperative Agreements, in lieu of issuing grant award notifications. If determined by the Department to be necessary, one or more Cooperative Agreements between the Department and PRDE will be drafted and their terms applied to the management of one or more projects, after which the Department will provide education program assistance to PRDE with the Department having substantial direct involvement in the management of the affected program project(s).

Specifically, if the Department chooses to require PRDE to administer one or more of its covered Federal programs under the terms of a Cooperative Agreement, the relationship between the Department and PRDE will be characterized as follows:

(1) The Department will halt a PRDE program activity immediately, if detailed performance specifications or requirements are not met;

(2) The Department will review and approve one stage of work before PRDE can begin a subsequent stage during the period covered by the award;

(3) The Department will review substantive provisions of PRDE's proposed contracts;

(4) The Department will be directly involved in the selection of key PRDE personnel;

(5) The Department will collaborate with PRDE or participate jointly with PRDE in program activities;

(6) The Department will undertake monitoring that permits it to direct or redirect specific program work or activities, for example, because of interrelationships with other projects;

(7) The Department will have substantial and direct operational involvement and participation in anticipated or planned projects, before an award is made, to ensure compliance with statutory requirements;

(8) The Department will generally participate closely with PRDE in program administration in such a way as to exceed what is normally undertaken to comply with general statutory requirements that are a condition of every award; and

(9) The Department will establish highly prescriptive requirements before an award is made, so as to limit PRDE's discretion with respect to the scope of services offered, organizational

structure, staffing, mode of operations and other management processes.

E. Withholding, Termination, or Suspension of Grant Funds—20 U.S.C. 1234c(a)(1), 1234d, and 1416

If the Department finds, after reasonable notice and after providing PRDE and Puerto Rico with an opportunity for a hearing, that PRDE has failed to comply with a requirement of law, including with those program requirements specifically identified and discussed in this Agreement, the Department may, after notifying Puerto Rico or PRDE, withhold future grant payments in whole or in part, or terminate one or more of PRDE's grants. The Department may limit withholding to a particular Federal grant or part of a grant.

F. Recovery of Funds Under Authority of 20 U.S.C. 1234a

Any program funds improperly expended by PRDE or not properly accounted for by PRDE will be subject to recovery by the Department under authority of 20 U.S.C. § 1234a.

G. Judicial Enforcement

1. Cease and Desist Order Under 20 U.S.C. 1234c(a)(2) and 1234e

The Department may seek injunctive relief to compel specific actions or to stop specific actions. Under this process, the Department issues a complaint to Puerto Rico or PRDE, describing the factual and legal basis for the Department's belief that Puerto Rico or PRDE is failing to comply with a requirement of law, including this Agreement, and containing a notice of hearing. A hearing before an Administrative Law Judge (ALJ) could then occur. The ALJ's report and order, requiring Puerto Rico or PRDE to stop specific actions or compelling specific actions, becomes the final agency decision. The Department may enforce the final order by withholding any portion of Puerto Rico's or PRDE's grant award or certifying the facts to the U.S. Attorney General who may bring an appropriate action for enforcement of the order.

2. Referral to the U.S. Department of Justice for Appropriate Enforcement—20 U.S.C. 1416

If the Department finds that Puerto Rico or PRDE has failed to comply with any provision of applicable Federal laws (with regard to the programs to which 20 U.S.C. 1416 applies) (including with the terms and timelines of this Agreement), the Department may, after notifying Puerto Rico or PRDE, refer the matter for an appropriate enforcement action, which may include referral to the U.S. Department of Justice.

III. Mutual Agreements and Understandings Regarding the Terms, Conditions, and Enforcement of This Compliance Agreement

Presentation of Documents, Reports, and Other Materials in English

PRDE will submit all documentation, reports, summaries, updates, or other materials to the Department under the terms of this Agreement, to demonstrate progress toward compliance with the terms of this Agreement, in English. In the case of original supporting documents written in Spanish, PRDE will, to the extent reasonable and as mutually agreed upon by the Parties, provide such documents to the Department accompanied by translations from Spanish to English that are attested to by PRDE.

Criteria for Determining Compliance and Consequences of Non-Compliance

Puerto Rico or PRDE will provide the Department with progress reports—as required in Section IV below—for the action steps set forth in this Agreement. Puerto Rico, PRDE, and the Department agree that a failure to: (1) Provide all required reports in a timely manner, (2) show progress in completing action steps, as required by this Agreement, (3) complete action steps within the timeframes designated in this Agreement, or (4) achieve critical measurable objectives as specified in the Corrective Action Plans incorporated into this Agreement, will be considered a failure to meet the terms and conditions of this Agreement.

Severability

The Parties agree that this Agreement includes terms and conditions that apply to the various Federal programs included in the Agreement. To that end, the Parties agree that each such term and condition for each covered Federal program may constitute a separate agreement among Puerto Rico, PRDE, and the Department. For purposes of 20 U.S.C. 1234f, each such term or condition as to each covered Federal program shall be severable from each other term or condition for each of the covered Federal programs. Unless set out otherwise, a determination by the Department under 20 U.S.C. 1234f (d) that Puerto Rico or PRDE is not meeting terms and conditions may be specific to such term, condition, or program without impacting Puerto Rico's or PRDE's continuing obligations under this Agreement. That is, all other terms and conditions for all covered Federal programs or the specific term or condition for other covered Federal programs would remain in place for the duration of the Agreement, or until such time as the Department were to determine that Puerto Rico or PRDE had failed to meet those terms and conditions.

Alternatively, the Parties understand and agree that a determination by the Department under 20 U.S.C. 1234f(d) that Puerto Rico or PRDE has failed to meet any of the terms and conditions shall, at the Department's discretion, be grounds for finding the Agreement, as to such terms and conditions, no longer in effect and that the Department may take any and all additional actions authorized by law. At the same time, if Puerto Rico or PRDE fails to meet the terms and conditions of this Agreement, the Department may terminate the entire Agreement, and may take any and all actions authorized by law. Some examples of such actions are set forth above.

Fraudulent Activity

In the event that fraudulent activity in the administration of Federal education funds in Puerto Rico is uncovered in one or more programs—by an independent audit, PRDE's Internal Audit Office, the Department's Office of Inspector General, a Department program review team, a Department monitoring team, or by any other party—the terms of this Agreement pertaining to the affected program may be deemed null and void. In addition, in the event that such fraudulent activity is uncovered, following written notice to PRDE, the Department will take whatever actions it deems appropriate, including withholding Federal funds for the affected program.

IV. Reporting Requirements

Under this Agreement, PRDE agrees to submit regular progress reports covering all program and performance issues. Generally, and unless the Department requires more frequent reporting, Puerto Rico and PRDE must provide the Department with progress reports on a quarterly basis.

PRDE's submission of each written report will be preceded by a meeting or conference call among representatives of Puerto Rico (which may include representatives of the Puerto Rico agencies mentioned in Section I above), PRDE, and the Department, within five business days (according to PRDE's business calendar) of the end of the quarter, to discuss Puerto Rico's and PRDE's progress and the level of detail the Department wants Puerto Rico and PRDE to include in its written quarterly

report that will be submitted within fifteen business days (according to PRDE's business calendar) of the call or meeting. The Parties may modify this schedule by mutual agreement.

Subject to the meeting or call above, in general, each quarterly report will include information such as: (1) A description of activities and progress for each task and its related sub-tasks during the reporting period, (2) the status of each critical action step required to be taken during the reporting period, (3) detailed documentation of critical action step completion for those steps required to be completed during the reporting period (including explanations of delays for all steps not completed that were scheduled to be completed during the period, and expected completion dates for all unimplemented steps), (4) documentation of measures of performance and results, and (5) other data or documentation as specified within the action steps for each task or related sub-task in this Agreement, and/or discussed in the pre-report meeting among the Department, Puerto Rico, and PRDE.

Per discussions with the Department, Puerto Rico and PRDE will transmit reporting information to the Department via e-mail and/or an Internet web site. If transmittal of the reporting information is not possible via a website, Puerto Rico and PRDE will continue to be responsible for tracking, monitoring, and reporting progress on all requirements and milestones in this Agreement, in English and in a manner that is fully accessible to the Department and the public. Reporting information will be updated continuously, but in any event, on a quarterly basis, no later than within fifteen business days (according to PRDE's business calendar) from the day of the call or meeting among the Department, Puerto Rico, and PRDE, specifying the specific reporting required for that quarterly period. These reports also will fulfill the reporting requirements required under PRDE's special conditions that are currently in effect, or as modified.

The first quarterly period will encompass the time from which the Parties sign this Agreement through March 31, 2008. Within the first forty-five days of the signing of this Agreement, the Department will work with PRDE to agree on a more rigorous reporting schedule for reporting progress during the first six months following the signing of this Agreement (the early implementation phase of this Agreement).

V. Independent Internal Audit Office and Audit Committee

PRDE commits to full implementation of its Internal Audit Office (IAO) and its Audit Oversight Committee (the Committee) in accordance with the terms of the IAO and Committee charters. Both signed charters are attached to this Agreement and are hereby incorporated by reference as Attachment B. Therefore, under the terms of this Agreement, PRDE commits to an IAO that is fully independent, staffed, and trained.

VI. Corrective Action Plans, Action Steps, and Timelines

Corrective Action Plans

With the exception of the Title I, Standards and Assessments Corrective Action Plan, which is attached and incorporated into this Agreement at the signing as Attachment A, Corrective Action Plans, that address each area of noncompliance are to be completed and incorporated into this Agreement by March 15, 2008. The Corrective Action Plans will either address specifically the action steps and timelines that are included in the task descriptions in this Agreement, or the Corrective Action Plans will delineate one or more alternative approaches that will be used to bring PRDE and Puerto Rico into compliance with Department requirements. Alternative approaches may include: (1) Consolidating administrative funds under §§ 9201 and 9203 of the ESEA; (2) Utilizing Federal funds to establish and operate a Statewide system of intensive and sustained support and improvement (Statewide system of support, § 1117 of the ESEA) for schools funded under Title I, ESEA including schoolwide programs under § 1114 of Title I, (3) Transferring funds, under §§ 6121–6123 of the ESEA, (4) Contracting for technical assistance services from a qualified and experienced third-party providers and receiving services from the Florida and the Islands Regional Comprehensive Center (FLICC); and/or (5) Contracting for specific services under one or more of the covered Federal programs.

Schoolwide Programs

Under § 1114 of Title I of the ESEA, the Department authorizes schools with concentrations of poverty of at least 40 percent, to use Title I funds, along with other Federal, State, and local funds, to operate a schoolwide program that upgrades the entire education program in the school to improve the academic performance of all students, but especially the lowest achieving students. To operate a schoolwide program, a school must conduct a comprehensive needs assessment of the entire school and, using data from the needs assessment, develop a comprehensive plan that meets the requirements of § 1114(b) of the Title I of the ESEA and § 200.27 of the Title I regulations. In operating a schoolwide program, a school may consolidate funds from Federal, State, and local sources into one ''pool'' of funds and is not required to account for those funds separately, provided that the school meets the intent and purposes of the programs included in the consolidation. This differs from a Title I ''targeted assistance'' program, where Title I funds may be used only for supplementary support services for specific students identified as being most at risk of not meeting State standards.

Under § 1114, Federal, State, and local funds, may be combined so that PRDE would operate Federal education programs with greater flexibility, improve its entire educational program, and improve the academic achievement of all Puerto Rico students. A Schoolwide program differs from a Title I, Part A ''targeted assistance'' program, where Title I funds may be used only for supplementary support services for targeted students identified as being most at risk of not meeting State standards.

As part of the Corrective Action Plan, PRDE agrees to report to the Department with regard to which funds have been consolidated into PRDE's schoolwide programs, including funds awarded under Title I of ESEA, and how PRDE is undertaking a comprehensive reform strategy to improve the academic achievement of all students in each eligible Puerto Rico school, particularly the lowest achieving students. In addition, PRDE and the Department may determine that they should consider additional ways for improving the operation of schoolwide programs, including alternative arrangements for the management and operations of schoolwide programs in Puerto Rico, such as management at the regional level and operation at the school level.

Continuous and Meaningful Reassessment of Compliance Status

The Department, with PRDE and Puerto Rico, will continuously reassess the action steps and timelines in this Agreement and in the various Corrective Action Plans to determine whether: (1) The action steps fully meet the requirements of this Agreement, (2) the action steps will move Puerto Rico and PRDE toward achieving required measurable objectives, and ultimately,

full programmatic compliance within three years, and (3) the timelines' need to be modified within the time boundaries set forth in this Agreement.

Additional Areas To Be Covered by Corrective Action Plans

The Corrective Action Plans for which Puerto Rico and PRDE will be accountable are critical to PRDE and Puerto Rico's compliance with each task and sub-task in this Agreement. Once Puerto Rico and PRDE develop Corrective Action Plans that address each task or sub-task in this Agreement, or that are based on an alternative approach for addressing compliance, and the Department agrees to the revised Corrective Action Plans, the action steps and timelines in the Corrective Action Plans will become additional requirements of this Agreement and will be subject to the reporting requirements and consequences for not meeting terms and conditions as set forth in this Agreement. The Department will assist by consulting with Puerto Rico and PRDE to develop reports or reporting formats that satisfy the reporting requirements set forth in this Agreement. The Department will also assist Puerto Rico and PRDE, to the extent that resources are available, with training personnel and technical assistance.

VII. General Measurable Objectives

Puerto Rico, PRDE, and the Department agree that the following measurable objectives apply for each task and sub-task contained in this Agreement and that will be in the Corrective Action Plans that are to be incorporated into this Agreement by March 15, 2008:

1. PRDE plans, other documents, and reports are timely, provided to the Department in English, complete, accurate, and address the requirements set forth in this Agreement.

2. PRDE implements action steps within the timeframes set forth in this Agreement and in the Corrective Action Plans to be developed.

3. PRDE's implementation of sub-tasks and action steps demonstrates progress towards achieving the outcomes or measurable objectives set forth in this Agreement or in the Corrective Action Plans to be developed.

The remainder of this Agreement provides task descriptions, goals, and action steps for the program areas in the covered Federal programs addressed in this Agreement. By signing this Agreement, Puerto Rico and PRDE commit to taking the necessary actions to be in full compliance, by the end of the three-year period covered by this Agreement, with the program requirements applicable to all Department grants for which Puerto Rico and PRDE expend funds and any other requirements set forth in this Agreement, unless the Department determines that an alternative approach to program compliance as delineated in one or more Corrective Action Plans is the approach by which PRDE can best serve the educational needs of its students, as provided for in Section VI of this Agreement. Puerto Rico and PRDE commit to full implementation of this Agreement, and in greater detail, of the action steps in the PRDE Corrective Action Plans that will be incorporated by reference into this Agreement.

VIII. Tasks

Because the stated purpose of this Agreement is to improve education for the students of Puerto Rico, it is critical to the success of this Agreement that Puerto Rico and PRDE develop and refine long-term goals, assess the current status of each program receiving Federal assistance, and design coherent plans to bridge the gap between the current status of education in Puerto Rico and its goals of improving education and fully complying with all Federal program requirements.

This ''Tasks'' section represents what the Parties have generally agreed to at the time of execution of this Agreement. With the exception of the Standards and Assessments Corrective Action Plan, some of the subtasks and steps set forth below may be modified by mutual consent of the Department, Puerto Rico, and PRDE, in the Corrective Action Plans that will be developed by March 15, 2008. If modifications are made to the subtasks and steps set forth below through the Corrective Action Plans, they will be incorporated by reference into this Agreement.

Title I, ESEA

Task 1.0: Title I—Standards and Assessments (Attachment A)

Overall Task Description

Title I of the ESEA, as amended by the No Child Left Behind Act of 2001 (NCLB), requires Puerto Rico and PRDE to develop content and performance standards and to develop and implement an appropriate assessment system. Puerto Rico and PRDE have failed to meet certain of the statutory and regulatory requirements in these areas.

Specific action steps that PRDE must meet to come into compliance with the standards and assessment requirements of Title I have been articulated and are hereby attached and incorporated by reference into this Agreement. As with all other programmatic issues included in and addressed by this Agreement, Puerto Rico and PRDE must timely submit documentation concerning their compliance with the action steps regarding standards and assessments in accordance with Section IV of this Agreement.

Responsible Offices/Persons: Carmen Ayuso, Janet De Jesus, Angel Canales.

Task 2.0: Title I—Improvement of Programmatic Performance

Goal: Develop and implement procedures that ensure proper computation and allocation of programmatic fiscal requirements.

Completion Date: July 31, 2009.

Responsible Offices/Persons: Janet De Jesus, Carmen M. Rivera, Edna Ramos.

Sub-Task 2.1: Title I Programmatic Fiscal Procedures—Formalize comparability procedures so they are standardized and consistent with Title I fiscal guidance provided by the Department.

Completion Date: July 31, 2008.

Sub-Task 2.2: Develop and implement procedures that ensure the proper allocation of reserved school improvement funds to schools in improvement, corrective action, or restructuring, through the following steps:

- Develop formal policies and procedures.
- Disseminate policies and procedures.
- Train relevant staff on policies and procedures.
- Monitor implementation of policies and procedures.

Completion Date: July 31, 2009.

Task 3.0: Adequate Yearly Progress (AYP)

Goal: To develop and implement an approved plan for the timely calculation of AYP, consistent with all statutory and regulatory requirements.

Completion Date: August 1, 2008.

Responsible Offices/Persons: Carmen Ayuso, Janet De Jesus, Angel Canales.

Sub-Task 3.1: Establish the manner in which AYP will be calculated in a timely manner consistent with all statutory and regulatory requirements.

Completion Date: August 1, 2008.

Sub-Task 3.2: Train relevant PRDE staff in, and confirm their understanding of, the AYP requirements and the use of AYP to make school improvement decisions.

Completion Date: August 1, 2008.

Task 4.0: Accountability Requirements

Goal: To develop and implement a methodology by which PRDE will comply with all ESEA Title I accountability requirements.

Completion Date: December 31, 2008 (unless otherwise agreed to in the Corrective Action Plan).

Responsible Offices/Persons: Carmen Ayuso, Angel Canales, Janet De Jesus.

Sub-Task 4.1: Make final determination as to what methodology PRDE will use to include small schools in the accountability system.

Completion Date: June 30, 2010 (unless otherwise specified in the Corrective Action Plan).

Responsible Offices/Persons: Carmen Ayuso, Angel Canales, Janet De Jesus.

Sub-Task 4.2: Establish the manner in which the graduation rate will be calculated in accordance with statutory and regulatory requirements.

Completion Date: December 31, 2008 (unless otherwise agreed to in the Corrective Action Plan).

Responsible Offices/Persons: Carmen Ayuso, Angel Canales, Janet De Jesus

Sub-Task 4.3: Develop and implement procedures that ensure PRDE's adherence to and compliance with all State and local report card requirements by:

- Including PPEA results and information on accommodations on separate forms.
- Including all ''Subgroup'' assessment information.
- Migrating all Highly Qualified Teacher (HQT) classroom level data from the data warehouse into the school report card.
- Developing State and local report card templates.

Completion Date: December 22, 2008.

Responsible Offices/Persons: Carmen Ayuso, Angel Canales, Janet De Jesus.

Sub-Task 4.4: Establish specific procedures that will ensure that PRDE adheres to and complies with all Federal School Improvement and School Level Planning requirements and ensure the implementation of the required activities for schools in improvement, corrective action, restructuring, and alternative governance.

Completion Date: June 30, 2008.

Responsible Offices/Persons: Norma Mendez, Lisandra Fradera, Zoraida Mercado, Rafael Cruz, Angel Canales.

Sub-Task 4.5: Assessments should be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards. AYP shall be defined by the State in a manner that is statistically valid and reliable. PRDE shall:

- Develop assessment quality control procedures to ensure that its assessment contractors are scoring assessments accurately using professionally recognized procedures and processes.
- Develop written procedures to address any failure of contractors to deliver assessment materials and results in a timely manner.
- Develop internal procedures for monitoring the accuracy of assessment data that it provides to the public and guidelines to ensure that all students are being assessed appropriately on an annual basis.
- Modify its appeals process for assessment and accountability to ensure that corrections are made well in advance of the beginning of the next school year by which the accurate data must be reported.

Completion Date: May 2009 (unless otherwise specified in the Corrective Action Plan).

Responsible Offices/Persons: Carmen Ayuso, Carmen Ramos, Angel Canales.

Sub-Task 4.6: Implement all required components as identified in Puerto Rico's accountability workbook. PRDE shall:

- Develop a process with clear and objective guidelines to ensure that all schools, especially schools with enrollments that fall below the minimum sample size, are included in AYP decisions.
- Train appropriate staff on the business rules and policies used by PRDE in making AYP decisions.
- Review procedures for coding student test booklets so that the responsibility for coding information, such as whether the student has been enrolled for a full academic year, is not placed primarily in the hands of students, especially at the elementary level.
- Develop a timetable for reporting AYP determinations so that parents are aware of their children's school's status prior to the beginning of each school year.

Completion Date: June 2010 (unless otherwise specified in the Corrective Action Plan).

Responsible Offices/Persons: Carmen Ayuso, Carmen Ramos, Angel Canales, Janet De Jesus.

Sub-Task 4.7: Publish an annual report card and an Annual Report to the Secretary. PRDE shall:

- Develop and publish its SEA/LEA and school report cards including all of the required NCLB reporting elements, as specified in section 1111(h) of ESEA.
- Provide to the Department templates, an updated timeline, and operational details for the report cards at each level.

Completion Date: December 2008.

Responsible Offices/Persons: Carmen Ayuso, Carmen Ramos, Angel Canales.

Sub-Task 4.8: PRDE indicates how funds received under Grants for State Assessments and Related Activities (section 6111) will be or have been used to meet the 2005–06 and 2007–08 assessment requirements under NCLB.

- PRDE must provide the Department with a full accounting of how it has expended section 6111 State assessment funds for the last three Federal fiscal years.

Completion Date: December 2008.

Responsible Offices/Persons: Rafael Cruz, Carmen Ramos.

Task 5.0: Activities for Schools in Corrective Action, Improvement, Restructuring, and Alternative Governance

Goal: To develop and implement an approved methodology for PRDE to come into full compliance with all program requirements.

Completion Date: June 30, 2008.

Responsible Offices/Persons: Norma Melendez, Lisandra Fradera, Zoraida Mercado, Rafael Cruz, Angel Canales.

Sub-Task 5.1: Implement actions for schools in corrective action or restructuring at the end of the current school year based on the recommendations of District level staff (on a yearly basis before the beginning of the school year).

Sub-Task 5.2: Develop and train school directors on necessary corrective actions for schools in corrective action or restructuring (on a yearly basis before the beginning of the school year).

Task 6.0: Public School Choice and Supplemental Educational Services

Goal: To develop and implement procedures that ensure PRDE's adherence to all Federal requirements on Public School Choice.

Completion date: June 30, 2008.

Responsible Offices/Persons: Norma Melendez, Lisandra Fradera, Zoraida Mercado, Rafael Cruz, Angel Canales.

PRDE will develop and implement procedures that ensure adherence to Federal requirements on Public School Choice through the following steps:

- Develop a fully functional Public School Choice Support and Administrative Structure.
- Implement Public School Choice for all schools in school improvement.
- Implement the administrative procedures to implement Public School Choice.
- Train school directors on Public School Choice requirements.

Task 7.0: Parental Involvement and Notification

Goal: To develop and implement procedures that ensure the proper implementation of parental involvement and notification requirements under Title I.

Completion Date: June 30, 2008.

Responsible Offices/Persons: Norma Melendez, Lisandra Fradera, Rafael Cruz.

PRDE will ensure compliance with requirements on parental involvement and notification, through the following steps:

- Train new school directors on new parental involvement policies.
- Verify that parental involvement meetings are held.
- Monitor PRDE to ensure that programs meet all parental involvement requirements.
- Send all required parental notifications to parents on a timely basis and in a manner consistent with statutory and regulatory requirements.

Task 8.0: Paraprofessional Qualifications

Goal: To develop and implement procedures that ensure the proper implementation by PRDE of all Federal paraprofessional qualification requirements.

Completion Date: June 30, 2008.

Responsible Offices/Persons: Rafael Sifonte, Myrna Crespo, Norma Melendez.

Task 9.0: Even Start Family Literacy Program

Goal: To develop and implement procedures that ensure that PRDE carries out required programs and activities under its Even Start Family Literacy Program grants, complies with fiscal requirements at the State and the local subgrant levels, and takes steps to prevent large amounts of Even Start grant funds from remaining unspent.

Completion Date: December 31, 2008. (*See* interim completion dates following each of the steps below).

Responsible Parties: Maria del Carmen Martinez, Myrna Rodriguez.

- PRDE will address the deficiencies in its Even Start program administration through the following steps:
- PRDE must provide a plan showing that an annual independent evaluation will be conducted of each local Even Start program, and include an analysis of data and recommendations for program improvement. [Interim completion date: June 2008.]
- PRDE must develop, submit to the Department, and implement a plan for Even Start projects to implement high-quality, intensive instructional programs, including evidence that it has provided training for Even Start staff to use high-quality instructional literacy materials for children and adults. [Interim completion date: December 2008.]
- PRDE must provide evidence that it has complied with the requirement in section 1233(a) of the ESEA for the 2006–2007 school year, which requires that it has not spent for administration more than 50% of the Even Start funds it has reserved for State level activities. [Interim completion date: March 2008.]
- PRDE must provide evidence that all local Even Start projects are meeting the required matching requirement, and that indirect costs (unallowable) are not included as a matching contribution. [Interim completion date: March 2008.]
- PRDE must provide documentation demonstrating that it has notified local Even Start programs about maintenance of effort requirements in section 9521 of the ESEA, and that it includes Even Start projects in its implementation of the maintenance of effort requirements. [Interim completion date: March 2008.]
- PRDE must provide a plan for how it will spend its Even Start grant funds so that large amounts of past years' funds do not remain unspent. [Interim completion date: March 2008.]

Titles I & II, ESEA

Task 10.0: Highly Qualified Teachers (HQT)

Goal: To develop and implement an approved plan for highly qualified teachers based on accurate and reliable school level data.

Completion Date (unless otherwise specified below): June 30, 2008.

Responsible Offices/Persons: Romanito Rodŕiguez, Richard Martinez, Clarimar Cruz.

PRDE agrees to fully comply with all HQT requirements, through the following steps:

- Submit an approvable revised State HQT plan that meets all requirements in the ''Reviewing Revised State Plans'' rubric, which the Department provided to States to help them develop their plans and which the Department uses to evaluate State plans. The plan will be based on an analysis of complete, accurate classroom-level HQT data.
- Develop and submit procedures by which PRDE will meet the HQT requirements, and the requirements for public reporting, as required by the ESEA (§§ 1111(h)(1)(C)(viii) and (h)(2)(B), and § 1111(h)(6)(B)(ii)) of the ESEA, on all teachers who are not highly qualified and all classes not taught by highly qualified teachers.
- Include in the PRDE monitoring instruments, criteria for determining whether administrative districts and schools meet all of the requirements governing HQT, including paraprofessionals (§ 1119(c)–(g) of the ESEA).
- Gather complete and accurate classroom level preliminary HQT data for the 2007–2008 school year by March 2008.
- By the date the Department establishes in December 2008, submit complete and accurate HQT data for the 2007–2008 year to the Department in Part 1 of PRDE's School Year 2007–2008 Consolidated State Performance Report (CSPR).
- On an annual basis, analyze classroom level HQT data to determine hiring and professional development needs.
- Implement an annual LEA-level needs assessment for professional development and hiring, as required in § 2122(c) of the ESEA. The needs assessment will be completed annually as part of the process of planning the use of Title II, Part A funds, and before any Title II, Part A funds are obligated or expended.
- Develop an annual spending plan for the LEA Title II, Part A funds, to indicate how proposed spending addresses needs identified in the required needs assessment, as well as allowable uses of LEA funds described in § 2123 of the ESEA.
- Develop an annual spending plan for SEA Title II, Part A funds that indicates how the proposed spending will be for allowable uses of SEA funds described in § 2113 of the ESEA.
- As required in § 9501 of the ESEA, consult, on an annual basis, with all eligible private schools that wish to participate in the Title II, Part A program and ensure that equitable services to private school staff are provided with Title II, Part A funds to address their professional development needs as identified by the private schools. Consultation should occur before the start of each school year and must be part of the process of planning the use of Title II, Part A funds, and before any Title II, Part A funds are obligated or expended.

Title IV, ESEA

Task 11.0: Safe and Drug Free Schools Discretionary and State Grants

Goal: To develop and implement procedures for a Safe and Drug-Free Schools (SDFS) strategy that PRDE will administer effectively and that takes into account need and quality programming supported by

strengthened controls to ensure that Federal funds are spent in a timely manner and in full compliance with all applicable Federal requirements.

Completion Date: June 1, 2008.

Responsible Offices/Persons: Shirley Nunez, Anna Crespo, Regina Cibes.

PRDE will implement the following steps that are designed to improve overall administration of the SDFS programs, including implementation of programs based on scientific research, and appropriate monitoring and internal controls to ensure that funds are used responsibly and in a manner consistent with all applicable statutory requirements and, among other things, ensure that large amounts of SDFS funds do not remain unspent:

- Fully implement the Principles of Effectiveness provided under § 4115(a) of the ESEA.
- Target SDFS resources, based on a needs analysis, to activities specific to funding priorities and grant requirements.
- Develop and implement the Uniform Management Information and Reporting System (UMIRS) consistent with all statutory requirements based on framework developed by PRDE.
- Improve oversight and monitoring strategies for program requirements, as well as financial management and internal controls.

Task 12.0: Twenty-First Century Schools—After School Learning Centers (21st CCLC)

Goal: To develop plans and procedures for spending, monitoring, and providing technical assistance.

Completion Date: August 29, 2008 (unless an interim date is specified below).

Responsible Offices/Persons: PRDE will develop and implement plans, procedures, and processes to ensure adherence to Federal requirements for the 21st CCLC program through the following steps:

- Develop, implement, and submit an annual spending plan that includes procedures on how funds will be drawn down and how State set-aside funds will be used to support the program. *Interim date:* February 15, 2008.
- Develop, implement, and submit an annual grant competition plan and schedule that outlines the activities that will be accomplished to ensure timely selection of providers.
- Design and implement a plan that describes the procedures and processes that will be used to evaluate and assess the quality of projects developed by providers.
- Create and implement a monitoring and technical assistance plan that includes strategies for improving oversight of, and monitoring for, program requirements, providing technical assistance to providers, and monitoring and administering financial management and internal controls.

Federal Student Assistance

Task 13.0: Title IV of the Higher Education Act (HEA)

Goal: To develop and implement procedures to ensure compliance with Federal Student Assistance regulations requiring accounting on an accrual, rather than cash, basis.

Completion Date: March 31, 2009 (unless otherwise specified in the Corrective Action Plan).

Responsible Office/Person: Felipe Rosa.

PRDE will ensure compliance with Department regulations at 34 CFR 668.23(d), implementing Title IV of the HEA, that require all schools receiving funds under the HEA to submit financial statements prepared on an accrual basis, in accordance with U.S. Generally Accepted Accounting Principles (GAAP).

Byrd Scholarship Program

Task 14.0: Establish Effective Communication System To Administer Grant Funds

Goal: To develop and implement an effective, ongoing system by which PRDE can communicate with Department staff in a timely manner to facilitate proper administration of Byrd Scholarship funds.

Completion Date: March 31, 2008.

Responsible Offices/Persons: Anna Crespo, Elaine Rosario.

PRDE will address the deficiencies in its administration of Byrd Scholarship Program funds through the following steps:

- Immediately establish an English speaking contact who would have the authority over the program to respond to Department officials directly, and in a timely manner, to discuss the administration of the Byrd Scholarship Program, and to whom Department officials can send information about the program.
- Within thirty days, provide to the Department the Annual Performance Report (APR) on the newly approved form by the Office of Management and Budget, OMB Form #1840–0598, for the reporting period 2006 through 2007.
- Ensure that information about the Byrd Scholarship Program is distributed to eligible recipients in a timely manner by resubmitting the Participation Agreement for review and approval by the Byrd Program manager.

Individuals With Disabilities Education Act (IDEA)

Task 15.0: Submit All Required Program Data

Goal: Provide all data required by the Office of Special Education Programs' June 15, 2007 State Performance Plan/Annual Performance Report (SPP/APR) response letter, and that will be required subsequently to be issued in June 2008, June 2009, and June 2010.

Interim Completion Dates: February 1, 2008; February 1, 2009.

Completion Date: February 1, 2010.

Responsible Offices/Persons: Miriam Merced, Ada Hernandez.

PRDE will address the deficiencies in its administration of Parts B and C of the IDEA, and will submit data and otherwise demonstrate its compliance with requirements of the IDEA by demonstrating that:

- PRDE develops individualized education programs (IEPs) for all children transitioning from Part C to Part B of the IDEA, and provides special education and related services by each child's third birthday.
- PRDE completes all evaluations and reevaluations within required timelines and eliminates the backlogs of students with disabilities needing evaluations to determine eligibility for special education and related services.
- PRDE provides children served under the IDEA with needed assistive technology devices and services in a timely manner, and eliminates the backlog of students needing such devices and services.
- PRDE resolves complaints within the required 60-day timeline (34 CFR 300.152(a)), or within the timeframe of an extension obtained under 34 CFR 152(b).
- PRDE completes all due process hearings, as set forth under 34 CFR 300.515, within the required timelines.
- PRDE resolves financial management issues, including addressing and resolving the use-of-funds requirements related to transportation contracts.
- PRDE submits timely and accurate data required under sections 616 (SPP/APR) and 618 (State-reported data) of the IDEA.
- Increase staff in PRDE to provide proper oversight of the IDEA State plan and ensure compliance with IDEA requirements at the local school level, by working with the Department to specify the number of special education staff who will be hired in each year of the compliance agreement to increase the number of staff above the number of special education staff at the time of the signing of the Agreement.

Internal Audit

Task 16.0: Full Implementation of Internal Audit Office and Audit Committee

Goal: To correct PRDE's current deficiencies in its internal audit practices.

Completion Date: December 31, 2008.

Responsible Offices/Persons: Lourdes Cruz, Myrna Crespo, IAO Director.

Pursuant to discussions between the Department and PRDE, and in order for PRDE to address the Department's areas of concern regarding PRDE's Internal Audit Office (IAO) and the Audit Committee, PRDE will correct the current deficiencies in its internal audit practices through the following steps within one year of the date of this Agreement:

• Empowerment. Currently PRDE's IAO and the Audit Committee are not ''empowered'' to carry out their duties and responsibilities as provided for in their charter and in the PRDE legislation establishing the IAO and the Audit Committee. PRDE and Puerto Rico must take expeditious action to ensure that the Committee is fully empowered to carry out its duties by the full implementation of the charter and the enabling legislation.

• Organizational Misalignment. The IAO appears to report directly to the PRDE Secretary of Education rather than to the Audit Committee, based on the organizational chart for the IAO provided to the Department. This organization and reporting structure compromises the independence and objectivity of the IAO, which are key elements of the charter for the IAO. Moreover, the Government Auditing Standards (the so-called ''Yellow Book'') in section 3.21, state that a government audit organization's ability to perform its work and report the results impartially can be affected by its place within the government. Whether performing work to report externally to third parties or internally to top management, audit organizations must be free from organizational impairments to their independence. Section 3.22 further states that government auditors can be presumed to be free from organizational impairments to independence when reporting externally to third parties.

• Absence of Sufficient Budgets. It appears that sufficient funding is not being provided for the IAO and the Audit Committee to function properly and to conduct investigations and studies as provided for in the respective charters and in the enabling legislation. PRDE and Puerto Rico must request and ensure that such necessary funding is provided so that the IAO and the Audit Committee are able to perform their duties.

• Autonomy. As a result of organizational misalignment and as confirmed by Audit Committee members, currently, neither the Audit Committee nor the IAO appears to have the level of autonomy from PRDE that is necessary to effectively carry out their duties and responsibilities, as specified in their charters and in PRDE's enabling legislation. Rather, the PRDE Secretary of Education has previously signed off on their reports, which is in clear violation of proper internal controls and internal audit principles and standards.

• Staffing. Neither the IAO nor the Audit Committee is adequately staffed in sufficient numbers, both at the professional and the support staff levels, to permit them to effectively conduct their duties and responsibilities, as specified in their charters and in the enabling legislation, through specific action steps.

Under this Agreement and in accordance with the action steps to be included in the Corrective Action Plans to be incorporated into this Agreement, PRDE will take immediate steps, including the following, to address these concerns:

• Develop a work plan for the IAO that includes, at a minimum, review and assessment of all key items in this Agreement throughout the effective period of the Agreement. This work plan will be provided to the Audit Committee and the Department for review and comment and the approved version will be made available to the public through the IAO Internet site.

• Issue a Memorandum or Directive that states clearly that all PRDE staff must cooperate with the staff of the IAO and the Audit Committee and respond appropriately and expeditiously to any requests submitted to them by the IAO or the Audit Committee.

• Schedule a series of mandatory ''All Staff'' meetings for all PRDE managers and supervisors to communicate directly about the critical duties and responsibilities of the IAO and Audit Committee and to convey to all PRDE managers and supervisors that they must fully cooperate with the staff of IAO and the Audit Committee.

• Realign the organizational relationships so that the IAO reports directly to the Audit Committee and not to the PRDE Secretary of Education, in order to ensure the IAO has full autonomy and independence to perform its required duties.

• Provide all reports to the Department's local Office of Inspector General staff at the same time as the reports are provided to the Audit Committee, and, upon request by Department staff or oversight and monitoring staff of the Office of Inspector General, provide translations from Spanish to English of such IAO reports, to which PRDE has attested.

• Make semiannual reports of all IAO activities available to the public through the Internet site.

• Prepare results and status of corrective actions and provide these to the Audit Committee, the Department, and the public, in part so that the Department's Office of Inspector General can provide appropriate feedback and recommendations on submitted reports to assist the IAO and the Audit Committee to come into compliance with all applicable audit requirements and with proper accounting principles.

• Notify the Department in a timely manner of any actions taken or considered that may have the effect of diminishing the effectiveness of PRDE's IAO or Audit Committee, including the ability of the IAO or Audit Committee to carry out duties and responsibilities provided for in their respective charters.

The Department also recommends that PRDE and Puerto Rico consider the following additional steps to help PRDE and Puerto Rico ensure that there is a fully functioning IAO and Audit Committee, although the Department recognizes that these steps may require more time and effort, and may depend in part on the actions of others (such as the Governor, legislature, and Unions) to execute fully:

• Increase the salaries for IAO members in order to be more competitive in recruiting and retaining the best possible candidates for office positions.

• Consider elevating the position of the IAO Director to a position equal to that of other senior PRDE management, both with regard to organizational placement and salary.

• Include in the annual PRDE budget appropriate funding for the projected work plan, materials, and staffing requirements for both the IAO and Audit Committee.

The Parties to this Agreement, the U.S. Department of Education, the Puerto Rico Department of Education, and the Commonwealth of Puerto Rico, agree to faithfully carry out the terms of this Agreement, as set forth above.

Effective Date and Modification of Agreement:

This Compliance Agreement will take effect upon execution by all the Parties and may be modified or amended only

by mutual written agreement of all the Parties hereto.

For the Commonwealth of Puerto Rico:_____/s/_____

Honorable Anibal Acevedo-Vilá, Governor,

12–17–2007

Date

For the Puerto Rico Department of Education:_____/s/_____

Dr. Rafael Aragunde-Torres, Puerto Rico Secretary of Education.

12–17–2007

Date

For the U.S. Department of Education:_____/s/_____

Raymond Simon, Deputy Secretary of Education.

12–17–2007

Date _____/s/_____

Sara Martinez Tucker, Under Secretary of Education.

12–17–2007

Date

Attachments A and B

Attachment A—Commonwealth of Puerto Rico Department of Education

Puerto Rico Department of Education Action Plan For Title I Assessment Compliance Agreement

December 2007

P.O. Box 190759, San Juan, Puerto Rico 00919–0759 • Tel.: (787) 759–2000 ext. 2749, 4749 • Fax: (787) 753–1804.

The Department of Education does not discriminate in its activities, educational services or employment opportunities on the basis of race, color, sex, age, birth, national origin, social condition, political ideas, religious beliefs or any handicap.

Action steps	Completion date	Documentation	Responsible office	Estimated budget
REQUIREMENT 1.0—Content Standards				
Development of rigorous academic content standards In English, Spanish, Mathematics and Science for each of the grades 3–8 and 11.	October 31, 2007	Agendas, attendee's lists, Minutes, Training Power Points, Content Standards.	Office of the Assistant Secretary for Academic Services.	Action steps that require budgeting have been completed.
Involve education stakeholders in the development of the academic content standards.	November 10, 2007.	Panel members, attendee's lists, meeting minutes.		
Approve academic content standards in English, Spanish, Mathematics and Science for each of the grades 3–8 and 11.	November 10, 2007.	Circular Letter.		
REQUIREMENT 2.0—Academic Achievement Standards				
Develop with the help of external consultant the academic achievement standards for English, Spanish, Mathematics and Science for each of the grades 3–8 and 11.	February 2009	Minutes, Panel members attendee's lists, PLDs for English, Spanish, Mathematics and Science, cut scores.	Office of the Assistant Secretary for Academic Services.	2007–2008 $10,000.
Develop with the help of external consultant the alternate academic achievement standards for students with the most significant cognitive disabilities for English, Spanish, Mathematics and Science for each of the grades 3–8 and 11.	February 2009	Minutes, Panel members attendee's lists, PLDs for alternate achievement standards for English, Spanish, Mathematics and Science, cut scores.	Office of the Associate Secretary for Special Education.	2008–2009 $500,000 2009–2010 $60,000.
Involve education stakeholders in the development of the academic achievement standards and alternate achievement standards.	July 2009	Panel members attendee's lists, meeting minutes.		Contract External Consultants and Vendors.

Action steps	Completion date	Documentation	Responsible office	Estimated budget
Approval of academic achievement standards and alternate academic achievement standards for students with the most significant cognitive disabilities for English, Spanish, Mathematics and Science for each of the grades 3–8 and 11.	July 2009	Memorandum stating the policy that the State's academic achievement standards apply to all students.		
Revisit with the help of external consultants the academic achievement standards and the alternate achievements standards for English, Spanish, Mathematics and Science for each of the grades 3–8 and 11.	July 2010	Minutes, Panel members attendee's lists, and PLDs.		
REQUIREMENT 4.0—Technical Quality				
Convene a TAC composed of five national experts to advise on the technical quality of the assessments.	January 2008 ..... April 2008 ..... July 2008	List of TAC members, attendee's list, agenda, meeting minutes.	Office of the Undersecretary for Academic Affairs Assessment Division.	2007–2010 $350,000 per year 2007–2008 $400,000.
State assessment staff will develop a validity argument stating the purposes of the assessments and delineating the types of uses and decisions most appropriate to each assessment.	January 2008	Meeting minutes, Memorandum of state policy.	Evaluation and Planning Unit	2008–2009 $600,000 2009–2010 $600,000.
PRDE will consider contracting to conduct a variety of studies as deemed appropriate and identified by the TAC such as: bias reviews, DIF analysis, confirmatory factor analysis, cognitive labs, Cronbach's alpha, SEM, reliability at cut points, generalizability to evaluate inter-rater agreement for scoring of CR items. Over the course of the year 2008 we will provide more details as to the studies that will be done as advised by the TAC.	July 2008–2010	TAC recommendations and planning schedules.	Contract External Consultants and Vendor.	
Analysis of the efficacy and validity of accommodations for the PPAA including descriptions and guidelines for linguistic accommodations.	April 2008	Review committee's notes, findings and recommendations, Guidance documents, Memorandum, Agenda, training material and attendee's list, documentation of on site visits and follow ups to training.		
Analysis of the efficacy and validity of accommodation use and interpretation of data.	December 2007	Sampling plan and student selection, Final Report and recommendations.		
Develop a technical manual that will document the technical quality of the assessments.	July 2008	Recommendations from TAC on the table of contents required of the 2008 Technical Manual, Technical Manual 2008.		

Action steps	Completion date	Documentation	Responsible office	Estimated budget
REQUIREMENT 5.0—Alignment				
Develop blueprints that reflect the standards in terms of content and DOK.	October 2007	PPAA Blueprints	Office of the Undersecretary for Academic Affairs Assessment Division.	2007–2008 $14.8M (Item development contract—5.5M.
Collect panelists ratings for items in the item bank on content match and DOK.	July 2008	Minutes of Panelists reviews and ratings.	Evaluation and Planning Unit	(PPEA contract—3M PPAA contract—4.7M).
Analyze with an external consultant the alignment on a set of scorable items.	July 2009	Study findings	Office of the Assistant Secretary for Academic Services.	
Convene a state assessment advisory committee to oversee the new PPAA test development and provide recommendations, decision options, alternative choices, best practices and emerging technical knowledge and outlining appropriate technical documentation required for assessment and accountability practices.	August 10, 2007 ...	Committee member roster ...	Office of the Associate Secretary for Special Education.	2008–2009 $11.6M (PPEA contract 3M PPAA contract 8M).
Select contractor for the development of test items that will ensure appropriate categorical concurrence, balance of representation, range of representation and depth of knowledge of our revised standards.	September 28, 2007.	Signed contract or other signed procurement document.		2009–2010 $16.5M (PPEA contract 3M PPAA contract 8M Fall Field Test 5M).
Schedule quarterly state assessment advisory committee meetings to address issues related to overall test development activities and fulfilling compliance agreement requirements.	September 28, 2007. December 17, 2007. March 31, 2008 .... June 20, 2008	Meeting minutes and recommendations.		Contract External Consultants and Vendors.
Convene the state assessment advisory committee composed of the Undersecretary, Auxiliary Secretary for Academic Services, Program Directors and Assessment Staff to provide recommendations to the Secretary for the approval of the standards, grade level expectations and test blueprints.	October 17, 2007	Assessment committee member roster, Meeting minutes and documentation of comments.		
Convene a technical advisory committee (TAC) to provide recommendations in the PPAA and PPEA test development process.	January, 2008	Roster and qualifications of TAC Members, invitational letters.		
Approval of the standards, grade level expectations and test blueprints.	October 31, 2007	Evidence of approval by the Secretary of Education.		
Statewide notification of revised academic content standards and grade level expectations.	November 10, 2007.	Memorandum	Office of the Undersecretary for Academic Affairs Assessment Division.	
PRDE staff training on new standards and grade level expectations.	December 19, 2007.	Meeting invitations, Agendas, PPT presentations, training material and attendee's list.	Evaluation and Planning Unit.	

Action steps	Completion date	Documentation	Responsible office	Estimated budget
Constitute school district training teams composed of school district superintendent, two auxiliary superintendents, one elementary and one secondary level school director, Spanish, Math and English content area supervisors, special education supervisor, Science facilitator and a librarian.	December 19, 2007.	Roster of school district training teams.	Office of the Assistant Secretary for Academic Services.	
Convene an item review committee to review the existing PPAA item bank to consider the recoding of the current items to align with the new standards and GLEs.	January 2008	Meeting minutes, attendee's list and recommendations.		
State assessment advisory committee review of the TAC suggestions to incorporate recommendations to the work plan.	July 2008	TAC recommendations, committee meeting minutes.		
Convene a committee to study the need to revise the standards for the adequate yearly progress measures.	January 2008	Study results and recommendations.		
Occasional Focal Group meetings for ongoing review of alignment issues to ensure content match and appropriate DOK levels and collecting evidence on ongoing review and item development process.	February 2008 ..... June 2008 ..... September 2008 ... December 2008 .... May 2009 ..... October 2009	Meeting minutes, attendee's list and recommendations.		
Conduct PPAA item writing workshops with consultants to develop passages, items and scoring rubrics that will address the changes to the new content standards and grade level expectations.	February–June 2008.	Agenda, PPT presentation, notes on work accomplished, evaluation sheets and attendee's list.		
Teacher and school personnel training on new standards and grade level expectations.	March 31, 2008	Meeting invitations, Agendas, PPT presentations and attendee's list.		
PPEA standard validation process to review cut scores that will adjust to rubric changes in 2008 scoring and reporting based on the progress dimension.	February 2008 ..... April 2008	Agenda, PPT, attendee's list, PLDs and cut scores and standard setting technical report.		
Convene a panel to review and revise the performance level descriptors based on the new standards and GLEs with the help of external consultants.	April 30, 2008—December 2008. February 2009	Panel roster, meeting minutes and recommendations.	Office of the Undersecretary for Academic Affairs Assessment Division.	
Collect and use samples of portfolios for the new PLD creation.				
Complete the PLDs after standard setting.	July 2009	PLDS	Office of the Assistant Secretary for Academic Services.	
Revisit PLDs with the help of external consultants.	July 2010	Panels recommendations.		

Action steps	Completion date	Documentation	Responsible office	Estimated budget
Content and Sensitivity meeting with teachers and consultants to revise new passages and items.	June 2008	Agenda, PPT presentation, attendee's list and recommendations.	Office of the Associate Secretary for Special Education.	
Conduct Content Grade Alignment with teachers and external consultants for all subjects and grades to develop grade level instructional and assessment activities for each of the grade level performance standards for students who participate in the PPEA including a resource guide for teachers.	February 2008	Agenda, PPT presentation, attendee's list and recommendations.		
Revise with the help of external consultants the PPEA to align to the new academic content standards.	July 2008	PPEA teacher's guide ..... PPEA Technical Manual.		
Technical assistance form NAAC on the pro's and con's of different PPEA testing strategies to be considered in the 2009 PPEA test design.	June 2008	NAAC TA notes.		
PPEA Stakeholder meetings composed of representatives from special and regular educators, content experts, administrators, university staff and parents to review the PPEA assessment requirements, NAAC recommendations, timelines and test materials development including the content grade alignment recommendations, the grade level performance standards and recommendations for changes and improvements.	July 2008	Stakeholder roster, attendee's list and suggestions.		
Develop with our vendor a new teacher's guide and resource manual for 2009 PPEA administration reflecting the new grade level performance standards and the requirements of the PPEA.	July 2008	Revised Teacher's Guide and Resource Manual.		
Prepare teacher training material for the PPEA 2008–2009 administration.	July 2008	Teacher Training Materials.		
Review and approval of the new item bank.	July 2008	Meeting minutes, attendee's list and recommendations.		
Conduct PPEA teacher trainings that will include an overview of the assessment process, participation guidelines, requirements and new grade level performance standards.	September 2008 ...	Agenda, TT Material, attendee's lists.		
PPEA testing on new standards begins.	October 2008	PPEA testing schedule.		
PPAA Forms are built for the Spring 2009 tests that will address the changes to the content standards and expectations.	August–September 2008.	Writing Test Forms.		

Action steps	Completion date	Documentation	Responsible office	Estimated budget
PPAA Writing forms for Spanish and English test review and approval.	September 2008 ...	Forms approval	Office of the Undersecretary for Academic Affairs Assessment Division.	
PPEA Follow up Teacher Training emphasizing the required new grade level performance standard to be assessed.	October 2008	Agenda, TT Material, attendee's lists.	Evaluation and Planning Unit.	
Final review and approval of all PPAA forms.	October 2008	Forms approval	Office of the Assistant Secretary for Academic Services.	
PPAA Spring 2009 Census Test Production.	December 2008–January 2009.	Census Test.		
Disseminate schedule for the PPAA Spring 2009 test administration.	January 2009	Memorandum, Test Administration Schedule.	Office of the Associate Secretary for Special Education.	
PPAA Pretest Workshop	January 2009	Agenda, PPT, training material attendee's list.		
Administer the PPAA Writing Tests.	February 2009	Program for test administration.		
Conduct PPAA Writing Rangefinding.	February 2009	Agenda, PPT presentation, attendee's list and scoring rules.		
Score the PPAA Writing Tests.	March 2009	Scorer information, Scoring results.		
Closing of PPEA administration aligned to new standards and GLEs.	March 2009	Portfolios developed based on new standards.		
PPAA Census Test Administration for all subjects.	March/April 2009 ..	Program for test administration.		
PPAA Rangefinding for all other subjects.	March/April 2009 ..	Agenda, PPT presentation, attendee's list and scoring rules.		
PPEA Rangefinding for all subjects.	March 2009	Agenda, PPT presentation, attendee's list and scoring rule.	Office of the Undersecretary for Academic Affairs Assessment Division.	
PPEA scoring on new standards.	April 2009	Scoring results and reports.		
PPAA Scoring of all other subjects.				
PPAA Census test item statistics review.	May 2009	Statistical analysis and reports.	Evaluation and Planning Unit.	
PPAA Standard Setting for all grades and subjects.	May 2009	Agenda, PPT, attendee's list, standard setting technical report.	Office of the Assistant Secretary for Academic Services.	
PPEA Standard Setting	May 2009	Agenda, PPT, attendee's list, performance level descriptors and cut scores and standard setting technical report.	Office of the Associate Secretary for Special Education.	
PPEA new score reporting and PPAA Reporting of test results.	June 2009	Reports.		
PPEA Stakeholder meeting to review the assessment activities for the 2008–2009 administration, timelines for the next assessment year, participation guidelines, grade level performance standards requirements and examples and make recommendations for changes and improvements.	July 2009	Stakeholder roster, attendee's list and suggestions.		
PPAA Fall Field Test Production.	June–July 2009	Test Forms.		
Convene a work group to review and approve PPAA fall field test forms.	July 2009	Test form approval.		

Action steps	Completion date	Documentation	Responsible office	Estimated budget
Fall 2009 standalone PPAA Field Test.	September 2009 ...	Field Test Program.		
Scoring of PPAA Fall Field Test.	October 2009	Scoring results and reports.		
PPAA Field test item and statistics review.	October–Nov. 2009.	Statistical analysis and reports.		
2010 PPAA Test Development and PRDE final review and approval.	December 2009	Test review notes and final approval.		
2010 PPAA Test Production	December 2009—January 2010.	2010 Tests Booklets.		
2010 PPAA Pretest Workshop.	February 2010	Agenda, PPT, attendee's list.		
PPAA Rangefinding Meeting	March 2010	Agenda, PPT presentation, attendee's list and scoring rules.	Office of the Undersecretary for Academic Affairs Assessment Division.	
Test data and reporting reviews and data quality controls.	April 2010	Review notes and findings Processing, Scoring and Reporting Quality Control Checklist.		
Reporting of test results	June 2010	Agenda, PPT presentation, attendee's list and scoring rules.	Evaluation and Planning Unit.	
Contract experience reviewers to conduct an evaluation of the quality of alignment on the new tests via an external alignment study.	February–June 2010.	Alignment Study	Office of the Assistant Secretary for Academic Services.	
Conduct a PLD validity study	June 2010	Study findings	Office of the Associate Secretary for Special Education.	
REQUIREMENT 6.0—Inclusion				
Review assessment data to document participation of all students in the assessments.	July 2008 ..... July 2009 ..... July 2010	Reports that specify the participation rates and methods of calculation.	Evaluation and Planning Unit	2007–2008 $335.000.
Review state guidelines for inclusion of all students.	July 2008	Guidelines and policy documents.	Office of the Assistant Secretary for Academic Services.	
Qualitative review of the existing accommodations by type to address their efficacy and use for LSP students.	December 2007	Review committee's notes, findings and recommendations.	Office of the Associate Secretary for Special Education.	2008–2009 $150,000.
Incorporate the expert panel and external consultant recommendations in the development of guidance documents and LSP participation plans.	January 2008	Guidance documents	Title III Director	2009–2010 $100,000.
Revision of the accommodations manual to include accommodations for LSP students.	January 2008	Revised Accommodations Manual.		
Incorporate the expert panel and external consultant recommendations in the state's review of its policy on the use of accommodations for Limited Spanish Proficient (LSP) students.	February 2008	Memorandum	Evaluation and Planning Unit Office of the Assistant Secretary for Academic Services. Office of the Associate Secretary for Special Education. Title III Director.	
Training for educators on accommodations selection and use.	July 2008	Agenda, training material and attendee's list.		

Action steps	Completion date	Documentation	Responsible office	Estimated budget
Evaluation of the effectiveness of training and the provision of technical assistance as needed to support appropriate accommodations selection and use.	April 2008	Documentation of on site visits and follow ups to training.		
Convene a panel of experts to review the linguistic accommodations recommended and best practices and accommodations for LSP students.	September 2007 ...	Roster of panel members, meeting minutes, work plan and recommendations.		
Review the recent July 2007 results to the LAS LINKS Español, Spanish language proficiency test, to gain a better understanding of our LSP student population and identify their linguistic background, their experiences in formal academic settings, and their distribution across grade levels.	September 2007 ...	Profile of LSP students.		
Convene a panel of linguistic experts to select the best accommodations after obtaining a comprehensive knowledge of the LSP student population's needs. Conditions that need to be explored to gain a better understanding of our LSP student population, considering the PRDE context, are the following: 1. Student's academic Spanish language proficiency, 2. First ''academic'' language development, 3. Prior formal schooling, and, 4. The length of time the student has resided in Puerto Rico.	October 2007	Roster of panel members, meeting minutes, work plan and recommendations.		
Develop guidelines with the help of external consultant to identify appropriate accommodations based on the student's performance and linguistic listening, speaking, reading and writing skills.	February 2008	Developed guidelines	Evaluation and Planning Unit Office of the Assistant Secretary for Academic Services. Office of the Associate Secretary for Special Education. Title III Director.	
Refine accommodation policy for LSP students to ensure maximum accessibility to the assessment.	February 2008	Policy statements.		
Continue participating in the LEP partnership and follow up on upcoming recommendations and best practices for LSP Students.	Ongoing	Literature reviews of best practices.		
Disseminate revised policy and responsibilities regarding the LSP student participation and expanded linguistic accommodations use in large scale and instructional assessments.	March 2008	Memorandum.		

Action steps	Completion date	Documentation	Responsible office	Estimated budget
Training on use of guidelines for the selection of accommodations, procedures for providing testing accommodations and documentation requirements.	March 2008	Agenda, training material and attendee's list.		
Monitor accommodations selection and use in state assessments.	April 2008	Monitoring findings.		
Stakeholder meeting to obtain recommendations for additional accommodations if needed to be used with the 2009 assessments.	June 2008	Meeting minutes, recommendations and attendee's list.		
REQUIREMENT 7.0—Assessment Reports				
Produce an interpretive guide that facilitates interpretation of assessment data.	Yearly	Interpretive Guide	Evaluation and Planning Unit	2007–2008 PPAA scoring and reporting $1.2M PPEA scoring and reporting $1.4M 2008–2009.
Produce individual student, school, region and island wide reports.	Yearly	Reports	Office of the Undersecretary for Academic Affairs Assessment Division.	
Conduct post-test workshops for training on interpretation and use of assessment results.	Yearly	Training materials		PPAA scoring and reporting $2.4M PPEA scoring and reporting $1.4M 2009–2010 PPAA scoring and reporting $2.4M PPEA scoring and reporting $1.4M (Costs are included in the test vendor's contracts).

*** Budget Summary**

The Puerto Rico Department of Education will be needing an estimated budget of approximately $45.8 M to cover the expenses for the tasks outlined in this three year action plan.

Critical element	2007–2008	2008–2009	2009–2010
2.0	$10,000.00	$500,000.00	$60,000
4.0	400,000.00	600,000.00	600,000.00
5.0	12.2 M	8.0 M	12.9 M
6.0	335,000.00	150,000.00	100,000
7.0	2.6 M	3.6 M	3.6 M
Total	15.6 M	12.9 M	17.3 M

The funding sources will be approximately 35% federal dollars and 65% state dollars.

* Puerto Rico and the U.S. Department of Education reserves the right to review the estimated budget submitted according to the needs that may arise during the plan implementation process.

Attachment B—Puerto Rico Department of Education Audit Committee Charter

Organization

This charter governs the operations of the Audit Committee (''the Committee'') of the Department of Education of Puerto Rico, (PRDE). The Committee shall review and reassess the charter at least every two years. The Committee shall consist of five members organized as described in the law. Members of the Committee shall be considered independent as long as they do not accept any consulting, advisory, or other compensatory fee from PRDE and are not affiliated persons of PRDE or its subsidiaries. All Committee members shall be financially literate, and at least one member shall have wide experiences in auditing matters.

Purpose

The Audit Committee shall provide assistance to PRDE Management in fulfilling its oversight responsibility to the State and Federal Government and others relating to: the integrity of PRDE statements, the financial reporting process, the systems of internal accounting and financial controls, the performance of the PRDE internal audit function independent auditors, the

independent auditors' qualifications and independence, and PRDE's compliance with ethics policies and regulatory requirements. In so doing, it is the responsibility of the Committee to maintain free and open communication among the Committee, independent auditors, the internal auditors, and Management of the PRDE.

In discharging its oversight role, the Committee is empowered to investigate any matter brought to its attention with full access to all books, records, facilities, and personnel of PRDE and the authority to engage independent counsel and other advisers as it determines necessary to carry out its duties.

Meetings

The Committee will hold at least four meetings annually and will meet in separate executive sessions with PRDE management, independent auditors, and internal audit department representatives to review and resolve matters of concern presented to the Committee. The Committee may meet as many additional times as the Committee deems necessary or appropriate. Reports of all meetings shall be made to the Governor of Puerto Rico and the Secretary of Education.

Duties and Responsibilities

The primary responsibility of the Audit Committee is to oversee PRDE's financial reporting process and to report the results of its activities to the Governor of Puerto Rico. While the Committee has the responsibilities and powers set forth in this Charter, it is not the duty of the Committee to plan or conduct audits or to determine that PRDE operations are accurate and in accordance with Laws and Regulations. Management is responsible for the preparation, presentation and integrity of PRDE financial statements; for the use of appropriate accounting principles and reporting policies by PRDE; and for the application of the Laws and Regulations that govern their operation. The Internal Audit Office as well as the independent auditors are responsible for auditing PRDE operations and reports regarding compliance with applicable laws and regulations.

The Committee, in carrying out its responsibilities, believes its policies and procedures should remain flexible, so that it can better respond to changing conditions and circumstances. The Committee should take appropriate actions to set the overall tone for quality financial reporting, effective risk management practices, and ethical behavior. The following shall be the principal duties and responsibilities of the Committee. These are set forth as a guide with the understanding that the Committee may supplement them as appropriate.

- The Committee will ratify the appointment, termination and compensation of the Chief Auditing Executive, (CAE). The selection and recommendation of the CAE is the responsibility of PRDE management.
- The Committee will review and discuss with the CAE and appropriate staff members of the internal auditing office:
  - The plans for, and scope of, their ongoing audit activities, and
  - The annual report of the audit activities, examinations and results thereof of the internal auditing department.
- The Committee shall be directly responsible for the appointment and termination (subject, if applicable, to PRDE ratification), compensation, and oversight of the independent auditors, including resolution of disagreements between Management and the auditors regarding the operation reporting. The Committee shall evaluate the independent auditors' qualifications, performance, and independence (including that of the lead audit partner) and shall periodically consider the rotation of the lead audit partner and the independent audit firm. The Committee shall pre-approve all audit and other related services such as agreed-upon procedures used by the independent auditors and shall not engage the independent auditors to perform non-audit services prescribed by law or regulation.
- At least annually, the Committee shall obtain and review a report by the independent auditors describing:
  - The independent auditors' internal quality control procedures;
  - Any material issues raised by the most recent internal quality control review of the independent auditors, or by any inquiry or investigation by governmental or professional authorities within the preceding five years, regarding one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and
  - All relationships between the independent auditor and PRDE (to assess the auditors' independence).
- The Committee shall discuss with the independent auditors the overall scope and plans for their respective audits, including the adequacy of staffing and compensation. Also, the Committee shall discuss with management, the internal auditors and financial controls including PRDE policies and procedures to assess, monitor and manage risk, and its legal and ethical compliance programs.
- The Committee shall periodically meet separately with Management, the internal auditors, and the independent auditors to discuss issues and concerns warranting the Committee's attention. The Committee shall provide sufficient opportunity for the internal auditors and the independent auditors to meet privately with members of the Committee. The Committee shall review with the independent auditors any audit problems or difficulties and Management's response.
- The Committee shall receive the reports from the independent auditor on the critical policies and practices of PRDE and all alternative treatments of financial information with accounting principles that have been discussed with Management.
- The Committee shall establish procedures for the receipt, retention, and treatment of complaints received by PRDE regarding accounting, internal accounting controls or auditing matters and the confidential anonymous submission by employees of PRDE of concerns regarding questionable accounting or auditing matters.

Internal Control Matters

- The Committee shall discuss with Management policies with respect to risk assessment and risk management. Although it is Management's duty to assess and manage the PRDE's exposure to risk, the Committee needs to discuss guidelines and policies to govern the process by which risk assessment and management is handled and review the steps Management has taken to monitor and control PRDE risk exposure.
- The Committee shall establish regular and separate systems of reporting to the Committee by Management and by the independent auditor, regarding any significant judgments made in Management's preparation of the financial statements and the view of each as to the appropriateness of such judgments.

The Committee shall review with an independent accountant and Management the extent to which changes or improvements in financial or accounting practices have been implemented. This review should be conducted at an appropriate time subsequent to implementation of changes or improvements, as decided by the Committee.

- The Committee shall advise the Governor about PRDE policies and procedures for compliance with applicable laws and regulations and PRDE code(s) of conduct.

• The Committee shall periodically discuss with the Secretary of Education, the Under Secretary of Administration and other Management officials as requested by the Committee (a) significant deficiencies in the design or operation of the internal controls that could adversely affect PRDE's ability to record, process, summarize, and report financial data, and (b) any fraud that involves Management or other employees who have a significant role in PRDE internal controls.

Annual Evaluation Procedures

The Committee shall annually assess its performance to confirm that it is meeting its responsibilities under this Charter. In the review, the Committee shall consider, among other things, (a) the appropriateness of the scope and content of this Charter, (b) the appropriateness of matters presented for information and approval, (c) the sufficiency of time for consideration of agenda items, (d) frequency and length of meetings and (e) the quality of written materials and presentations. The Committee may recommend to PRDE such changes to this Charter as the Committee deems appropriate. The Committee may also evaluate its objectivity, knowledge of PRDE operations, and judgment, as well as members' attendance, preparation, and participation in meetings.

Investigations and Studies

The Committee shall have the authority and sufficient funding to retain special legal, accounting or other consultants (without seeking PRDE approval) to advise the Committee. The Committee may conduct or authorize investigations into or studies of matters within the Committee's scope of responsibilities as described herein, and may retain, at the expense of PRDE, independent counsel or other consultants necessary to assist the Committee in any such investigations or studies.

Miscellaneous

Nothing contained in the Charters is intended to expand applicable standards of liability under statutory or regulatory requirements for PRDE's Secretary or members of the Committee. The purposes and responsibilities outlined in this Charter are meant to serve as guidelines rather than as inflexible rules, and the Committee is encouraged to adopt such additional procedures and standards as it deems necessary from time to time to fulfill its responsibilities. This Charter, and any amendments thereto, shall be displayed on the PRDE web site and a printed copy of such shall be made available to any person who requests it.

To the extent not prohibited by law, the President of the Committee may represent the entire Committee for purposes of receiving reports, performing reviews, and pre-approving the scope of other audit services to be performed by the independent auditors and the fees relating thereto, provided that a report on all such activities shall be presented to the full Audit Committee at its next meeting.

Approved by:

Nilsa Clas, President, Audit Committee.
Rafael Aragunde Torres, Secretary,
Department of Education.

Puerto Rico Department of Education Internal Audit Office—Internal Audit Office Charter

Introduction

Internal auditing is an independent appraisal activity established within the Department of Education of Puerto Rico (PRDE) to examine and evaluate its activities and operations. The objectives of internal auditing are to assist PRDE management in the effective discharge of their responsibilities by furnishing them with analyses, appraisals, recommendations, counsel, and information concerning the activities reviewed and by promoting effective control at reasonable cost.

Mission Statement

The mission of the internal audit office is to provide independent, objective assurance and consulting services designed to add value and improve the organization's operations. It helps the organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes.

Authority and Responsibilities

Authorization to the Internal Audit Office and its Staff is granted for full and complete access to any of PRDE's records (either manual or electronic), physical properties, and personnel relevant to a review. Documents and information given to internal auditors during a periodic review will be handled in the same prudent manner as by those employees normally accountable for them.

Scope of Audits

The Internal Auditor shall have the authority to conduct audits in all of PRDE's departments, programs, activities, and areas. The Internal Auditor's activities shall generally consist of:

A. Reviewing activities and programs to ensure compliance with applicable policies, procedures, laws and regulations;

B. Reviewing activities and programs to ensure that they are being conducted in a manner to efficiently and effectively accomplish the objectives intended by PRDE;

C. Reviewing the reliability and integrity of financial and operating information and the means used to identify, measure, classify, and report such information;

D. Verifying that funds are being expended in compliance with applicable laws and in an efficient and effective manner;

E. Verifying that revenues are properly collected, deposited, and accounted for;

F. Verifying that resources, including funds, property, and personnel, are adequately safeguarded, controlled, and used in an effective and efficient manner;

G. Confirming that there are adequate operating and administrative procedures and practices, accounting internal control systems, and that internal management controls have been established by management;

H. Reviewing whether risks are adequately identified and managed;

I. Determining whether programs, plans and objectives have been meet.

With the exception of special audits and those audits requiring the element of surprise, auditees will receive advance notice of planned audits, and the Internal Auditor will make an effort to schedule audits at mutually convenient times. Notification of special audits will be given as appropriate.

Standards of Practices and Code of Ethics

The Internal Audit Office will meet or exceed the Generally Accepted Governmental Auditing Standards, the Standards for the Professional Practice of Internal Auditing and the Code of Ethics of The Institute of Internal Auditors. These documents are included as supplements to this charter.

Organization

The Internal Audit Office will report administratively to the Secretary of Education and functionally directly to the Audit Committee. The administrative reporting will not, in any manner, impinge on the independence of the audit function as more fully described in the following sections. The Office of the Comptrollers and Ethics Affairs will respond to the Internal

Audit Office and will be in charge of all matters related to prevention and ethics.

Independence

Internal Audit Office activities must be free from outside influence, including with regard to scope, procedures, frequency, time or the content of the reports, in order to ensure the independence necessary to develop an objective report.

The internal auditor cannot have any direct operational responsibility or authority over any activity that could be subject to audit. Auditors cannot develop or install systems or procedures, prepare registries, or supervise any activity they will audit.

Objectivity

Objectivity is an independent mental attitude which internal auditors should maintain in performing audits. Internal auditors are not to subordinate their judgment on audit matters to that of others.

Objectivity requires that internal auditors perform audits in such a manner that they have an honest belief in their work product and that no significant quality compromises are made. Internal auditors are not to be placed in situations in which they feel unable to make objective professional judgments.

Audit Annual Work Plan

Annually, the Chief Auditing Executive will submit to the Audit Committee and the Secretary of Education an itinerary of the Internal Audit Office's scope of work for the next year. This itinerary will be based on the priorities of the audit universe using relevant risk factors. Any deviation to the work plan must be approved by the Audit Committee and communicated to the Secretary of Education. The Committee will be responsible for the approval of the annual audit work plan. The Secretary of Education can recommend the inclusion of additional aspects to be considered in this audit plan. The Committee will review the recommendation and will make the decision whether or not to include the areas recommended.

Audit Reports

A written audit report will be prepared and issued by the Chief Auditing Executive following the conclusion of each audit. Once finalized, the report will be distributed as appropriate. The manager of the activity or department receiving the report will respond to any recommendations within thirty days. The response will indicate what actions were taken regarding specific report findings and recommendations. If a response is not received within thirty days, the Chief Internal Auditor will contact the Deputy Secretary of Administration for assistance in resolving the matter.

Audit Reports to the Audit Committee

A. Each audit will result in a written final report.

B. The Internal Audit Office shall submit copies of each audit report to the Audit Committee and shall retain a copy as a permanent record.

C. The Internal Audit Office shall include in the audit reports, where applicable:

1. A precise statement of scope encompassed by the audit;

2. A statement that the audit was performed in accordance with generally accepted auditing standards;

3. A statement of the time frame covered by the audit;

4. A statement of significant audit findings including a statement of the underlying causes, evaluation criteria used, and the current and prospective significance of the findings;

5. Statements of response submitted by the auditees relevant to the audit findings;

6. Recommendations for additional necessary or desirable action.

Continued Education

All Auditors shall take 40 credit hours of continued education at least every two years. Of those 40 hours, at least 24 must be directly related to audit themes. The Internal Audit Office will be responsible for accounting for these hours and coordinating the different courses and workshops to assure compliance.

Confidentiality

All information related to an audit will be managed with the strictest confidentiality. This information cannot be use for purposes other than to express an opinion over the operation that has been audited. No auditor is authorized to solicit any information that is unrelated to an aspect being evaluated in the normal course of an audit being performed. The disclosure of confidential information constitutes a violation of the Code of Ethics, the Standards for the Audit Profession, and the Internal Rules of the Internal Audit Office.

Due Professional Care

All work performed by the Internal Audit Office will be performed with due professional care following practice standards.

Effective Date

This charter will be effective from the date of approval by the Secretary of Education and the Audit Committee. This charter will replace the one approved by the Secretary of Education on July 2, 2001.

Dated: May 18, 2007.

Presented by:

Eda L. Velázquez-Caraballo,

Chief Audit Executive.

Nilsa Clas,

President, Audit Committee.

Approved By:

Rafael Aragunde Torres,

Secretary of Education.

[FR Doc. E8–11852 Filed 5–27–08; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Wednesday,
May 28, 2008

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Proposed 2008–09 Migratory Game Bird Hunting Regulations (Preliminary) With Requests for Indian Tribal Proposals and Requests for 2009 Spring/Summer Migratory Bird Subsistence Harvest Proposals in Alaska; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

[FWS–R9–MB–2008–0032; 91200–1231–9BPP–L2]

RIN 1018–AV62

Migratory Bird Hunting; Proposed 2008–09 Migratory Game Bird Hunting Regulations (Preliminary) With Requests for Indian Tribal Proposals and Requests for 2009 Spring/Summer Migratory Bird Subsistence Harvest Proposals in Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; availability of supplemental information.

SUMMARY: The U.S. Fish and Wildlife Service (hereinafter the Service or we) proposes to establish annual hunting regulations for certain migratory game birds for the 2008–09 hunting season. We annually prescribe outside limits (frameworks) within which States may select hunting seasons. This proposed rule provides the regulatory schedule, describes the proposed regulatory alternatives for the 2008–09 duck hunting seasons, requests proposals from Indian tribes that wish to establish special migratory game bird hunting regulations on Federal Indian reservations and ceded lands, and requests proposals for the 2009 spring/summer migratory bird subsistence season in Alaska. Migratory game bird hunting seasons provide hunting opportunities for recreation and sustenance; aid Federal, State, and tribal governments in the management of migratory game birds; and permit harvests at levels compatible with migratory game bird population status and habitat conditions.

DATES: You must submit comments on the proposed regulatory alternatives for the 2008–09 duck hunting seasons by June 27, 2008. Following later **Federal Register** documents, you will be given an opportunity to submit comments for proposed early-season frameworks by July 31, 2008, and for proposed late-season frameworks and subsistence migratory bird seasons in Alaska by August 31, 2008. Tribes must submit proposals and related comments by June 1, 2008. Proposals from the Co-management Council for the 2009 spring/summer migratory bird subsistence harvest season must be submitted to the Flyway Councils and the Service by June 15, 2008.

ADDRESSES: You may submit comments on the proposals 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: 1018–AV62; 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).

Proposals for the 2009 spring/summer migratory bird subsistence season in Alaska should be sent to the Executive Director of the Co-management Council, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, AK 99503, or fax to (907) 786–3306 or e-mail to *ambcc@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Ron W. Kokel, at: Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, MS MBSP–4107–ARLSQ, 1849 C Street, NW., Washington, DC 20240, (703) 358–1714. For information on the migratory bird subsistence season in Alaska, contact Fred Armstrong, (907) 786–3887, or Donna Dewhurst, (907) 786–3499, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Mail Stop 201, Anchorage, AK 99503.

SUPPLEMENTARY INFORMATION:

Background and Overview

Migratory game birds are those bird species so designated in conventions between the United States and several foreign nations for the protection and management of these birds. Under the Migratory Bird Treaty Act (16 U.S.C. 703–712), the Secretary of the Interior is authorized to determine when ''hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any * * * bird, or any part, nest, or egg'' of migratory game birds can take place, and to adopt regulations for this purpose. These regulations are written after giving due regard to ''the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds'' and are updated annually (16 U.S.C. 704(a)). This responsibility has been delegated to the Service as the lead Federal agency for managing and conserving migratory birds in the United States.

The Service develops migratory game bird hunting regulations by establishing the frameworks, or outside limits, for season lengths, bag limits, and areas for migratory game bird hunting. Acknowledging regional differences in hunting conditions, the Service has administratively divided the nation into four Flyways for the primary purpose of managing migratory game birds. Each Flyway (Atlantic, Mississippi, Central, and Pacific) has a Flyway Council, a formal organization generally composed of one member from each State and Province in that Flyway. The Flyway Councils, established through the International Association of Fish and Wildlife Agencies (IAFWA), also assist in researching and providing migratory game bird management information for Federal, State, and Provincial Governments, as well as private conservation agencies and the general public.

The process for adopting migratory game bird hunting regulations, located at 50 CFR part 20, is constrained by three primary factors. Legal and administrative considerations dictate how long the rulemaking process will last. Most importantly, however, the biological cycle of migratory game birds controls the timing of data-gathering activities and thus the dates on which these results are available for consideration and deliberation.

The process includes two separate regulations-development schedules, based on early and late hunting season regulations. Early hunting seasons pertain to all migratory game bird species in Alaska, Hawaii, Puerto Rico, and the Virgin Islands; migratory game birds other than waterfowl (*i.e.*, dove, woodcock, etc.); and special early waterfowl seasons, such as teal or resident Canada geese. Early hunting seasons generally begin prior to October 1. Late hunting seasons generally start on or after October 1 and include most waterfowl seasons not already established.

There are basically no differences in the processes for establishing either early or late hunting seasons. For each cycle, Service biologists gather, analyze, and interpret biological survey data and provide this information to all those involved in the process through a series of published status reports and presentations to Flyway Councils and other interested parties. Because the Service is required to take abundance of migratory game birds and other factors into consideration, the Service undertakes a number of surveys throughout the year in conjunction with Service Regional Offices, the Canadian Wildlife Service, and State and

Provincial wildlife-management agencies. To determine the appropriate frameworks for each species, we consider factors such as population size and trend, geographical distribution, annual breeding effort, the condition of breeding and wintering habitat, the number of hunters, and the anticipated harvest.

After frameworks, or outside limits, are established for season lengths, bag limits, and areas for migratory game bird hunting, migratory game bird management becomes a cooperative effort of State and Federal governments. After Service establishment of final frameworks for hunting seasons, the States may select season dates, bag limits, and other regulatory options for the hunting seasons. States may always be more conservative in their selections than the Federal frameworks but never more liberal.

Notice of Intent To Establish Open Seasons

This notice announces our intent to establish open hunting seasons and daily bag and possession limits for certain designated groups or species of migratory game birds for 2008–09 in the contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands, under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K of 50 CFR part 20.

For the 2008–09 migratory game bird hunting season, we will propose regulations for certain designated members of the avian families Anatidae (ducks, geese, and swans); Columbidae (doves and pigeons); Gruidae (cranes); Rallidae (rails, coots, moorhens, and gallinules); and Scolopacidae (woodcock and snipe). We describe these proposals under Proposed 2008–09 Migratory Game Bird Hunting Regulations (Preliminary) in this document. We published definitions of waterfowl flyways and mourning dove management units, as well as a description of the data used in and the factors affecting the regulatory process, in the March 14, 1990 **Federal Register** (55 FR 9618).

Regulatory Schedule for 2008–09

This document is the first in a series of proposed, supplemental, and final rulemaking documents for migratory game bird hunting regulations. We will publish additional supplemental proposals for public comment in the **Federal Register** as population, habitat, harvest, and other information become available. Because of the late dates when certain portions of these data become available, we anticipate abbreviated comment periods on some proposals. Special circumstances limit the amount of time we can allow for public comment on these regulations.

Specifically, two considerations compress the time for the rulemaking process: The need, on one hand, to establish final rules early enough in the summer to allow resource agencies to select and publish season dates and bag limits prior to the beginning of hunting seasons and, on the other hand, the lack of current status data on most migratory game birds until later in the summer. Because the regulatory process is strongly influenced by the times when information is available for consideration, we divide the regulatory process into two segments: early seasons and late seasons (further described and discussed under the Background and Overview section).

Major steps in the 2008–09 regulatory cycle relating to open public meetings and **Federal Register** notifications are illustrated in the diagram at the end of this proposed rule. All publication dates of **Federal Register** documents are target dates.

All sections of this and subsequent documents outlining hunting frameworks and guidelines are organized under numbered headings. These headings are:

1. Ducks
   - A. General Harvest Strategy
   - B. Regulatory Alternatives
   - C. Zones and Split Seasons
   - D. Special Seasons/Species Management
   - i. September Teal Seasons
   - ii. September Teal/Wood Duck Seasons
   - iii. Black ducks
   - iv. Canvasbacks
   - v. Pintails
   - vi. Scaup
   - vii. Mottled ducks
   - viii. Wood ducks
   - ix. Youth Hunt
2. Sea Ducks
3. Mergansers
4. Canada Geese
   - A. Special Seasons
   - B. Regular Seasons
   - C. Special Late Seasons
5. White-fronted Geese
6. Brant
7. Snow and Ross's (Light) Geese
8. Swans
9. Sandhill Cranes
10. Coots
11. Moorhens and Gallinules
12. Rails
13. Snipe
14. Woodcock
15. Band-tailed Pigeons
16. Mourning Doves
17. White-winged and White-tipped Doves
18. Alaska
19. Hawaii
20. Puerto Rico
21. Virgin Islands
22. Falconry
23. Other

Later sections of this and subsequent documents will refer only to numbered items requiring your attention. Therefore, it is important to note that we will omit those items requiring no attention, and remaining numbered items will be discontinuous and appear incomplete.

We will publish final regulatory alternatives for the 2008–09 duck hunting seasons in mid-July. We will publish proposed early season frameworks in mid-July and late season frameworks in mid-August. We will publish final regulatory frameworks for early seasons on or about August 17, 2008, and those for late seasons on or about September 14, 2008.

Request for 2009 Spring/Summer Migratory Bird Subsistence Harvest Proposals in Alaska

Background

The 1916 Convention for the Protection of Migratory Birds between the United States and Great Britain (for Canada) established a closed season for the taking of migratory birds between March 10 and September 1. Residents of northern Alaska and Canada traditionally harvested migratory birds for nutritional purposes during the spring and summer months. The governments of Canada, Mexico, and the United States recently amended the 1916 Convention and the subsequent 1936 Mexico Convention for the Protection of Migratory Birds and Game Mammals. The amended treaties provide for the legal subsistence harvest of migratory birds and their eggs in Alaska and Canada during the closed season.

On August 16, 2002, we published in the **Federal Register** (67 FR 53511) a final rule that established procedures for incorporating subsistence management into the continental migratory bird management program. These regulations, developed under a new co-management process involving the Service, the Alaska Department of Fish and Game, and Alaska Native representatives, established an annual procedure to develop harvest guidelines for implementation of a spring/summer migratory bird subsistence harvest. Eligibility and inclusion requirements necessary to participate in the spring/summer migratory bird subsistence season in Alaska are outlined in 50 CFR part 92.

This proposed rule calls for proposals for regulations that will expire on August 31, 2009, for the spring/summer subsistence harvest of migratory birds in Alaska. Each year, seasons will open on

or after March 11 and close prior to September 1.

Alaska Spring/Summer Subsistence Harvest Proposal Procedures

We will publish details of the Alaska spring/summer subsistence harvest proposals in later **Federal Register** documents under 50 CFR part 92. The general relationship to the process for developing national hunting regulations for migratory game birds is as follows:

(a) *Alaska Migratory Bird Co-Management Council.*

Proposals may be submitted by the public to the Co-management Council during the period of November 1–December 15, 2008, to be acted upon for the 2009 migratory bird subsistence harvest season. Proposals should be submitted to the Executive Director of the Co-management Council, listed above under the caption **ADDRESSES**.

(b) *Flyway Councils.*

(1) Proposed 2009 regulations recommended by the Co-management Council will be submitted to all Flyway Councils for review and comment. The Council's recommendations must be submitted prior to the Service Regulations Committee's last regular meeting of the calendar year in order to be approved for spring/summer harvest beginning March 11 of the following calendar year.

(2) Alaska Native representatives may be appointed by the Co-management Council to attend meetings of one or more of the four Flyway Councils to discuss recommended regulations or other proposed management actions.

(c) *Service regulations committee.* Proposed annual regulations recommended by the Co-management Council will be submitted to the Service Regulations Committee (SRC) for their review and recommendation to the Service Director. Following the Service Director's review and recommendation, the proposals will be forwarded to the Department of the Interior for approval. Proposed annual regulations will then be published in the **Federal Register** for public review and comment, similar to the annual migratory game bird hunting regulations. Final spring/summer regulations for Alaska will be published in the **Federal Register** in the preceding fall.

Because of the time required for review by us and the public, proposals from the Co-management Council for the 2009 spring/summer migratory bird subsistence harvest season must be submitted to the Flyway Councils and the Service by June 15, 2008, for Council comments and Service action at the late-season SRC meeting.

Review of Public Comments

This proposed rulemaking contains the proposed regulatory alternatives for the 2007–08 duck hunting seasons. This proposed rulemaking also describes other recommended changes or specific preliminary proposals that vary from the 2007–08 final frameworks (see August 28, 2007 **Federal Register** (72 FR 49622) for early seasons and September 20, 2007 **Federal Register** (72 FR 53882) for late seasons) and issues requiring early discussion, action, or the attention of the States or tribes. We will publish responses to all proposals and written comments when we develop final frameworks for the 2008–09 season. We seek additional information and comments on the recommendations in this proposed rule.

Consolidation of Notices

For administrative purposes, this document consolidates the notice of intent to establish open migratory game bird hunting seasons, the request for tribal proposals, and the request for Alaska migratory bird subsistence seasons with the preliminary proposals for the annual hunting regulations-development process. We will publish the remaining proposed and final rulemaking documents separately. For inquiries on tribal guidelines and proposals, tribes should contact the following personnel:

Regions 1 and 8 (California, Idaho, Nevada, Oregon, Washington, Hawaii, and the Pacific Islands)—Brad Bortner, U.S. Fish and Wildlife Service, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181; (503) 231–6164.

Region 2 (Arizona, New Mexico, Oklahoma, and Texas)—Jeff Haskins, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103; (505) 248–7885.

Region 3 (Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin)—Jane West, U.S. Fish and Wildlife Service, Federal Building, One Federal Drive, Fort Snelling, Minnesota 55111–4056; (612) 713–5432.

Region 4 (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Puerto Rico/Virgin Islands, South Carolina, and Tennessee)—David Viker, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Room 324, Atlanta, Georgia 30345; (404) 679–4000.

Region 5 (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia)—Diane Pence, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, Massachusetts 01035–9589; (413) 253–8576.

Region 6 (Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming)—James Dubovsky, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Building, Denver, Colorado 80225; (303) 236–8145.

Region 7 (Alaska)—Russ Oates, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503; (907) 786–3423.

Requests for Tribal Proposals

Background

Beginning with the 1985–86 hunting season, we have employed guidelines described in the June 4, 1985, **Federal Register** (50 FR 23467) to establish special migratory game bird hunting regulations on Federal Indian reservations (including off-reservation trust lands) and ceded lands. We developed these guidelines in response to tribal requests for our recognition of their reserved hunting rights, and for some tribes, recognition of their authority to regulate hunting by both tribal and nontribal members throughout their reservations. The guidelines include possibilities for:

(1) On-reservation hunting by both tribal and nontribal members, with hunting by nontribal members on some reservations to take place within Federal frameworks, but on dates different from those selected by the surrounding State(s);

(2) On-reservation hunting by tribal members only, outside of usual Federal frameworks for season dates and length, and for daily bag and possession limits; and

(3) Off-reservation hunting by tribal members on ceded lands, outside of usual framework dates and season length, with some added flexibility in daily bag and possession limits.

In all cases, tribal regulations established under the guidelines must be consistent with the annual March 10 to September 1 closed season mandated by the 1916 Convention Between the United States and Great Britain (for Canada) for the Protection of Migratory Birds (Convention). The guidelines are applicable to those tribes that have reserved hunting rights on Federal Indian reservations (including off-reservation trust lands) and ceded lands. They also may be applied to the establishment of migratory game bird hunting regulations for nontribal members on all lands within the exterior boundaries of reservations where tribes have full wildlife management authority over such

hunting, or where the tribes and affected States otherwise have reached agreement over hunting by nontribal members on non-Indian lands.

Tribes usually have the authority to regulate migratory game bird hunting by nonmembers on Indian-owned reservation lands, subject to our approval. The question of jurisdiction is more complex on reservations that include lands owned by non-Indians, especially when the surrounding States have established or intend to establish regulations governing migratory bird hunting by non-Indians on these lands. In such cases, we encourage the tribes and States to reach agreement on regulations that would apply throughout the reservations. When appropriate, we will consult with a tribe and State with the aim of facilitating an accord. We also will consult jointly with tribal and State officials in the affected States where tribes may wish to establish special hunting regulations for tribal members on ceded lands. It is incumbent upon the tribe and/or the State to request consultation as a result of the proposal being published in the **Federal Register**. We will not presume to make a determination, without being advised by either a tribe or a State, that any issue is or is not worthy of formal consultation.

One of the guidelines provides for the continuation of tribal members' harvest of migratory game birds on reservations where such harvest is a customary practice. We do not oppose this harvest, provided it does not take place during the closed season required by the Convention, and it is not so large as to adversely affect the status of the migratory game bird resource. Since the inception of these guidelines, we have reached annual agreement with tribes for migratory game bird hunting by tribal members on their lands or on lands where they have reserved hunting rights. We will continue to consult with tribes that wish to reach a mutual agreement on hunting regulations for on-reservation hunting by tribal members.

Tribes should not view the guidelines as inflexible. We believe that they provide appropriate opportunity to accommodate the reserved hunting rights and management authority of Indian tribes while also ensuring that the migratory game bird resource receives necessary protection. The conservation of this important international resource is paramount. Use of the guidelines is not required if a tribe wishes to observe the hunting regulations established by the State(s) in which the reservation is located.

Details Needed in Tribal Proposals

Tribes that wish to use the guidelines to establish special hunting regulations for the 2008–09 migratory game bird hunting season should submit a proposal that includes: (1) The requested migratory game bird hunting season dates and other details regarding the proposed regulations;

(2) Harvest anticipated under the proposed regulations;

(3) Methods that will be employed to measure or monitor harvest (mail-questionnaire survey, bag checks, etc.);

(4) Steps that will be taken to limit level of harvest, where it could be shown that failure to limit such harvest would seriously impact the migratory game bird resource; and

(5) Tribal capabilities to establish and enforce migratory game bird hunting regulations.

A tribe that desires the earliest possible opening of the migratory game bird season for nontribal members should specify this request in its proposal, rather than request a date that might not be within the final Federal frameworks. Similarly, unless a tribe wishes to set more restrictive regulations than Federal regulations will permit for nontribal members, the proposal should request the same daily bag and possession limits and season length for migratory game birds that Federal regulations are likely to permit the States in the Flyway in which the reservation is located.

Tribal Proposal Procedures

We will publish details of tribal proposals for public review in later **Federal Register** documents. Because of the time required for review by us and the public, Indian tribes that desire special migratory game bird hunting regulations for the 2008–09 hunting season should submit their proposals as soon as possible, but no later than June 1, 2008.

Tribes should direct inquiries regarding the guidelines and proposals to the appropriate Service Regional Office listed above under the caption Consolidation of Notices. Tribes that request special migratory game bird hunting regulations for tribal members on ceded lands should send a courtesy copy of the proposal to officials in the affected State(s).

Public Comments Solicited

The Department of the Interior's policy is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, we invite interested persons to submit written comments, suggestions, or recommendations regarding the proposed regulations. Before promulgation of final migratory game bird hunting regulations, we will take into consideration all comments received. Such comments, and any additional information received, may lead to final regulations that differ from these proposals.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. We will not accept anonymous comments; your comment must include your first and last name, city, State, country, and postal (zip) code. Finally, we will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* If you provide personal identifying information in addition to the required items specified in the previous paragraph, such as your street address, phone number, or e-mail address, 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.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, 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, Division of Migratory Bird Management, Room 4107, 4501 North Fairfax Drive, Arlington, VA 22203.

For each series of proposed rulemakings, we will establish specific comment periods. We will consider, but possibly may not respond in detail to, each comment. As in the past, we will summarize all comments received during the comment period and respond to them after the closing date in any final rules.

NEPA Consideration

NEPA considerations are covered by the programmatic document ''Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88–14),'' filed with the Environmental Protection Agency on June 9, 1988. We published Notice of Availability in the **Federal Register** on June 16, 1988 (53 FR 22582). We published our Record of

Decision on August 18, 1988 (53 FR 31341). In addition, an August 1985 environmental assessment entitled ''Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands'' is available from the address indicated under the caption **FOR FURTHER INFORMATION CONTACT**.

In a notice published in the September 8, 2005, **Federal Register** (70 FR 53376), we announced our intent to develop a new Supplemental Environmental Impact Statement for the migratory bird hunting program. Public scoping meetings were held in the spring of 2006, as detailed in a March 9, 2006, **Federal Register** (71 FR 12216). We have prepared a scoping report summarizing the scoping comments and scoping meetings. The report is available by either writing to the address indicated under **FOR FURTHER INFORMATION CONTACT** or by viewing on our Web site at *http://www.fws.gov/migratorybirds.*

Endangered Species Act Consideration

Prior to issuance of the 2008–09 migratory game bird hunting regulations, we will comply with provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543; hereinafter the Act), to ensure that hunting is not likely to jeopardize the continued existence of any species designated as endangered or threatened or modify or destroy its critical habitat and is consistent with conservation programs for those species. Consultations under Section 7 of this Act may cause us to change proposals in this and future supplemental proposed rulemaking documents.

Executive Order 12866

The Office of Management and Budget has determined that this rule is significant and has reviewed this rule under Executive Order 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.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Flexibility Act

The regulations have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). We analyzed the economic impacts of the annual hunting regulations on small business entities in detail as part of the 1981 cost-benefit analysis discussed under Executive Order 12866. This analysis was revised annually from 1990–95. In 1995, the Service issued a Small Entity Flexibility Analysis (Analysis), which was subsequently updated in 1996, 1998, and 2004. The primary source of information about hunter expenditures for migratory game bird hunting is the National Hunting and Fishing Survey, which is conducted at 5-year intervals. The 2004 Analysis was based on the 2001 National Hunting and Fishing Survey and the U.S. Department of Commerce's County Business Patterns, from which it was estimated that migratory bird hunters would spend between $481 million and $1.2 billion at small businesses in 2004. Copies of the Analysis are available upon request from the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our Web site at *http://www.fws.gov/migratorybirds/reports/SpecialTopics/EconomicAnalysis-Final-2004.pdf.*

Last year, due to limited data availability, we partially updated the 2004 analysis, but restricted our analysis to duck hunting. Results indicate that the duck hunters would spend between $291 million and $473.5 million at small businesses in 2007. We plan to perform a full update of the analysis this year when the full results from the 2006 National Hunting and Fishing Survey is available. Copies of the updated analysis are available upon request from the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our Web site at *http://www.fws.gov/migratorybirds/reports/SpecialTopics/EconomicAnalysis-2007Update.pdf.*

Small Business Regulatory Enforcement Fairness Act

This rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons outlined above, this rule has an annual effect on the economy of $100 million or more. However, because this rule establishes hunting seasons, we do not plan to defer the effective date under the exemption contained in 5 U.S.C. 808(1).

Paperwork Reduction Act

We examined these regulations under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The various recordkeeping and reporting requirements imposed under regulations established in 50 CFR part 20, Subpart K, are utilized in the formulation of migratory game bird hunting regulations. Specifically, OMB has approved the information collection requirements of our Migratory Bird Surveys and assigned control number 1018–0023 (expires 2/28/2011). This information is used to provide a sampling frame for voluntary national surveys to improve our harvest estimates for all migratory game birds in order to better manage these populations. OMB has also approved the information collection requirements of the Alaska Subsistence Household Survey, an associated voluntary annual household survey used to determine levels of subsistence take in Alaska, and assigned control number 1018–0124 (expires 1/31/2010).

A Federal agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Unfunded Mandates Reform Act

We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities. Therefore, this rule is not a ''significant

regulatory action'' under the Unfunded Mandates Reform Act.

Civil Justice Reform—Executive Order 12988

The Department, in promulgating this proposed rule, has determined that this proposed rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Takings Implication Assessment

In accordance with Executive Order 12630, this proposed rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, these rules allow hunters to exercise otherwise unavailable privileges and, therefore, reduce restrictions on the use of private and public property.

Energy Effects—Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. While this proposed rule is a significant regulatory action under Executive Order 12866, it is not expected to adversely affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Federalism Effects

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. We annually prescribe frameworks from which the States make selections regarding the hunting of migratory birds, and we employ guidelines to establish special regulations on Federal Indian reservations and ceded lands. This process preserves the ability of the States and tribes to determine which seasons meet their individual needs. Any State or Indian tribe may be more restrictive than the Federal frameworks at any time. The frameworks are developed in a cooperative process with the States and the Flyway Councils. This process allows States to participate in the development of frameworks from which they will make selections, thereby having an influence on their own regulations. These rules do not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. Therefore, in accordance with Executive Order 13132, these regulations do not have significant federalism effects and do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

The rules that eventually will be promulgated for the 2008–09 hunting season are authorized under 16 U.S.C. 703–711, 16 U.S.C. 712, and 16 U.S.C. 742 a–j.

Dated: April 4, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

Proposed 2008–09 Migratory Game Bird Hunting Regulations (Preliminary)

Pending current information on populations, harvest, and habitat conditions, and receipt of recommendations from the four Flyway Councils, we may defer specific regulatory proposals. At this time, we are proposing no changes from the final 2007–08 frameworks established on August 28 and September 20, 2007 (72 FR 49622 and 72 FR 53882). Other issues requiring early discussion, action, or the attention of the States or tribes are contained below:

1. Ducks

Categories used to discuss issues related to duck harvest management are: (A) General Harvest Strategy, (B) Regulatory Alternatives, (C) Zones and Split Seasons, and (D) Special Seasons/Species Management. Only those containing substantial recommendations are discussed below.

A. General Harvest Strategy

We propose to continue use of adaptive harvest management (AHM) to help determine appropriate duck-hunting regulations for the 2008–09 season. AHM is a tool that permits sound resource decisions in the face of uncertain regulatory impacts, as well as providing a mechanism for reducing that uncertainty over time. The current AHM protocol is used to evaluate four alternative regulatory levels based on the population status of mallards (special hunting restrictions are enacted for species of special concern, such as canvasbacks, scaup, and pintails).

In recent years, the prescribed regulatory alternative for the Pacific, Central, and Mississippi Flyways has been based on the status of mallards and breeding-habitat conditions in central North America (Federal survey strata 1–18, 20–50, and 75–77, and State surveys in Minnesota, Wisconsin, and Michigan). For the 2008 hunting season, however, we are considering setting hunting regulations in the Pacific Flyway based on the status and dynamics of a newly defined stock of ''western'' mallards. For now, western mallards would be defined as those breeding in Alaska (as based on federal surveys in strata 1–12), and in California and Oregon (as based on state-conducted surveys). Efforts to improve survey designs in Washington State and British Columbia are ongoing, and mallards breeding in these areas would be included in regulatory assessments when a sufficient time-series of abundance estimates is available for analysis. Predicting changes in the abundance of western mallards due to harvest and uncontrolled environmental factors would be based on a model of density-dependent growth, with appropriate allowances for model uncertainty and the impact of hunting. Various harvest-management objective(s) for western mallards are being considered but, in any case, would not allow for a harvest higher than the estimated maximum sustainable yield. More specifics concerning this proposed change in AHM protocol are available on our Web site at *http://www.fws.gov/migratorybirds/mgmt/AHM/AHM-intro.htm* and will be provided in a supplemental proposed rule in May along with Flyway Council recommendations and comments. The final AHM protocol for the 2008–09 season will be detailed in the early-season proposed rule, which will be published in mid-July (see Schedule of Regulations Meetings and **Federal Register** Publications at the end of this proposed rule for further information). Finally, since 2000, we have prescribed a regulatory alternative for the Atlantic Flyway based on the population status of mallards breeding in eastern North America (Federal survey strata 51–54 and 56, and State surveys in New England and the mid-Atlantic region). We are recommending a continuation of this protocol for the 2008–09 season.

We will propose a specific regulatory alternative for each of the Flyways during the 2008–09 season after survey information becomes available in late summer. More information on AHM is located at *http://www.fws.gov/*

migratorybirds/mgmt/AHM/AHM-intro.htm

B. Regulatory Alternatives

The basic structure of the current regulatory alternatives for AHM was adopted in 1997. The alternatives remained largely unchanged until 2002, when we (based on recommendations from the Flyway Councils) extended framework dates in the ''moderate'' and ''liberal'' regulatory alternatives by changing the opening date from the Saturday nearest October 1 to the Saturday nearest September 24, and changing the closing date from the Sunday nearest January 20 to the last Sunday in January. These extended dates were made available with no associated penalty in season length or bag limits. At that time we stated our desire to keep these changes in place for 3 years to allow for a reasonable opportunity to monitor the impacts of framework-date extensions on harvest distribution and rates of harvest prior to considering any subsequent use (67 FR 12501).

For 2008–09, we are proposing to maintain the same regulatory alternatives that were in effect last year (see accompanying table for specifics of the proposed regulatory alternatives). Alternatives are specified for each Flyway and are designated as ''RES'' for the restrictive, ''MOD'' for the moderate, and ''LIB'' for the liberal alternative. We will announce final regulatory alternatives in mid-July. Public comments will be accepted until June 27, 2008, and should be sent to an address listed under the caption **ADDRESSES**.

D. Special Seasons/Species Management

iii. Black Ducks

In 2007, we developed a proposal for an international harvest strategy that consisted of a constant harvest rate and criteria for maintaining approximate parity in harvest between the United States and Canada. However, during consultations with the Atlantic and Mississippi Flyway Councils, the Canadian Wildlife Service, and provincial wildlife agencies in eastern Canada, we were unable to reach consensus on several technical and policy aspects of that strategy. In February 2008, a meeting of representatives from the Service, the Canadian Wildlife Service, and the Atlantic and Mississippi Flyways was convened, with the goal of reaching consensus on the essential elements of an international harvest strategy that could be implemented in 2008. That group recommended that a prescriptive, interim strategy be used until development of a derived, adaptive harvest strategy is completed. The prescriptive strategy would be based on the current breeding population status in relation to its long-term average. The group also agreed on the elements of maintaining harvest parity between the two countries. Based on the outcome of this meeting, we plan to propose the specifics of an interim joint harvest strategy with Canada in the supplemental proposed rule, which will be published in May (see Schedule of Regulations Meetings and **Federal Register** Publications at the end of this proposed rule for further information).

iv. Canvasbacks

Since 1994, we have followed a canvasback harvest strategy that if canvasback population status and production are sufficient to permit a harvest of one canvasback per day nationwide for the entire length of the regular duck season, while still attaining a projected spring population objective of 500,000 birds, the season on canvasbacks should be opened. A partial season would be permitted if the estimated allowable harvest was within the projected harvest for a shortened season. If neither of these conditions can be met, the harvest strategy calls for a closed season on canvasbacks nationwide.

Last year's spring survey resulted in a record high estimate of 865,000 canvasbacks. This was 25 percent above the 2006 estimate of 691,000 canvasbacks and 53 percent above the 1955–2006 average. The estimate of ponds in Prairie Canada was 5.04 million, which was 13 percent above last year and 49 percent above the long-term average. The size of the spring population, together with above-average expected production due to the good habitat conditions, resulted in an allowable harvest in the United States of 467,900 birds for the 2007–08 season. The expected canvasback harvest with a 1-bird daily bag limit for the entire season was expected to be about 120,000 birds. Available data indicated that adding a second canvasback to the daily bag limit was expected to increase harvest about 25 percent, or to approximately 150,000 birds in the United States. Thus, while the current harvest strategy has no provisions for daily bag limits greater than one bird, with the record high breeding population and the expected good recruitment, we supported the Flyway Councils' recommendations to increase the daily bag limit for canvasbacks to two birds for the 2007–08 season (see September 20, 2007, **Federal Register** 72 FR 53882).

While doing so, we expressed our continued support for the current canvasback harvest strategy and the model adopted in 1994. However, we recognized that this strategy was developed primarily due to concerns about low population levels, and as such, did not address circumstances encountered like last year of record high abundance and the potential for increased daily bag limits. We increased the daily bag limit because we believed there was reasonable opportunity to allow a limited increase without compromising the population's ability to sustain a breeding population in excess of 500,000 canvasbacks this spring.

We noted, however, that departures from existing harvest strategies are not actions that we generally condone, nor would we make an exception to the canvasback strategy this year, even if similar circumstances exist, without an explicit modification to the existing strategy allowing for daily bag limits greater than one bird. We stated our desire to discuss the possibility of revising the strategy with the Flyway Councils and other interested parties over the next year. Because the population model has performed relatively well since inception in 1994, we further stated that we believe that the most productive area for discussion involves examination of the harvest management objectives of this strategy, with an emphasis on allowing bag limits greater than one bird. Such a revision should carefully consider the potential ramifications of such changes on the expected frequency of closed and partial seasons for this species in the future.

This winter we prepared and distributed to the Flyway Councils an assessment of potential changes to the frequency of various canvasback seasons due to introducing a liberal, 2-bird daily bag season in the Canvasback Harvest Strategy (the assessment is available at *http://www.fws.gov/migratorybirds/reports/reports.html*). The assessment estimates the likely changes in proportion of closed and restricted seasons that might result if a 2-bird daily bag limit were permanently included in the Canvasback Harvest Strategy. To further the development of this assessment and any subsequent proposed changes to the harvest strategy, we have requested Flyway Council feedback on several important policy issues. These issues include: the desire to modify the current strategy, potential canvasback population thresholds that allow a 2-bird daily bag limit, and any further strategy

modifications to account for density-dependence. Progress on the canvasback harvest strategy will be detailed in supplemental **Federal Registers** and a decision regarding whether to propose changes to the current harvest strategy for the 2008–09 season will be made in early June (see Schedule of Regulations Meetings and **Federal Register** Publications at the end of this proposed rule for further information).

v. Pintails

As we have stated over the past several years, we remain committed to the development of a framework to inform pintail harvest management based a formal, derived strategy and clearly articulated management objectives. In collaboration with scientists from the U.S. Geological Survey, we developed a fully adaptive harvest management protocol for pintails and forwarded the technical details *(http://www.fws.gov/migratorybirds/reports/reports.html*) to the Flyway Councils for their review. We also requested Flyway Council input on a possible implementation schedule and any modifications or adjustments they feel would improve the existing strategy. Following Flyway Council and public review, we will announce any proposed changes regarding the existing strategy for the 2008–09 season in May (see Schedule of Regulations Meetings and **Federal Register** Publications at the end of this proposed rule for further information).

vi. Scaup

The continental scaup (greater *Aythya marila* and lesser *Aythya affinis* combined) population has experienced a long-term decline over the past 20 years. Over the past several years in particular, we have continued to express our growing concern about the status of scaup. The 2007 breeding population estimate for scaup was 3.45 million, essentially unchanged from the 2006 estimate, and the third lowest estimate on record.

Last year, we developed an assessment framework that uses available data to help predict the effects of harvest and other uncontrollable environmental factors on the scaup population. After extensive review that we believe resulted in substantial improvements, the final technical assessment was made available for public review in the April 11, 2007 **Federal Register** (72 FR 18328). We stated then, and continue to believe, that this technical assessment represents an objective and comprehensive synthesis of data relevant to scaup harvest management and can help frame a scientifically-sound scaup harvest strategy. We note that results of the assessment suggest that a reduction in scaup harvest is commensurate with the current population status of scaup. Based on this technical assessment, a proposed scaup harvest strategy was made available for public review in the June 8, 2007 **Federal Register** (72 FR 31789). The proposed harvest strategy included initial Service recommendations on a harvest management objective and proposed Flyway-specific harvest allocations, as well as an additional analysis that predicted scaup harvest from various combinations of Flyway-specific season lengths and bag limits *(http://www.fws.gov/migratorybirds/reports/reports.html)*. However, several Flyway Councils expressed concern regarding the implications of regulatory changes associated with the proposed decision making framework.

In the July 23, 2007 **Federal Register** (72 FR 40194), we addressed these concerns and stated that while we continue to support the technical assessment of scaup harvest potential, we were sensitive to the concerns expressed by the Flyway Councils about the policy and social aspects of implementation of the proposed strategy at that time. More specifically, we agreed that more dialogue about the nature of harvest management objectives and regulatory alternatives was necessary for successful implementation of the strategy. Failure to agree on crucial policy aspects of the proposed strategy in a timely fashion increases the risk that more drastic regulatory measures may be necessary in the future, and having considered all of these concerns, we agreed that another year was needed to develop consensus on a harvest strategy for scaup. We further stated that it was our intent to implement a strategy in 2008 and we requested that the Flyways continue to work with us to resolve the outstanding technical and policy issues surrounding the proposed scaup assessment and decision making framework.

In response to this expectation, we participated in a number of meetings to foster continued communication and coordination and hosted a Web broadcast to communicate assessment results to a broad State audience. In addition, we proposed a methodology to assist the Flyways in developing regulatory packages that would specify scaup regulatory alternatives.

One of the outcomes of our communication efforts with the Flyways was an agreement to consider an alternative model that represents the belief that the scaup population will continue to decline to a new equilibrium level and that harvest has no effect on the decline. The results from the alternative model along with the existing model would then be compared and weighted through an adaptive process while forming a basis for the derivation of an optimal harvest strategy. We have begun scoping out the technical and policy issues associated with incorporating such an alternative; however it cannot be completed in time for this regulatory cycle. Additional technical work is necessary and policy guidance will be required throughout model development since the alternative model will require specification of the lower equilibrium state. It is not possible to estimate this lower equilibrium population size using available data; therefore it will have to be chosen based on professional judgment and social considerations. It is not known if an alternative model will be ready for incorporation by next year because the harvest management implications of developing an adaptive decision process that accommodates ongoing system change are largely unexplored and will likely require a significant amount of effort to evaluate.

Therefore, for 2008, we are soliciting Flyway Council feedback regarding the following alternative approaches to developing and implementing a scaup harvest strategy: (1) Delay implementation of any strategy and continue to work on the alternative model; (2) Implement the 2007 proposed strategy and continue to work on the alternative model until completed when it will then be incorporated into the decision making framework; (3) Discontinue work on an alternative model and implement the strategy proposed last year.

In addition, we are also seeking feedback from the Flyway Councils regarding several policy issues. These include the form of the objective function that will be used to derive a scaup harvest policy, the appropriate Flyway-specific harvest models that will be used in part to determine Flyway specific regulatory alternatives, and feedback regarding the proposed methodology to specify the threshold harvest levels associated with each package (Restrictive, Moderate, and Liberal). Progress on the scaup harvest strategy will be detailed in supplemental **Federal Registers** and a final decision regarding any implementation of the proposed strategy will be made in the July early-season proposed rule (see Schedule of Regulations Meetings and **Federal Register** Publications at the end of this proposed rule for further information).

vii. Mottled Ducks

The Service and other agencies have been concerned about the status of mottled ducks since at least the late 1990s. This concern stems from negative trends in population survey data, loss and degradation of habitat, interbreeding with captive-reared and feral mallards, and increased harvest rates as the result of longer hunting seasons since 1997. In the past, we have expressed our desire to work with the States to develop a harvest-management strategy for mottled ducks. Since 2005, several workshops have been convened with State agencies, the U.S. Geological Survey, and others to discuss the status of mottled ducks, population structure and delineation, and to evaluate current monitoring programs and plan for the development of new population surveys. Major conclusions from these workshops are that mottled ducks should be managed as two separate stocks, a Florida stock and a Western Gulf Coast stock, and that the lack of a range-wide population survey for Western Gulf Coast mottled ducks is a significant impediment to management.

Although progress has been made toward development of monitoring systems to improve assessment capabilities for mottled ducks, we remain concerned about the status of mottled ducks across their range, especially in the Western Gulf Coast. Reasons for these concerns were mentioned previously. We provided the Flyway Councils with analyses of harvest data that examine potential harvest restrictions to reduce harvest rates (*http://www.fws.gov/migratorybirds/reports/reports.html*), should that be deemed necessary. We encourage the Flyway Councils to examine the status of mottled ducks and assess the potential need for any regulatory actions for the 2008–09 season.

viii. Wood Ducks

Over the past year, significant technical progress has been made in estimating the harvest potential of wood ducks in the Atlantic and Mississippi Flyways. This winter, we prepared and received initial Flyway feedback on a scoping document describing how our assessment of the harvest potential could fit within an overall harvest strategy for wood ducks (see *http://www.fws.gov/migratorybirds/reports/reports.html*). To further the development of this assessment and subsequent harvest strategy, we have requested Flyway Council feedback on several important policy issues. These issues include: The decision criteria for a harvest strategy (e.g., manage for the stock with the lowest harvest potential or for a range-wide average), a harvest objective, test criteria to compare harvest rates, and the extent to which regulations should be allowed to differ among Flyways. While we have not yet finalized a harvest strategy proposal, we plan to evaluate feedback from the winter Flyway meetings and make a later determination as to whether it would be feasible to consider implementation of a wood duck harvest strategy for the Atlantic and Mississippi Flyways during the 2008–09 cycle. Progress on the wood duck harvest strategy will be detailed in supplemental **Federal Registers** and a decision regarding whether to propose a harvest strategy for the 2008–09 season will be made in early June (see Schedule of Regulations Meetings and **Federal Register** Publications at the end of this proposed rule for further information).

14. Woodcock

In 2006, the Atlantic and Mississippi Flyway Councils urged the Service to re-affirm its commitment to cooperatively develop a woodcock harvest strategy, with an initial approach outlined no later than the 2008 winter Flyway meetings. In 2007, we embarked on a review of available woodcock population databases that potentially could be incorporated in an assessment framework and eventual harvest strategy. Results of this review were included in a scoping document and provided to Flyway Councils for comment. The scoping document also included potential approaches as to how available databases could be utilized in a harvest strategy. We recently requested that the Atlantic, Mississippi, and Central Flyway Councils appoint appropriate technical representatives to work with us on a task group to develop a woodcock harvest strategy. It is anticipated that a draft harvest strategy would be available for consideration for the 2009–2010 hunting season.

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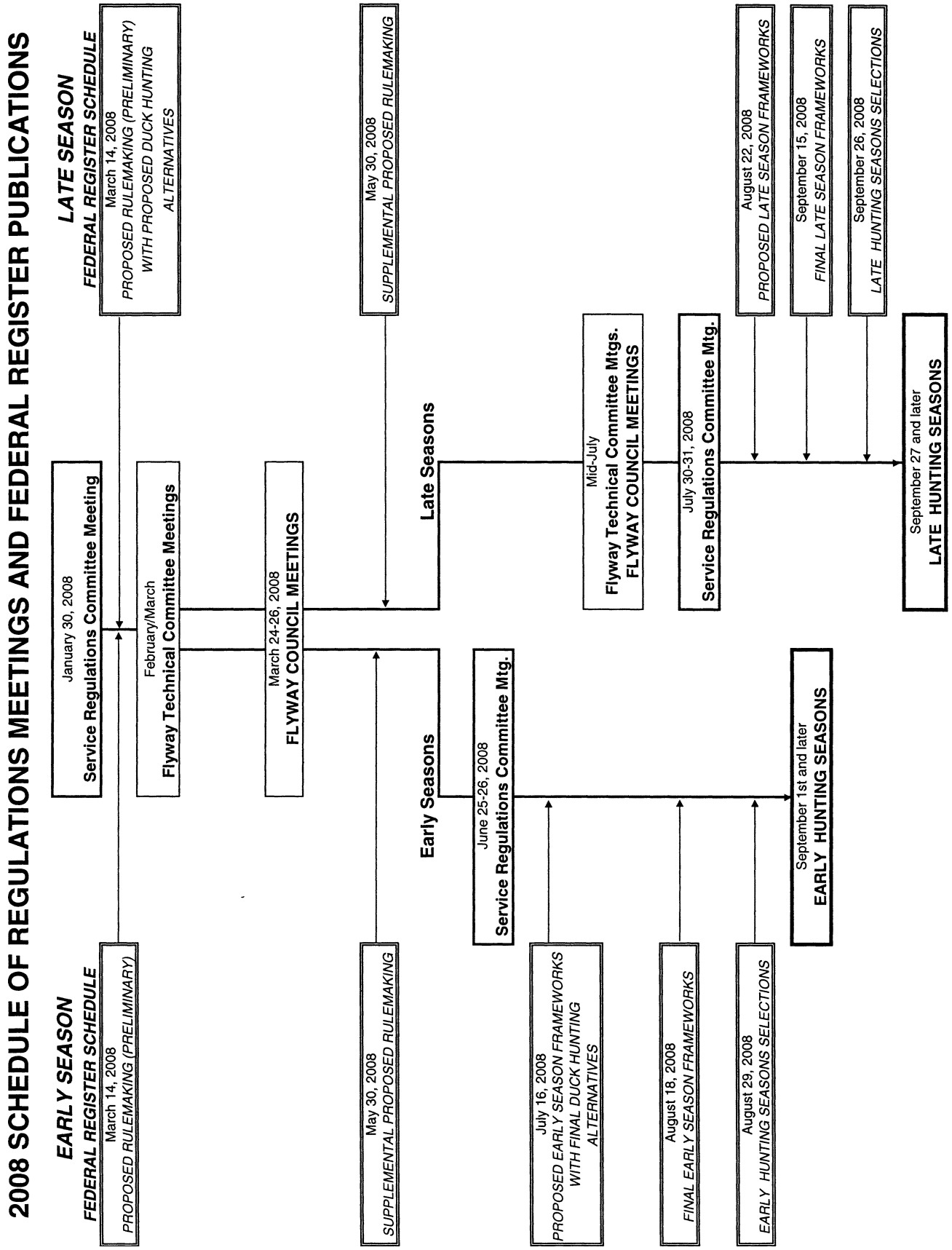
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PROPOSED REGULATORY ALTERNATIVES FOR DUCK HUNTING DURING THE 2008-09 SEASON

	ATLANTIC FLYWAY			MISSISSIPPI FLYWAY			CENTRAL FLYWAY (a)			PACIFIC FLYWAY (b)(c)		
	RES	MOD	LIB	RES	MOD	LIB	RES	MOD	LIB	RES	MOD	LIB
Beginning Shooting Time	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise
Ending Shooting Time	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset
Opening Date	Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24
Closing Date	Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.
Season Length (in days)	30	45	60	30	45	60	39	60	74	60	86	107
Daily Bag/ Possession Limit	3 6	6 12	6 12	3 6	6 12	6 12	3 6	6 12	6 12	4 8	7 14	7 14
Species/Sex Limits within the Overall Daily Bag Limit												
Mallard (Total/Female)	3/1	4/2	4/2	2/1	4/1	4/2	3/1	5/1	5/2	3/1	5/2	7/2

(a) In the High Plains Mallard Management Unit, all regulations would be the same as the remainder of the Central Flyway, with the exception of season length. Additional days would be allowed under the various alternatives as follows: restrictive - 12, moderate and liberal - 23. Under all alternatives, additional days must be on or after the Saturday nearest December 10.

(b) In the Columbia Basin Mallard Management Unit, all regulations would be the same as the remainder of the Pacific Flyway, with the exception of season length. Under all alternatives except the liberal alternative, an additional 7 days would be allowed.

(c) In Alaska, framework dates, bag limits, and season length would be different from the remainder of the Pacific Flyway. The bag limit would be 5-8 under the restrictive alternative, and 7-10 under the moderate and liberal alternatives. Under all alternatives, season length would be 107 days and framework dates would be Sep. 1 - Jan. 26.

[FR Doc. E8–11583 Filed 5–27–08; 8:45 am]
BILLING CODE 4310–55–C

Federal Register

Wednesday,
May 28, 2008

Part V

The President

Proclamation 8260—Prayer for Peace, Memorial Day, 2008

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Presidential Documents

Title 3—

The President

Proclamation 8260 of May 22, 2008

Prayer for Peace, Memorial Day, 2008

By the President of the United States of America

A Proclamation

On Memorial Day, we honor the heroes who have laid down their lives in the cause of freedom, resolve that they will forever be remembered by a grateful Nation, and pray that our country may always prove worthy of the sacrifices they have made.

Throughout our Nation's history, our course has been secured by brave Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen. These courageous and selfless warriors have stepped forward to protect the Nation they love, fight for America's highest ideals, and show millions that a future of liberty is possible. Freedoms come at great costs, yet the world has been transformed in unimaginable ways because of the noble service and devotion to duty of these brave individuals. Our country honors the sacrifice made by those who have given their lives to spread the blessings of liberty and lay the foundations of peace, and we mourn their loss.

Today, our service men and women continue to inspire and strengthen our Nation, going above and beyond the call of duty as part of the greatest military the world has ever known. Americans are grateful to all those who have put on our Nation's uniform and to their families, and we will always remember their service and sacrifice for our freedoms.

On this solemn day our country unites to pay tribute to the fallen, who demonstrated the strength of their convictions and paid the cost of freedom. We pray for the members of our Armed Forces and their families, and we ask for God's continued guidance of our country.

In respect for their devotion to America, the Congress, by a joint resolution approved on May 11, 1950, as amended (64 Stat. 158), has requested the President to issue a proclamation calling on the people of the United States to observe each Memorial Day as a day of prayer for permanent peace and designating a period on that day when the people of the United States might unite in prayer. The Congress, by Public Law 106–579, has also designated the minute beginning at 3:00 p.m. local time on that day as a time for all Americans to observe the National Moment of Remembrance.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim Memorial Day, May 26, 2008, as a day of prayer for permanent peace, and I designate the hour beginning in each locality at 11:00 a.m. of that day as a time to unite in prayer. I also ask all Americans to observe the National Moment of Remembrance beginning at 3:00 p.m., local time, on Memorial Day. I encourage the media to participate in these observances. I also request the Governors of the United States and the Commonwealth of Puerto Rico, and the appropriate officials of all units of government, to direct that the flag be flown at half staff until noon on this Memorial Day on all buildings, grounds, and naval vessels throughout the United States, and in all areas under its jurisdiction and control. I also request the people of the United States to display the flag at half staff from their homes for the customary forenoon period.

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

[FR Doc. 08–1306
Filed 5–27–08; 9:05 am]
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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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LIST OF PUBLIC LAWS

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Passed over the President's veto:

H.R. 2419/P.L. 110–234

Food, Conservation, and Energy Act of 2008 (May 22, 2008; 122 Stat. 923)

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